

The Florida Bar Journal

[Advertising Rates](#) • [Submission Guidelines](#) • [Archives](#) • [Subscribe](#) • [News](#)

June, 2013 Volume 87, No. 6

[Journal HOME](#)

A Case of Neglect? Representation for Children in the Florida Dependency System

by Gurjot Kaur

Page 94

Florida and Washington state,¹ while on opposite ends of the continental United States, unite on one point — they are among the few states in our nation that do not require the appointment of attorneys for children in dependency and termination proceedings.²

Why would this be cause for concern? First, Florida leads the nation in the number of child deaths from abuse or neglect *after* the Florida Department of Children and Families has intervened in the family's life.³ Second, with the aid of the media, public sentiment is shifting. Children in the dependency system have been humanized. Some tragic, high-profile cases of child neglect and death⁴ have shocked and captured the public's conscience, raising questions regarding the state's role as *parens patriae* and the efficiency of the Department of Children and Families and the Guardian ad Litem Program. These questions have prompted a candid discussion about the current state of the Florida dependency system and potential solutions to the identified problems. The children in the dependency system are no longer "their kids" or "those kids" but "our kids" and, thus, "our concern."⁵

Child advocacy groups have already begun analyzing Florida's system to identify areas for growth. First Star, a public charity with a mission of protecting the rights of dependent children, released three reports in 2007, 2009, and 2012 that evaluated the dependency systems and practices of each state.⁶ Florida scored an "F" all three times, primarily for failing to implement a legislative framework that requires attorneys for children.⁷ The appointment of an attorney ad litem to represent a child's legal interests in dependency proceedings is discretionary in Florida.⁸ In contrast, states that scored an "A+" over the years, including Massachusetts and Connecticut, have legislation mandating children in the dependency system have independent legal representation.⁹ First Star's report has been criticized for not focusing on outcomes, but rather on simply whether the systems provide an attorney for children.¹⁰ However, First Star's Report Card Program specifically compares, lauds, and critiques positive and negative practices of each state and has firmly concluded that client-directed legal representation provides the best outcomes for children.¹¹ Child advocates have used this and similar reports to advocate for a revision of F.S. Ch. 39, or Florida's rules of procedure to require the appointment of an attorney for children in *all* dependency cases.

Past Legislation, Opposing Arguments, and a Step Forward

In 2010, the Florida Senate proposed legislation that mandated attorneys for some categories of children in dependency proceedings, but the bill failed in committee.¹² Although it is unclear why the bill failed, opponents of mandating attorneys for children have argued a lack of resources to achieve this goal. They assert that there will be a duplication of services and that the existence of the Guardian ad Litem Program, which represents a child's best interests and will be explored in the sections below, negates the need for the appointment of an attorney ad litem in a dependency case.¹³ They have also expressed concern about

any negative impact new legislation may have on funding the Guardian ad Litem Program, which they hold is the preferable system.¹⁴

The Florida Supreme Court Steering Committee on Families and Children in the Court, charged with overseeing issues relevant to Florida's Unified Family Courts, did not adopt a position on the proposed legislation in 2010, but its 2008–2010 report recommended tracking the issue.¹⁵ Since 2010, the issue has expanded beyond Tallahassee and created a statewide phenomenon, invoking debate within every segment of the Florida dependency system, which has led to a reevaluation of the necessity and value of all parties in the dependency courtroom, including an assessment of any federal or state requirements for a guardian ad litem or attorney ad litem.

Recent amendments to the Florida Rules of Juvenile Procedure have also indicated a shifting tide toward increased rights for children. In 2012, the Florida Supreme Court amended Fla. R. Juv. P. 8.255 to help increase the presence of children at dependency hearings.¹⁶ The amendment imposes an affirmative duty on a dependency judge to inquire why a child is not present for his or her hearing and to determine whether it is in the child's best interest to proceed without him or her.¹⁷ The revisions arguably suggest continued movement toward attorney representation for children in dependency proceedings.

Federal Requirements: Child Abuse Prevention and Treatment Act of 1975

Florida, as a recipient of federal funds, is bound by the Child Abuse Prevention and Treatment Act of 1975 (CAPTA), which requires every state to appoint a guardian ad litem to represent a child in dependency proceedings.¹⁸ The guardian ad litem may be an attorney or a court-appointed special advocate who has received appropriate training for the role.¹⁹ CAPTA does not define all the roles and duties of a guardian ad litem, but does require him or her to perform at least two functions: 1) "obtain first-hand, a clear understanding of the situation and needs of the child"; and 2) "make recommendations to the court concerning the best interests of the child."²⁰

Thus, CAPTA leaves states with three options in dependency proceedings: 1) appoint an appropriately trained attorney to represent the child; or 2) appoint an appropriately trained [nonlawyer] special advocate²¹ to represent the child; or 3) both. In a state following the second option, the following issues emerge: 1) the nonlawyer is not bound by the same ethical considerations governing attorneys; 2) a nonlawyer advocate does not provide legal representation to the child and cannot accurately assess and elicit the needs of a child due to this limitation; 3) the term "represent" is a term of art in law that is traditionally found within the context of an attorney-client relationship;²² 4) CAPTA does permit nonlawyers to make nonlegal representations concerning the best interests of the child to the court; 5) many of the issues that arise in dependency surrounding a child's needs require an understanding of dependency law and the ability to provide legal advice and advocacy in order to properly represent the child²³; and 6) there is a risk that the nonlawyer special advocate may inadvertently engage in the unauthorized practice of law in making these representations to the court.

Florida's Approach Under CAPTA

To comply with CAPTA, Florida follows the second approach, *i.e.*, the appointment of nonlawyer "special advocates" or volunteers to represent the best interests of a child in dependency proceedings. Florida mandates the appointment of a guardian ad litem, who represents the child's best interests — not legal interests — at the "earliest possible time" in dependency proceedings.²⁴ A guardian ad litem under Florida law includes:

a certified guardian ad litem program, a duly certified volunteer, a staff attorney, contract attorney, or certified pro bono attorney working on behalf of a guardian ad litem or the program; staff members of a program office; a court-appointed attorney; or a responsible adult who is appointed by the court to represent the best interests of a child in a proceeding as provided for by law, including, but not limited to, this chapter, who is a party to any judicial proceeding as a representative of the child, and who serves until discharged by the court.²⁵

Although the option of appointment of an attorney ad litem exists, the general practice in Florida is the use of a nonlawyer volunteer to act as a guardian ad litem.²⁶ The statewide Guardian ad Litem Program, established by the Florida Legislature, is responsible for recruiting these nonlawyer volunteers.²⁷ As of May 2010, the Guardian ad Litem Program represented approximately 22,800 children with approximately 7,900 certified volunteers.²⁸

The statewide Guardian ad Litem Program, established and funded by the Florida Legislature, previously appointed attorneys to represent the Guardian ad Litem Program and its agents.²⁹ The guardian ad litem attorney did not counsel the child, and any advocacy that he or she did on behalf of the child was technically done on behalf of the program and the nonlawyer volunteer. As of July 2012, however, the Florida Guardian ad Litem Program changed its standards of operations (2012 operational changes). The most significant change is that the Guardian ad Litem Program attorneys no longer represent the program or the nonlawyer volunteer, but the legal concept of "best interests" and are referred to as the child's best interest (CBI) attorney.³⁰ Further, the program itself is now represented by a general counsel and not the CBI attorneys.

The effectiveness of the 2012 operational changes remains to be determined. Arguably, it could cause more confusion in the courtroom as to the roles of the nonlawyer volunteer and the guardian ad litem attorney. It is also unparalleled in legal jurisprudence in which no legal precedent exists for attorney representation of a legal concept. Either way, the Guardian ad Litem Program members continue to exclusively represent the child's best interests and not the actual child. The 2012 operational changes can also be seen as duplicative when attorneys for Children's Legal Services presently represent the Department of Children and Families, an agency that claims to act in a *parens patriae* capacity for the state — *i.e.*, in the best interest of the child — and pursue the goals of F.S. Ch. 39.³¹ So, there are now two attorneys in Florida courtrooms who act in the child's best interests, but who do not actually represent the child.

Guardian ad Litem Nonlawyer Volunteer vs. Attorney ad Litem

Under Florida's model, the guardian ad litem nonlawyer volunteer's role is limited to representing the best interests of a child as a layperson. Florida jurisprudence has never provided a concise legal definition for the "best interests" standard.³² The Florida Guardian ad Litem Program considers the following factors in assessing best interests: "[P]hysical safety, emotional well-being, permanent placement in a stable and nurturing home environment that fosters the child's healthy growth and development."³³

In order to conduct a best interests analysis, the following tasks are set forth for a guardian ad litem volunteer. The volunteer:³⁴

- 1) Visits the child and keeps the child informed about the court proceedings;
- 2) Gathers and assesses independent information on a consistent basis about the child in order to recommend a resolution that is in the child's best interest;
- 3) Reviews records;
- 4) Interviews appropriate parties involved in the case, including the child; and
- 5) Determines whether a permanent plan has been created for the child in accordance with federal and state laws and whether appropriate services are being provided to the child and family.

On the other hand, an attorney ad litem "shall have the responsibilities provided by law,"³⁵ including the responsibilities under the Florida Rules of Professional Conduct, such as competent representation, undivided loyalty, rules of confidentiality, and zealous advocacy. Unlike a guardian ad litem volunteer or, arguably, a guardian ad litem attorney pursuant to the 2012 operational changes, the attorney ad litem's role is beyond that of an auditor of records in the dependency case as he or she serves as the official voice for the child.

The attorney ad litem must maintain an attorney-client relationship, counsel the child-client, abide by the client's decisions in the objectives of representation, and reasonably consult with the client as to the means by which they are pursued.³⁶ However, this does not mean that a child's attorney is permitted to follow a course of action that may cause harm for the child.³⁷

As ethical rules of conduct bind the attorney ad litem, he or she can act as a safeguard between the child and the state. A client-directed attorney is required by law to provide competent representation, owes a duty of allegiance to the child and no other party, and must adopt a firm position on motions and pleadings raised before the court. The guardian ad litem volunteer (or a guardian ad litem attorney) cannot provide legal counsel to a child, owes a duty to the Guardian ad Litem Program and not the child, and does not typically adopt a firm position on the issues. Instead, the Guardian ad Litem Program seeks judicial review of its best interests recommendations.

Furthermore, the attorney ad litem's representation is more encompassing. The guardian ad litem terminates involvement in a case as soon as the child reaches the age of majority.³⁸ Under F.S. Ch. 39, the dependency court can extend jurisdiction over a child until he or she is 19 and, under the independent living benefits provision of the Florida Statutes, a former dependent youth is entitled to receive certain benefits, including the road-to-independence scholarship and transitional funds, until he or she is 23.³⁹ The guardian ad litem is, thus, unable to 1) provide assistance to a child during a time when he or she needs it the most, such as in the immediate days, months, and years after aging out; or 2) assist in helping the child receive and maintain these benefits, which can have complex eligibility requirements.⁴⁰ An attorney ad litem, however, typically stays on a youth's case until he or she is 19 or older to assist him or her in a safe and healthy transition into adulthood.

The guardian ad litem volunteer, who is usually not an attorney, despite the 2012 operational changes, is also at risk of being unable to perform the task he or she is statutorily charged with — ascertain a child's best interests vis a vis conversations with the child — especially when resources are scarce or unavailable. This is because the child, who is often unfamiliar with the roles of players in the dependency system, may reveal certain confidences to a volunteer, not understanding that the volunteer does not represent the child. These confidences may later be disclosed in court. A child who opposes the disclosure will no doubt feel betrayed by the volunteer. The nonlawyer volunteer making such revelations may also inadvertently harm a child's position in a pending delinquency action (crossover cases) in which the state and juvenile justice system are also a party to the proceedings. This could easily strain relations between the child and other parties in the dependency system and/or force the child to withdraw, thereby preventing the volunteer from determining the child's best interests when other records or resources are unavailable.

An attorney ad litem, on the other hand, is in a position to ascertain a child's best interests, make recommendations to the court about the child's best interests, and identify an irreconcilable difference between the child's best interests and express wishes because 1) he or she has a clearly defined fiduciary relationship with the child; 2) is privy to the child's confidences and can counsel accordingly; and 3) is required to provide competent representation, which necessarily entails a more comprehensive investigation and analysis of the case.

Majority Approach Under CAPTA

The first approach under CAPTA — the appointment of a guardian ad litem that is an attorney to represent the child in dependency proceedings — is used by most states. It is consistent with the principles behind CAPTA — to curtail instances of child abuse within the dependency system — and completely eliminates the risk of the guardian ad litem engaging in the unauthorized practice of law. Under CAPTA, a guardian ad litem who is an attorney is not limited to representing the child's best interests, but also the child's expressed wishes, *i.e.*, a client-directed independent attorney. This is evidenced by the fact that he or she is an attorney bound by traditional, ethical, and professional obligations, including duties of loyalty and zealous advocacy, and is required to "represent the child"⁴¹ and not just represent the legal concept of the "best interests of the child." This approach in complying with CAPTA is further solidified as a best practice because states that interpret CAPTA to mandate client-directed attorneys for children instead of a nonlawyer special advocate who makes recommendations about the best interests of the child have been

found to be in full compliance under the federal statute.⁴²

With the first approach, certain questions remain: 1) How can a client-directed attorney make recommendations about a child's best interests to the court and comply with his or her ethical obligations to the child? 2) Is it economically sound to have a statewide attorney ad litem program?

With respect to the first issue, it is important to examine the legislative remedies available in other states. For instance, Connecticut, one of two states that scored an A+ on First Star's second and third reports, has set forth a statutory framework that tracks the first approach under CAPTA — appointment of an attorney as a guardian ad litem to represent the child. The statute provides, in relevant part: "A child shall be represented by counsel...who shall be appointed by the court to represent the child and to act as guardian ad litem for the child."⁴³ Connecticut General Statute §46b-129a (2) (2013) further delineates the duties of this guardian ad litem attorney:

(C) The primary role of any counsel for the child shall be to advocate for the child in accordance with the Rules of Professional Conduct, except that if the child is incapable of expressing the child's wishes to the child's counsel because of age or other incapacity, the counsel for the child shall advocate for the best interests of the child.

(D) If the court, based on evidence before it, or counsel for the child, determines that the child cannot adequately act in his or her own best interests and the child's wishes, as determined by counsel, if followed, could lead to substantial physical, financial or other harm to the child unless protective action is taken, counsel may request and the court may order that a separate guardian ad litem be assigned for the child, in which case the court shall either appoint a guardian ad litem to serve on a voluntary basis or notify the office of Chief Public Defender who shall assign a separate guardian ad litem for the child...⁴⁴

The Connecticut interpretation of its requirements under CAPTA reveals two ways it addresses the potential conflict between the child's best interests and the child's expressed interest. First, it shows that a guardian ad litem attorney under CAPTA is not required to represent only the best interests of the child, but instead must adhere to a traditional attorney-client relationship. Second, it provides an outlet to handle the conflict between best interests and express wishes — a nonlawyer may be appointed to speak as to the child's best interests. Considering that a best interests analysis can be made through available records and resources in a dependency case and does not require the same depth of legal inquiry as client-directed representation, it could be argued the Connecticut model not only allows for adequate representation of the child, but also safeguards a child's interests and welfare.

With respect to the second issue, emerging evidence supports the view that the appointment of an attorney ad litem in dependency proceedings can be cost-efficient, primarily because of the value of representation. The Foster Children's Project of the Legal Aid Society of Palm Beach County, Inc., provides client-directed attorneys for children ages zero to 11 in dependency proceedings.⁴⁵ The Chapin Hall Center for Children released a 2008 study on the project,⁴⁶ and revealed that children with effective counsel in the program were moved to permanency at about twice the rate of unrepresented children in accordance with statutory timelines.⁴⁷ This inevitably leads to decreased court costs and long-term state savings in foster care, as well as long-term benefits to the state of having healthier, well-adjusted adult members of society.⁴⁸

Constitutional Concerns

Opponents of mandated client-directed attorneys argue that children do not have a constitutional right to counsel in dependency proceedings and that current procedural safeguards under Florida law effectively protect children. The U.S. Supreme Court has previously held that children in delinquency proceedings have a constitutional right to counsel, but this finding has not yet been extended to dependency proceedings.⁴⁹ Nevertheless, several courts across the country have recognized that children have a fundamental liberty interest at stake in dependency proceedings, thus, warranting the appointment of counsel.⁵⁰ For example, the Northern District of Georgia held that "a child's liberty interests continue to be at stake even after the

child is placed in state custody, at which point a special relationship is created that gives rise to rights to reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm.”⁵¹ *In the Matter of the Dependency of MSR*, 271 P.3d 324 (Wash. 2012), the Washington Supreme Court held that a child’s liberty interest in dependency is as great as a parent’s.⁵²

Employing the three-part test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether children in dependency proceedings have due process rights, the Washington Supreme Court considered the private parties’ interests at stake, the government’s interest, and the risk that the procedures will lead to erroneous decisions.⁵³ The first test relates to the interests at stake for children in the dependency system.⁵⁴ Children are dependent on others for basic needs and are at risk of not only losing the parent-child relationship, but relationships with other relatives.⁵⁵ The child also faces a loss of physical liberty because he or she is removed from the parental home and/or may become a foster child forced to move from one foster home to another.⁵⁶ The child often has no control over these changes, and the continued loss of home, schools, and friends may cause the child significant harm.⁵⁷ The child also has an interest in not being returned to an abusive home and for these numerous reasons, the child’s liberty interest in a dependency proceeding was found to be as great as that of a parent’s.⁵⁸

Considering the state’s interest, the court noted that the state has a compelling interest in the welfare of the child, as well as in “an accurate and just decision” in dependency proceedings.⁵⁹

The final part of the analysis evaluates whether mandating client-directed representation will reduce the likelihood of erroneous proceedings or results in dependency proceedings. In Washington, the court first found that children do have a constitutionally protected fundamental liberty interest at stake in dependency proceedings. However, it held that the due process implications of this interest were met by the existing statutory scheme that permitted trial judges to appoint attorneys for children at their discretion.⁶⁰

Although Washington and Florida laws are similar, some differences exist. Therefore, it is necessary to consider whether the due process rights of the children in Florida’s dependency system are being protected. For instance, Florida courts have the discretion to appoint an attorney ad litem, if necessary, at any point in the proceedings, similar to Washington.⁶¹ However, Florida has no procedure whereby a child of any age is informed that he or she is entitled to counsel or is provided a venue to request one.⁶² Presently, Florida mandates the appointment of counsel in dependency proceedings only when a child opposes placement in a mental health residential treatment center.⁶³

The Department of Children and Families and the Guardian ad Litem Program require or recommend the appointment of independent counsel as part of their administrative rules or operating procedures in various other cases; however, note that these are not statutory or court-ordered requirements.⁶⁴ For instance, when a child who objects to psychotropic medication has unmet civil needs (*i.e.*, immigration, probate), or when the Guardian ad Litem Program has a conflict (for instance, the best interests of siblings may diverge), the situation may require appointment of counsel.⁶⁵

However, if recent tragic cases of child neglect and death are examples, it could be argued that Florida’s discretionary statutory scheme to appoint client-directed counsel does not effectively reduce the risk of erroneous proceedings or results. Simply put, judges often do not receive enough information to determine whether the child “needs” his or her own attorney. If judges are unable to make this call in even the most egregious cases, such as those in which warning signs abound yet no attorney is appointed, then it is difficult to imagine that a child’s procedural safeguards will be protected — much less his or her physical safety — with Florida’s discretionary approach. Mandating client-directed attorneys may not only reduce instances of foster children following the traumatic track of neglected or deceased children, but may also facilitate and expedite the resolution of disputes, minimize contentiousness, and effectuate court orders.⁶⁶ This one-step solution may go a long way toward fixing Florida’s broken dependency system as well as protecting the fundamental liberty interests of children in dependency.

Conclusion

Florida's current dependency program requires additional work to ensure children's rights are protected. One potential option would be to fall in line with current trends and promulgate legislative and procedural amendments and policy changes within the Florida dependency system to require client-directed attorneys in all dependency cases, with an option to appoint a guardian ad litem nonlawyer volunteer if there is a conflict. This approach could serve to protect the constitutional rights of children in dependency, protect the rights and interests of children under F.S. Ch. 39, be consistent with Florida's obligations under CAPTA, and address public concerns about the child welfare system. At the very least, some type of action plan, based on a careful review and analysis of the current system and outcomes compared to other states' systems and outcomes, should be implemented to protect Florida's most precious resource — our children.

¹ An analysis of the Washington dependency system is beyond the purview of this article. However, of note, the Washington Supreme Court recently upheld a state law that authorizes, but does not require, the appointment of attorneys for children in dependency and termination cases. *In re Dependency of M.S.R.*, 271 P.3d 234, 244 (Wash. 2012).

² The terms "dependency cases" or "dependency proceedings" or "dependency system" in this article will be used interchangeably to encompass all dependency and termination of parental rights' proceedings. Sixty-one percent of states require the appointment of attorneys for children in dependency proceedings; 31 percent of states specifically require the appointment of client-directed representation for the child. See Children's Advocacy Inst. & First Star, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children 10* (3d ed. 2012), available at http://www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf [hereinafter National Report Card 3d ed.].

³ See Carol Carbin Miller, *The Number of Child Deaths After Abuse Investigations Has Risen*, The Miami Herald, Feb. 27, 2011, available at http://articles.sun-sentinel.com/2011-02-27/news/fl-barahona-dcf-policy-20110227_1_abuse-or-neglect-child-deaths-child-welfare.

⁴ Some of the children who were murdered, committed suicide, or disappeared while in the care of the Florida Department of Children and Families include Victor and Nubia Barahona, Gabriel Myers, and Rilya Wilson.

⁵ "Our" refers to the conglomerate of individuals in a position to influence the Florida juvenile dependency system, whether it be legislators, judges, attorneys, policymakers, public figures, and the general public.

⁶ Children's Advocacy Inst., *CAI Holds Congressional Briefing to Unveil New Report* (May 10, 2012), available at http://www.caichildlaw.org/RTC_3rd.htm (stating the third edition of *A Child's Right to Counsel: National Report Card 3d ed.* serves 1) to alert, among others, the public of inequities from state to state in providing abused and neglected children with legal representation in dependency proceedings; and 2) initiate a national call to action promoting stronger federal and state laws to provide children with highly trained and qualified legal representation to help resolve and overcome childhood maltreatment and achieve bright futures).

⁷ National Report Card 3d ed.; First Star, *A Child's Right to Counsel: First Star's National Report Card on Legal Representation for Children*, (1st ed. 2007), available at <http://www.firststar.org/documents/FIRSTSTARReportCard07.pdf> [hereinafter National Report Card 1st ed.]; Children's Advocacy Inst. & First Star, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children* (2d ed. 2009), available at http://www.caichildlaw.org/misc/final_rtc_2nd_edition_lr.pdf [hereinafter National Report Card 2d ed.].

⁸ See Fla. Stat. §39.4085 (2012) (stating "The Legislature...establishes the following goals for children in

shelter or foster care...(20) [t]o have a guardian ad litem appointed to represent, within reason, their best interests and, where appropriate, an attorney ad litem appointed to represent their legal interests..."); Fla. R. Juv. P. 8.217(a) (2013) (stating "At any stage of the proceedings, any party may request or the court may consider whether an attorney ad litem is necessary to represent any child alleged, or found, to be dependent, if one has not already been appointed.").

⁹ See National Report Card 1st ed.; National Report Card 2d ed.; National Report Card 3d ed.

¹⁰ The Guardian ad Litem Program's executive director, Alan Abramowitz, has claimed that the "[The First Star report] isn't measuring whether you get good outcomes for children — they're just measuring whether you have an attorney that represents the child's expressed wishes." Margie Menzel, *State Disputes Florida Receiving F for Legal Rights of Abused Youngsters*, The News Serv. of Fla. 1 (May 10, 2012), available at <https://www.firststar.org/about-first-star/first-star-newsfeed/vw/1/itemid/615.aspx>.

¹¹ National Report Card 3d ed.

¹² See SB 1860, 2010 Leg. (Fla. 2010).

¹³ Presently, a typical juvenile dependency courtroom consists of the following attorneys: 1) attorney for Children's Legal Services, representing the Department of Children and Families; 2) attorney for the Guardian ad Litem Program, representing the Guardian ad Litem Program, including its employees and volunteers; 3) attorney for the mother; and/or 4) attorney for the father.

¹⁴ See Fla. Children's First and U. of Florida Levin of College of L. Ctr. on Children and Fam., *Legal Representation of Children, a 2012 Report on Florida's Patchwork System* at 2 (Feb. 2012), available at <http://www.floridaschildrenfirst.org/wp-content/uploads/2012/02/Legal-Rep.-of-Dep.-Children-FINAL-FINAL.pdf> [hereinafter *Legal Representation of Children*].

¹⁵ See Fla. S. Ct. Steering Comm. on Fam. and Children in the Ct., *End of Term Report 2008-2010*, available at http://www.flcourts.org/gen_public/family/bin/FINAL%20FCC%202008%20-%202010%20End%20of%20Term%20Report%20-%20FINAL.pdf, 5.

¹⁶ *In re Amendments to Fla. R. Juv. P. 8.255*, 88 So. 3d 142 (Fla. 2012).

¹⁷ *Id.*

¹⁸ 42 U.S.C. §5106a (2013). CAPTA was reauthorized by Congress in 2010. *CAPTA Reauthorization Act of 2010*, Pub. L. No. 110-320, 124 Stat. 2459 (2010); Court Appointed Special Advocates for Children, Congress Reauthorizes Child Abuse Prevention and Treatment Act (CAPTA), <http://blog.casaforchildren.org/blog/legislation/congress-reauthorizes-child-abuse-prevention-treatment-act-capta/>.

¹⁹ 42 U.S.C. §5106a (b)(2)(B)(xiii).

²⁰ 42 U.S.C. §5106a (b)(2)(B)(xiii)(I) and (II).

²¹ The terms "nonlawyer volunteer" and "nonlawyer special advocate" will be used interchangeably in this article.

²² See generally Model R. Prof'l Conduct, pmbl. (ABA 2003). The term in the model rules describes a professional relationship with another individual or entity (the client) that includes being an advisor, advocate, negotiator, and evaluator as to that person or entity's legal rights, obligations, and position. The

preamble also recognizes that in order to be a representative of a client, including a child, the attorney must have a confidential relationship with the client; Fla. Rules of Prof'l Conduct 4-1.2, cmt. (noting that even a lawyer who provides limited representation "forms an attorney-client relationship with the litigant, and owes the client all attendant ethical obligations and duties imposed by the Rules Regulating The Florida Bar, including, but not limited to, duties of competence, communication, confidentiality and avoidance of conflicts of interest").

²³ See, e.g., Fla. Stat. §409.1451 (2012) (setting forth complex eligibility requirements for transitional living services including the Road-to-Independence Scholarship Program available to a foster youth once he or she reaches the age of majority, as well as the youth's rights in obtaining and maintaining these services, including right to appeal).

²⁴ Fla. Stat. §§39.822(1) and 39.4085 (2012).

²⁵ Fla. Stat. §39.820(1) (2012); Fla. R. Juv. P. 8.215(b) and (c) (2013).

²⁶ Florida Guardian ad Litem Program, Frequently Asked Questions, http://www.guardianadlitem.org/vol_faq.asp.

²⁷ Fla. Stat. §§39.8296 and 39.8298 (2012) (establishing the statewide guardian ad litem office and its duties and a guardian ad litem direct-support organization).

²⁸ Florida Guardian ad Litem Program, Frequently Asked Questions, http://www.guardianadlitem.org/vol_faq.asp.

²⁹ See Fla. Stat. §39.8296 (2012) (creating a statewide Guardian ad Litem Program).

³⁰ See Statewide Guardian ad Litem Office, *Standards of Operations 3* (July 2012), available at <http://www.guardianadlitem.org/Documents/Standards%20of%20Operation-%20July%202012%20FINAL.pdf>, (stating "The former class title for this position, 'program attorney' did not accurately reflect the role of these attorneys. The title was cold, agency focused and not reflective of their duties. The [p]rogram has a [g]eneral [c]ounsel who represents the [p]rogram while the CBI [a]ttorneys are to represent the best interest of children.").

³¹ See State of Fla. Dep't of Children & Fam. *Legal Best Practices Guide for the Protection of Child Victims of Human Trafficking 3* (Sept. 2009), available at <http://www.goccp.maryland.gov/victim/documents/human-trafficking/research-policy/FL-Legal-Best-Practices.pdf> (defining Children's Legal Services as "a statewide law firm within the Department of Children and Families. CLS attorneys are employed by the [d]epartment and represent the [s]tate of Florida, acting through the [d]epartment in its parens patriae role, in fulfilling the duties as set forth in Chapter 39, F.S. CLS's duty in representing the [s]tate is to ensure the health, safety and well being of children and the integrity of families when they come into contact with the [d]epartment as a result of an allegation of abuse, abandonment or neglect."); George Sheldon, *Collaboration for Children*, Focusing on Children (newsltr. of Children's L. Svcs.) 2 (Aug. 2008) (announcing that DCF general counsel "would continue to represent the interests of the agency in...[most] matters," whereas "CLS [lawyers] would focus on what is best for children").

³² Florida Guardian ad Litem Program, Frequently Asked Questions, http://www.guardianadlitem.org/vol_faq.asp.

³³ *Id.*

³⁴ *Id.*

³⁵ Fla. R. Juv. P. 8.127(c).

³⁶ Rules Regulating The Fla. Bar 4-1.2 (a) (2012).

³⁷ Michael Dale & Louis Reidenberg, *Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated*, 35 Nova L. Rev. 305, 344 (Apr. 2011) (stating "Under the Florida [r]ules, which do not go as far as the ABA Model Rules, attorneys for children are still bound by ethical principles so that they may not carry out the harmful wishes of their child clients. First, attorneys have an advisory function, under Florida Rule 4-2.1, to give candid advice to their client. Second, Florida Rule 4-3.3, Candor Toward the Tribunal, provides that an attorney shall not permit the child client to testify or provide evidence the attorney knows to be false, such as the child's denial of prior or future harm. Third, Florida Rule 4-1.16, Declining or Terminating Representation, provides that an attorney may withdraw from representation if 'the client insists upon taking action that the lawyer considers repugnant, imprudent, or with which the lawyer has a fundamental disagreement.'").

³⁸ See Statewide Guardian ad Litem Office, *Standards of Operation, Standard 2.2* (March 1, 2006), available at http://www.guardianadlitem.org/training_docs/February11/StandardsOfOperation.pdf (stating "The GAL Program has authority to act only as long as the court retains jurisdiction. Loss of jurisdiction by the court results in the [p]rogram losing authority to take action in a case. For those courts that obtain continuing jurisdiction over children as provided by Florida Statutes, once active judicial review of the case ends, the [p]rogram shall seek discharge.").

³⁹ Fla. Stat. §409.1451 (2012) (establishing independent transition living services); Fla. Stat. §39.013 (2) (2012) (extending jurisdiction of the juvenile court past the youth's 18th birthday to determine appropriate services, such as after care or transitional support).

⁴⁰ Fla. Stat. §409.1451. For instance, the Road-to-Independence Scholarship requires that a youth maintain appropriate progress and attend school full time, unless he or she receives an accommodation for a disability. Fla. Dep't Children & Fam. Svcs. R. 65C-31.004 (2006). However, statutes and rules do not always clearly define the duties of each party and/or explain terms or procedures.

⁴¹ See, e.g., Fla. R. Prof. Conduct 4-1.1 (2012) (requiring an attorney to provide competent representation to a client, which requires legal knowledge, skill, thoroughness, and preparation); Fla. R. Prof. Conduct 4-1.2 (requiring an attorney to abide by a client's decisions); Fla. R. Prof. Conduct 4-1.3 (requiring an attorney to act with diligence and promptness in his/her representation); Fla. R. Prof. Conduct 4-1.4 (establishing communication requirements between an attorney and his/her client); Fla. R. Prof. Conduct 4-1.6 (establishing standards of confidentiality of information between attorney and client); Fla. R. Prof. Conduct 4-1.7 (establishing an attorney's duty of loyalty to a client).

⁴² Katherine Hunt Federle, *Righting Wrongs: A Reply to the Uniform Law Commission's Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, 42 Fam. L.Q. 103, 108 (2008); see Douglas E. Abrams, Sarah Abrams & Sarah H. Ramsey, *Children and the Law: Doctrine, Policy and Practice* (4th ed. 2010); see also on Natl. Conf. of Commr. on Unif. St. L., *Unif. Representation of Children in Abuse, Neglect, and Custody Proceedings Act* 1-6 (Oct. 9, 2007), available at http://www.uniformlaws.org/shared/docs/representation%20of%20children/urcancpa_final_07.pdf.

⁴³ Conn. Gen. Stat. §46b-129a (2)(A) (2013); National Report Card 2d Ed. at 40; National Report Card 3d. at 39.

⁴⁴ Conn. Gen. Stat. §46b-129a (2)(A) (2013) (C) & (D) (2013).

⁴⁵ A.E. Zinn & J. Slowriver, Chapin Hall Ctr. for Children at the U. of Chicago, *Expediting Permanency: Legal*

Representation for Foster Children in Palm Beach County 1 (2008), available at http://www.chapinhall.org/sites/default/files/old_reports/428.pdf [hereinafter *Expediting Permanency*].

⁴⁶ See generally *id.*

⁴⁷ *Id.* at 1, 19-20; see Fla. Stat. §39.0136(1) (discussing time limits for permanency under current Florida law).

⁴⁸ *Expediting Permanency*.

⁴⁹ *In re Gault*, 387 U.S. 1, 36-37 (1967).

⁵⁰ See, e.g., *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005) (finding that children have a constitutional right to counsel at every state in dependency proceedings).

⁵¹ *Id.* at 1360.

⁵² *In re Dependency of M.S.R.*, 271 P.3d at 243 (applying the due process analysis from *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

⁵³ *Id.* at 242 (citing *Lassiter v. Dep't of Social Svcs. of Durham Cty., N.C.*, 452 U.S. 18 at 27 (1981)).

⁵⁴ *Id.* at 242.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 243.

⁵⁸ *Id.* at 244.

⁵⁹ *Id.* at 243.

⁶⁰ *Id.* at 245. However, Washington law, unlike Florida, also requires that children 12 or older be informed of the right to request counsel and are asked every year whether they wish to exercise this right.

⁶¹ *Id.*

⁶² See generally Fla. Stat. Ch. 39 (establishing statutory framework for dependency proceedings); Fla. R. Juv. Proc. (setting forth procedures in juvenile court).

⁶³ Fla. R. Juv. P. 8.350.

⁶⁴ *Legal Representation of Children* at 2.

⁶⁵ Fla. Admin. Code 65C-35.005; see also *Legal Representation of Children*.

⁶⁶ 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, 61-62 (2000).

Gurjot Kaur, a civil rights attorney at The Sikh Coalition, is licensed to practice in Florida, New Jersey, and New York, is a former attorney ad litem, and is a supporting member of the NACC. She graduated summa cum laude from the University at Buffalo.

The editor thanks Nicholas Mckenney, a law student attending Florida Coastal School of Law, for his assistance in the editing process.

This column is submitted on behalf of the Family Law Section, Carin Marie Porras, chair, and Sarah Kay, editor.

[Revised: 05-29-2013]

[Journal HOME](#)