

JAMS ANZELMO (0068229)
Anzelmo Law
COUNSEL FOR L.A.
446 Howland Drive
Gahanna, Ohio 43230
(614) 816-1012
Anzelmolawfirm@gmail.com

JUSTIN LOVETT (0081826)
RACHEL DAEHLER (0090486)
Jackson County Prosecutor
COUNSEL FOR JACKSON COUNTY JFS
295 Broadway Street, Suite 100
Jackson, Ohio 45640
(740) 286-5006
appeals@jacksonprosecutor.com

TABLE OF CONTENTS

Statement of Interest of Amici Curiae	1
Statement Of The Case And Facts.....	5
Argument	6
I. Independent Lawyers Serve as Counselors to their Child Clients	6
II. Ohio Laws, Rules, and Caselaw Mandate that Children be Appointed Independent Counsel	10
III. Appointment of Independent Counsel Aligns with Common Practice in Other States with Dual or Hybrid Appointment Statutes	22
IV. Appointment of Independent Counsel When There is a Conflict Between the Child’s and the GAL Attorney’s Position is Consistent with National Best Practices and Empirical Research	27
V. Legal Understanding of Adolescent Development Requires Appointment of Independent Counsel	34
VI. Appointment of Independent Counsel When There is a Conflict Between the Child’s and the GAL Attorney’s Position is Necessary to Protect the Child’s Constitutional Rights	36
VII. The Improper Denial of Counsel is Structural Error Requiring Reversal.....	41
Conclusion	46
Certificate of Service	47

TABLE OF AUTHORITIES

Cases

<i>Adoption of K.A.S.</i> , 499 N.W.2d 558, 567 (N.D. 1993).....	46
<i>Bellotti v. Baird</i> , 443 U.S. 622, 633, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).....	36
<i>Graham v. Florida</i> , 560 U.S. 48 (2010).....	34
<i>Greenholtz v. Inmates of Neb. Penal & Corr. Complex</i> , 442 U.S. 1, 12-13 (1979).....	40
<i>Franz v. United States</i> , 707 F.2d 582, 595 (D.C. Cir. 1983).....	38
<i>In re Adoption of J.D.F.</i> , 761 N.W.2d 582, 588 (N.D. 2009).....	46
<i>In re Adoption of L.B.M.</i> , 639 Pa. 428, 446, 161 A.3d 172 (2017).....	27, 43
<i>In re A.T., T.R., J.T., L.T., A.T.</i> , 9th Dist. Summit No. 23065, 2006-Ohio-3919.....	20
<i>In re Baby Girl Baxter</i> , 17 Ohio St.3d 229, 479 N.E.2d 257 (1985).....	16, 17, 20
<i>In re B.K.</i> , 12th Dist. Butler No. CA2010–12–324, 2011-Ohio-4470.....	21
<i>In re Brown</i> , 7th Dist. Columbiana No. 04CO59, 2005-Ohio-4374.....	20
<i>In re Clark</i> , 141 Ohio App. 3d 55, 749 N.E.2d 833 (8th Dist. 2001).....	19
<i>In re Dependency of M.S.R.</i> , 174 Wn.2d 1, 271 P.3d 234 (Wash. 2012) (en banc).....	39
<i>In re D.F.</i> , 7th Dist. Columbiana 2014-Ohio-4155.....	22, 35
<i>In re D.M.</i> , 3rd Dist. Crawford No. 3-18-06, 2019-Ohio-1497.....	20
<i>In re Gault</i> , 387 U.S. 1, 87 S.Ct. 1428 (1967).....	7, 21, 24, 38
<i>In re Graham</i> , 167 Ohio App.3d 284, 2006-Ohio-3170, 854 N.E.2d 1126 (1st Dist.).....	19
<i>In re Howard</i> , 119 Ohio App. 3d 201, 206, 695 N.E.2d 1, 4 (1st Dist. 1997).....	19
<i>In re Jamie Tt</i> , 191 A.D.2d, 599 N.Y.S.2d 892 (NY 1993).....	40
<i>In re Janie M</i> , 6th Dist. Lucas No. L-98-1223, 131 Ohio App. 3d 637, 723 N.E.2d 191..	18
<i>In re J’K.M.</i> , 191 A.3d 907 (PA Super 2018).....	27
<i>In re J.M.B.</i> , 676 S.E.2d 9, 12 (Ga.App 2009).....	45
<i>In re Joshua B.</i> , 2003-Ohio-3096, 2003 Ohio App. LEXIS 2797.....	41
<i>In re J.P.</i> , 10th Dist. Franklin No. 15AP–193, 2015-Ohio-4687.....	20
<i>In re K.S.</i> , 8th Dist. Cuyahoga No. 109928, 2021-Ohio-694.....	20
<i>In re L.J.</i> , 6th Dist. Clark No. 2015-CA-85, 2016-Ohio-2658.....	20
<i>In re Melody L.</i> , 290 Conn. 131, 962 A.2d. (Conn. 2009).....	39
<i>In re S.A.W.</i> , 1993 OK 95, 856 P.2d 286, (Okla. 1993).....	39
<i>In re Smith</i> , 77 Ohio App.3d 1, 14, 601 N.E.2d 45 (6th Dist. 1991).....	18, 20, 41
<i>In re Stacey S.</i> , 136 Ohio App. 3d 503, 737 N.E.2d 92	18, 41
<i>In re Walling</i> , 1st Dist. Hamilton, No. C-050646, 2006-Ohio-810.....	18
<i>In re Williams</i> , 101 Ohio St. 3d 398, 2004-Ohio-1500, 805 N.E.2d 1110...10,15, 17, 19, 21, 22, 24, 30, 35, 36, 42	
<i>In the Interest of A.T. and T.P.</i> , 744 N.W. 2nd 657 (Iowa App. 2007).....	24
<i>In the Matter of J.E.</i> , 5th Dist. Knox No. 15CA19, 2016-Ohio-1500.....	20
<i>J.D.B. v. North Carolina</i> 131 S.Ct. 2394 (2011).....	34
<i>John L. v. Adams</i> , 969 F.2d 228, 1992 U.S. App. LEXIS 16208 (6th Cir.1992).....	2
<i>Kenny A. v. Perdue</i> , 356 F. Supp. 2d 1353 (N.D.Ga. 2005).....	37, 40
<i>Lassiter v. Dep’t of Social Services</i> , 452 U.S. 18, 101 S.Ct. 2153, 68 L. Ed.2d 640 (1981)...37, 42	
<i>Matter of Duncan/Walker Child.</i> , 109 Ohio App.3d 841, 844-45, 673 N.E.2d 217, 219 (5th Dist. 1996)...18, 19	
<i>Matters of J.F. and J.A.F.</i> , 4th Dist. Jackson Nos. 21CA2, 21CA3, 2021 WL 3478655 (Aug. 3, 2021)...6, 20, 21	
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 334 (1976).....	39, 40

<i>Miller v. Alabama</i> , 132 S. Ct. 2455 (2012).....	34
<i>Rivera v. Marcus</i> , 696 F.2d 1016, 1026 (2d Cir.1982).....	39
<i>Roe v. Conn</i> , 417 F. Supp. 769, 780 (M.D. Ala. 1976).....	38
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	34
<i>State ex rel. Asberry v. Payne</i> , 82 Ohio St.3d 44, 1998-Ohio-569, 693 N.E.2d 794.....	40
<i>State v. Colon</i> , 118 Ohio St. 3d 26, 30, 2008-Ohio-1624, 885 N.E.2d 917 ¶ 20 (Citations omitted.)...42	
<i>United States v. Cronin</i> , 466 U.S. 648, 658-59 (1984).....	42
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140, 148-49 (2006).....	42
<i>Wallis ex rel. Wallis v. Spencer</i> , 202 F.3d 1126, 1136 (9th Cir.1998).....	39

Statutes

R.C. 2151.281.....	9, 11, 15
R.C. 2151.352.....	11, 13, 17, 18, 21, 30, 40

Administrative Rules/Regulations

Georgia’s Rules of Professional Conduct 1.2, 1.7, 1.14, 3.7.....	23
H.B. 1035, 67thLeg. Assemb., Reg. Sess. (N.D. 2021).....	34
H.B. 1219, 67thLeg., Reg. Sess. (Wash. 2021).....	34
Iowa Code 232.89.....	23
Loc.R. 4.1(B)(2)(d) of the Court of Common Pleas of Franklin County.....	9
Loc.R. 30 of the Hamilton County Juvenile Court.....	9
Loc.R. 41(C)(5)(a)-(b) of Butler County, Juvenile Rules.....	9
Juv.R. 2(Y).....	17
Juv.R. 3(B).....	21
Juv.R. 4(A).....	12
Juv.R. 4(B).....	12
Juv.R. 6(A)(3)(c), (e).....	22
Sup.R. 48.....	9, 12
Pa. Code Title 237, Rule 1154.....	27
Prof.Cond.R. 1.14.....	15
Prof.Cond.R. 1.7.....	13, 14, 15
S.B. 1391, 55thLeg., Reg. Sess. (Ariz. 2021).....	34

Additional Authorities

2006 BCGD Op. No. 2006-5.....	16
Admin. for Children and Families, <i>High Quality Legal Representation for All Parties in Child Welfare</i> (Jan. 17, 2021)	
https://www.acf.hhs.gov/sites/default/files/documents/cb/im1702.pdf	14
Admin. for Children and Families Children’s Bureau, <i>IM-17-02 High Quality Legal Representation for All Parties in Child Welfare Proceedings</i> (2017)	
https://www.acf.hhs.gov/cb/policy-guidance/im-17-02	30
Admin. for Children and Families Children’s Bureau, <i>IM-19-03 Engaging, empowering, and utilizing family and youth voice in all aspects of child welfare to drive case planning</i>	

<i>and system improvement</i> (2019) https://www.acf.hhs.gov/cb/policy-guidance/im-19-03	30
Admin. for Children and Families Children’s Bureau, <i>IM-21-06 Utilizing Title IV-E Funding to Support High-Quality Legal Representation and Promote Child and Family Well-Being</i> (2021) https://www.acf.hhs.gov/cb/policy-guidance/im-21-06	30
Admin. for Children and Families, <i>Utilizing Title IV-E Funding to Support High Quality Legal Representation for Children and Youth who are in Foster Care, Candidates for Foster Care and their Parents and to Promote Child and Family Well-being</i> (Jan. 14, 2021).....	32
Ann M. Haralambie, <i>The Role of the Child’s Lawyer In Protecting the Child Throughout the Litigation Process</i> , 71 N.D. L. Rev. 939, 941 (1995).....	24
Anna M. Cody, <i>Children’s Participation Rights in Child Welfare Systems: Identifying Opportunities for Implementation</i> , https://scholarscompass.vcu.edu/cgi/viewcontent.cgi?article=7617&context=etd	33
American Bar Association, <i>ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings</i> , https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf	28
American Bar Association, <i>Child Safety: A Guide for Judges and Attorneys</i> http://www.ct.gov/ccpa/lib/ccpa/ABA_Child_Safety_Manual_june32009.pdf	14
American Bar Association Section of Family Law, <i>Standards of Practice for Lawyers Representing Children in Custody Cases</i> , 37 Fam. L.Q. 131, 134 (2003).....	24
American Bar Association, <i>Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases</i> , https://www.azafcc.org/uploads/1/2/6/4/126491982/aba-standards-of-practice-for-lawyers-who-represent-children-in-abuse-and-neglect-cases_7.pdf	28
Casey Family Programs, <i>Group and Institutional Placements</i> , https://www.casey.org/congregate-care/	37
Children and Youth Services Review, <i>Exploring the legal representation of individuals in foster care: What say youth and alumni?</i> , https://www.sciencedirect.com/science/article/pii/S0190740917302505?via%3Dihub ..	33
Duquette, Haralambie, & Sankaran, <i>Child Welfare Law and Practice, Representing Children, Parents and State Agencies in Abuse, Neglect, and Dependency Cases (The Red Book)</i> , Chapter 16, (3d Ed. 2016).....	38
Family Justice Initiative, <i>Attributes of High Quality Legal Representation for Children and Parents in Child Welfare Proceedings</i> . https://15ucklg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2020/03/fji-attibutes-2019.pdf	28
First Star Institute, <i>A National Report Card on Legal Representation for Abused and Neglected Children</i> , http://www.caichildlaw.org/Misc/RTC4.pdf	29, 30
Judith G. Smetana “Adolescents’ and Parents’ Conceptions of Parental Authority.” <i>Child Development</i> , 591988, 321–35, https://doi.org/10.2307/1130313	35
National Association of Counsel for Children, <i>NACC Recommendations for Representation of Children in Abuse and Neglect Proceedings</i> ,	

https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/policy/2021/draft_nacc_recommendations_7.pdf	8, 29, 32
National Association of Counsel for Children, <i>State Models of Children's Legal Representation</i> ,	
https://secureservercdn.net/72.167.241.180/zmc.c18.myftpupload.com/wp-content/uploads/2021/10/Model-of-Rep-Chart-2021.pdf	23
Ohio Governor's Children's Initiative Office of Children Services Transformation, <i>Initial Findings Report</i> ,	
https://content.govdelivery.com/attachments/OHOOD/2020/02/05/file_attachments/1373438/Transformation%20Report%20020520.pdf	36
Shanta Trivedi, <i>My family Belongs to Me: A Child's Constitutional Right to Family Integrity</i> , 56 Harv. C.R.-C.L. L. Rev. X (forthcoming 2021).....	38
State Bar of Arizona, <i>Ethics Opinion 86-13: Conflicts, Confidentiality; Attorney/Client</i> ,	
https://www.azbar.org/for-lawyers/ethics/ethics-opinions/	25
State Bar of Georgia Handbook, <i>Formal Advisory Opinion No. 16-2</i> ,	
https://www.gabar.org/Handbook/index.cfm#handbook/rule600	23
State Bar of Wisconsin <i>CLE Books</i> , Wisconsin Ethics Opinions E-89-13, (July, 1998),	
https://www.wisbar.org/formembers/ethics/Ethics%20Opinions/E-89-13.pdf	25
The Supreme Court of Ohio, <i>Qualified Residential Treatment Program (QRTPT) Level of Care Assessments Toolkit for Judicial Use</i> ,	
https://www.supremecourt.ohio.gov/JCS/CFC/resources/QRTPToolkit.pdf	37
QIC ChildRep, <i>Children's Justice: Chapter 11 – Reflections on QIC Empirical Findings</i> , available at	
https://www.improvechildrep.org/ResearchPolicyRec/ResearchFindings/AnalysisofQIC/ChildrensJusticeChapter11.aspx	7
Washington State Center for Court Research, <i>Evaluation of the Washington State Dependent Child Legal Representation Program</i> , https://counselforkids.org/wp-content/uploads/2021/11/DCLR-Report-2021.pdf	31

STATEMENT OF INTEREST OF AMICI CURIAE

This case implicates the fundamental right of children to familial association and the circumstances under which they are entitled to independent counsel¹ to protect and assert that right. The issues presented by the case are of importance to the undersigned amici. The Justice for Children Project, Office of the Ohio Public Defender, Legal Aid Society of Columbus, Southeast Ohio Legal Services, Family and Youth Law Center at Capital University Law School, National Association of Counsel for Children, National Coalition for a Civil Right to Counsel, Franklin County Public Defender, and the Cuyahoga County Public Defender share the goal of securing justice and resolving fundamental problems for those who are low income and/or vulnerable. Relating to their missions, the undersigned legal services organizations regularly file amicus briefs, such as the instant appeal, where decisions may affect important rights or obligations of Ohioans and matters of great public interest. Accordingly, the undersigned legal services organizations join this *amici curiae* brief to support the right to appointed, express-wishes counsel for children in child welfare and permanent custody cases, a process that will aid courts in fulfilling its *parents patriae* duty to determine what is in the best interests of the children in foster care.

The **Justice for Children Project** was founded in 1998. Since then the Justice for Children Project has performed research and advocacy on behalf of a very vulnerable population: children. The Project houses the Justice for Children Clinic.

¹ Throughout this brief, Amici uses client-directed counsel, express wishes counsel, and independent counsel all to refer to a lawyer who takes direction from their child client as to the theory and position in the case.

The Justice for Children Clinic at The Ohio State University Moritz College of Law affords third-year law students the opportunity to learn and zealously advocate for the rights of children across a variety of systems. Students in the clinic work towards the expressed goals of their client and represent children in neglect and dependency proceedings, delinquency cases, immigration adjustments and educational issues.

The **Office of the Ohio Public Defender** (“OPD”) is a state agency, designed to represent criminal defendants, adults, and juveniles, and to coordinate defense efforts throughout Ohio. The OPD, through its Juvenile Department, provides juveniles who have been adjudicated delinquent their constitutional right to access to the courts. See *John L. v. Adams*, 969 F.2d 228, 1992 U.S. App. LEXIS 16208 (6th Cir.1992). Like this Court, the OPD is interested in the effect of the law that this case will have on parties who are or may someday be involved in similar litigation. Accordingly, the OPD has an enduring interest in protecting the integrity of the justice system, ensuring equal treatment under the law, and safeguarding the rehabilitative purpose of the juvenile court system. To this end, the OPD supports the fair, just, and correct interpretation and application of Ohio’s juvenile rules and laws.

The **Legal Aid Society of Columbus and Southeastern Ohio Legal Services** are non-profit organizations that provide civil legal aid and advocacy to combat unfairness and injustice and to help people rise out of poverty. Part of their mission is to ensure equal access to the courts which includes advocating for a right to counsel in certain civil matters for those who cannot afford an attorney and ensuring a child’s interests are accurately presented when a court is weighing questions of custody.

The **Family and Youth Law Center at Capital University Law School**

(“FYLaw”) is a nationally recognized non-profit organization devoted to improving child welfare and adoption law, policies, and systems. Through education, advocacy, and research, FYLaw advocates for child welfare and adoption laws across the nation to work to provide children the stable families they deserve. FYLaw believes that good laws, sound policies, and equitable decisions promote safe, permanent homes for all children, whether through reunification with parents, placement with relatives, long-term foster care, or adoption. FYLaw joins this *Amici Curiae* brief to offer a national perspective, gained through years of work on behalf of children and families.

Founded in 1977, the **National Association of Counsel for Children** (“NACC”), is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to advancing the rights, well-being, and opportunities of youth impacted by the child welfare system through access to high-quality legal representation. A multidisciplinary organization, its members primarily include child welfare attorneys and judges, as well as professionals from the fields of medicine, social work, mental health, and education. NACC’s work includes federal and state level policy advocacy, the national Child Welfare Law Specialist attorney certification program, a robust training and technical assistance arm, and an *amicus curiae* program. Through the *amicus curiae* program, NACC has filed numerous briefs promoting the legal interests of children in state and federal appellate courts, as well as the Supreme Court of the United States. More information about NACC can be found at www.naccchildlaw.org.

Formed in January 2004, the **National Coalition for a Civil Right to Counsel** (NCCRC) is an unincorporated association that advances the right to counsel for indigent litigants in civil cases involving basic human needs, such as shelter, safety, sustenance, health, and child custody. NCCRC is comprised of over 300 participants from 40 states, including civil legal services attorneys, supporters from public interest law firms, and members of the private bar, academy, state/local bar associations, access to justice commissions, national organizations, and others. NCCRC supports litigation, legislation, and other advocacy strategies seeking a civil right to counsel where basic human needs are at stake (such as the right to parent), including amicus briefing where appropriate. In this vein, NCCRC participants worked closely with the American Bar Association's Presidential Task Force on Access to Justice on its 2006 Resolution (which passed the ABA House of Delegates unanimously) that urges federal, state, and territorial governments to recognize a right to counsel in certain civil cases. American Bar Association, *Resolution 112A* (Aug. 2006), available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf. By promoting such a civil right to counsel in cases about an indigent party's fundamental rights, NCCRC works tirelessly to try to close the national "justice gap" in the United States, which results in low-income Americans receiving no—or inadequate—legal help for 86% of the civil legal problems they face. Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (June 2017), available at <https://www.lsc.gov/mediacenter/publications/2017-justice-gap-report>.

The **Franklin County Public Defender** is a countywide agency that provides comprehensive legal representation to indigent clients in criminal proceedings in Franklin County, Ohio, so as to fulfill the constitutional mandate of “Equal Justice Under Law.” The Office of the Franklin County Public Defender understands that “Equal Justice Under Law” fully embraces the principle that citizens should not be twice held in jeopardy. The Franklin County Public Defender is comprised of Municipal, Juvenile, Common Pleas, and Appellate Divisions. As one of the largest legal services offices in the State of Ohio, each Division is staffed with attorneys, social workers, law clerks, and secretaries dedicated to ensuring high quality legal representation. There are 91 attorneys, 12 social workers, and adjunct support staff totaling 120 full-time and 40 part-time employees.

The **Office of the Cuyahoga County Public Defender** is legal counsel to the majority of parents and legal custodians involved in Dependency, Neglect and Abuse cases filed in Cuyahoga County Juvenile Court. As such the Office is the largest single source of legal representation for parties in those cases. The instant case is of great importance to the Amicus Curiae as well as to the people of the State of Ohio because advocacy of the child’s wishes by an attorney in addition to an opinion on best interest is central to a proper custody determination.

STATEMENT OF THE CASE AND FACTS

The amicus brief hereby adopts the Statement of Facts included in the brief submitted by Appellant L.A.

INTRODUCTION

This case involves the substantial question of when a child is entitled to client-directed counsel in cases involving abuse, neglect or termination of parental rights. The decisions, made in the span of a few short years, impact a child's life in countless ways. Yet the problematic standard established by some of Ohio's Courts of Appeal, as described below, threaten to deprive courts of critically important information and impede children from meaningful participation in these proceedings. For these reasons, the Court must clarify a child's right to independent counsel and affirm a standard that is consistent with fundamental due process and ensures children's voices are heard in the proceedings that affect their rights and their futures.

ARGUMENT

I. Independent Lawyers Serve as Counselors to their Child Clients

In the underlying case, the court incorrectly affirmed the trial court's failure to appoint independent counsel for J.A.F. because the child did not "consistently and repeatedly express a strong desire" in contravention of the GAL's position. *Matters of J.F. and J.A.F.*, 4th Dist. Jackson Nos. 21CA2, 21CA3, 2021 WL 3478655 (Aug. 3, 2021). This fundamentally misunderstands the child attorney's critical responsibility as legal counselor, pursuant to Ohio Rule of Professional Conduct 2.1 and generally accepted best practice standards.

Expressed interest representation of a child client is more than simply parroting their statements and wishes to the court; it requires the development of an attorney-client relationship and a theory of the case which centers the child's voice and

perspective at every turn. Client communication, contact, and counseling are central to the role of a child's attorney. The wishes of a child take time to be elicited, discussed, investigated, and then, only after client counseling regarding the possible outcomes of a particular position, presented on the record in court. As in delinquency matters, "the juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a [case] and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'" In re Gault, 387 U.S. 1, 36, 87 S.Ct. 1428, 1448 (1967) (internal citations omitted).

This principle was affirmed by a six-year, federally funded research project that explored the best practices and impact of children's counsel. Between 2009 and 2016, the U.S. Children's Bureau sponsored a Quality Improvement Center on the Representation of Children in the Child Welfare System (QIC-ChildRep). This first ever, random-assignment, experimental design research assessed the attributes of lawyer behavior most likely to yield positive outcomes for children and foster care. Findings were organized into "Six Core Skills"; first among these is the ability to "enter the child's world" – engaging with the child and learning their needs. QIC ChildRep, *Children's Justice: Chapter 11 – Reflections on QIC Empirical Findings*, available at <https://www.improvechildrep.org/ResearchPolicyRec/ResearchFindings/AnalysisofQIC/ChildrensJusticeChapter11.aspx> (accessed Jan. 10, 2022).

Lawyers trained to listen carefully to their clients and to frame their advocacy in terms of the child's wishes had increased client contact, were more likely to meet the client outside of court and provided an enhanced level of engagement that improved

procedural justice for the child. *Id.* Researchers hypothesized that this positive result may indeed be linked to the attorney’s counseling functioning and the understanding that “robotic allegiance” to the child’s stated wishes is not desirable or required. *Id.*

Even more recently, in December 2021, NACC published *Recommendations for Legal Representation of Children and Youth in Abuse and Neglect Proceedings* that further emphasize the critical counseling function of the child’s attorney. The *Recommendations* extended the mandate for frequent contact between lawyer and client and explained the attorney’s obligation to help clients understand their legal options and make informed choices in developmentally appropriate and trauma-informed ways. “Rendering prudent legal advice is one of the most valuable functions an attorney can provide, which no other professional assigned to the case (caseworker, lay volunteer/CASA, mentor) can fulfill.” See National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Proceedings*, https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/policy/2021/draft_nacc_recommendations_7.pdf (accessed Jan. 10, 2022).

Child welfare stakeholders, including caseworkers, attorneys, and judges, are routinely faced with difficult decisions that involve a complex interplay of law, facts and social science. Even experienced professionals in the field may initially feel flummoxed in the face of these choices. Caseworkers for agencies benefit from the advice and counsel of trained attorneys to help inform their recommendations before taking a position in court. So, too, do children. Parents involved in these cases fairly

expect their requests to be relayed to the court through counsel, without having to do so “repeatedly.”

The standard used in this case is entirely subjective and without any basis in law. There may be many reasons that a child does not request their position “consistently” or repeatedly” to the GAL. Neither the Ohio Revised Code nor the Rules of Superintendence for the Court of Ohio detail how often an attorney GAL must visit or talk with their ward. See R.C. 2151.281. Also see Sup.R. 48. Local courts have adopted their own requirements, ranging from “reasonable contact” to every 90 days. Loc.R. 4.1(B)(2)(d) of the Court of Common Pleas of Franklin County, Juvenile Court Rules (*requiring “reasonable contact.”*); Loc.R. 41(C)(5)(a)-(b) of Butler County, Juvenile Rules (“[N]o less than 30 days prior to and no less than thirty days after every court hearing regarding the child... at least every ninety days in the home where the home [or] at the child’s school”); Loc.R. 30 of the Hamilton County Juvenile Court (*requiring* communication within 14 days appointment, before adjudication, before disposition, and thereafter at least every three months). A child who sees their attorney GAL just a couple of times per year may not even understand who that person is or feel comfortable talking to them, let alone discuss with them their wishes about their case. And, even if they do, under these rules it could take 6 months or longer (2-3 visits) before a child’s wishes had been expressed “repeatedly” in order to effectuate the request for counsel.

Even assuming, *arguendo*, that the court in J.A.F. worried that the child was wavering in their position, ambiguous decision-making is a factor *in favor* of appointing counsel, not against it. In such situations, counsel is needed to speak

confidentially with the child and offer legal advice to attempt to help the child resolve the ambiguity while ensuring the child understands the legal consequences of the proceeding as much as possible.

Expecting a child to express a “consistent,” “repeated” and “strong” desire before triggering their right to counsel holds them to a higher standard than any of the adults involved in the case, essentially requiring them to act as pro se litigants until it has been determined that they have been “consistent” enough to be afforded counsel. Appointing counsel at this stage merely triggers the appointment of an attorney who can build trust and then clarify and advocate for those wishes, adding to the information available to the trier of fact; it does not restrict the trial court’s ultimate determination of the best interests of the child.

II. Ohio Laws, Rules, and Caselaw Mandate that Children be Appointed Independent Counsel

The current state of the law in Ohio provides for the appointment of counsel for every child involved in a child welfare court proceeding. Attorneys may be appointed in a “dual role” as both independent counsel and GAL, but those roles must be bifurcated upon identification of conflict between the attorney’s best interest position and the client’s positions. Although Ohio’s statutes, Rules, ethics and Supreme Court case law are aligned on this point, some intermediary courts have misinterpreted *In re Williams* in a way that poses a violation to attorney-client privilege and has created inconsistency in access to counsel for children in Ohio foster care. Clarification is needed so that every child has access to counsel who can advocate on their behalf.

a. Ohio Statutes Require Independent Counsel for Children

R.C. 2151.352 provides that children are entitled to counsel in juvenile proceedings in any matter in which they are “not represented by the child's parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.” R.C. 2151.352. The plain language of the statute is unambiguous and does not condition the child’s access to counsel on any factor such as the strength or repetition of their requests. As such, this should be recognized as an unconditional right to counsel.

Although R.C. 2151.352 seems to contemplate a scenario in which the child’s interests could be represented through another party, this is inappropriate in child welfare cases. See R.C. 2151.352 (provides for counsel for children in any proceeding under R.C. 2151 or 2152, including child custody or delinquency proceedings). Because the allegations that initially trigger foster care cases are - by definition - conflicts between the potential interests of parents and children, there is no circumstance in which a parent’s counsel could adequately or ethically investigate and advance a case on behalf of both parties. Similarly, counsel for the agency cannot simultaneously represent the child’s and the agency’s legal interests. See R.C. 2151.281 (B)(1) (attorney responsible for presenting evidence regarding abuse or neglect cannot be the child’s GAL).

Ohio statutes also state that an attorney may serve as GAL and attorney for a child in child welfare proceedings, but, if a conflict arises, the court must appoint a new GAL for the child. See R.C. 2151.281(H). This allows the attorney to retain client confidences, as mandated by the Rules of Professional Conduct. *Id.* Either the dually-

appointed attorney or the court can find that a conflict exists. *Id.* Finally, counsel may also be appointed for a child if the person originally appointed as guardian is not an attorney. *Id.*

b. Ohio Rules Are Aligned about Appointing Independent Counsel for Children When a Conflict Exists Between the Child’s Position and the Guardian ad Litem.

Ohio Juvenile Court Rule 4(A) reaffirms the expectation that every party to a child welfare case is entitled to legal counsel. The Rule states that “[e]very party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent.” Juv.R. 4(A). This right to counsel is separate and distinct from the court’s discretion to appoint a GAL under Rule 4(B). See Juv.R. 4(B) (requiring appointment of a GAL for a child when the child has no parents, guardian, or legal custodian; when the interests of the child and the parent are in conflict; and when the “court believes that the parent of the child is not capable of representing the best interest of the child”).

Effective January 1, 2021, Rule 48.02(D) of the Ohio Rules of Superintendence requires that “[a] court shall appoint a separate attorney to represent a child in abuse, neglect, dependency, unruly, and delinquency cases in which the wishes of the child differ from the recommendations of the guardian ad litem.” Sup.R. 48.02(D)(1).

Furthermore,

“[i]f an attorney who has been appointed to serve as both guardian ad litem and attorney for the child or any other party believes that a conflict exists in the dual appointment, the attorney or party shall immediately notify the court in writing with notice to the parties or affected agencies and request a separate appointment of a guardian ad litem and attorney for the child. The court shall make such additional appointment or appointments or order or orders to remedy the conflict.

The court may also make such appointment or appointments on its own motion.”

Id. Thus, under the rule, once the dual-appointment counsel has identified the conflict, there is a presumption that the court will appoint independent counsel. The conflict must be brought to the court’s attention with haste and the trial court must appoint independent counsel. Nothing in the Rule permits further inquiry into the frequency or content of privileged attorney-client communications.

R.C. 2151.352 and Rule 48.02(D) are consistent with other areas of Ohio legal ethics and practice which similarly require the court to resolve conflicts through appointment of separate counsel. Guardian ad litem attorney representation is unique because the “client” is the attorney’s own formulated best interest position, as informed by their investigation and training. Dually-appointed GALs represent both the child’s best interests and the child’s stated position. Although representation of multiple parties in the same matter is permitted in certain circumstances, it must be discontinued when a conflict arises. “The principles of loyalty and independent judgment are fundamental to the attorney-client relationship and underlie the conflict-of-interest provisions of [Ohio’s] rules.” Prof.Cond.R. 1.7 Comment [1]. Rule 1.7(a) of Ohio’s Rules of Professional Conduct defines a conflict of interest to include either of the following:

- (1) the representation of that client will be directly adverse to another current client;
- (2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests. (Emphasis sic.).

Prof.Cond.R. 1.7(a)(1)-(2). Therefore, when a GAL attorney's best interest position conflicts with the child's positions, both conditions described in Rule 1.7(a) are met. An individual lawyer cannot simultaneously advance their own best interest position without rendering herself directly adverse to her current client's position, nor can they carry out a case theory, trial strategy or advocacy work without being materially limited by ethical duties to the child client. The attorney must seek leave of the court to withdraw:

“When a lawyer withdraws from representation in order to avoid a conflict, the lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must also continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).”

Prof.Cond.R. 1.7 Comment [7]. This process of client identification and withdrawal is routine for adult litigants, and the same should hold true for children.

The Rules' emphasis on confidentiality is especially pertinent in the case at hand. Confidentiality is a key feature of the attorney-client relationship that the law must seek to preserve, especially for children. In 2017, the U.S. Children's Bureau provided express guidance to state child welfare agencies on this specific point: “[t]he confidential attorney-client privilege allows children to feel safe sharing information with attorneys that otherwise may go unvoiced.” See Admin. for Children and Families, *High Quality Legal Representation for All Parties in Child Welfare* (Jan. 17, 2021) .<https://www.acf.hhs.gov/sites/default/files/documents/cb/im1702.pdf>. This bolsters the attorney's ability to advocate for a safe plan for the child and expands the available information for the court to consider in determining whether to continue or terminate jurisdiction of the case. See American Bar Association, *Child Safety: A*

Guide for Judges and Attorneys

http://www.ct.gov/ccpa/lib/ccpa/ABA_Child_Safety_Manual_june32009.pdf (accessed Jan. 10, 2021). Ohio makes clear that a dually-appointed GAL must withdraw as GAL when a conflict exists, thereby maintaining the confidential relationship between the child and the attorney. See R.C. 2151.281(H) (mandating that the attorney continue on the case as express-wishes counsel for the child and the court appoint a new GAL).

Importantly, there is no exception to the lawyer's obligations under Rule 1.7 simply because the client has not reached the age of majority. As explained in Rule 1.14, age alone is not dispositive of a client's ability to instruct counsel.

"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."

Prof.Cond.R. 1.14 Comment [1]. The Rules further instruct that an attorney representing a person with diminished capacity must, as much as reasonably possible, maintain a normal attorney-client relationship. *Id.* at 1.14(a).

The Ohio Supreme Court's Board of Commissioners on Grievances and Discipline looked squarely at the fraught issue of conflicts in the context of a dual role appointment. In an opinion issued two years after this Court's decision in *In Re Williams*, the Board opined:

"An attorney may not serve in a dual role as a child's attorney and guardian ad litem when a conflict exists in carrying out the two roles. The duties conflict when a best interest determination differs from the client's wishes and interests...When there is conflict between the two roles, the court *shall* appoint another person as guardian ad litem for

the ward...Attorneys who serve in a dual role as an attorney and guardian ad litem are reminded that the highest duty is to the client.” (emphasis added).

2006 BCGD Op. No. 2006-5, at 2, available at <https://www.ohioadvop.org/wp-content/uploads/2017/04/Op-06-005.pdf>. Again, this aligns with the Ohio Revised Code requirement that a dually-appointed attorney withdraw as GAL and maintain their attorney-client relationship with the child when a conflict arises. See R.C. 2151.281(H).

c. Case Law Also Requires Appointment of Independent Counsel for Children but the Requirement is Unevenly Applied

As discussed above, the role of GAL and attorney for a child are different. Children in Ohio can be appointed a GAL², an attorney serving as GAL, or an attorney serving as both GAL and counsel for the child. The disparate impact of the type of appointment a child receives is one of the reasons independent counsel is so important. This court has clearly delineated the distinct roles of the GAL and the attorney for the child. In *In re Baby Girl Baxter*, the court explained:

“The duty of a lawyer to his client and the duty of a guardian ad litem to his ward are not always identical and, in fact, may conflict. The role of guardian ad litem is to investigate the ward’s situation and then to ask the court to do what the guardian feels is in the ward’s best interest. The role of the attorney is to zealously represent his client within the bounds of the law.”

² In 57 counties in Ohio, a child’s best interests can be represented by Ohio CASA, an organization that utilizes lay volunteers to perform GAL services.

In re Baby Girl Baxter, 17 Ohio St.3d 229, 232, 479 N.E.2d 257, 260 (1985). The *Baxter* court provided unequivocal instruction as to the course of action when a conflict arises:

“[W]hen an attorney is appointed to represent a person and is also appointed guardian ad litem for that person, his first and highest duty is to zealously represent his client within the bounds of the law and to champion his client’s cause. If the attorney feels there is a conflict between his role as attorney and his role as guardian, he should petition the court for an order allowing him to withdraw as guardian. *The court should not hesitate to grant such request.*” (Emphasis added.)

Id. This latter language is critical, as it protects the sanctity of the attorney-client relationship and protects against the court interrogating into the frequency and quality of attorney-client contact before granting such a request.

This core principle - that counsel and the GAL serve distinct functions - has been reaffirmed numerous times in Ohio case law. See *In re Brooks*, 10th Dist. Franklin Nos. 04AP-164, 04AP-202, Nos. 04AP-165, Nos. 04-AP-201, 2004-Ohio-3887; see also, *In re T.V.*, 10th Dist. Franklin No. 04AP-1159, No. 04AP-1160, 2005-Ohio-4280. In *In re Williams*, this Court held that “pursuant to R.C. 2151.352, as clarified by Juv.R. 4(A) and Juv.R. 2(Y), a child who is the subject of a juvenile court proceeding to terminate parental rights is a party to that proceeding and, therefore, is entitled to independent counsel in certain circumstances. 101 Ohio St. 3d 398, 405, 2004-Ohio-1500, 805 N.E.2d 1110, ¶29. As described above, the nature of child welfare cases inherently involves potential adversity between the child and the parent, separate counsel must be provided at all times for the child. The “certain circumstances” language used in *Williams* encompassed the vehicle for providing that

counsel - whether it is through an independent appointment or a dual role appointment. The "certain circumstances" to which the decision refers are instances where a child's wishes are in conflict with their GAL's recommendation where the GAL is also serving as the child's attorney. *In re Walling*, 1st Dist. Hamilton, No. C-050646, 2006-Ohio-810.

d. Uneven Interpretation in Ohio's Intermediary Courts

Some intermediary Ohio courts have correctly applied the law recited above. For example, the Sixth District Court of Appeals held that children have a right to counsel that attaches upon removal from their home and that appointment of a lay (non-attorney) GAL who is represented by counsel is not sufficient to satisfy this requirement. *In re Stacey S.*, 136 Ohio App. 3d 503, 1999-Ohio-989, 737 N.E.2d 92 (6th Dist.). The court recognized the potential for conflict in dual appointments³ and held "that for an attorney to act in both capacities, the court must first make a dual appointment, and a finding that no conflict exists." *Id.* at 100; *See also In re Smith*, 77 Ohio App.3d 1, 14, 601 N.E.2d 45 (6th Dist. 1991).

The Fifth District also addressed this issue in *Matter of Duncan/Walker*. In evaluating whether the children were adequately represented by counsel in the matter below, the court opined:

The attorney may serve as attorney for the ward and guardian only when there is no conflict of interest, and who better to determine that issue but the court? Therefore, we find that for an attorney to act as guardian ad litem and attorney for the ward, there must be a dual

3 Amici do not have access to the initial GAL appointment order in this case. If the child had a lay GAL only, they were left without any legal representation in violation of R.C. 2151.352. *See In re Janie M*, 6th Dist. Lucas No. L-98-1223, 131 Ohio App. 3d 637, 723 N.E.2d 191.

appointment, and a finding that no conflict exists. To hold otherwise would lead to obvious errors in the adjudicatory phase of the permanent custody hearing and the dispositional phase.

Matter of Duncan/Walker Child., 109 Ohio App.3d 841, 844-45, 673 N.E.2d 217, 219 (5th Dist. 1996).

The First District has emphasized the responsibility of both counsel and the court to identify and remedy these conflicts as soon as they emerge. “Generally, it is counsel who must bring potential conflicts to the attention of the court, but where counsel fails to perceive a conflict, or fails to bring it to the court's attention, the court may be obliged to act *sua sponte*.” *In re Howard*, 119 Ohio App. 3d 201, 206, 695 N.E.2d 1, 4 (1st Dist. 1997). The language here accords with the requirements under Rule 48.02(D) in both urgency (“immediately”) and imperative (“shall”). The First District has also, however, included an investigation requirement not found in *Williams*. In *In re Graham*, the Court held that if a dually-appointed attorney alerts the court to a potential conflict, the court should conduct a recorded, in camera interview with the child to determine whether independent counsel is needed. 167 Ohio App.3d 284, 2006-Ohio-3170, 854 N.E.2d 1126, 1132, ¶ 32 (1st Dist.) (ultimately finding no conflict existed). This additional investigation violates the child's right to confidentiality and should not occur. See discussion above regarding confidentiality and the attorney-client relationship, *supra*, at 14-18.

Similarly, in *In Re Clark*, the Eighth District Court of Appeals found that the children were denied a right to independent counsel in their disposition hearing after their GAL merely notified the court of their wishes but proceeded to advocate for a permanency goal adverse to those very requests; the court reversed and remanded.

141 Ohio App. 3d 55, 57, 749 N.E.2d 833 (8th Dist. 2001). The Sixth District went even further by addressing the appellees' failed efforts to distinguish the case from *Baxter*. The trial court in *In re Smith* made a dual appointment for six children. On appeal, the agency argued that because the attorney/GAL had not made overt statements or arguments detrimental to the children's desire to be reunified with their parents, there was no conflict to be remedied. 77 Ohio App. 3d 1, 14, 601 N.E.2d 45 (6th Dist. 1991). The appellate court disagreed, stating that such a position would require the appellant (parents here) to prove a negative. *Id.* In effect, the court recognized that the dually-appointed attorney cannot advocate for their own best interest position without harming the children's case to return home.

Despite these numerous consistent holdings, the Fourth District, where this case originates, has misinterpreted Ohio law, and developed an antecedent test to trigger appointment of independent counsel; specifically, the trial court demanded proof that the child "*consistently and repeatedly* expressed a *strong* desire that differs and is otherwise inconsistent with the guardian ad litem's recommendations" (emphasis added). *Matters of J.F. and J.A.F.*, 4th Dist. Jackson. Nos. 21CA2, 21CA3, 2021-Ohio-2713 (Aug. 3, 2021). The same standard has been adopted by the Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Twelfth Districts. *In re L.J.*, 6th Dist. Clark No. 2015-CA-85, 2016-Ohio-2658.; *In re D.M.*, 3rd Dist. Crawford No. 3-18-06, 2019-Ohio-1497.; *In the Matter of J.E.*, 5th Dist. Knox No. 15CA19, 2016-Ohio-1500.; *In re Brown*, 7th Dist. Columbiana No. 04CO59, 2005-Ohio-4374.; *In re K.S.*, 8th Dist. Cuyahoga No. 109928, 2021-Ohio-694.; *In re A.T., T.R., J.T., L.T., A.T.*, 9th Dist. Summit No. 23065, 2006-Ohio-3919.; *In re J.P.*, 10th Dist. Franklin No.

15AP–193, 2015-Ohio-4687.; *In re B.K.*, 12th Dist. Butler No. CA2010–12–324, 2011-Ohio-4470.

The Fourth District applied this standard to find that J.A.F. had not been entitled to independent counsel, notwithstanding that the GAL informed the court that J.A.F. wanted to be with his mother, had “expressed love for Mother, believed that he would be going home at some point, and questioned when he would be able to go home.” *Matters of J.F. and J.A.F.*, 4th Dist. Jackson Nos. 21CA2, 21CA3, 2021 WL 3478655. The requirements of “consistent”, “repeated”, and “strong” desires on behalf of the child do not appear in *Williams*. In fact, while *Williams* observed that the Court of Appeals below in that case had applied a “consistently expresses a desire to be with a parent” standard, it pointed out that “[t]his court declined discretionary review of that decision.” 101 Ohio St. 3d 398 at 400.

This ruling is problematic for several reasons. First, it violates due process of law by requiring that children must first represent themselves and repeatedly disagree with the recommendations of their court-appointed GAL to trigger their right to be represented by an attorney. This is inconsistent with the Ohio Revised Code, which requires the appointment of counsel for the child. See R.C. 2151.352. The plain language of this statute does not confer a conditional right to counsel, it confers a right to counsel based upon the child’s status as a party. It is also inconsistent with Ohio Rules of Juvenile Procedure which caution against waiver of the right to counsel for children facing a loss of liberty. Under Juv.R. 3(B), the child shall be informed of their right to counsel and the disadvantages of self-representation. While this rule was created to comply with the mandates of *In re Gault*, 387 U.S. 1 (1967) as applied in

delinquency cases, the Ohio rules expressly recognize children in abuse and neglect cases are also “taken into custody” “by a law enforcement or duly authorized officer.” Juv.R. 6(A)(3)(c), (e).

Moreover, the requirement that the child repeatedly inform their GAL that their position differs puts the GAL in a position to effectively waive the child’s right to counsel. This - in the absence of any requirement the GAL advise the child regarding their right to counsel - violates the spirit, intent and language of the law. Again, this would not be permitted under Rule 3 which expressly states no parent, custodian, guardian or GAL has authority to waive a child’s right to counsel. Individual GALs may have differing levels of understanding and training about adolescent development, leading to different decisions about whether a child is mature enough to warrant counsel. Compare *In re D.F.*, 7th Dist. Columbiana 2014-Ohio-4155 at ¶ 19 (9 year old child not mature enough to understand proceedings) with *Williams*, 101 Ohio St. 3d 398, 405, 2004-Ohio-1500, 805 N.E.2d 1110 (6 year old entitled to counsel). Because the standard applied by the court below is without basis in Ohio statute, rule, or ethics, it has created confusion among intermediary courts and hindered access to justice for children in foster care. This court must intercede.

III. Appointment of Independent Counsel Aligns with Common Practice in Other States with Dual or Hybrid Appointment Statutes

The national landscape of legal representation of children includes a variety of models, including best interest representation, expressed interest representation, representation based upon the age of the child, and representation in a dual or hybrid format which seeks to combine the roles of both best interest and expressed interest representation. Ohio is one of approximately ten states with a dual appointment or

hybrid-style model of representing children. See National Association of Counsel for Children, *State Models of Children’s Legal Representation*, <https://secureservercdn.net/72.167.241.180/zmc.c18.myftpupload.com/wp-content/uploads/2021/10/Model-of-Rep-Chart-2021.pdf>. (accessed Jan. 10, 2022).

Other jurisdictions have been faced with similar questions regarding how to proceed when there is a conflict between the child’s expressed wishes and the guardian’s position. They have provided reasoned authority establishing that the threshold is low for identifying conflicts, that it should never warrant court inquiry into privileged attorney-client communications, and that the remedy for an identified conflict is bifurcation of the roles of independent counsel and GAL.

A. Georgia

The most recent examination of this issue of which amici are aware comes from the State Bar of Georgia’s Formal Advisory Opinion No. 16-2 in 2016. See State Bar of Georgia Handbook, *Formal Advisory Opinion No. 16-2*, <https://www.gabar.org/Handbook/index.cfm#handbook/rule600> (accessed Jan. 10, 2022). The Advisory Opinion Board was presented with a similar factual scenario to the one in the instant case: “May an attorney who has been appointed to serve as both legal counsel and as guardian ad litem for a child in a termination of parental rights case advocate termination over the child’s objection?” In responding, the Board looked at the question in relation to Georgia’s Rules of Professional Conduct 1.2 (Scope of Representation), 1.7 (Conflicts of Interest) 1.14 (Client with Diminished Capacity), and 3.7 (Lawyer as Witness). It concluded, “[w]hen it becomes clear that there is an irreconcilable conflict between the child’s wishes and the attorney’s

considered opinion of the child's best interest, the attorney must withdraw from his or her role as the child's guardian ad litem." *Id.*

B. Iowa

Iowa law permits the same attorney to serve as both the child's counsel and guardian ad litem, however the court may appoint a separate GAL if the same person cannot properly represent the legal interests of the child as counsel and the best interests of the child as GAL. Iowa Code 232.89. The Iowa Court of Appeals in 2007 considered whether a child was competent to waive the conflict of interest that existed when her attorney represented her both as a GAL and as child's attorney in the termination of parental rights. *In the Interest of A.T. and T.P.*, 744 N.W. 2nd 657 (Iowa App. 2007). The court considered law review articles cautioning against dual role representation, Ann M. Haralambie, *The Role of the Child's Lawyer In Protecting the Child Throughout the Litigation Process*, 71 N.D. L. Rev. 939, 941 (1995), and noted that under ABA standards, one lawyer cannot take on a hybrid role and advocate both for the child's wishes and his or her best interest. American Bar Association Section of Family Law, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 Fam. L.Q. 131, 134 (2003). The Iowa Court of Appeals also considered this Court's opinion in *Williams*. 744 N.W.2d at 665. Although the court found the child mature enough to state her own wishes, it also found she was not competent to waive a conflict of interest. 744 N.W.2nd at 665. Citing *In re Gault*, the court found "only by the appointment of an attorney can the child's wishes be effectively represented." *Id.* at 666.

C. Wisconsin

A 1989 Wisconsin Formal Ethics Opinion addressed conflicts of interest for attorneys simultaneously acting as attorney of record and as GAL. See *State Bar of Wisconsin CLE Books*, Wisconsin Ethics Opinions E-89-13, (July, 1998), <https://www.wisbar.org/formembers/ethics/Ethics%20Opinions/E-89-13.pdf>. (accessed Jan. 10, 2022). The Wisconsin Supreme Court found there is no inherent conflict of interest in an attorney simultaneously serving in both roles. Nevertheless, the Court found that circumstances may arise in which the dual roles of attorney and guardian ad litem may conflict. This includes when a “lawyer’s duty to follow his or her client’s wishes as far as ethically and legally possible” may conflict with the GAL’s duty to pursue the best interests of the minor. *Id.* The Wisconsin Supreme Court found that when a “reasonably prudent and competent lawyer detects, or should detect, a divergence between client wishes and best interests of any consequence, the lawyer should seek judicial severance of the dual roles.” *Id.*

D. Arizona⁴

In 1986, The State Bar of Arizona Committee on the Rules of Professional Conduct also issued a detailed opinion on this issue. It concluded that an attorney may accept employment as both the GAL and attorney for a minor child in dependency proceedings “provided no conflict of interest arises.” See State Bar of Arizona, *Ethics Opinion 86-13: Conflicts, Confidentiality; Attorney/Client*, <https://www.azbar.org/for-lawyers/ethics/ethics-opinions/>. (accessed Jan. 10, 2022).

⁴ Arizona’s statutory scheme regarding the legal representation of children was amended during the 2021 legislation session. Arizona law now requires attorneys for children to provide expressed-interest representation, eliminating the possibility that a lawyer could serve in a dual role. hearing. Ariz. Rev. Stat. Ann. § 8-221.

After reviewing several ethical rules, the Committee determined a dual-role attorney's "first obligation is to the minor client as the child's attorney, and that if there is no conflict between the wishes of the child and the best interests of the client, the lawyer may also act in the capacity of guardian ad litem." *Id.* But, in the case of a conflict between the wishes of the client and the best interests of the client, "the attorney must ask for the appointment of a new guardian ad litem." *Id.* at 3.

The Committee found it would be inappropriate for the attorney to continue as guardian ad litem and have a new attorney appointed as counsel because ethical rule 1.9 prohibits a lawyer (absent client consent) from representing a client and then representing another in the same matter with materially adverse interests. The committee recognized that adults may consent to such representation after a full advisement but did not "feel that the child client is capable of making such a knowing waiver." Furthermore, Arizona rules would not allow an attorney serving in a dual role to breach attorney-client confidentiality. Specifically, Rule 1.9(b) prohibits an attorney from using "information relating to the representation to the disadvantage of the former client." *Id.*

E. Pennsylvania

Pennsylvania courts have considered several cases involving the appointment of a GAL attorney to serve in a dual role. Commentary to Pennsylvania court rules state if there is a conflict of interest between the duty of a GAL to make recommendations to the court and the duty to advise the court of the child's wishes, the GAL may move the court for appointment as legal counsel and assignment of a

separate GAL. If there is not a conflict of interest, the GAL represents both the child's expressed wishes and the child's best interest. Pa. Code Title 237, Rule 1154.

In termination of parental rights proceedings, the trial court is required to appoint counsel for the child and the Pennsylvania Supreme Court ruled that failure to do so is structural error. *In re Adoption L.B.M.*, 161 A.3rd 172 (PA 2017). This ruling was relied upon by the Superior Court of Pennsylvania in *In re J'K.M.*, 191 A.3d 907 (PA Super 2018), which found that in dependency matters, when the child's best interests and expressed interests diverge, the GAL should request appointment as legal counsel and the assignment of a separate GAL. *Id.* at 914.

IV. Appointment of Independent Counsel When There is a Conflict Between the Child's and the GAL Attorney's Position is Consistent with National Best Practices and Empirical Research

a. National Best Practice

Decades of best practice publications endorse independent counsel for children in abuse, neglect and termination of parental rights proceedings.⁵ Today, leading children welfare law groups, including the American Bar Association (ABA), the

⁵ In 1995, a conference on legal representation of children resulted in the Recommendations of the Fordham Conference on Ethical Issues in the Legal Representation of Children. A year later, the ABA adopted its Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Proceedings. In 2003, the ABA House of Delegates approved the Standards of Practice for Lawyers Representing Children in Custody Cases. In 2006, the William S. Boyd School of Law at the University of Nevada, Las Vegas (UNLV) published, Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham. In 2011, the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings was adopted. In 2021, the National Association of Counsel for Children (NACC) rescinded and replaced its NACC Recommendations for Representation of Children in Abuse and Neglect Cases.

National Association of Counsel for Children (NACC), First Star, the Family Justice Initiative (FJI), and the Children’s Advocacy Institute (CAI), all agree that youth are best served by client-directed advocates who are obliged to advise, counsel and speak on their behalf without conflict. The ABA Standards of Practice, for example, explicitly recognize the child as a separate party with discrete and independent views. “To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position.” See American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, https://www.azafcc.org/uploads/1/2/6/4/126491982/aba-standards-of-practice-for-lawyers-who-represent-children-in-abuse-and-neglect-cases_7.pdf (accessed Jan. 10, 2022). Similarly, FJI underscores that “[f]irst and foremost, children’s attorneys...in child welfare proceedings are lawyers who have ethical duties to their clients and to the administration of justice in an adversarial system.” See Family Justice Initiative, *Attributes of High Quality Legal Representation for Children and Parents in Child Welfare Proceedings*. <https://15uclg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2020/03/fji-attributes-2019.pdf> (accessed Jan. 10, 2022). The ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings also specifies that “The court shall appoint a child’s lawyer for each child who is the subject of a petition in an abuse and neglect proceeding”, with the appointment of a best interests advocate being secondary. Commentary to the Act adds that “A best interest advocate does not replace the appointment of a lawyer for the child ... The child is entitled to conflict-free representation and the applicable rules of professional conduct must be applied in the

same manner as they would be applied for adults.” See American Bar Association, *ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings*,

https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf (accessed Jan. 10, 2022).

NACC’s 2021 *Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceeding* offer specific best practice guidance regarding how to proceed when a dual role conflict develops. “When such a conflict of interest emerges and bifurcation of the roles is necessary, the attorney with the conflict should remain on the matter as the youth’s expressed interest counsel rather than the best interest attorney, to ensure that confidential information obtained under the prior appointment remains protected by attorney-client privilege.” See National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Proceedings*,

https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/policy/2021/draft_nacc_recommendations_7.pdf (accessed Jan. 10, 2022).

The value to the court of hearing *directly* from youth in foster care is so critical that it is one of six fundamental criteria used to evaluate states in the National Report Card on Legal Representation for Abused & Neglected Children. See First Star Institute, *A National Report Card on Legal Representation for Abused and Neglected Children*, <http://www.caichildlaw.org/Misc/RTC4.pdf>. (accessed Jan.10, 2022).

“Important considerations support hearing from children, including:

- (1) the need for basic information – the child is in the best position to know what has taken place, whether services, education,

counseling, etc. have occurred and whether he or she has had contact with others (relatives, etc.) who might be possible placements or other types of support;

(2) the need to make decisions that will work best for particular child – hearing from the child is critical to an assessment that takes this into account;

(3) helping to ensure that the child is informed when other adults and the court weigh in with him or her – court proceedings are not natural events, ensuring that a child really understands what he or she is weighing in on will help with sound decision-making by the court.”

Id. In the most recent 2019 edition of the report card, Ohio earned a “B” rating, scoring 86 out of a possible 100 points. The authors note that the limitations and confusion created by *Williams* were a primary reason for the deduction. *Id.* (stating that “The caselaw interpreting § 2151.352, specifically with regard to the appointment of independent (client-directed) counsel for children, was not reflected in Ohio’s grade for criterion 3 in the 3rd edition of *A Child’s Right to Counsel*, but is now factored into the revised grade above.”).

Similarly, the federal Administration for Children and Families (ACF) Children’s Bureau (CB) has also issued three information memoranda highlighting the importance of youth voice as critical to a well-functioning child welfare system. See Administration for Children and Families Children’s Bureau, *IM-17-02 High Quality Legal Representation for All Parties in Child Welfare Proceedings* (2017) <https://www.acf.hhs.gov/cb/policy-guidance/im-17-02> (accessed Jan. 10, 2022).; *IM-19-03 Engaging, empowering, and utilizing family and youth voice in all aspects of child welfare to drive case planning and system improvement* (2019) <https://www.acf.hhs.gov/cb/policy-guidance/im-19-03> (accessed Jan. 10, 2022). ; *IM-21-06 Utilizing Title IV-E Funding to Support High-Quality Legal Representation and*

Promote Child and Family Well-Being (2021) <https://www.acf.hhs.gov/cb/policy-guidance/im-21-06> (accessed Jan. 10, 2022). In offering guidance to states, the federal government has unequivocally asserted that “utilizing and integrating family and youth voice in all aspects of child welfare decision-making is a strength-based approach to working with families and youth that can increase engagement and empower families and youth. It is also a straightforward way to demonstrate respect.” *IM-19-03, supra*, at 3. The client-directed model ensures that a child’s viewpoint will be heard and considered and, as emphasized in federal guidance, having one’s viewpoint considered, even if the desired outcome is not granted, is one of four key components to procedural justice. *IM-17-02, supra*, at 5.; see also Tyler, T. & Zimmerman, N. *Between Access to Counsel and Access to Justice: A Psychological Perspective*. 37 *Fordham Urb. L. J.* 473-507 (2010).

b. Research

A growing body of evidence links high-quality legal representation to improved outcomes for children. Most recently, a Washington State evaluation explored the experiences of children in foster care who were served by trained attorneys representing their stated and legal interests. See Washington State Center for Court Research, *Evaluation of the Washington State Dependent Child Legal Representation Program*, <https://counselforkids.org/wp-content/uploads/2021/11/DCLR-Report-2021.pdf>. (accessed Jan. 10, 2022). Specifically, the study focused on the experiences of children who were served by trained attorneys representing their stated and legal interests. Researchers found that children assigned independent counsel experienced a 45% higher reunification rate, a 30% reduction in the rate of

placement moves and a 65% reduction in the rate of non-normative school moves. *Id.* These results did not expand state costs and, in fact, may have yielded fiscal savings. *Id.*

These results are consistent with 2009 research conducted in Palm Beach County, Florida. In that study, 832 children represented by attorneys experienced exit to permanent homes about 1.5 times more frequently than children who were not afforded counsel. In addition, children moved from case plan approval to permanency at twice the rate of comparison children. See Admin. for Children and Families, *Utilizing Title IV-E Funding to Support High Quality Legal Representation for Children and Youth who are in Foster Care, Candidates for Foster Care and their Parents and to Promote Child and Family Well-being* (Jan. 14, 2021).

Apart from case outcomes, research also affirms the importance of children's legal representation to enhance procedural justice. As the federal government has recognized:

The child welfare system is intended to keep families safe, together and strong, and where that is not possible, to find the next best option for children and youth. To realize this potential, it is critical that children and families experience the system as transparent and fair, one in which their voices are heard, rights are protected and options are known, co-created and understood.

IM-21-06, supra, at 14.

Individuals with lived experience in the foster care system overwhelmingly indicate a desire to be heard, informed about what is happening in their case, and meaningfully engaged in the legal proceedings that shape their lives. See National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Proceedings*,

https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/policy/2021/draft_nac_c_recommendations_7.pdf (accessed Jan. 10, 2022). Meaningful participation

includes recognition, supportive communication and involvement. See Anna M. Cody, *Children's Participation Rights in Child Welfare Systems: Identifying Opportunities for Implementation*,

<https://scholarscompass.vcu.edu/cgi/viewcontent.cgi?article=7617&context=etd>

(accessed Jan. 10, 2022). Studies have demonstrated a “positive correlation between youths' aggregate perception of legal representation and their broader perception of the foster care experience. Youth who had more favorable legal representation experiences also had more favorable foster care experience.” See Children and Youth Services Review, *Exploring the legal representation of individuals in foster care: What say youth and alumni?*,

<https://www.sciencedirect.com/science/article/pii/S0190740917302505?via%3Dihub>

(accessed Jan. 10, 2022). Research indicates that, like adults, “children and adolescents appear to desire participation in legal proceedings that affect them both because they want to have a voice in decisions and because they want to have accurate information about the proceedings and their outcomes.” Weisz, Wingrove, and Faith-Slaker, *Children and Procedural Justice*, 44 Ct. Rev. 36 (2007).

c. State Trends

Recent state legislative enactments signal a trend in the direction of expanding access to counsel for children. For example, in 2021, Arizona passed legislation requiring a client-directed lawyer for every child in foster care, Washington did the

same for children eight and older, and North Dakota approved legal representation for children of "sufficient age and competency." See S.B. 1391, 55thLeg., Reg. Sess. (Ariz. 2021); H.B. 1219, 67thLeg., Reg. Sess. (Wash. 2021); H.B. 1035, 67thLeg. Assemb., Reg. Sess. (N.D. 2021).

V. Legal Understanding of Adolescent Development Requires Appointment of Independent Counsel.

Requiring a child to voice their position "consistently" and "repeatedly" before gaining the assistance of counsel fails to appreciate all that the legal system has learned about adolescent brain development. Age and maturity are factors routinely recognized by courts as reasons to provide children *more* due process, not less. U.S. Supreme Court jurisprudence over the last fifteen years has repeatedly relied upon development science and neuroscience in its constitutional analysis of children as litigants. In *J.D.B. v. North Carolina*, the Supreme Court held a child's age must be considered in a Miranda custody analysis. 131 S.Ct. 2394 (2011). The Court held "a reasonable child subject to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." 131 S.Ct. at 272. This is because children "are more vulnerable or susceptible to ...outside pressures than adults." *Id.* The Supreme Court relied upon the same science and reasoning in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

Children's vulnerability and immaturity place them at a particular disadvantage in their child welfare case. As discussed above, they are inherently placed in a position adverse to their parent whose conduct led to the involvement of a child

protective agency. Due to the lack of experience with and understanding of the legal system, they are reliant on the adults in their case to both advocate for them and assist them in making sense of their options. But children are also suggestible, meaning that the tendency to rely on the suggestions and opinions of others, in place of reaching one's own conclusions. Even older adolescents are privy to an authority figure bias, which has the potential to prevent them from contradicting adults under certain circumstances. See Judith G. Smetana "Adolescents' and Parents' Conceptions of Parental Authority." *Child Development*, 59:1988, 321–35, <https://doi.org/10.2307/1130313>. As discussed above, a properly trained, child-centered attorney can work with a child to understand their case, develop a case theory, litigation strategy, and position about their future. This role is distinct from the GAL role, where there is no requirement to assist the child in understanding the intricacies of the legal positions available in their case.

The case-by-case approach denies similarly situated children equal protection under Ohio law. One court may deem a child as "insufficiently mature" to express an opinion that warrants the GAL attorney to identify a conflict and request appointment of independent counsel, while another court may credit the wishes of a child of similar age and development as "repeatedly and consistently" expressing interest in a different permanency outcome. *Compare, In re D.F.*, 7th Dist. Columbiana 2014-Ohio-4155 (it is up to the GAL to determine whether the child was mature enough to understand the proceedings; GAL found 9-year too immature) with *Williams*, 101 Ohio St. 3d 398, 405, 2004-Ohio-1500, 805 N.E.2d 1110 (6 year-old should have been

appointed counsel). If *Williams* is read consistently with Rule 3, courts should err on the side of appointing counsel for the child.

VI. Appointment of Independent Counsel When There is a Conflict Between the Child's and the GAL Attorney's Position is Necessary to Protect the Child's Constitutional Rights.⁶

As the Supreme Court of the United States has noted, "[a] child, merely on account of his minority, is not beyond the protection of the Constitution." *Bellotti v. Baird*, 443 U.S. 622, 633, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979). Foster care court proceedings implicate numerous federal constitutional rights for children. These include the constitutional liberty interest in freedom from state custody and safety while in state custody; association and family integrity; and procedural due process when the state seeks to infringe on those rights.

When a child is removed from their home of origin, significant liberty interests are immediately at stake. "These include interests in their own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with biological parents. Further, children in state custody may be ordered to reside in a wide array of placements, including those where their physical liberty may be restricted." See Adams, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 Fam. Ct. Rev. 605 (2009). Many youth in Ohio are placed in restrictive, unstable, and/or out-of-state congregate care settings. A recent report by the Ohio Governor's Children's Initiative found that more than 16,000 Ohio children are in the custody of a child services agency. See Ohio

⁶ Amici also concur and adopt the constitutional right to counsel arguments put forth in the brief of Generation Justice.

Governor's Children's Initiative Office of Children Services Transformation, *Initial Findings Report*, https://content.govdelivery.com/attachments/OHOOD/2020/02/05/file_attachments/1373438/Transformation%20Report%20020520.pdf (accessed Jan. 10, 2022). As of July, 2021, 140 Ohio children per day were receiving care out of state, a 200 percent increase since 2016. See Smith, *Ohio children with special needs going out of state for treatment*, Record-Courier (July 18, 2021). More than 40 percent of youth over age 15 in the child welfare system are in congregate care settings, which are disfavored over family settings and subject to more procedural requirements. *Id.*; see also Casey Family Programs, *Group and Institutional Placements*, <https://www.casey.org/congregate-care/> (accessed Jan. 10, 2022); The Supreme Court of Ohio, *Qualified Residential Treatment Program (QRTP) Level of Care Assessments Toolkit for Judicial Use*, <https://www.supremecourt.ohio.gov/JCS/CFC/resources/QRTPToolkit.pdf> (accessed Jan. 10, 2022). The Supreme Court explained in *Lassiter v. Dep't of Social Services*, which concerned a parent's right to counsel in termination of parental rights proceedings, that due process concerns giving rise to the right to counsel are at their highest where participants in proceedings face risks of physical liberty deprivations. *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L. Ed.2d 640 (1981), at 26-27. These are precisely the types of risks Ohio youth experience from the onset of their foster care experience.

Other courts have similarly found that the physical, custodial and quasi-carceral nature of foster care triggers a constitutional right to counsel. See *Kenny A.*

v. Perdue, 356 F. Supp. 2d 1353 (N.D.Ga. 2005) at 1360-1361 (concluding that where “foster children in state custody are subject to placement in . . . institutional facilities where their physical liberty is greatly restricted[,]” the “private liberty interests at stake support a due process right to counsel in deprivation and TPR proceedings”); see also, *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976) (finding that children in Alabama dependency custody proceedings have a right to independent counsel since, much like the delinquency proceedings at issue in *In re Gault*, these matters “may result in commitment to an institution in which the juvenile's freedom is curtailed).

“If family integrity means nothing else, it should mean that all family members have constitutional rights to their relationships with each other.” See Shanta Trivedi, *My family Belongs to Me: A Child’s Constitutional Right to Family Integrity*, 56 Harv. C.R.-C.L. L. Rev. X (forthcoming 2021). The Supreme Court “has made clear that, until and unless there is a finding of unfitness, parents and children both share an interest in preserving their familial relationship. Consequently, prior to any unfitness finding, all family members hold the right to family integrity and can assert it.” *Id.* (Citing *Santosky* and *Troxel*).

Among lower courts, the “U.S. Court of Appeals for the District of Columbia Circuit has written that children and parents enjoy “reciprocal rights . . . to one another’s companionship.” Duquette, Haralambie, & Sankaran, *Child Welfare Law and Practice, Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases (The Red Book)*, Chapter 16, (3d Ed. 2016) citing *Franz v.*

United States, 707 F.2d 582, 595 (D.C. Cir. 1983). “Other federal and state courts have held similarly.” *Id.* citing *Wallis ex rel. Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir.1998); *Rivera v. Marcus*, 696 F.2d 1016, 1026 (2d Cir.1982); *In re Melody L.*, 290 Conn. 131, 962 A.2d. (Conn. 2009). For example, the Washington Supreme Court held in 2012 that “children have fundamental liberty interests at stake in termination of parental rights proceedings,” including the interest “in maintaining the integrity of the family relationships, including the child’s parents, siblings, and other familiar relationships.” *Id.* citing *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (Wash. 2012) (en banc).

The Supreme Court of Oklahoma relied precisely on this constitutional principle in analyzing a child’s right to independent counsel in termination of parental rights proceedings. The court recognized that “[t]he relationship of parents to their children is a fundamental, constitutionally-protected right” and then went on to conclude that:

“[i]f a parent has a right to be represented in a case involving termination of parental rights, the child, whose own rights are in jeopardy of being terminated, has equal interests at stake and must also be represented.” The ruling enumerated numerous ways that appointment of independent counsel for the child might have impacted the final determination (including presenting argument and evidence and clarifying confusing testimony in the record) and reversed and remanded the case. The court ultimately expanded the child’s right to counsel to both privately and publicly initiated termination of parental rights cases.

In re S.A.W., 1993 OK 95, 856 P.2d 286, (Okla. 1993).

As stated by the Supreme Court, “due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.”

Mathews v. Eldridge, 424 U.S. 319, 334 (1976). Rather, “due process is flexible,”

which is “necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.” *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12-13 (1979) (cleaned up). Evaluating what process is due involves weighing the *Mathews* factors, which are:

(1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews, 424 U.S. at 335.

Even before the *Kenny A.* decision, *supra*, other courts have found that children are constitutionally entitled to counsel in dependency actions.

<https://casetext.com/case/matter-of-jamie-tt> (holding that a child who is a subject of the child abuse petition has a legally cognizable right to the effective assistance of counsel throughout the proceeding). Ohio, through R.C. 2151.352, provides “a statutory right to appointed counsel that goes beyond constitutional requirements.” *State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44, 46, 693 N.E.2d 794.

Without independent, conflict-free counsel, children are incapable of exercising their constitutional rights to liberty, association and family integrity through the judicial process. They are inhibited from calling witnesses, presenting and objecting to evidence, conducting cross-examinations, presenting experts, appealing key court

orders, and otherwise advocating for their constitutional protections consistent with their stated positions.

VII. The Improper Denial of Counsel is Structural Error Requiring Reversal.

Should this Court find that the trial court erroneously denied counsel to the child, the Court should hold that the denial of a right to counsel is structural error requiring reversal without proof of harm and then remand this matter back to the trial court. Although the Sixth District Court of Appeals has said that the “ultimate issue ... is whether the violation of the right to counsel resulted in prejudice to the children or the parents,” *In re Joshua B.*, an examination of the cited authority reveals that the applicability of the prejudicial error test has never been analyzed, even in the Sixth District. 2003 WL 21384883, ¶ 12. (*Joshua B* relied upon *In re Stacey S.*, 1999-Ohio-989, 136 Ohio App.3d 503, 515, 737 N.E.2d 92, 101, which in turn relied on *In re Smith*, 77 Ohio App.3d 1, 13, 601 N.E.2d 45, 52–53 (1991)). However, in *Smith*, the court was concerned with whether the parents had standing to assert the denial of counsel on behalf of the children, and to this end, it held that “An appealing party may complain of an error committed against a nonappealing party when the error is prejudicial to the rights of the appellant.” 77 Ohio App.3d at 13. Thus, the matter of prejudice was specifically related to the question of standing of the parents. Moreover, none of these decisions, including *Joshua B.*, specifically examined whether the prejudicial error test is appropriately applied in the context of a denial of counsel, even though there is established case law from the U.S. Supreme Court that such a test is not to be used for such a denial in criminal cases. This Court has said that structural errors are “constitutional defects that defy analysis by harmless error

standards because they affect [] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself ... Such errors permeate [t]he entire conduct of the trial from beginning to end so that the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.” *State v. Colon*, 118 Ohio St. 3d 26, 30, 2008-Ohio-1624, 885 N.E.2d 917 ¶¶ 20 (Citations omitted.). This Court also said that as a threshold matter, it must determine “whether such error involves the deprivation of a constitutional right.” *Id.* Given that this Court has said that “the subject child is a party whose due process rights are entitled to protection,” *In re Williams*, it is clear that the violation of the right to counsel deprives the child of the constitutional right to due process in the proceeding. 101 Ohio St. 3d 398, 405, 2004-Ohio-1500, 805 N.E.2d 1110, ¶¶28.

The U.S. Supreme Court has held that the complete denial of counsel in the criminal context is not subject to harmless error review. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006). Justice Scalia’s majority opinion in *Gonzalez-Lopez* comments that where a litigant is denied their counsel of choice, “[h]armless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.” *Id.* at 150. *See also United States v. Cronin*, 466 U.S. 648, 658-59 (1984) (*noting* that there are “circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel.”).

This reasoning is no less true in the civil context, where the framework of the trial is equally affected and where the search for error would be just as speculative. In fact, in *Lassiter v. Dep’t. of Soc. Servs.*, Justice Blackmun’s dissent explained why

appellate courts in a civil termination of parental rights case are not in a position to effectively review a trial court's denial of counsel in order to determine if an error was made:

The Court assumes that a review of the record will establish whether a defendant, proceeding without counsel, has suffered an unfair disadvantage. But in the ordinary case, this simply is not so. The pleadings and transcript of an uncounseled termination proceeding at most will show the obvious blunders and omissions of the defendant parent. Determining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case. Even if the reviewing court can embark on such an enterprise in each case, it might be hard pressed to discern the significance of failures to challenge the State's evidence or to develop a satisfactory defense. Such failures, however, often cut to the essence of the fairness of the trial, and a court's inability to compensate for them effectively eviscerates the presumption of innocence. Because a parent acting pro se is even more likely to be una-ware of controlling legal standards and practices, and unskilled in garnering relevant facts, it is difficult, if not impossible, to conclude that the typical case has been adequately presented.

452 U.S. 18 (1981) at 50-51 (Blackmun, J., dissenting). Justice Blackmun added that "Assuming that this ad hoc review were adequate to ensure fairness, it is likely to be both cumber-some and costly." *Id.*

In recognition of the fact that it is equally impossible to discern error when counsel is completely denied in a civil case (due to the lopsided record), and in light of the fundamental interests at stake, the Supreme Court of Pennsylvania adopted the structural error test where children are denied their statutory right to counsel in termination of parental rights cases. *In re Adoption of L.B.M.*, 639 Pa. 428, 446, 161 A.3d 172 (2017). The *L.B.M.* court explained that

In criminal and TPR cases alike, critical rights are at stake. With respect to the former, the framers of our Constitutions, and the courts interpreting those charters, have determined that counsel was required to ensure that liberty interests and process rights are protected. With respect to the latter, our General Assembly has decided that counsel for the child is required because of

the primacy of children's welfare, the fundamental nature of the parent-child relationship and the permanency of termination. The legislature has codified a process that affords a full and fair opportunity for all of the affected parties to be heard and to participate in a TPR proceeding. The denial of mandated counsel compromises the framework of the proceedings and constitutes a structural error. Further, as suggested by the Juvenile Law Center, harmless error analysis would require speculation after the fact to evaluate the effect of the lack of appointed counsel, effectively requiring proof of a negative. For all of these reasons, we hold that the failure to appoint counsel for a child involved in a contested, involuntary termination of parental rights proceeding is a structural error and is not subject to harmless error analysis.

Moreover, numerous courts have held that the complete denial of counsel for

parents in child welfare cases is harmful per se and/or is a structural error requiring

reversal.⁷ Georgia's change of heart on its handling of error where counsel is denied

⁷ *In Interest of R.D.*, 277 P.3d 889, 896 (Colo. App. 2012) ("A majority of other jurisdictions addressing the issue have concluded that the violation of a respondent parent's statutory or constitutional right to counsel in a termination of parental rights hearing is either reversible error per se or structural error ... given the importance of the statutory right to counsel in termination of parental rights hearings, the deprivation of that statutory right constitutes reversible error per se"); *State v. Doe (in the Interest of Doe)*, 850 P.2d 211, 212 (Idaho Ct. App. 1993) ("Because there is no evidence in the record indicating that the court advised the mother at the start of the termination proceedings of her right to counsel, we reverse and remand with directions to conform to due process requirements outlined in I.C. § 16-2009"); *G.P. v. Ind. Dep't of Child Servs.*, 4 N.E.3d 1158, 1167 (Ind. 2014) (in dependency case, court states, "In a number of contexts, Indiana courts have applied a bright-line rule as to the right to counsel—reversing convictions or other judgments when that right is denied ... We think this bright-line rule is the right approach to take here, as well"); *In re K.L.T.*, 237 S.W.3d 605, 607 (Mo. App. 2007) (in stepparent adoption case, court comments, "Failure to appoint counsel to represent the parents or to obtain an affirmative waiver of that right has been held to be a reversible error"); *In re A.S.A.*, 852 P.2d 127, 129–30 (Mont.1993) (where counsel not appointed for parent until the end of termination hearing, parent's constitutional right to due process was violated and district court's termination judgment was reversible error); *Williams v. Bentley*, 26 A.D.3d 441, 442; 809 N.Y.S.2d 205 (N.Y. App. Div. 2006) ("The deprivation of a party's fundamental right to counsel in a custody or visitation proceeding is a denial of due process and requires reversal, without regard to the merits of the unrepresented party's position"); *In re Evan F.*, 29 A.D.3d 905, 906; 815 N.Y.S.2d 697 (N.Y. App. Div. 2006) (same); *Richard v. Michna*, 431 S.E.2d 485 (N.C. App. 1993) (where trial court failed to appoint guardian ad litem for mentally disabled mother in termination proceeding as required by statute, court reversed even though it believed mother was not prejudiced); *In re S.S.*, 90 P.3d 571, 575-76 (Okla. Civ. App. 2004) (in termination

in the child welfare context is illustrative of the problems with the harmless error standard. In *In re J.M.B.*, the court reversed its own precedent and abandoned the harmless error test, concluding that “placing this additional burden upon an indigent parent who has already established that his or her right to counsel was erroneously denied ... does not comport with the Supreme Court's directive that we guarantee ‘the most stringent procedural safeguards’ in termination cases.” It concluded:

[W]hen the state is terminating a parent’s ‘fundamental and fiercely guarded right’ to his or her child, although technically done in a civil proceeding, the total and erroneous denial of appointed counsel during the termination hearing is presumptively harmful because it calls into question the very structural integrity of the fact-finding process.

676 S.E.2d 9, 12 (Ga.App. 2009). The North Dakota Supreme Court echoed similar concern, in light of the extremely important interests at stake:

We have previously expressed that [w]e are skeptical that the denial of counsel to an indigent parent in an adoption proceeding which results in the termination of parental rights can ever be ‘harmless,’ under any standard. The law of adoption and the procedure for terminating parental rights in a contested case are complex and demanding ... A parent in a termination proceeding must

case, parent deprived of counsel for first half of proceedings; court holds that “the actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice ... When a defendant is deprived of counsel, it is inappropriate to apply either the prejudice requirement or the harmless error analysis ...”; *In Interest of J.M.O.*, 459 S.W.3d 90, 94 (Tex. App. 2014) (“the *Cronic* presumption should apply when appointed counsel wholly fails to appear at trial in a parental-rights termination proceeding”); *In re Torrance P., Jr.*, 724 N.W.2d 623, 635 (Wis. 2006) (“[S]tructural errors ‘seriously affect the fairness, integrity or public reputation of judicial proceedings’ and are so fundamental that they are considered per se prejudicial. Depriving a parent of the statutory right to counsel in a termination of parental rights proceeding deprives the parent of a basic protection without which, according to our legislature, a termination of a parental rights proceeding cannot reliably serve its function. The fairness and integrity of the judicial proceeding that the legislature has established for termination proceedings has been placed in doubt when the statutory right to counsel is denied a parent. Accordingly, the denial of the statutory right to counsel in the present case constitutes structural error.”)

execute basic advocacy functions to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross examine witnesses, make objections, and preserve a record for appeal ... Without competent counsel, parents in [termination of parental rights] proceedings will be unlikely to mount an effective defense ...

In re Adoption of J.D.F., 761 N.W.2d 582, 588 (N.D. 2009) (quoting *Adoption of K.A.S.*, 499 N.W.2d 558, 567 (N.D. 1993)).

For these reasons, where counsel is denied, the matter must be reversed and remanded back to the trial court without the appellant being required to demonstrate that the failure to appoint counsel was harmful.

CONCLUSION

Given the seriousness of the child's interests at stake in abuse, neglect, and termination of parental rights cases, we urge the Court to:

1. Reaffirm that when a dually-appointed attorney identifies a conflict of interest between their best interest position and the child's wishes, they must bring it to the court's attention;
2. Reaffirm once a trial court is informed of a conflict of interest, there is a presumption that the court will appoint independent counsel for the child without further investigation and will not violate attorney-client privilege; and
3. Reaffirm "certain circumstances" means instances where a child's wishes are in conflict with their dually-appointed GAL's position;
4. Strike down misinterpretations of the law used in lower courts, such as the language "consistently and repeatedly express a strong desire" used in the case below
5. Find that failure to appoint independent counsel is structural error requiring reversal.

Respectfully submitted,
/s Kimberly Payne Jordan
Kimberly Payne Jordan (0078655)
Supervising Attorney
Moritz College of Law Clinical
Programs
The Ohio State University
55 West 12th Ave.
Columbus, Ohio 43210-1391
(614) 688-3657
(614) 292-5511 (fax)
Jordan.723@osu.edu

*Attorney for Amicus Curiae
Justice for Children Project*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of Amici Curiae was served via regular U.S. Mail on January 11, 2022, upon the following:

COUNSEL FOR APPELLANT MOTHER L.A.
James Anzelmo
Anzelmo Law
446 Howland Drive
Gahanna Ohio 43230

COUNSEL FOR APPELLEE
Justin Lovett & Rachel Daehler
Jackson County Prosecutor
295 Broadway Street, Suite 100
Jackson Ohio 45640

/s Kimberly Payne Jordan
Kimberly Payne Jordan (0078655)