



CENTER FOR THE RIGHTS
OF ABUSED CHILDREN

Support for HB 2381

Appointing Client-Directed Counsel to Children in Children-in Need-of-Care Proceedings

Appointing a guardian ad litem (GAL) in cases involving abused children results in confusion. This confusion stems from the unclear and potentially conflicting ethical obligations of the GAL to the court and the child. This conflict and confusion limit the ability of a GAL to adequately represent the child and enforce the child's rights. To reduce confusion, states should appoint a client-directed attorney with well-established ethical duties to represent the child's expressed wishes.

In-Person Testimony

Darcy Olsen, Founder and CEO
Center for the Rights of Abused Children

House Judiciary Committee

2:30MST/3:30CST, Thursday, March 7, 2024

Introduction

Chair Humphries and committee members, thank you for listening to me today.

My name is Darcy Olsen, and I am the founder and CEO of the Center for the Rights of Abused Children. I am testifying in support of House Bill 2381.

About ten years ago, I felt inspired to become a foster parent.

When I took that first newborn baby into my home, I expected the challenges — complications from drug withdrawal — like convulsions, shaking and crying, frequent feedings, constant visits to the pediatrician, and sleepless nights. I promised this little girl I would do everything possible to help her.

But I did not expect that to best care for this baby, I would have to hire a law firm to represent her rights in court.

I would like to tell you that the American legal system made every effort to protect this sweet little girl. I would like to tell you that the process focused on her rights, life, and safety. But that was not the case for her, nor for the children of Kansas, or the vast majority of children in our country.



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I watched as every other party to the case received a lawyer. The parents were provided with attorneys at no charge to them. The child protection agency that placed her in foster care was represented by a team of state lawyers. Even the judge had an appointed legal advisor.

The only person in this case who wasn't entitled to a lawyer was this little girl -- the victim. This flies in the face of any notion of justice, due process, and equal protection.

The current model of appointing attorneys to serve as guardian ad litem (GAL) for abused children results in confusion. While the current GAL system can be confusing for adults, it can be especially so for children. Because the lives of children are those most impacted by the child protection system, they should have a meaningful opportunity to be heard, have their position represented, and have their rights and liberties protected. To accomplish these goals, the Center recommends Kansas adjust its current model to give every child in CINC proceedings a client-directed attorney.

1. Client-directed Counsel Satisfies the Demand for Justice

A child victim should have the right to an attorney from the moment of state involvement, just like the criminally accused do in their court cases, and for the same reason.

Their fundamental life and liberty interests are at stake. These court proceedings will determine whether a child can go home, whether they will see their siblings, whether they will be adopted or age out, and even whether they will be set on a course that could cost them their lives.

While we recognize that Kansas appoints GALs, GALs are not the child's attorney – they do not represent the child as an attorney would. Their duties are to the court. In an ideal scenario, they serve as independent investigators to assist the court in deciding what is in a child's best interests.

However, with so much at stake – with children's liberty interests on the line – justice demands that children have an opportunity to be heard and have their rights protected. This can best be accomplished when children have an attorney to zealously advocate for the child and protect the child's legal rights.

2. Client-directed Counsel Help Children Feel Heard

We frequently hear from foster youth that they do not feel heard. This is one adverse symptom of the current system. GALs do not represent the child. They do not form an attorney-client relationship. They do not owe the child the ethical duties of loyalty, zealous advocacy, or



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confidentiality, among others. These duties help attorneys build trust with their clients and help children in need of care feel heard and know that somebody is in *their* corner.

Client-directed counsel gives children the voice they deserve. It allows judges to make more informed decisions as to the best interests of a child, having heard from all the parties involved – including the child, whose best interest is central to the proceedings.

3. Client-Directed Counsel Improves Outcomes

Not only does justice demand children have an opportunity to be heard, but children represented by attorneys also have better outcomes.

Research shows that children with client-directed lawyers exit the system more quickly. Children represented by client-directed counsel exited foster care for a permanent home at rates ranging from 1.7 to 3.5 greater than children who were not represented by client-directed attorneys.¹

For example, assuming that the average child will be in care for 20 months, the likelihood that a child will find permanency within that timeframe is up to 3.5 times greater for children represented by client-directed counsel.

Additionally, researchers have observed no negative impact on reunification. In fact, not only was there no negative impact, but representation by client-directed attorneys helped children reunify at the same or slightly higher rates as children who were not represented by client-directed counsel. For represented children, reunification with their biological parents occurred at slightly higher rates of between 1.02 and 1.23.²

¹ Andrew E. Zinn & Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* (2008), Chicago: Chapin Hall Center for Children at the University of Chicago, 14-15, <https://www.issuelab.org/resources/1070/1070.pdf>. (This study measured the impact of Children’s Services Council of Palm Beach County (CSC) whose program was geared toward helping expedite children’s exit to permanency through client-directed counsel. To measure the outcomes of the program, third-party researchers calculated the rate at which children exited to permanency among children represented by CSC attorneys compared to those who were referred to CSC but were not represented by them because of legal conflict. Researchers used a model that measures the rate of exits to permanency of comparison groups over time. Thus, the rate of 3.5 means that children represented by CSC attorneys exited to permanency at a rate 3.5 time greater than children who were not represented by CSC attorneys over the same period).

² *Id.* at 15.



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Additionally, research shows that children with client-directed legal representation had a 45% higher reunification rate, a 30% reduction in placement moves, and a 65% reduction in unnecessary school moves.³

Legal representation affords the best means of protecting the child's fundamental rights and ensuring improved outcomes. None of us would accept less for our own children.

Conclusion

In Arizona, we made the switch. Just like Kansas today, Arizona offered children a guardian ad litem. Today, Arizona is one of ten states providing every child who enters care with a client-directed attorney. In Arizona, as would likely be the case here in Kansas, our guardians ad litem changed roles to become client-directed attorneys, shifting their ethical duties to the children, giving all abused and neglected children a voice and an advocate in court. It was met with unanimous bipartisan approval. Kansas children deserve nothing less.

Legislators often ask me where to start when it comes to mending the child protection system.

The answer is **THIS**. Providing attorneys to foster children is the single most important thing we can do to prevent additional harm to child victims and to safeguard their lives and legal rights. Allow children their voices. Let them be heard. Give them attorneys.

Thank you. I ask for your support of HB2381.

³ Washington State Center for Court Research, (2021) *Evaluation of the Washington State Dependent Child Legal Representation Program* (2021), 1, Olympia, WA: Administrative Office of the Courts, <https://www.courts.wa.gov/subsite/wsccr/docs/DCLR%20Report%202021.pdf>.



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Frequently Asked Questions

Will the switch to client-directed attorneys improve child representation?

Yes. While we recognize that the same pool of attorneys currently serving as GALs will likely serve as client-directed attorneys for children, as explained further below, the subtle but significant differences between GALs and client-directed attorneys are the duties owed and to whom. A client-directed attorney must zealously represent the child's position and protect the client's rights in court. Theoretically, this also could contemplate disciplinary action for lawyers who shirk their ethical duties. This enhances system accountability.

Additionally, states must provide crucial quality training. In a multi-year study, researchers found that lawyers who were trained in a quality representation regime and received regular follow-up:

...initiated more contact with the children they represented, created more discussion and collaboration with other players in the system, did more problem-solving, advocated for more services, and spent more time influencing the case plan and developing a theory of the case. Importantly, these different behaviors improved the child outcomes.⁴

Improved outcomes included exiting the system more quickly (trained attorneys made children 20 to 40 percent more likely to achieve permanency within six months).⁵

Will there be an increased shortage of attorneys with the enactment of this legislation?

While we know conversations in Kansas about the need for attorneys, particularly in rural Kansas, children shouldn't be denied permanency simply because of bench and bar administration. We believe there should be a concentrated and coordinated effort by the bar and courts to ensure that attorneys are provided to some of the most vulnerable residents of the state – abused and neglected children.

Experience in Arizona shows that many attorneys currently serving as GALs will shift roles, advocating on behalf of children's expressed interests.

⁴ Donald Duquette, *How to Improve Legal Representation of Children in America's Child Welfare System* (2022), *Law and Economics Working Papers*, University of Michigan Law School Scholarship Repository, 3, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1343&context=law_econ_current.

⁵ *Id.* at 3-4.



In what ways is the current system failing to ensure the safety of children?

It seems success in child welfare is often measured by inputs and outputs. For example, how many children entered care this year? Have we sufficiently reduced the number of children entering care? However, this type of inquiry does not adequately track child safety.

When looking at the extent to which a child protection system keeps children safe and quickly gets them into a safe, loving, family-like setting, states need to look at more than just the number of children entering care.

Compared to the national average, Kansas could improve placement stability, the length of time children are in care, and the rate at which children age out. These areas can be improved with a good attorney fighting for children's rights to family, safety, and timely permanency.

	Percent of children in care with 3+ placements	Median months in care	Percent of children exiting care due to emancipation
<i>Kansas</i>	20	20.5	14
<i>National Average</i>	16	17.6	8

How are conflicts of interest handled?

Conflicts in the legal profession are not uncommon, and there are rules regarding how they should be handled. In abuse and neglect proceedings, even if a conflict exists, they can and should be handled in the same they are handled in any other legal setting.⁶

What could quality training include?

The model of training studied by the University of Michigan, called *QIC-Childrep*, focused on six core skills:

⁶ KS R RULE 240 RPC KRPC 1.7.



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1. *Enter the Child's World: Engage with the child, learn their needs, guide them, counsel them and advocate for their needs while accommodating their stated interests consistent with state law.*
2. *Assess child safety and protect the child but without over-reacting. "Remove the danger, not the child", whenever that can be done consistent with child safety. Distinguish between case plan and safety plan.*
3. *Actively Evaluate Needs: Facilitate an appropriate assessment of the needs of the child and his/her family. Diagnose the problem.*
4. *Advance Case Planning: Facilitate development of an appropriate case plan.*
5. *Develop Case Theory: Develop an active and forward-looking theory of the case. What is going on here? Adopt, and maybe rule-out, alternative and tentative theories of the case. Provides force and direction to the advocacy. (Drive the bus.).*
6. *Advocate Effectively: Use advocacy corollaries in meeting a child's needs that stress problem-solving and non-adversarial approaches - but which include traditional adversarial modes when appropriate.⁷*

What is the role of a GAL?

When children are appointed GALs, many wrongfully assume that the children are represented by an attorney zealously arguing a client's position in court and holding the system accountable. However, this is not the case for children represented by GALs in CINC proceedings. In fact, Kansas statute may make this misconception even more confusing.⁸

GALs are independent investigators.⁹ They review documents and records and interview individuals involved in the case.¹⁰ Ultimately, they form an opinion as to what they believe is in the best interests of the child and then "vigorously" advocate for and represent that position.¹¹

In Kansas, the line between GALs and client-directed counsel is blurrier than in other states, and it can result in even more confusion. For example, GALs must file appropriate pleadings on their behalf and present relevant facts (including the child's position). Yet, they still don't have the same ethical obligations to represent the child's position and hold the system accountable.

⁷ Donald Duquette, *supra*. note 4 at 6.

⁸ Kan. Stat. § 38-2205(a) (requiring GALs to "appear for and represent the best interests of the child").

⁹ *Id.*

¹⁰ Kan. R. Rel. Dist. Ct. 110A(c).

¹¹ *Id.*



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In the event of a disagreement between a GAL and the child, the GAL must inform the court of the disagreement. It is up to the court to decide to appoint an attorney to represent the child's expressed wishes.¹²

This means that, in practice, GALs function as investigators appointed to assist the court in deciding what is in the child's best interest. Nobody is duty-bound to advocate for what the child wants or even share with them. They do not have an advocate giving them the voice they deserve when so much in their lives is at stake.

How does a client-directed attorney differ from a GAL?

In contrast to a GAL, lawyers engaged in an attorney-client relationship perform various functions – as advisors, advocates, negotiators, and evaluators.¹³ In the attorney-client relationship, the attorney owes the client specific duties. For example, a client-directed lawyer:

- must provide competent representation. The lawyer must have "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."¹⁴
- is generally required to "abide by a client's decisions concerning the objectives of representation" and consult with the client about how to achieve that objective.¹⁵
- must act with diligence and promptness and maintain ongoing communication with the client to keep the client informed and consult with the client.¹⁶
- must keep the client's information confidential.¹⁷

How does a lawyer represent infants, toddlers, and other children with diminished capacity?

¹² *Id.* at (d).

¹³ "As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others." KS R RULE 240 RPC, Preamble.

¹⁴ KS R RULE 240 RPC KRPC 1.1.

¹⁵ KS R RULE 240 RPC KRPC 1.2.

¹⁶ KS R RULE 240 RPC KRPC 1.3 – 1.4.

¹⁷ KS R RULE 240 RPC KRPC 1.6.



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Often, legislators are concerned that children lack the capacity to direct representation in a traditional attorney-client relationship. However, addressing diminished capacity should not be a foreign concept to lawyers. The rules of professional conduct provide a mechanism for assessing capacity and maintaining the relationship to the maximum extent possible.

Kansas' rules of professional conduct state:

*When a client's capacity to make adequately considered decisions in connection with a representation is diminished ... because of minority ... the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.*¹⁸

...[A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, 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. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions."¹⁹

When a child cannot direct the representation, a lawyer could be permitted to use substitute judgment. Current ethical rules permit lawyers to take protective action for their clients with diminished capacity. "Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools."²⁰ However, when contemplating protective action, "the lawyer should be guided by ... the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."²¹

Additionally, a GAL is not out of the question even when client-directed default becomes the default appointment. Current ethical rules permit the appointment of a GAL "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical,

¹⁸ KS R RULE 240 RPC KRPC 1.14.

¹⁹ KS R RULE 240 RPC KRPC 1.14 (Comment 1).

²⁰ *Id.* at Comment 5.

²¹ *Id.*



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financial or other harm unless action is taken and cannot adequately act in the client's own interest."²²

Arizona Substitute Judgement

When providing attorneys for all children in care, the Arizona Supreme Court implemented a special mechanism for substitute judgement when a child cannot direct the representation. In relevant part, the rules state:

*Substituted Judgment. During any period in which a normal attorney-client relationship is not reasonably possible to maintain, the child's attorney must make a substituted judgment. The attorney must advise the court of the determination of capacity that requires substituted judgment and any subsequent change in that determination. A substituted judgment includes determining what the child would decide if the child was capable of making an adequately considered decision and representing the child in accordance with that determination. The attorney should take direction from the child as the child develops the capacity to direct the attorney.*²³

Determine Capacity. It is the ethical obligation of an attorney for a child to determine their client's capacity to make adequately considered decisions regarding the case. In making this determination for the child, the attorney must meet with the child in person, become acquainted with the child and the child's situation, and assess the child's ability to express wishes and direct the representation. The attorney should also consult other individuals such as family, foster placements, medical experts, and others with relevant information to determine the child's capacity.

Diminished Capacity. If the child's attorney determines that the child lacks the capacity to express wishes and direct representation, the attorney must make a good-faith effort to determine the child's needs and wishes. As far as possible, the attorney must maintain a normal attorney-client relationship with the child. Accomplishing both points requires regular in-person meetings with the child and, often, consistent communication with the child's caregivers.

Substituted Judgement. If the child's attorney determines the child has diminished capacity, the attorney must inform the court of the determination and substitute the attorney's judgment, advocating what the child part's wishes would be if the child could adequately consider decisions. To do this effectively, the attorney must continue to meet with the child, the child's

²² *Supra* note 14.

²³ AZ ST JUV CT Rule 306.



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caregivers, and others with knowledge of the child's wellbeing; engage fully in all court proceedings, including keeping up with records, testimony, and case reports; and keeping the child updated on the status of the case and pending hearings or other court obligations.

What other states have recognized the importance of lawyers for foster children?

States nationwide are beginning to shift to a model that grants children a meaningful voice. States like:

- Arizona
- Connecticut
- Louisiana
- Massachusetts
- Montana
- Nevada
- New Jersey
- New York
- Oregon
- Vermont

What is the cost and how would this be funded?

If structured correctly, the cost of providing children with client-directed counsel should not exceed that of the current structure utilizing GALs. The only difference we are discussing is appointing an attorney in the first instance instead of a GAL. The same funding available for GALs can be spent to fund attorneys for children in care. As a result, the practice of appointing a GAL in child abuse and neglect cases will occur less frequently.

Additionally, the state can better leverage federal funding to improve legal representation of children, including pre-petition legal services. Federal matching funds through Title IV-E of the Social Security Act help pay the costs of attorneys representing certain children and their parents in child welfare legal proceedings.²⁴ A federal information memorandum, *Utilizing Title IV-E Funding to Support High-Quality Legal Representation and Promote Child and Family Well-Being*, explains how Title IV-E agencies can claim federal financial participation (FFP) for

²⁴ "Title IV-E Reimbursement for Lawyers Representing Children, Parents, and Pre-Petition Prevention Opportunities," National Center for State Courts, https://www.ncsc.org/_data/assets/pdf_file/0027/79524/Title-IV-E-Reimbursement.pdf; "Title IV-E Funding for Legal Representation," National Association of Counsel for Children, <https://www.naccchildlaw.org/page/TitleIVforLegalRepresentation>; "Utilizing Title IV-E Funding to Support High-Quality Legal Representation and Promote Child and Family Well-Being," The Office of the Administration for Children and Families (January 20, 2021), <https://www.acf.hhs.gov/cb/policy-guidance/im-21-06>.



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administrative costs of independent legal representation provided by attorneys representing children in Title IV-E foster care, children who are candidates for Title IV-E foster care, and their parents for "preparation for and participation in judicial determinations" in all stages of foster care legal proceedings.

Also, federal funds are available for representation in child abuse and neglect proceedings. This includes competitive grants to nonprofits and courts and pass-through funds to states and local governments.

FAQs: Switching from guardians ad litem to client-directed attorneys in child abuse cases.

Guardians ad Litem (GAL)

Client-Directed Attorney

How does the role of guardians ad litem differ from client-directed attorneys?

- GALs do not represent the child.
- GALs advocate for their own position.
- GALs conduct an independent investigation and determine what they believe to be in the best interest of the child.
- Attorneys represent the child and have elevated ethical obligations to listen to the child and hold the child welfare system accountable.
- Attorneys advocate for the child's position.
- Attorneys work with the child to determine the child's position and expressed interests regarding outcome of abuse and neglect proceedings, including the living arrangement.

How do the ethical obligations differ between GALs and client-directed attorneys?

- GALs do not form an attorney-client relationship.
- Attorneys form an attorney-client relationship with the child.
- GALs do *not* owe the child any ethical duties that accompany the attorney-client relationship such as loyalty and confidentiality.
- Attorneys must advocate for the child's rights, remain loyal to the child's wishes, competently represent the child, and keep non-waived communications with the child confidential.
- GALs have a duty to the court to assist the judge to determine a child's best interests.
- An attorney's duty is to the child client alone while the judge determines the child's best interest having heard from all parties – especially the child.

How do GALs and client-directed attorneys differ when handling children or youth with diminished capacity*?

**Diminished capacity indicates a full or partial inability to know and express what one wants and the related consequences, due to issues like age, maturity, and mental disabilities.*

- A GAL's job remains the same – make an independent determination about what is in the child's best interests – sometimes without ever meeting the child.

- An attorney would be required to maintain a normal attorney-client relationship to the maximum extent possible.
- If a child is unable able to express his or her wishes, the attorney determines what the child would want, if the child were able to express his or her wishes, not the attorney's opinion about what is best.

How are attorneys held more accountable than GALs for representing a child's wishes?

- There are no meaningful measures to ensure that a child's wishes are adequately presented to the court.
- There are no meaningful measures to hold GALs accountable.
- Attorneys can be fired if the attorney fails to advocate for the client's wishes or face disciplinary action for failure to fulfill their ethical obligations.

How do client-directed attorneys improve outcomes for foster children?

Children represented by client-directed counsel:

- Exited foster care for a permanent home at rates ranging from 1.7 to 3.5 greater than children who were not.
- Experienced a 45% higher reunification rate.
- Saw a 30% reduction in placement moves, and
- Were unnecessarily moved 65% less often.

What is the cost of switching from GALs to attorneys for kids?

In states that already regularly assign attorney GALs to the cases of children in care, assigning client-directed counsel in lieu of GALs should not impact the budget.