

# REPRESENTATION FOR CHILDREN UNDER 8 YEARS OLD

IN CHILD WELFARE CASES



CHILDREN'S  
REPRESENTATION  
WORKGROUP

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## I. Executive Summary

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When a child enters the Washington child welfare system, they are immediately at the center of one of the most complex legal problems of their lifetime. The chief legal objective is obvious: permanency, either through reunification with their parents and when that's not possible, with a non-parental caregiver. But permanency is by no means the only issue litigated. Within the dependency process, children possess a panoply of rights, both statutory and constitutional, such as the right to be placed with relatives before strangers, to live with or visit their siblings, to visit their parents, and to be free from harm in their placements. Outside of the dependency process, a child in the care of the state may require advocacy in matters of public benefits law, education and special education law, family law, immigration law, housing law, and criminal law, not to mention appellate advocacy. [1] The child will be dependent on the state to fulfill their fundamental needs, among them doctor's visits, an interim safe placement, and legal enforcement of the right to have these needs met when they are not. And permanency itself is substantively and procedurally complex. The road to permanency contains a proliferation of dependent children's statutory rights to everything from the pace of proceedings to preferences for certain types of placements over others, depending on individual circumstances. In light of the complex legal rights that must be advocated for on behalf of young children, and informed by the research outlined below, we make four findings.

First, all children under the age of eight require legal counsel right from the beginning of the dependency process. Just like children need pediatricians to diagnose and treat their medical issues, they need children's attorneys to identify their legal rights and enforce those rights when they are in the midst of a complex dependency proceeding. [2] This finding is bolstered by national trends—the majority of states automatically provide counsel to all children from the beginning of the case—and by our interviews with lawyers from seven states, none of whom were willing to identify a particular age at which counsel becomes necessary. Some described such age-driven rules as “arbitrary,” pointing to a lack of child development-based rationale for providing counsel to only a subset of children. Empirical research from four data-driven studies shows that appointment of counsel for children of all ages at the outset leads to better outcomes. Moreover, non-attorney advocates such as CASAs and GALs (defined below) are not qualified and do not have the expertise to either identify or advocate for the many wide-ranging, complex and fundamental legal objectives, elaborated above, that inevitably arise during dependency.

Second, “stated interest” (also known as “expressed interest”) representation is the appropriate approach to representing children, as it is required by the binding and profession-defining ABA Rules of Professional Conduct. For those children unable to communicate their preferences, counsel should use “legal interests” representation. The legal interests model doesn't run afoul of the Rules of Professional Conduct, and minimizes the influence of attorney bias.

Third, the legal interests model for nonverbal and preverbal youth—already implemented in parts of Washington—is consistent with the legislature's goals of enforcing children's legal rights

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[1] Recommendations for Representation of Children in Abuse and Neglect Cases § V (Nat'l Assoc. Couns. for Child. 2022).

[2] As described by Jim and John Walsh, Supervising Attorneys at the Legal Aid Society of Palm Beach County.

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while minimizing advocate bias as a driving force behind litigation objectives. When an attorney is beholden to basing their advocacy around a prescribed set of rights, as is required by the legal interests model, there is far less room for the insertion of the attorney's own subjective assessments. Below, parents and lawyers alike explain the importance of advocacy that is driven by objective standards and carried out by professionals who are highly trained in those standards.

Fourth, lawyers for young children require specific training in: (1) childhood development, (2) the impact of trauma on a child's cognition and ability to communicate, (3) mental health, and use of psychotropic medications, (4) risks of secondary trauma, (5) lawyering skills that will allow for effective communication with young children, particularly those who have experienced trauma, (6) the legal rights of children that exist in state and federal statutes, regulations, departmental policies, and case law, including the substantive due process rights to family integrity and to be free from unreasonable risk of harm while in state care guaranteed under the Washington constitution, (7) guarding against bias, (8) the impact of implicit and overt bias on children involved in the child welfare system, (9) disproportionality in the child welfare system, and (10) relational permanency and permanency planning. This list is informed by the parents, young people, attorneys, and other professionals we spoke to.

## II. Introduction: The Status Quo in Washington

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### Right to counsel among children and youth

In Washington, the right to counsel for dependent children is undergoing significant change. By a process to begin this summer, and to conclude in 2027, all Washington children ages eight and up will have the right to counsel immediately upon the filing of a new dependency proceeding, “at or before the commencement of a shelter care hearing.” [3] Children under the age of eight will have automatic right to counsel upon the filing of a termination petition under the same phase-in schedule. [4]

During the phase-in period, all children of any age are still entitled to appointment of counsel six months after the finding of termination. [5] Further, any child may be appointed counsel at any point in the dependency proceeding on the court’s own initiative or if “a parent, the child, a guardian ad litem, a caregiver, or the department” requests it. [6] As children may not be aware of their ability to file a motion requesting an attorney, Washington requires that the department and a dependent child’s GAL notify the child of their right to request an attorney on the date of the child’s twelfth birthday. [7] It is important to note that the right to request an attorney does not automatically translate to appointment. Rather, requesting an attorney requires that someone file a motion requesting one, and the court has discretion to grant it or not. Empirical data suggests that such requests are rare. A 2015-2016 court observation study focused on King, Pierce, and Snohomish counties found that 15% of children in middle-stage dependency hearings had neither a CASA/GAL nor an attorney, and requests for appointment of counsel were raised in only 4% of those cases. Even then, the requests were granted only 25% of the time. [8]

The gradual acquisition of the statutory right to counsel for children at various ages and stages of the proceedings is further complicated by local practice. Some counties provide for automatic appointment of counsel at twelve; others at eight; two counties were previously subject to a legislatively created study funding appointment of counsel for children at all ages and stages of the proceedings; and others appoint only as required by statute. [9] Recent enactments giving all children eight years of age and older the right to counsel have gone a long way towards correcting this fragmented approach often referred to as “Justice by Geography.” But for the youngest of Washington’s children, the statutory right to counsel is available only to those who are six-months post-termination of their parents’ parental rights, those who happened to have had cases filed in jurisdictions where study funding was available, and per the most recent amendment, those whose parents’ rights are challenged by termination proceedings (and even then, pursuant to the six-year statutory phase-in schedule). [10] This leaves children under eight

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[3] RCW 13.34.212(3)(a)(ii).

[4] RCW 13.34.212(3)(a)(i).

[5] RCW 13.34.212(1)(a).

[6] RCW 13.34.212(3)(a)(i); *In re Dependency of E.H.*, 158 Wash. App. 757 (2010).

[7] RCW 13.34.212(2)(c).

[8] Alicia LeVezu, *Alone and Ignored: Children Without Advocacy in Child Abuse and Neglect Courts*, 14 STAN. J. C.R. & C.L. 125, 145 (2018). See also Marisa Forthun, *Judicial Discretion is Advised*, 96 Wash. L. Rev. 23, 38 (a 2020 court observation study suggests that “although trial courts have discretion from both statutes and case law to appoint attorneys for children in dependency proceedings, trial judges rarely utilize this discretion.”).

[9] See, e.g., Forthun, *supra* note 8 at 31.

[10] RCW 13.34.212(3)(a)(i).

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without a lawyer from the crucial decisions made at shelter care through to the filing of a petition to terminate parental rights, a period which often spans multiple years. This will remain true even after Washington's new statutory rights to counsel are fully implemented.

As it currently stands, some dependent children under age eight in Washington are represented not by attorneys but by volunteer CASAs or Guardians ad Litem who advocate for their own determination of the child's best interests, as required by statute. While there is some variation by county in how this statutory mandate is fulfilled, the CASA volunteer program is primarily relied upon to meet the demand for GALs, not just for young children but children of all ages in Washington state. Due to the shortage of volunteers, court observation studies have shown that some children have no CASA/GAL appointed to advocate for their best interests. [11]

### Youth Perspective: Appointment by Age

Lily Cory, a foster care alum and current MSW, works in systems reform and policy. She is passionate about making sure those with lived experience inform systems of care. She shared her own experience of having a lawyer appointed to her at age 12, several years into her dependency proceeding. She emphasized the arbitrariness of an age cutoff for appointment of counsel, and characterized it like this: one day she was unrepresented, as she had been for years. The next, she suddenly had a lawyer, although nothing else about her circumstances had changed. Her sibling, several years younger, remained unrepresented. This felt unfair, she explained, because she and her sibling had very different wants and needs from each other, but only one of them had legal counsel, and only because of their age discrepancy. This did not help the system's tendency to lump their wants and needs together, thereby misunderstanding both.

### How children and youth are discussed in dependency proceedings

A 2018 court observation study carried out in King, Snohomish, and Pierce counties provides insight into certain material effects that the presence of children's advocates—and the type of children's advocate—have upon the substance of dependency proceedings. [12] The study reports that, when a child is represented by legal counsel, the child is *mentioned* in proceedings 92% of the time. By contrast, when a child is represented by a best interests advocate—such as a CASA or GAL—the child is only mentioned in proceedings 79% of the time. [13] When a child has no advocate at all, the child is mentioned in proceedings only 67% of the time.

The study also took note of how often a children's *wellbeing* (i.e., mental and physical health, progress in school, or other qualitative information) was raised in proceedings. [14] Among children represented by legal counsel, wellbeing was raised in proceedings 76% of the time, compared with 64% of the time among children represented by best interests advocates and 28% of the time among children with no advocate.

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[11] See Levezu, *supra* note 8, at 144.

[12] *Id.*

[13] *Id.* at 146.

[14] *Id.* at 147.

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The study reported the most significant disparity in the rate at which children's preferences and opinions were relayed during proceedings. [15] Among children with legal counsel, their preferences and opinions were raised in the proceedings 80% of the time. Among children with best interests advocates, preferences and opinions were only raised 25% of the time. And the opinions of children without any advocate were raised in proceedings just 6% of the time.

### **Disparity in experience between children and youth of different races**

As of 2019, there is significant disparity between the experiences of children and youth of different races in the dependency system. To begin with, Black children and youth are 1.8 times more likely to experience an intake into the child welfare system than white children, and Black children and youth are 1.89 times more likely than white children and youth to be screened into the child welfare system post-intake. [16] The disparity remains as dependency proceedings progress. Black children are 1.74 times more likely than white children to be placed, 1.33 times as likely to move twice or more during the first 12 months in care, and 1.28 times as likely to remain in care for over two years. Furthermore, among children and youth who have been in care for over two years, Black children and youth are 1.51 times more likely than white children to move within a given year.

American Indian and Alaska Native children and youth are 1.8 times more likely to experience an intake than white children and youth, and 1.89 times more likely to be screened in. [17] As dependency proceedings progress, American Indian and Alaska Native children and youth are over twice as likely to be placed as white children and youth.

Although there is not a lot of data concerning racially disparate experiences of children and youth with respect to advocate relationship, a national evaluation of CASA conducted in 2004 found that "[c]ompared to children of other races, volunteers spent less time with African American children." [18]

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[15] *Id.* at 148.

[16] Wash. Dep't Child., Youth & Fam., 2019 Washington State Child Welfare Racial Disparity Indices Report (2019).

[17] *Id.*

[18] Caliber, Evaluation of CASA Representation (2004).



### III. The Legislative Charge

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In light of the recent amendments to dependent children’s right to counsel and the enduring unrepresented status of most children under eight, the legislature requested the Supreme Court Commission on Children and Foster Care to:

convene a children's representation workgroup composed of relevant stakeholders, to review the available research and best practices regarding representation of the legal interests of children under the age of eight, and submit to the legislature recommendations regarding the appropriate model of representation including timing of appointment, training and oversight needs, and other considerations. The recommendation shall be reported to the relevant committees of the legislature by March 31, 2022. [19]

This report summarizes a survey of the models and practice standards used by attorneys who represent children under the age of eight across the country. It is informed by parents and by youth who have experience in systems of care. Ultimately, this report recommends universal legal representation in addition to considerations and approaches to representing very young children.

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[19] Second Substitute House Bill 1219.

## IV. Methodology

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When it comes to representing children in dependency proceedings, “if you ask one hundred different lawyers, you’ll get one hundred different answers” about how it should be done. [20] As such, it is difficult to present a full or adequately nuanced picture of child representation throughout the country. This report attempts to capture the diversity of approaches, and some of the nuance, as follows:

First, we set out the four prevalent “models” of representation and two sets of widely implemented national standards. Together, the models and standards describe a general spectrum encompassing most approaches to representation. Crucially, this section includes comments by parents, professionals, and youth who have experienced the models and standards in action.

Second, we detail how the models and standards are implemented in seven states. Key to each state-specific section are interviews with attorneys who have extensive experience representing very young clients according to their state’s models and standards. The attorneys’ comments on the benefits and challenges of their state’s approach are interspersed throughout the tables. We have highlighted their most important examples and insight in colorful boxes that stand out from the text.

Third, we summarize the four existing empirical studies that provide data-driven support for the importance of children’s lawyers in dependency proceedings and the efficacy of different approaches to representation.

Finally, in response to the charge provided by the legislature, we offer recommendations for the representation of children under age eight informed by models, standards, empirical studies, and most importantly, the insight and experiences offered by counsel, experts, parents, and youth.

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[20] A common refrain among the lawyers we interviewed for this report.

## V. Summary of Models

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The “model” of representation refers to the manner in which a child’s attorney determines the litigation objectives in abuse and neglect proceedings and termination proceedings. Discourse on “models of representation” marks a sharp distinction between the legal representation of children and adults. Lawyers representing adults and children are bound by Rules of Professional Conduct to “abide by a client’s decisions concerning the objectives of representation.” [21] Even when representing a client “with diminished capacity,” lawyers must “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” [22] And in fact, the rules include “minority” status as a type of diminished capacity. [23] Therefore, it is notable that certain of the models described below pose challenges for an attorney who is bound to abide by the Rules of Professional Conduct.

Still, representing children—and especially children who are very young, preverbal, or nonverbal—presents unique opportunities which demand creative, well-trained, standards-based approaches. To understand the nuanced ways in which the lawyers we spoke to approach their advocacy, it is crucial to understand the basic tenets of the four models set out below, which form the basis for most approaches to representation.

### **Stated Interests Model of Representation**

The “stated interest” approach to legal representation is fairly characterized as the default approach to representing clients. A “stated interest” is an interest communicated to the attorney by the client verbally, in writing, or through the use of other techniques, such as American Sign Language, language interpreters, or assistive communications technologies that aid those children who are unable to communicate verbally.

As described above, the American Bar Association’s rules of professional conduct define the stated-interest model in Rule 1.2, which requires that a lawyer “abide by a client’s decisions concerning the objectives of representation and . . . consult with the client as to the means by which they are to be pursued.” [24] Lawyers are obligated to adhere closely to Rule 1.2; to violate the rule is to be vulnerable to professional sanctions, suspension, or expulsion. Thus, even when a client is of “diminished capacity,” their lawyer cannot diverge from stated-interest representation unless or until the client “is at risk of substantial physical, financial, or other harm.” [25] In the presence of such risk, the lawyer may “take protective action,” which can include “consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.” [26]

This is what the stated interests model entails in the child advocacy context. Put very simply: under the stated interest model, the child’s lawyer adheres to the Rules of Professional Conduct, and proceeds by determining their client’s objectives to the best of their ability, and then

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[21] Model Rules of Pro. Conduct r. 1.2 (Am. Bar Ass’n 1983).

[22] *Id.* r. 1.14. See also Washington Rules of Professional Conduct r. 1.14 (Wash. Bar Ass’n 2021).

[23] *Id.*

[24] *Id.* r. 1.2.

[25] *Id.* r. 1.14(b).

[26] *Id.*

[27] *Id.* r. 1.2.

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advocating for those objectives in court. [27] Crucially, under the stated interest model, if a client will not express a position on an issue, their lawyer may choose not to take a position in court on that issue.

Because the stated interest model is committed to centering the voices of children and youth, rather than the voice of the advocate or other parties, it effectively promotes agency and autonomy on the part of children and youth in dependency proceedings. It also begins to address some of the issues outlined in the Status Quo section above, namely, the rate at which children, their wellbeing, and their preferences are raised in dependency hearings. In this way, the stated interest model also strives to address, in part, the systemic racial disparity discussed in the Status Quo section above, because it reduces the extent to which attorney bias can permeate litigation objectives.

### **Youth Perspective: Empowered to Think of Broader Opportunities for Self-Advocacy**

Emily Stochel, who is a foster care alum, a Mockingbird Society Advocate, and the Program Manager of Statewide Initiatives at the College Success Foundation, recounted her experience working with a lawyer. She explained how, after advocating strenuously for her own basic safety and fundamental needs, having a lawyer appointed empowered her to think not only about what she absolutely needed, but what she wanted in the course of her dependency. For example, her attorney filed a motion for custody of her dog. Although this motion wasn't ultimately successful, the fact that her lawyer told her it was possible and advocated strongly in its favor made Emily aware of broader opportunities for self advocacy she hadn't previously thought possible.

### **Youth Perspective: The role of attorneys; the role of GALs.**

Among a group of fifteen members of the board of Passion to Action (P2A), a statewide advisory board to Washington State's Children's Administration led by youth and alumni of foster care, several spoke to the importance of GALs and CASAs, especially for younger children. For example, someone spoke about a great GAL who came to meet with a client in their community. Another spoke to a GAL who brought Christmas presents. At the same time, another P2A member spoke to attorneys being preferable to GALs in the context of court proceedings, explaining that by their observations, GALs, who tend to be white, middle-aged and from the middle class, are more likely to express more biased positions. By contrast, attorneys would advocate on a more granular, legal level. It is also important, another board member added, to make sure that clients are clear on the difference between their attorney and a GAL.

### **Best Interests Model of Advocacy**

This model is not envisioned under the Model Rules of Professional Conduct and is contrary to the central tenet that the client directs the litigation. Therefore, it does not constitute legal representation of children and is referred to in this report as "advocacy" to distinguish it from direct legal representation. Under the best interest model of advocacy, a GAL is appointed by the court to make recommendations and take legal action based on the advocate's determination of what is best for the child, even when contrary to the child's stated position.

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Best interest advocacy across the country generally falls into three categories, where the role of the appointed advocate is fulfilled by: (1) a non-attorney guardian ad litem (GAL) or Court Appointed Special Advocate (CASA), who is sometimes represented by an attorney; (2) an attorney-GAL who does not directly represent the child but takes legal action based upon the attorney's determination of what is in the child's best interests; or (3) an attorney who serves in a dual role as a GAL and counsel.

There is a significant difference between GALs and volunteer CASAs and counsel. While GALs and CASAs provide the court with “information about the child and the child’s circumstances,” they are “not trained to, nor is it their role to, protect the legal rights of the child.”[28] Conversely, lawyers “provide legal advice on potentially complex and vital issues to the child, ... are bound by [the] ethical duties” of the legal profession, and “maintain confidential communications.” [29] Additionally, lawyers help the child and the court by “explaining to the child the proceedings and the child’s rights,” and “facilitate and expedite the resolution of disputes, minimize contentiousness, and effectuate court orders.” [30]

Given that the best interest advocate’s representation is guided simply by their own judgment, this model of representation is rife with the potential to introduce bias. [31] Even in the states where GALs are attorneys with legal training and bound by Rules of Professional Conduct, legal representation is still based on “what the attorney deems best (often and inevitably based upon the legal representative's values and life experiences, albeit unwittingly at times).” [32] As explained by Professor Jean Koh Peters of Yale Law School, “[t]his level of discretion makes it inevitable that the [advocate] will sometimes resort to personal value choices, including references to his own childhood, stereotypical views of clients whose backgrounds differ from his, and his own lay understanding of child development and children's needs, in assessing a client's best interests. Especially for practitioners who must take cases in high volume, the temptation to rely on gut instinct, stereotype, or even bias is overwhelming.” [33]

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[28] *In re Dependency of M.S.R.*, 174 Wash. 2d 1, 21, 271 P.3d 234, 245 (2012).

[29] *Id.*

[30] *Id.*

[31] See Caliber, *supra* note 18 (Nationally, 83% of CASA volunteers were white according to a 2002 survey); see also Wash. Bar Assoc., *Diversity, Intersectionality & WSBA Membership* (2015) (overall, 89% of the WSBA's members are white, compared to 72% of the population).

[32] Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers*, 32 Loy. U. Chi. L.J. 1, 34 (2000).

[33] Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 Fordham L. Rev. 1505, 1526 (1996).

## **A Parent’s Perspective: Attorneys and GALs Have Meaningfully Distinct Roles.**

Tonia McClanahan is both a contracted social worker for OPD with years of experience and a parent with lived experience. She expressed appreciation for GALs, but emphasized that they are not a replacement for attorneys because “GALs pick and choose based on what they believe.” She recounted a case involving domestic violence and observed that the GAL was “anti-dad” and intimated “no faith that things would be different” even though the child’s mother was doing well. Because the GAL was advocating for adoption, an attorney was assigned to represent the child in order to provide balance and represent the child’s legal rights. In another case involving a seven-year-old, “the GAL was anti-parent” and the judge recognized that the child was articulate and appointed a children’s attorney. The attorney was able to “speak more to the bigger picture, whereas the GAL was only speaking to what was in the best interest of the child that day.” In another case, a child was placed in an abusive foster home and CASAs and GALs were not listening when the parent described this abuse. From Ms. McClanahan’s perspective, if an attorney had been representing that child, he would have not stayed in that abusive home as long as he did, and the permanent effects of trauma on this child would have been avoided.

### **Substituted-Judgment Model**

Under the substituted-judgment approach to representation, the advocate must “make a reasonable attempt to make the decision that the protected person would make” if they were able to make a decision. [34] A reasonable attempt must include consulting and adhering to the protected person’s “known and previously expressed preferences,” which are informed principally by reliable evidence of express preferences, past behavior, values, and secondarily, by the opinions of those close with the protected person who are familiar with their express desires and wishes. [35] The advocate might also review written evidence of preferences, including legal documents and letters. [36] As Professor Lisa Kelly, The Bobbe and Jon Bridge Professor of Child Advocacy at the University of Washington School of Law, explained in a recent article, substituted judgment “requires advocates to put themselves in the place of their client, and in the context of the client’s life, to make a decision that the client likely would have made had they been able to verbalize a position.” [37] There is an exception to the substituted judgment approach, which is that if a decision made under substituted judgment would result in “substantial harm” in a particular instance, then the decision maker should use a different approach in that particular instance. [38]

Advocates typically use the substituted judgment model of decision making with adult clients who have become unable to direct their own representation. [39] However, in some places,

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[34] Fam. & Volunteer Guardian’s Handbook p. 19 (King County Bar Ass’n 2010).

[35] Id.

[36] Id.

[37] Lisa Kelly & Alicia LeVezu, *Until the Client Speaks: Reviving the Legal-Interest Model for Preverbal Children*, 50 Fam. L.Q. 383, 391 (2016).

[38] Id.

[39] Lisa Kelly & Alicia LeVezu, *Until the Client Speaks: Reviving the Legal-Interest Model for Preverbal Children*, 50 Fam. L.Q. 383, 396 (2016).

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children’s attorneys use this approach in the course of representing even very young clients. As with adult clients, the decision maker must determine what the child would decide if the child were able to make an “adequately considered decision.” [40] And, just as an attorney for an adult would do when using substituted judgment,, an attorney who is substituting their judgment for that of a child may consult a variety of resources, including observations of the child in their environment, information from those who know the child, and information from experts. [41] The substituted-judgment approach differs from best interests principally because it is based, at least in theory, not on the personal beliefs of the advocate, but rather on what the child would seemingly decide based on the information that the decision maker has sourced. [42]

The substituted judgment model is ultimately subject to many of the same pitfalls as the best interests model. By definition, very young children do not have a large compendium of expressed preferences, past behavior, values, or wishes. Even those closest to a baby would struggle to identify that baby’s basic preferences, let alone core values. As such, “the advocate is left to imagine what he or she would want if he or she were in this baby’s booties.” [43] So, just like the best interest model, here the decision is ultimately subject to the attorney’s own values, gut instinct, and racial and class biases.

### **Legal Interests Model**

The legal interest model of representation is the model currently in place in Washington for pre-verbal and non-verbal children and youth. Under the legal interest model of representation, an attorney is bound to identify and advocate for a child’s legal rights that are enumerated by the constitution, federal statutes, state statutes, and case law. These laws would set objective criteria for a legal interest attorney to represent the child. [44] As Professor Kelly explains, a legal interest representation “ highlights the unique skill set of lawyers —that of identifying legal issues and utilizing court processes.” [45]

The legal interest approach differs from best interest advocacy and substituted judgment representation in that the attorney is not charged “with telling the court what the advocate thinks is best or what the advocate imagines the child would want.” [46] Thus, this approach to representation minimizes the influence of bias, and allows lawyers to exercise their skills to protect the child’s legal rights, even when that child is unable to direct counsel.

Moreover, the legal interests approach ensures that children and their wellbeing are raised in dependency hearings. Recall from the Executive Summary that children in care require advocacy in matters beyond dependency, including public benefits law, education and special education law, family law, immigration law, and housing law, to name a few. It is the job of the legal interest

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[40] Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, § 7(d).

[41] Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, Commentary to § 7(d).

[42] *Id.*

[43] Lisa Kelly & Alicia LeVezu, *Until the Client Speaks: Reviving the Legal-Interest Model for Preverbal Children*, 50 *Fam. L.Q.* 383, 384 (2016).

[44] *Id.*

[45] *Id.*

[46] *Id.*

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attorney to identify any and all legal issues which their young client faces in these diverse areas of law, and to ensure that these issues are raised, attended to, and solved throughout the course or proceedings. The legal interest model also places an emphasis on agency and autonomy in that it preserves the rights of young people before the court until the point at which they can determine their own legal objectives. In this way, it strikes a balance between attending to the wellbeing of preverbal and nonverbal clients and reducing opportunities for attorneys to project their biases into litigation objectives.

While the legal-interest model was recommended by the American Bar Association in the 1996 Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, Washington is the only state to implement the model. Therefore, there is only very limited quantitative and qualitative information available about its drawbacks. Still, it is conceivable that the legal-interest model makes sacrifices in the interest of objectivity. Namely, it limits advocacy to areas where there is a statutory or other legal entitlement and therefore may allow other parties to the given dependency to have access to more robust and creative advocacy than the child.

### **A Judge's Perspective: Legal Interests and the Bias Towards Adult Perspectives**

Judge Megan Valentine of the Grays Harbor District Court spoke to how the benefits of the legal interest model reverberate in the courtroom. She explained that juvenile court judges face a significant bias in favor of assuming that the adults in the room are the ones who are in control. That assumption can function to discount the values and desires of the children also before the court. The stated interest/legal interests dichotomy guards against this bias by diminishing the opportunities for a child's lawyer--an adult in the room—to put forward their own opinions and judgments that a judge may unconsciously weigh more heavily than those of the child.

### **A Lawyer's Perspective: Comparing Models in Action**

Karen Lindholdt, who has extensive experience representing children in dependency proceedings in Grant County, spoke to the differences between legal interests and GAL-determined best interests. She recounted parallel stories in which she had been appointed to represent very young children, both from Latinx families. By the time Ms. Lindholdt was appointed in each case, the children had been placed with white foster families. In both cases, Ms. Lindholdt identified relatives who not only wanted to raise the children, but who were already raising their siblings. Under RCW 13.34.130, which states a statutory preference for placement with relatives and with siblings when parents aren't an option, Ms. Lindholdt emphasized that her young clients had the right to be placed with their family members. Her clients' GALs in each case advocated instead that it was in the best interests of each child to remain with their foster families with whom the children had bonded, despite the opportunity that each child had to be raised with family alongside siblings. In each case, Ms. Lindholdt's clients were ultimately placed with family in accordance with Washington's statutory preference for placement with relatives and siblings where possible.



## VI. Distribution of Models Across the U.S.

As depicted in the graphic below, currently the majority of states (72%) and Puerto Rico and the US Virgin Islands, require independent counsel for all children at all stages of abuse and neglect proceedings. [47] Of these states with universal representation, about one third require client-directed counsel [48] and the rest use attorney best-interest representation and/or a hybrid form of representation (i.e., best interests for youth under a specific age). [49] When an attorney is appointed, most state statutes require that the attorney is appointed for all phases of the case.[50] Furthermore, a majority of states now require multi-disciplinary training for child’s counsel or GAL. [51] And a vast majority of states give the child legal party status with all rights of a party. [52]

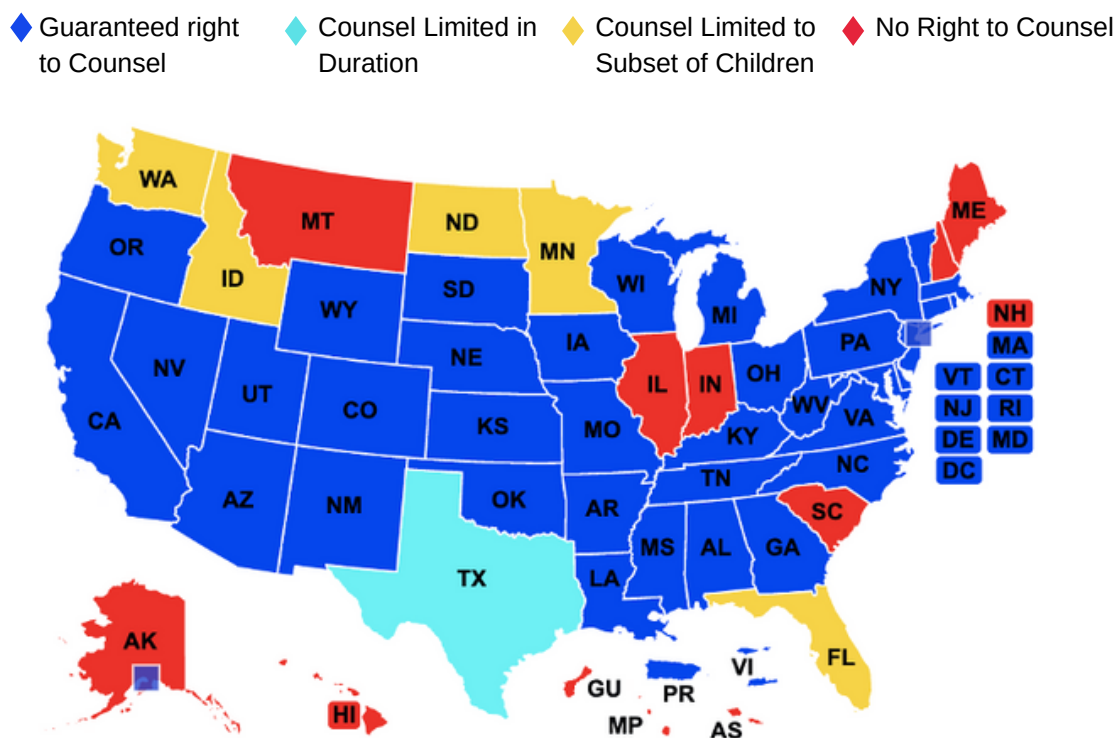


Figure 1: Models of Children’s Legal Representation by State [53]

[47] Nat’l. Assoc. Couns. for Child., State Models of Children’s Legal Representation 2-7 (2021).

[48] Client-directed counsel includes the use of substituted-judgment representation when the client is determined to be at “diminished capacity” or is nonverbal. It is defined as representation where the attorney’s duty of loyalty is to the child. Client-directed counsel must advocate for their client’s expressed preferences and positions to the extent possible consistent with any diminished capacity of the child, including age.

[49] Id. (Client-directed counsel)

[50] Id.

[51] Id.

[52] Id.

[53] Recreation of the NACC Model of Representation Map (2021).

## VII. National Standards and Guidelines

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The practice standards and guidelines governing child advocacy are distinct from the models set out above. While the models name the approach a child advocate takes to determine the objectives of the litigation, standards and guidelines address both preferred models of representation and further aspects of the attorney-client relationship, such as confidentiality, continuity, and training. While several states, Washington included, have produced their own standards, there are two prominent national organizations that have offered guidance in this area: the American Bar Association and the National Association of Counsel for Children. [54] The recommendations of both organizations frequently serve as the basis for state-specific standards, and attorneys and judges often cite to them independently. While there is a lot to learn from both, we have focused on their recommendations for the appropriate model of representation for very young children. In developing its standards in 2010, Washington relied heavily on the ABA standards that were in effect at the time.

### **ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases**

In 1996, the ABA published its standards and recommended a stated interest approach as default. For example, it recommends that “[t]he child’s attorney should elicit the child’s preferences in a developmentally appropriate manner, advise the child, and provide guidance.” [55] In court, “[t]he child’s attorney should represent the child’s expressed preferences and follow the child’s direction throughout the course of litigation.” [56] However, when a child “cannot express a preference,” such as “in the case of a preverbal child,” the ABA standards recommended that “the child’s attorney shall make a good faith effort to determine the child’s wishes and advocate accordingly or request appointment of a guardian ad litem” (emphasis added). [57] When an attorney cannot determine the child’s wishes, the attorney should operate under the legal interests model. [58] The ABA standards were careful to distinguish the legal interests model from the best interests model, and explain that “this limitation distinguishes the scope of independent decision-making of the child’s attorney and a person acting as a guardian ad litem.” [59] Guardians ad litem operate under the best interest model by definition; this is not, according to the ABA standards, the province of the child attorney. Washington’s standards, adopted in 2010, endorsed the ABA default of stated interest as well as its recommendation for legal interest advocacy for child clients unable to direct counsel.

In 2011, the ABA revised its approach and adopted the Model Act Governing the

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[54] Meaningful Legal Representation for Children and Youth in Washington’s Child Welfare System draws heavily on the ABA Standards; American Bar Association, Model Act Governing the Representation of Children in Abuse and Neglect Proceedings (2011); NACC Recommendations, Revised.

[55] ABA Standards § B-4.

[56] Id.

[57] ABA Standards § B-4(1).

[58] Id. (“Under such circumstances, the child’s attorney should continue to represent the child’s legal interests and request appointment of a guardian ad litem.”)

[59] Id.

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Representation of Children in Abuse, Neglect and Dependency Proceedings. [60] In this version, the ABA retained stated interest as its default position but chose instead to endorse the use of the substituted judgement model for those children unable to direct counsel. [61]

### **NACC Recommendations for Representation of children in Abuse and Neglect Cases**

The NACC published updated recommendations in February 2022. Crucially, NACC recommends that “[r]egardless of model, children and youth should have party status in their own cases and enjoy access to effective assistance of legal counsel at all stages of welfare proceedings, from initiation through final appeal.” [62]

Regarding the model of representation, “NACC supports express-interest representation as the preferred model of children’s legal representation.” NACC refers to this model also as the “Child Attorney” model in which “[t]he attorney owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client” in addition to “active client counseling and investigation.” [63]

For children “of diminished capacity (such as infants),” NACC recommends substituted judgment “as the preferred approach to legal representation.” [64] This substituted judgment representation requires that attorneys first make “firsthand, trauma-informed and culturally responsive observations of the client and seek guidance from collateral sources (e.g., family, supports, experts, and other professionals)” to develop a position. [65] With these observations as a foundation, NACC recommends that attorneys using the substituted judgment model “further consider the child’s legal rights and interests in safety, permanency, and wellbeing (presently and into the future) and factors such as attachment, identity and cultural connection, sibling relationships, health, etc.” [66] NACC emphasizes that “[i]mportantly, a child’s age, in and of itself, is not sufficient to make a diminished capacity determination that triggers a substituted judgment approach.” [67]

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[60] American Bar Association, Model Act Governing the Representation of Children in Abuse and Neglect Proceedings (2011).

[61]

[62] NACC Recommendations, Revised, Comment to § 1.

[63] NACC Recommendations, Revised, Definitions.

[64] Id.

[65] Id.

[66] NACC Recommendations, Revised Comment to § 1.

[67] Id.

## VIII. State-Specific Approaches to Representation

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The seven states studied in depth were identified for several reasons: They (1) represented a comprehensive sample of the various models and practices used across the country, (2) encompassed a complete range of the ratings provided by the First Star's latest edition of A Child's Right to Counsel, [68] and (3) provided an opportunity to interview practitioners who are well known for their expertise in this area of the law.

The states we studied have a variety of approaches to representation of children. A majority of these states have some form of best interest representation model. The challenges associated with each of these models are diverse, but they all have one challenge in common: they are prone to the advocates' biases. Different states have put different measures in place to protect against biases, but there is still much work to be done in this area across the board.

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[68] FIRST STAR ET AL., A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN (4th ed.) (Evaluating state laws relating to the legal representation of children in civil child abuse and neglect proceedings).

# Arizona

<b>Interviewee</b>	Paul Bennett, Professor of Law and Director of the Child and Family Law Clinic at the University of Arizona.
<b>Right to Counsel</b>	As of 2021, Arizona enacted a new statute that provides all children with a right to counsel, regardless of age. [69] The statute provides:  "The court shall appoint an attorney for a child in all ... dependency or termination of parental rights proceedings that are conducted pursuant to this title. The court shall appoint the attorney before the first hearing. The attorney shall represent the child at all stages of the proceedings and, in a dependency proceeding, through permanency."
<b>Model</b>	Stated interest: Arizona requires a stated interest lawyer to represent children in juvenile court. Additionally, "the court may appoint a guardian ad litem to protect the juvenile's best interests." However, "the guardian ad litem is not the child's attorney." [70] In cases where the child is preverbal or has diminished capacity, there is no statewide model of representation. Rather, attorneys proceed in accordance with the rules and practice standards of their jurisdiction.  Under new regulations, which have not passed yet, if the attorney is not able to determine what the child's stated interest is, they must inform the court and get permission to proceed.
<b>Bright-Line Age Rule</b>	None.
<b>Counsel's Critiques</b>	Potential for attorney biases to affect the child's answers if the attorney is not properly trained in how to interview and counsel young children.
<b>Interdisciplinary Training</b>	Arizona has requirements for interdisciplinary training. In accordance with Arizona Rules of Procedure for the Juvenile Court, [71] attorneys and GALs shall complete "six (6) hours of court approved training prior to their first appointment and an additional two (2) hours within the first year of practice in juvenile court." [72] Additionally, there is a requirement to complete "eight (8) hours each year of ongoing continuing education and training. Education and training shall be on juvenile law and related topics, such as child and adolescent development (including infant/toddler mental health), effects of substance abuse by parents by and upon children, behavioral health, impact on children of parental incarceration, education, Indian Child Welfare Act, parent and child immigration status issues, the need for timely permanency, the effects of the trauma of parental domestic violence upon children and other issues concerning abuse and/or neglect of children." [73]

## An Attorney's Perspective: The Importance of Trauma-Informed Interviewing

Interviewing in a developmentally appropriate manner is critical. Mr. Bennett recounted a case where the child's siblings were murdered by one of his parents. "We were all worried that the child did not know about the murder. We did not want to deliver this message, and cause additional trauma just so that we can do our job." but when they asked the child if he knew why they were there, they found out that he already knew what had happened. And so, they were able to counsel the child and determine his stated interest.

## An Attorney's Perspective: We Must Support Lawyers for Children

Mr. Bennett points out that as part of any representation model, we must consider supporting children's representatives in their work to improve longevity of trained lawyers in this profession. "It is not easy to do this work for a long period of time," Mr. Bennett explains, and "we are not successful more often than we are, in anybody's measure of success." So he urges Washington to think about the issues of burnout and secondary trauma and make sure our attorneys have the proper support.

[69] Ariz. Stat § 8-221.

[70] *Id.*

[71] Ariz. R. Juv. P. 40.1(J)

[72] *Id.*

[73] *Id.*

# California

<b>Interviewee</b>	Susan Abrams, Policy Director, Children's Law Center of California. CLC represents half of all children in dependency proceedings in California.
<b>Right to Counsel</b>	"If a child . . . is not represented by counsel, the court shall appoint counsel for the child." [74] One exception, allowing the court to refrain from appointing counsel "if the court finds that the child . . . would not benefit the appointment of counsel," [75] is in practice never used.
<b>Model</b>	Model is dictated by statute. Stated interests for children 4 and older. [76] Best interests (attorney GAL) for children under 4. [77]  CLC policy requires counsel to advise the court of the child's wishes, regardless of age. The policy is driven by a commitment to be "youth centered."
<b>Bright-Line Age Rule</b>	Age does not factor in appointment of counsel. Age 4: counsel to switch to stated interest representation. [78] Age 8: children must attend court hearings.
<b>Counsel's Critiques</b>	Bias is "always" an issue in making best interests determinations. Clearer laws could ameliorate bias in best interests representation. A stated interest model would also be less subject to bias, in some situations.
<b>Interdisciplinary Training</b>	Statutory training requirements:  "Cultural competency and sensitivity relating to, and best practices for, providing adequate care to lesbian, gay, bisexual, and transgender youth in out-of-home care." [79]  "Authorization, uses, risks, benefits, assistance with self-administration, oversight, and monitoring of psychotropic medications; trauma, and substance use disorder and mental health treatments, including how to access those treatments." [80]

## An Attorney's Perspective: Babies have distinct positions

Ms. Abrams spoke about representing a very young baby who had sustained serious injuries—allegedly from being shaken by one of their parents. Both the State and the parents acquired experts, and Ms. Abrams acquired her own. Her analysis, combined with her expert's opinions, yielded a different position from either the state or the parents. While the State advocated to bypass reunification services and fast track to terminating parental rights, and the parents advocated for dismissal of the petition, Ms. Abrams advocated for services and psychological evaluations for the parents before considering termination. She was successful, and therefore, better able to balance her client's right to being raised by their biological parents with their right to safety than the state or the parents were prepared or willing to do. Absent legal representation, this client's crucial rights would not have been fully represented.

[74] CA Welfare and Institutions Code Division 2 Part 1 Ch. 2 Art. 7 § 317(c)(1).

[75] Id.

[76] CA Welfare and Institutions Code Division 2 Part 1 Ch. 2 Art. 7 § 317(e)(2).

[77] Id.

[78] Id.

[79] CA Welfare and Institutions Code Division 2 Part 1 Ch. 2 Art. 7 § 317(c)(5)(B)(i).

[80] CA Welfare and Institutions Code Division 2 Part 1 Ch. 2 Art. 7 § 317(c)(5)(B)(ii).

## Colorado

<b>Interviewee</b>	Ashley Chase, Staff Attorney and Legislative Liaison of the Colorado Office of the Child's Representative (OCR). OCR is the state agency mandated to provide competent and effective best interests legal representation to children involved in the Colorado court system.
<b>Right to Counsel</b>	All children have a statutory right to advocacy, regardless of age. [81] Children under age 12 have the right to GAL advocacy, carried out by an attorney. [82] Children aged 12 and up have the right to legal representation, and are automatically appointed client-directed counsel. [83]  Children under 12 may have legal counsel in limited circumstances, including when the child faces contempt of court or the court has determined that the child holds their own patient-therapist privilege. [84] Serving in these limited situations, counsel has a traditional attorney-client relationship with the child.
<b>Model</b>	Best-interest advocacy (by attorney-GAL, not a volunteer) for under youth 12; stated interest for 12 and older  Representing the "best interests of the child" means that the GAL does not work in the traditional attorney-client role where an attorney advocates on behalf of the client's stated interests. The GAL must advocate independently on behalf of the child's health, safety, and well-being. The GAL is tasked with investigating as needed "to ascertain the facts," and "shall talk with or observe the child involved," and "make recommendations to the court concerning the child's welfare." [85]  Once the child turns 12, an attorney represents the child's stated interests. [86] In this role, lawyers have a traditional attorney-client relationship and advise their client about the issues pending before the court and advocate according to the child's wishes.
<b>Bright-Line Age Rule</b>	Yes, CO draws a line at 12. Those younger receive GAL advocacy; those 12 and older receive legal counsel.
<b>Counsel's Critiques</b>	This model of representation is subject to attorney biases, and Colorado has tried to mitigate this concern to the extent possible through implementing proper recruitment practices, and training.
<b>Interdisciplinary Training</b>	OCR trains all of its attorneys on the law, social science research, child development, mental health and education issues, and best practices relating to issues impacting children involved in court proceedings. Additionally, GALs must meet OCR's Core Competencies. [87] The Core Competencies are grounded in understanding ethical obligations, having substantive knowledge of the law, advocacy skills, effective engagement with youth, and ability to conduct meaningful investigations.  The Colorado standards also require use of a Tool for Assessing and Planning for Child Safety. This tool includes a set of six questions to gather information about the child's safety, followed by a rubric to analyze the gathered information and assess safety. If the child is determined to not be safe, the attorney establishes a safety plan as provided in the form.
<b>Standards</b>	The roles and responsibilities of a GAL, are governed by the Colorado practice standards, [88] the professional standards governing all attorneys, the attorney's contract with OCR, and OCR practice standards.  GALs must independently and timely investigate the matters to which they are appointed, make recommendations that are in the best interests of the child, and advocate on the child's behalf. Additionally, GALs must meet each child in each placement and communicate with the child and other parties throughout the case. A few key practice standards point to the GALs' obligation to (1) visit the child within 30 days of appointment, (2) independently investigate and interview parties involved in the child's life within the first 45 days of appointment, and (3) to obtain 10 hours of OCR-sponsored training. [89]

[81] Colo. Rev. Stat. §19-1-115(8)(d).

[82] *Id.*

[83] *Id.*

[84] *L.A.N. v. L.M.B.*, 11 SC 529 (Jan. 22, 2013).

[85] Colo. Rev. Stat. §19-3-203(3).

[86] Colo. Rev. Stat. §19-1-115(8)(d).

[87] See <https://coloradochildrep.org/wp-content/uploads/2019/11/OCR-Core-Competencies-for-DN-Attorneys.pdf>.

[88] Chief Justice Directive 04-06.

[89] *Id.*

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**An Attorney's Perspective: Practice Standards and Trainings Are Key to an Effective Model**

From Ms. Chase's perspective, Colorado's practice standards help address some of the critiques of the best interest representation model. Because "they require you to meet with the child outside of court, to ascertain what the child wants and inform the judge of the child's wishes." And "ultimately the judge makes the final decision in dependency proceedings." So, "states should focus on high quality standards."



## Florida

<b>Interviewee</b>	Gerry Glynn, Chief Legal Officer of Embrace Families Jim Walsh & John Walsh, Supervising Attorneys at the Legal Aid Society of Palm Beach County.
<b>Right to Counsel</b>	There is no universal representation in Florida. Children get appointed GALs who are primarily volunteers. [90] As provided in the statute, a GAL shall be appointed “at the earliest possible time to represent the child.”[91] GALs are required to file a written report including a statement of the wishes of the child. [92] Florida requires appointment of attorneys only under a very narrow set of factors as defined by statute. [93] It is important to note that GALs have a right to counsel, unlike most children. In Florida this has mostly been driven by funding and only few of the 67 counties have received funding to appoint attorneys. There is an additional complication in Florida where under rules of juvenile procedure, judges are allowed to appoint an attorney in any case. [94] Only children who have an attorney appointed receive client-directed representation. [95]
<b>Model</b>	Best interest (non-attorney GAL) throughout most jurisdictions.  However, because there is no statewide model of representation in Florida, practitioners may differ in their approaches. For example, the Children’s Services Council of Palm Beach County provides client-directed council for children three years and older.
<b>Bright-Line Age Rule</b>	None.
<b>Counsel’s Critiques</b>	GALs have very limited training, and they do not have rules of professional conduct to abide by. Their representation of a child is highly subject to bias.
<b>Interdisciplinary Training</b>	No multidisciplinary training is required for attorneys except for a narrow subset of cases involving child sexual abuse.
<b>Standards</b>	Florida has developed Florida Guidelines for Lawyers who Represent Children in Abuse and Neglect. These guidelines, modeled after the ABA and the NACC standards, are mostly educational and are not binding.

### An Attorney’s Perspective: We Are the Pediatricians of the Child Welfare System

As Jim and John explain, children are coming to us with the most complex legal problem of their lifetime. We are experts with interpreting, and enforcing the law. And our job is to get these children out of foster care and into permanent homes as soon as possible, preferably with their biological parents.

[90] Fla. Stat. §39.822(1).

[91] Id.

[92] Fla. Stat. §39.807(2)(b)(1).

[93] Fla. Stat. §39.01305(3).

[94] Fla. R. Juv. P., Rule 8.255(b)(1).

[95] Fla. Stat. §39.4085(20).

# Georgia

<b>Interviewee</b>	Natalece Washington, JD, CWLS, Policy Counsel, National Association of Counsel for Children. Former attorney for dependent children in Georgia.
<b>Right to Counsel</b>	Statutory right to counsel for all children in dependency proceedings. [96] Counsel must be appointed “as soon as practicable to ensure adequate representation of the child.” [97] The right cannot be waived. [98]
<b>Model</b>	Hybrid: counsel + GAL. Counsel can serve as both “unless or until there is a conflict of interest between the attorney’s duty . . . as . . . attorney and the attorney’s considered opinion of such child’s best interests” as a GAL. [99] In such a situation, counsel files a motion for new GAL and continues their role as counsel.  Counsel for all children “owes his or her client the duties imposed by the law of this state in an attorney-client relationship.” [100] Thus, for nonverbal children, counsel is required to apply the ethical rules governing representation of clients with diminished capacity to guide representation.
<b>Bright-Line Age Rule</b>	None, pertaining to either right to counsel or appropriate model.  Ms. Washington emphasizes the importance of case-specific inquiry to determine the approach to representation, based on the capacity of the child.
<b>Counsel’s Critiques</b>	Any model in which the client is not telling counsel what to do is vulnerable to counsel’s biases.
<b>Interdisciplinary Training</b>	Ethical obligation of competence requires interdisciplinary training for children’s counsel, including in child development and interviewing, and immigration, disability, and social security law.  Ms. Washington emphasizes the importance of understanding early childhood development, especially the point at which decision-making capacity develops.

## An Attorney’s Perspective: Basic childhood wellbeing

In advocating for nonverbal children, Ms. Washington emphasizes an essential aspect of counsel’s role: advocating for basic childhood wellbeing. Counsel for very young children must be hyper-vigilant and place high importance on understanding how their client is doing on a day-to-day basis. She also emphasizes the importance of noticing whether a client has a bruise on their arm or leg, of speaking regularly to daycare teachers, and of routinely asking basic questions such as “how are you doing” and “did you eat today”?

Ms. Washington’s discussion of day-to-day attention to clients’ basic wellbeing emphasize the importance of counsel for very young dependent children. Counsel not only advocates for a position on permanency; counsel advocates throughout the pendency of the case, which can be years, for their client’s right to have their basic needs met. This may be especially important for preverbal children.

[96] GA Code § 15-11-103(a) (2014).

[97] GA Code § 15-11-103(b) (2014).

[98] GA Code § 15-11-103(f) (2014).

[99] GA Code § 15-11-104(b).

[100] GA Code § 15-11-103(c).

<b>Interviewee</b>	Judge Brent Pattison, Iowa Judicial District 5.
<b>Right to Counsel</b>	In Iowa, all children have a right to counsel, regardless of age. [101] And the appointment of counsel occurs upon filing of a petition. [102] The statute provides that the court shall “appoint counsel and a guardian ad litem” and that the same person may serve both roles unless the “same person cannot properly represent the legal interest of the child as legal counsel and also represent the best interest of the child as guardian ad litem.” [103]
<b>Model</b>	Hybrid: counsel + GAL. Counsel can serve as both “unless or until there is a conflict of interest between the attorney’s duty . . . as . . . attorney and the attorney’s considered opinion of such child’s best interests” as a GAL.[90] In such a situation, counsel files a motion for new GAL and continues their role as counsel.  Counsel for all children “owes his or her client the duties imposed by the law of this state in an attorney-client relationship.”[91] Thus, for nonverbal children, counsel is required to apply the ethical rules governing representation of clients with diminished capacity to guide representation.
<b>Bright-Line Age Rule</b>	None.
<b>Counsel’s Critiques</b>	Attorney bias Assessment of when to withdraw as a GAL.
<b>Interdisciplinary Training</b>	Iowa does not require specialized multidisciplinary education and/or training for attorneys representing children in dependency proceedings.

**A Judge’s Perspective:  
Regardless of the Model, Effective, Zealous, and Active Representation of Children’s Rights is Needed**

Before becoming a judge, Judge Pattison represented a child whose parent had requested different visitation times. The state disagreed with the parent, arguing that current visits were not going well and were disruptive to the child’s daycare. The consensus was that the parent was not handling the situation well. Judge Pattison took the case and approached it with zealous advocacy. He interviewed the child, and the preschool teacher, to find out what was happening. He learned that the visits were scheduled during nap time so there was no chance they would go well regardless of how the parent was handling them. This was also the main reason behind the parent’s request to adjust visitation times. So following this investigation, they scheduled visits in between nap time, just as frequently, and the outcome was highly successful. “All it took was zealous advocacy, interviewing the parties and considering the child’s rights!”

[101] Iowa Code §232.89(2); §232.113(2); §232.126  
 [102] Id.  
 [103] Iowa Code §232.89(4).

# Washington

<b>Interviewee</b>	Judge Megan Valentine, Grays Harbor District Court. Former legal interests study attorney.
<b>Right to Counsel</b>	As of 2022, statutory right to counsel for children 8 and up, pursuant to six-year phase-in schedule, and all ages upon the filing of a termination petition. [104] Statutory right to best interests GAL for children under 8. [105] Exception: statutory right to counsel for all children 6 months post-termination. [106]
<b>Model</b>	Stated interests for clients able to direct counsel. [107] Legal interests for preverbal and nonverbal children. [108]
<b>Bright-Line Age Rule</b>	Yes. Statute draws a line at age 8 for right to counsel in dependency. [109] None for termination or six months post-termination. From her experience, Judge Valentine does not think it is possible to identify one specific age at which representation should begin or change.
<b>Counsel's Critiques</b>	The legal interests model minimizes the extent to which counsel's judgment influences their advocacy. This is a far better approach than using the substituted judgment or best interest model, where counsel is ultimately advocating for their own judgment. This is exacerbated by the fact that many advocates do not understand the lived experience of foster youth well enough to understand the proper role of children's advocacy.
<b>Interdisciplinary Training</b>	Judge Valentine emphasizes the importance of training that teaches counsel how to talk to children and how to discern whether a child is at a stage, developmentally, at which the stated interest model is appropriate.
<b>Practice Standards</b>	WA attorneys are guided by Meaningful Legal Representation for Children and Youth in Washington's Child Welfare System, a set of standards modeled on the ABA's standards, summarized above.

## An Attorney's Perspective: Basic Right to Care

Judge Valentine shared her experience representing a very young child who could speak but not communicate their needs. This client, whose parental rights had been terminated, was gravely injured in their foster placement and hospitalized for two months as a result.

Since Judge Valentine's client was out of their foster placement for over two months due to the hospitalization, they did not automatically get a new placement. As a result, save for a monthly thirty-minute visit with a caseworker, Judge Valentine's client had no one outside of their medical team to care for them during their hospital stay. However, Judge Valentine's appointment as counsel obligated her to ensure that her client's basic right to care was met. Judge Valentine visited the hospital frequently, and filed a motion with the court requesting an order compelling the department to find a placement for her client at the end of their hospitalization. Through this motion, Judge Valentine secured a foster placement that would not only care for the client post-hospitalization, but also visit the hospital and assist with the client's respiratory needs.

As Judge Valentine said: this client's story is a strong and highly emotional example of how a very young, nonverbal client required an attorney to advocate for their rights. The legal interest model provided a framework for Judge Valentine to advocate for her client who was physically safe in the hospital but whose rights beyond physical safety--to basic care and permanency--would not have been enforced throughout the hospital stay without legal counsel.

[104] RCW 13.34.212(3)(a)(i).

[105] RCW 13.34.212(2)(a).

[106] RCW 13.34.212(1)(a).

[107] Meaningful Legal Representation for Children and Youth in Wash. Child Welfare Sys. § 1.1(1) (Wash. Courts 2011).

[108] Id. at § 1.1(7).

[109] RCW 13.34.212(3)(a)(i).

## IX. Outcome Studies

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Four outcome studies are available nationally that provide data-driven support for the importance of children’s lawyers in dependency proceedings and the efficacy of advocacy and representation for children. These studies are summarized as follows. Additionally, during the interviews practitioners pointed to anecdotes that are consistent with these results, noting that children who are represented by attorneys, especially using stated interest models, typically spend less time in care, and have more favorable outcomes.

### **2021 Evaluation of the Washington State Dependent Child Legal Representation (DCLR) Program**

The DCLR Program offered standards-based legal representation to all dependent youth in Grant and Lewis counties. [110] It identified three outcomes to assess at the program’s conclusion, including permanency, placement stability, and school stability. [111] To determine the efficacy of the DCLR program, evaluators identified a control jurisdiction, comprising Whatcom and Douglas counties where the DCLR was not implemented, and a control time period, comprising the two years before the start of the DCLR program. [112] Then, evaluators compared the outcomes for 434 children in Grant and Lewis counties who entered shelter care during the study period with the outcomes for three control groups: (1) 322 children who entered shelter care in Grant and Lewis counties during the control time period, (2) 265 children who entered shelter care in Douglas and Whatcom counties during the study period, and (3) 430 children who entered shelter care in Douglas and Whatcom during the control time period.

Evaluators found that children represented by DCLR attorneys were 45% more likely to experience reunification with their biological parent(s) than children in the comparison group. Moreover, the DCLR program decreased the change of placement rate by 30% across all age groups. Finally, the DCLR decreased the rate of non-normative [113] school transitions by 65%.

### **Alone and Ignored: Children Without Advocacy in Child Abuse and Neglect Cases**

In her court observation study, Alicia Levezu observed 596 hearings regarding 872 children in Snohomish, King, and Pierce Counties. She explains that Washington State is somewhat unique in that it is home to various methods of advocacy. “When a child is appointed an advocate,” she explains, “depending on the child’s age, geographic location, and random luck, that person could either be an unpaid best interest volunteer, a professional best interest lay advocate, or a stated interest attorney.” [114] Therefore, she was able to observe how each type

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[110] Evaluation of the Washington State Dependent Child Legal Representation Program (2021); Page 1 (study attorneys used legal-interest for preverbal and nonverbal youth and stated-interest otherwise; the study did not evaluate the efficacy of the models per se, rather, but of universal, standards-based legal representation in general).

[111] Id. at page 7-9.

[112] Id. at page 7.

[113] Id. at page 1. (non-normative school transitions was measured by the “number of transitions from one school to another, for reasons other than grade promotion”)

[114] Alicia LeVezu, *Alone and Ignored: Children Without Advocacy in Child Abuse and Neglect Courts*, 14 STAN. J. C.R. & C.L. 125, 137 (2018).

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of advocate functioned in practice. Levezu’s conclusions ranged from foundational observations—the type of advocate present was a stated interest attorney 13% of the time, a best interest advocate 69% of the time, both 6% of the time and none at all 15% of the time [115]—to more complex ones: stated interest attorneys offered arguments in favor of their client’s relayed preference 68% of the time, and best interests advocates did so just 30% of the time. [116]

While Levezu observed that both types of advocates could improve their practice to better focus on the voices of their clients, her findings provided more support for the efficacy of stated interest attorneys than best interest advocates. Namely “[c]hildren who were appointed client-directed legal counsel were more likely to be mentioned, to have their well-being discussed, to have their preference relayed and argued for, and to be present for their hearing, than children with best interest advocates.” [117]

### **QIC Best Practice Model of Child Representation**

The QIC-ChildRep Intervention was a five-year study designed by the University of Michigan Law School as a contribution to the U.S. Children’s Bureau National Quality Improvement Center on the Representation of Children in the Child Welfare System. [118] Based on the hypothesis that a lack of adequate legal representation creates a significant barrier to permanency, the study set out to “raise the level or practice among attorneys representing children in child welfare dependency cases and evaluate how those changes affected attorney behavior and child welfare outcomes.” [119] Researchers implemented the study in Washington and Georgia. [120]

In its final analysis, the QIC studied three outcomes: placement stability, placement with kin, and time spent in foster or group care. [121] The study found that in Washington, the children who were appointed counsel by QIC-trained attorneys appointed early in the case experienced faster permanency than children represented by control attorneys. Because the children who are appointed counsel in Washington are generally twelve or older, and represented under a client-directed model, the QIC concluded that its finding in Washington suggests QIC trained attorneys were “better able to influence situations where the course of action is clearer . . . and where the voice of a child may have a stronger impact . . . .”

Ultimately, the QIC drew two broad, but poignant conclusions. First, the QIC identified an “appetite” among participating lawyers in both Washington and Georgia to “learn from behaviors to be more in alignment with a nationally recognized best practice model.” Second, the QIC found that for older children in the welfare system, client-directed attorneys trained on QIC best practices achieved, on average, “more permanency within six months.”

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[115] Id. at 144.

[116] Id. at 149.

[117] Id. at 158.

[118] Evaluation of the QIC-ChildRep Best Practices Model Training for Child Representatives in the Child Welfare System (2016); Page 9.

[119] Id.

[120] Id.

[121] QIC Study at 85.

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## **Expediting Permanency: Legal Representation for Foster Children in Palm Beach County**

In 2001, the Children’s Services Council of Palm Beach County contracted with the Legal Aid Society of Palm Beach County (Legal Aid) to provide legal representation to children under the age of three. Legal Aid’s Foster Children’s Project (FCP) uses an attorney ad litem model of representation (representing a child’s stated interests) for the duration of children’s dependency cases and its advocacy is centered around four core activities: (1) filing of legal motions, (2) filing of termination of parental rights petitions and recruitment of adoptive homes, (3) attendance at staffing and case plan meetings, and (4) service advocacy. In 2006, Chapin Hall Center for Children at the University of Chicago, conducted a third-party evaluation of the FCP for children placed in foster care from 2001 to 2004. The study found that children represented by the FCP had a significantly higher rate of exit to permanency compared to children without legal representation. [122] This “appears to be a function of much higher rates of adoption and long-term custody.” [123] Fiscal implications of FCP are also noteworthy. The study found that implementation of FCP results in a reduction of substitute care and case management costs. While this reduction may not quite offset the program costs of FCP, the net cost for each additional day of permanency was estimated to be as low as \$32 per day. Given the pilot project’s desirable outcomes, FCP has expanded twice since its inception to include children 12 years of age and younger.

### **Youth perspective: An essential role of attorneys is to explain the process to their clients.**

Several P2A board members emphasized the importance of being well-informed about court proceedings. This means it is essential for attorneys to help their clients understand what they’re going through. That includes making sure their client knows they’re not in trouble, that the dependency proceedings are not meant to decide how to punish them, but a process to determine how to support them. It is also critically important for lawyers to explain what it looks like for them to speak on their clients’ behalf.

For example, one P2A member recounted that, when someone in their family was facing criminal charges related to their dependency case, their attorney provided them with a diagram/timeline of the criminal proceedings so that they could understand exactly what would happen and when. They referred back to this diagram often. Another member spoke to the usefulness of clearly marking the hearings throughout the dependency process on a calendar. A third member recommended going through DCYF’s “Know Your Rights” document even with very young clients.

### **Youth Perspective: Consistent Attorney Relationship**

A P2A member spoke to having a lawyer appointed at age nine. They remained with the same lawyer until they turned twenty-one and exited foster care. They explained that this lawyer was the only consistent presence in their life throughout their time in foster care. They spoke to the importance of how their lawyer spoke with them one-on-one, made it clear that they were there just for them and that they wanted to hear what their client wanted. This was empowering. For example, this P2A member recounted being drowned out during a hearing. Their lawyer stopped the discussion and ensured that their client had the opportunity to speak.

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[122] Expediting Permanency: Legal Representation for Foster Children in Palm Beach County (2008).

[123] Id.

## X. Recommendations

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Among the states surveyed, there was no consensus as to the model of representation for very young children. However, in the course of our research and interviews with lawyers, parents, youth, and experts, we observed many common threads. These common threads inform our recommendations:

### First:

Children under the age of eight require legal counsel from the beginning of the dependency process. In fact, attorneys in Washington have been representing children under the age of eight since 2014 when children whose parental rights had been terminated for six months were first given counsel. [124] This recommendation is informed primarily by the following:

- That two thirds of states automatically provide counsel to all children in dependency proceedings indicates that a large majority of the country recognizes the importance of the right.
- Throughout the course of our interviews, no one was able to single out a particular age at which counsel becomes necessary. Some described bright-line age rules as “arbitrary.”
- Empirical research from three different data-driven outcome studies shows that appointment of counsel for children of all ages at the start of a dependency leads to better outcomes.
- Most importantly, every single person interviewed emphasized the fact that dependent children require advocacy not just for a disposition on permanency, but for many wide-ranging and fundamental objectives during the pendency of the case, from independent educational plans to regular doctor visits to safety in an interim placement. CASAs and GALs are not prepared to either identify or advocate for many of these essential rights. Moreover, the youngest children are least able to voice these rights on their own.

### Second:

Stated interest representation is the appropriate approach to representing children, as it is consistent with the ABA Rules of Professional Conduct. For those children who are unable to communicate their preferences and direct counsel, counsel should use legal interest representation. Unlike the best interest model, which may be inconsistent with the Rules of Professional Conduct, and the substituted judgment model, the legal interests model does not allow advocates to structure the litigation objectives according to their own subjective evaluation of their client’s situation.

- Just as there is no accurate bright-line age rule in the access to counsel context, there is no bright-line age rule that indicates when any particular child can direct counsel. Rather, attorneys must constantly assess the developing capacities of their clients. [125] Counsel may even find it appropriate to use legal interests representation for some issues and stated interests for others.

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[124] RCW 13.34.100(6) (children’s right to counsel was recodified in 13.34.212 in 2021).

[125] Model Rules of Professional Conduct; comments to r. 1.14 (“Children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”)



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**Third:**

Stated interest representation, alongside legal-interest representation for preverbal and nonverbal youth (which is already implemented in parts of Washington), are the two models that are consistent with the legislature's goals of enforcing children's legal rights and minimizing advocate bias as a driving force behind litigation objectives. This recommendation is informed primarily by the following:

- Minority children, and in particular African American children are overrepresented in the child welfare system. [126] In 2017, Black children were 2.2 times and Native American children were 2.9 times more likely to be placed in out-of-home care compared to white children. [127] Explicit and implicit bias is one of the main factors responsible for this disproportionality.
- Bias influences the decisions made at every stage of the child welfare system, and as a result, minority children who have the same problems and characteristics as white children, enter the system at higher rates and stay in the system longer. As described above, both the "best interest" and "substituted judgment model" leave room for bias and using either of these models would only perpetuate the disproportionality problem. [128]
- Moreover, as described above in the Status Quo section, children, their wellbeing, and their preferences and opinions are raised less frequently when they are represented by best-interests advocates than when they have legal representation. [129]
- Conversely, when an attorney is beholden to basing their advocacy around a prescribed set of rights, as is required in legal interest representation, there is far less room for the insertion of their own subjective assessments. As detailed above, parents and lawyers alike explained the importance of advocacy that is driven by objective standards and carried out by professionals who are highly trained in those standards.

**Fourth:**

Based on interviews with practitioners and parents and children with lived experience, lawyers for young children require specific training in:

- childhood development,
- the impact of trauma on a child's cognition and ability to communicate,
- mental health, and use of psychotropic medications,
- risks of secondary trauma,
- lawyering skills that will allow for effective communication with young children, particularly those who have experienced trauma,

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[126] See Disparity Indices, *supra* note 16. Refer back to footnotes 16-18 for further discussion of racial disparity.

[127] Partners For our Children, Child Welfare Data at a Glance, <https://partnersforourchildren.org/data/quickfacts>.

[128] See footnotes 31-33 for further explanation of how best interests advocacy implicates advocate bias; See footnote 43 for further explanation of how substituted judgment legal representation implicates attorney bias.

[129] See footnotes 12-15 for further discussion of how children and youth are discussed in dependency proceedings.

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- the legal rights of children that exist in state and federal statutes, regulations, departmental policies, and case law, including the substantive due process rights to family integrity and to be free from unreasonable risk of harm while in state care guaranteed under the Washington constitution,
  - guarding against bias,
  - the impact of implicit and overt bias on children involved in the child welfare system,
  - disproportionality in the child welfare system,
  - importance of relational permanency and permanency planning.