Children's Legal Rights Journal

Volume 43
Issue 2 *2023*

Article 6

2023

"We Can't Hear You": A Call for Right to Counsel for Youth in Care

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Legislative Update

"We Can't Hear You": A Call for Right to Counsel for Youth in Care

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I. INTRODUCTION

In 1967, the Supreme Court decided *In re Gault*, holding that children have a due process right to counsel at the adjudication phase of delinquency proceedings, however, the Court has yet to recognize a comparable right to counsel for youth in civil contexts. The Court stated that children are "persons" under the Fourteenth Amendment and are thus entitled to counsel in proceedings where their liberty interests are at risk. In fiscal year 2019, there were more than 400,000 youth experiencing foster care in the United States. Additionally, there are currently 13 states that do not guarantee representation to youth in their dependency proceedings: Alaska, Hawaii, Washington, Idaho, Montana, North Dakota, Minnesota, Indiana, Illinois, Maine, New Hampshire, South Carolina, and Florida. In those 13 states, 97,874 youth were in foster care in fiscal year 2019, which means that nearly a quarter of youth in the child welfare system live in states that do not guarantee representation. Illinois is seeking to change that. Research has shown that youth who were represented by a well-trained attorney achieved permanency faster. Under the Social Security Act, there are three permanent placement options for youth in care. Reunification, the favored goal, returns the child to their family of origin. Only after that option has been exhausted, may the court terminate parental rights, allowing the child to be adopted. Alternatively, permanent legal guardianship is considered the next-best option. Children represented by attorneys reach permanency at rates 1.38 to 1.59 times higher than children without attorneys. This paper will address why representation matters, explore different models of representation using examples of different models in three states, and examine pending legislation in the Illinois legislature to guarantee a right to counsel for youth in care.

II. MODELS OF REPRESENTATION MATTER

While it is crucial for youth in care to be afforded legal representation, the model of representation followed by the state is just as important for youth outcomes. The following subsections will explore the three most common models of representation: stated/expressed interest, best interest, and the hybrid model.

A. Stated/Expressed-Interest

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Oftentimes, it is easy for the youth's voice to get lost in the dependency proceedings. Research has shown that to achieve better long-term outcomes for youth, they should be provided with expressed-interest representation. This form of representation prioritizes the voice of the youth by advocating for their stated and expressed, rather than the youth's supposed best interest. The "stated" or "expressed" interest representation refers to advocating for the youth's desires (i.e., wanting to return home, continue familial visits, etc.), while best interest only considers what the representative (often a biased third party sharing a different cultural background and values) believes is the best situation for the youth. This model espouses that best interest determinations are best reserved for the judge, not the representative.

On September 1, 2011, the American Bar Association (ABA) published its adopted Model Act on Child Representation. The ABA encouraged lawyers to ensure all advocacy is child-centered, research-informed, permanency driven, and holistic. The Model Act requires that the child be appointed a lawyer bound by the rules of professional conduct, have specific child welfare legal training, and elicit the child's wishes in a developmentally appropriate manner, among other things.

The stated and expressed interests of a child are paramount and must be central to the court's best interest determinations. In *Kenny A. ex rel. Winn v. Perdue*, a Georgia federal court recognized that children have a liberty interest in their well-being, in addition to interests in maintaining a relationship with their biological parents. The court went further to say that neither citizen review panels nor court-appointed special advocates could engage in adequate investigation necessary to effectively represent the child. According to the court, "[j]udges, unlike child advocate attorneys, cannot conduct their own investigations and are entirely dependent on others to provide them information about the child's circumstances. . . CASAs are also volunteers who do not provide legal representation to a child." For that reason, among others, many advocates suggest that stated/expressed interest (also referred to as client-directed representation) is the best model of representation for youth in care.

B. Best Interest

This model of representation may most popularly be referred to as the GAL model. The Federal Child Abuse Prevention and Treatment Act (CAPTA) requires states to appoint a guardian ad litem, or GAL, to represent a youth's best interest in their dependency or child abuse and neglect cases. The responsibilities of this representative include making recommendations to the court concerning the best interests of the child. One of the primary concerns with this model is that there is no requirement that the GAL be an attorney. In fact, sometimes this representative is someone appointed by the court with only 30 hours of training prior to representing their first case.

While there is no standard definition of the "best interest of the child," the Child Welfare Information Gateway acknowledges that the term "refers to the deliberation that courts undertake when deciding what types of services, actions, and orders will best serve

the child as well as who is best suited to take care of a child." As of 2020, about 22 states, in addition to Washington, DC, have statutory factors to consider when making best interest determinations. The three states highlighted in the next section, Nevada, Michigan, and Illinois, are all a part of these 22 states. While the specific factors vary from state-to-state, some examples include considering: the emotional ties and relationships between the child and their family/household members; the capacity for parents to provide for the basic needs of the child (food, clothing, medical care, etc.); and the mental and physical health needs of the child. Only in 12 states and the District of Columbia are courts required to consider the child's wishes when making a best interest determination. Because of the ambiguity surrounding the definition of "best interest", this model is least preferred when it comes to child representation, however, advocates would suggest that this model is still better than not having statutorily mandated representation.

C. Hybrid

On its surface, a hybrid model seems like the best of both worlds – the youth has a representative to share their expressed interest while also being informed on their "best interest," taking into account the youth's age, maturity, and ability. However, courts and advocates alike continue to contend that the hybrid attorney-GAL model is inherently problematic. Several courts (see *S.S. v. D.M.*, *In re Williams*, and *Clark v. Alexander*) have determined that (1) an attorney/GAL who acts as an advocate for a child should not also be permitted to testify as a witness in a neglect proceeding; (2) when a GAL is also a child's attorney in a proceeding for termination of parental rights, the court must appoint an independent counsel to represent the child if the child's wishes differ from the guardian's position); (3) the attorney/GAL should not act as attorney for the child but should objectively aid the court in determining best interests of the child; and (4) ethical rules requiring attorneys to represent client's wishes and to respect client confidences are modified for attorneys functioning as attorney/GAL. Additionally, there are conflicting ethical obligations for representatives when they function both as a lawyer and GAL, such as the representative being called as a witness in the case or the loss of the obligation to protect confidential information.

III. STATE SNAPSHOTS

A. Nevada

In Nevada, right to counsel is guaranteed by statute. The state has a mandatory scope of representation –meaning that youth are afforded a right to counsel without discretion. Nevada uses an express or stated-interest model for their representation of children and youth. The statutes enumerates that (1) the court shall appoint an attorney to represent the child; (2) the child must be represented by an attorney at all stages of any proceedings held; and (3) the attorney representing the child has the same authority and rights as an attorney representing any other party to the proceedings. Additionally, in any proceeding regarding the termination of parental rights to a child placed in out-of-home care the court shall appoint an attorney to represent the child as their counsel.

This model of representation protects attorney-client privilege, as well as bars the attorney from being able to testify in the case. The child deserves to be a party in their own proceeding, rather than a pawn continuously thrown around a court system that they have yet to understand.

B. Michigan

The state of Michigan also guarantees a right to counsel by statute; however, they use a best-interest model for representation. The statute reads that the court shall appoint a lawyer-guardian ad litem to represent the child in any case where judicial proceedings are necessary. A lawyer-guardian ad litem represents the child and has powers and duties in relation to that representation as set forth in throughout the statute.

Michigan Compiled Laws § 712A.17d goes on to enumerate the lawyer-guardian ad litem powers and duties. This includes "to serve as the independent representative for the child's best interest" and "to make a determination regarding the child's best interest and advocate for those according to the [lawyer's] understanding of those best wishes, regardless of whether the [lawyer's] determination reflects the child's wishes." However, dismissing the youth's wishes in favor of their "best interest" harms the attorney-client relationship and may result in a lack of trust between the child and their representative.

IV. BRINGING IT HOME TO ILLINOIS

The scope of representation in Illinois is limited at best. Illinois does not require a right to counsel by statute or in practice. To muddy the waters further, Illinois has varied access to counsel across the state. Cook County follows a hybrid model – where youth are provided counsel who prioritize the best interest determination as well as the youth's stated interest. Throughout the rest of the state, however, counsel is not required if a Court Appointed Special Advocate (CASA) is appointed and represented by counsel. This is known as a lay-GAL practice, where non-attorneys represent the youth's best interest in court proceedings. Illinois statute enumerates the rights of parties to proceedings. The statute reads that the minor who is the subject of the proceeding has the right to be present, to be heard, to present evidence material to the proceedings, to cross-examine witnesses, to examine pertinent court files and records. It is unreasonable to assume that a youth would have the skills and ability to exercise these rights *pro se*, or by themselves without a lawyer.

There is no doubt that the state is doing a disservice to the other 101 counties that do not guarantee counsel for youth in care. Not only that, but the lack of standards for representation throughout the state harms our youth. While there is not a one-size-fits-all model of representation, our youth deserve someone in their corner to be their voice when they feel that they don't have one.

A. A New Day for New Legislation

Illinois is one of seven states that does not guarantee legal counsel to at least some youth in care, and one of fourteen states that does not guarantee legal counsel for all children in child welfare proceedings. In February 2023, Illinois Senator Ann Gillespie introduced legislation that would change that. The proposed legislation, Senate Bill 1478, amends the Foster Children's Bill of Rights to include the right to an attorney for youth in child welfare proceedings. The bill is co-sponsored by Illinois Representative Lakesia Collins, a former foster youth herself. The Senate Judiciary Committee heard testimony on the matter in March 2023 where the importance of representation for youth was stressed to the legislature. Shortly after, the bill passed the Senate unanimously, even in the face of opposition. The proposed legislation would follow an expressed-interest model, requiring attorneys to advocate for the stated interests of the youth they represent, and nothing more. More importantly, however, the legislation would ensure that all youth in care in the state of Illinois will have their voice heard regarding the outcome of their case, and ultimately the outcome of their life.

V. CONCLUSION

Children, although vulnerable, are deserving of respect, and the value of having a lawyer advocate for their wishes should not be underestimated. While the research supports no statistically significant differences in the rate of reunification between youth with representation and youth without, research does demonstrate that youth with representation find permanency more often by means of adoption, guardianship, and long-term custody. No one would argue against the notion that children deserve higher quality representation – no matter the representative. Additionally, we can all agree that some models of representation are better than others as best-interest models of representation undermine the voice that youth have in their own proceedings. Representatives often fail to be trauma-informed and often remain complete strangers in the lives of the youth they represent. How then, can they pose best interest determinations to the court when they fail to see the child in the context of their family and community? The only reasonable "best interest" determination is that our youth in care be afforded high-quality legal representation in their dependency proceedings, no matter their age, sexual orientation, maturity, or disability.

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