

Case No. 79394

*In the Supreme Court of Nevada*

In the Matter of S.B., a Minor Child.

S.B.,

Appellant,

*vs.*

WASHOE COUNTY HUMAN SERVICES  
AGENCY,

Respondent.

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**APPEAL**

from the Second Judicial District Court, Washoe County  
The Honorable Cynthia Lu, District Judge  
District Court Case No. JV0800475

***AMICUS CURIAE BRIEF***  
**OF NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN**

IN SUPPORT OF APPELLANT S.B.

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**NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The National Association of Counsel for Children (“NACC”) is a nonprofit organization registered in Colorado. No publicly traded company owns more than 10% of its stock.

NACC is represented by Daniel F. Polsenberg, Abraham G. Smith, and Chelsea C. Jensen at Lewis Roca Rothgerber Christie, LLP.

Dated this 20th day of March, 2020.

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## STATEMENT OF INTEREST

The National Association of Counsel for Children (“NACC”) is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America’s children.<sup>1</sup> Founded in 1977, NACC works to strengthen legal advocacy for children and families by promoting well-resourced, high-quality legal advocacy, implementing best practices, advancing systemic improvement in child-serving agencies, institutions and court systems and promoting a safe and nurturing childhood through legal and policy advocacy.<sup>2</sup>

This appeal concerns a child’s right to independent legal counsel throughout dependency proceedings—an issue central to NACC’s mission and expertise.

NACC files this *amicus curiae* brief with the consent of all parties as permitted by NRAP 29(a) and as memorialized in a concurrently filed notice of the parties’ consent.

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<sup>1</sup> *About the NACC*, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN (last accessed Feb. 18, 2020), <https://www.naccchildlaw.org/page/About>.

<sup>2</sup> *Mission and Vision Statement*, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN (last accessed Feb. 18, 2020), <https://www.naccchildlaw.org/page/Mission>.

## STATEMENT OF FACTS<sup>3</sup>

S.B. is a special needs child with autism. (AA 131.) He is nonverbal and cannot otherwise communicate. (See AA 2, 141.) When S.B. was seven, the State of Nevada removed him from his home and placed him in the state’s custody. (AA 131.) S.B. was never adopted; he remained in state custody throughout his minority, for over a decade. (See AA 185–88.)

Washoe Legal Services was appointed to be S.B.’s attorney in his dependency matter. (AA 136.) Counsel reminded the district court of S.B.’s nonverbal status on December 12, 2017. (AA 2.) Based on S.B.’s inability to communicate with counsel, counsel noted that she was advocating on S.B.’s behalf using the substituted judgment model of representation—through which counsel seeks to determine what the child would decide if the child were able to make and express that decision. (See AA 5, 7.) Thus, the state and the district court were on notice that S.B.’s counsel was employing the substituted judgment model of representation. No one objected.

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<sup>3</sup> While *amicus curiae* adopts the facts set forth in the appellant’s opening brief, *amicus curiae* emphasizes the following selected facts.

Later, in August 2018, counsel indicated that she would pursue an election for the court’s continued jurisdiction over S.B. after his eighteenth birthday under NRS 432B.594. (AA 36–37.) Counsel also suggested that a guardian *ad litem* might be required to enter S.B. into a contract for purposes of the “AB 350” program, which provides financial assistance and continued guidance to Nevada youth to ease the transition out of the foster care system.<sup>4</sup> (AA 36–37.) Counsel informed the district court that the state opposed the court exercising continued jurisdiction over S.B. (AA 39.)

After acknowledging that a guardian *ad litem* was required for every child in foster care under NRS 432B.500, the district court admitted that Washoe County could not currently comply with the mandate. (AA 39.) The county had no person available to appoint as S.B.’s guardian *ad litem*. (*Id.*) But the district court entered an order that a guardian *ad litem* be appointed anyway. (AA 137.)

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<sup>4</sup> See Janice Wolf, *AB 350 Helps Foster Youth Transition into Adulthood*, NEVADA LAWYER, June 2012, at 12–15, [https://www.nvbar.org/wp-content/uploads/NevLawyer\\_June\\_2012\\_AB\\_350-1.pdf](https://www.nvbar.org/wp-content/uploads/NevLawyer_June_2012_AB_350-1.pdf) (last accessed March 19, 2020); see also *Preparing Your Client to Age Out of Foster Care*, LEGAL AID CENTER OF SOUTHERN NEVADA, <http://www.lacsprobono.org/wp-content/uploads/2014/04/Preparing-Your-Client-to-Age-Out-of-Foster-Care.pdf> (last accessed March 16, 2020).

A guardian *ad litem* was never appointed. (See AA 56–60.) Instead, the district court rescinded its order just three months later, opining that counsel was sufficiently representing S.B.’s interests. (*Id.*) Counsel then suggested that S.B.’s adult guardian—who was set to be in place before S.B.’s eighteenth birthday—could enter S.B. into the AB 350 program. (AA 56–57.)

Counsel filed S.B.’s election for continued jurisdiction and a supporting motion on January 14, 2019—prior to S.B.’s turning eighteen. (AB 140.) The state then opposed the motion. (AA 148.)

The district court first considered whether to continue its jurisdiction over S.B. in March 2019. It determined that the state had no authority to object to the jurisdiction under NRS 432B.594. (AA 165–66.) But it also determined that the statute required the child—rather than his attorney—to make the election. (AA 166–67.) Thus, the district court set an evidentiary hearing to determine if S.B. had personally elected for continued jurisdiction. (AA 166–67.)

In S.B.’s subsequent trial statement, counsel explained again that she employed the substituted judgment model of representation when advocating on S.B.’s behalf. (AA 170–71.) Indeed, counsel consulted

with S.B.’s caregivers and then-prospective adult guardian before filing S.B.’s election for continued jurisdiction.<sup>5</sup> (AA 171.) The state filed an opposition, arguing in part that Nevada had not adopted the substituted judgment model of representation. (AA 178–81.)

The district court ultimately denied S.B.’s petition for continued jurisdiction on August 7, 2019—nearly six months after S.B. aged out of the welfare system. (AA 185.) The district court found that a guardian *ad litem* would have been required to elect continue jurisdiction on behalf of S.B. based on S.B.’s inability to voice his actual desires. (AA 186–87.) Even though S.B. had appointed counsel and the district court lacked discretion to refuse continued jurisdiction under NRS 432B.594, S.B. was denied access to and benefits from the AB 350 program. (AA 185–88.) S.B., who never had a physical voice, now lost his legal voice, too.

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<sup>5</sup> Communicating with experts or other individuals with knowledge of the child is one of the recommended ways to view a case through the child’s perspective, as the substituted judgment model requires. *See* AMERICAN BAR ASSOCIATION, MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS (“Model Act”) § 7(d), commentary.

## ARGUMENT

A child has a due process right to be heard through independent legal counsel in a dependency proceeding in which the child is the subject.<sup>6</sup> Where the child has no physical voice, the substituted judgment model of representation must be employed to preserve the child's legal voice. The district court violated S.B.'s constitutional right to counsel by prohibiting S.B.'s counsel from using the substituted judgment model of representation when electing for continued court jurisdiction over S.B.

Further, in Nevada, a child has a statutory right to counsel throughout dependency proceedings under NRS 432B.420. The legislative history of NRS 432B.420 establishes that a child's independent legal counsel must be permitted to vocalize a child's interests through the

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<sup>6</sup> S.B. turned eighteen during the dependency proceeding but only after filing an election for continued jurisdiction. (*See* AA 140.) Under NRS 432B.594(1), “[a] court which orders a child to be placed other than with a parent and which has jurisdiction over the child when the child reaches the age of 18 years ***shall retain jurisdiction over the child if the child so requests.***” (emphasis added). *See also* NRS 432B.591(2) (defining “child” as including a person “[o]ver the age of 18 years and who remains under the jurisdiction of the court pursuant to NRS 432B.594.”).

substituted judgment model of representation where the child cannot otherwise communicate. The district court's rejection of S.B.'s election for continued jurisdiction for being made under the substituted judgment model of representation must be reversed accordingly.

## I.

### **DUE PROCESS REQUIRES THAT A CHILD'S LEGAL VOICE BE HEARD IN DEPENDENCY HEARINGS**

The Due Process Clause of “the Fourteenth Amendment ... is [not] for adults alone.” *Application of Gault*, 387 U.S. 1, 13 (1967) (establishing a child's due process right to counsel in delinquency proceedings). And the right to be heard is “one of the most fundamental requisites of due process[.]” *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962). Thus, a child has a due process right to be heard in a dependency proceeding to which the child is a party. *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005) (holding that a child in a dependency or a termination-of-parental rights proceeding has a due process right to counsel). NRS 432B.420(2) explicitly identifies a child as a party to a dependency hearing.

But given a child’s minority status and abilities, courts cannot require a child to communicate his legal interest without the assistance of legal counsel. *See J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (“[C]hildren generally are less mature and responsible than adults[.]”) (internal citation omitted). Due process instead requires that independent legal counsel be appointed in dependency proceedings to assert the child’s legal voice. The American Bar Association (“ABA”) and other leading family law scholars and experts advocate for the same.

**A. A Child Has a Due Process Right to Independent Legal Counsel in Dependency Hearings**

A child’s right to independent legal counsel is found in the Due Process Clauses of both the United States and the Nevada constitutions.

**1. *A Child’s Right to Counsel Under the Fourteenth Amendment is Established by the Mathews v. Eldridge Balancing Test***

To determine what due process demands under the federal constitution, *Mathews v. Eldridge* requires the balancing of three factors: (1) the individual’s private interests at stake; (2) the government’s interests; and (3) the risk of an erroneous decision under the procedures

afforded to the individual. 424 U.S. 319, 335 (1976). All three factors weigh in favor of requiring independent legal counsel on behalf of a child throughout dependency proceedings.

a. A DEPENDENCY PROCEEDING IMPACTS THE CHILD'S LIBERTY INTERESTS OF PHYSICAL CUSTODY, HEALTH, SAFETY, AND WELL-BEING

To begin, the child's interests at stake in a dependency proceeding are commanding. The proceeding determines the person to whom the court entrusts the child's physical custody. See *In re Matter of Jamie TT.*, 599 N.Y.S.2d 892 (N.Y. 1993). It dictates the place in which a child is physically housed. See *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) ("A child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution" to implicate 42 U.S.C. § 1983). It controls the stability and permanence a child experiences in a home as an adolescence, deciding when and to where a child in the foster care system moves. *Kenny A.*, 356 F. Supp. 2d at 1360; see also *In re Dependency of MSR*, 271 P.3d 234, 242 (Wash. 2012); Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663, 673–82 (2006)

("[A]ll children in state custody are at the whim of state officials to decide where they will live at any given moment."). It potentially terminates a child's familial relationships with both parents and extended family members. *Lassiter v. Dep't of Soc. Serv. of Durham Cnty., N.C.*, 452 U.S. 18, 27 (1981); see also *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Kenny A.*, 356 F. Supp. 2d at 1360. And, once the state takes custody of a child, the proceeding promises the child "reasonable safety and minimally adequate care and treatment[.]" *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 846 (9th Cir. 2010); see also *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989) (explaining the state owes a duty to protect the safety and well-being of individuals over whom the state has custody).

Indeed, the outcome of a dependency proceeding influences the child's entire future. See Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, *supra*, 673–82. It answers the most fundamental questions in a child's life: "Where is home? Who takes care of me? Who are my parents, my siblings, my extended family and my classmates?" Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005*,

6 NEV. L.J. 966, 967 (2006). Thus, “[a]side from the criminal context, few other interests in court rival the interest of a child in the outcome of his own dependency proceeding.” Jacob Ethan Smiles, *A Child’s Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, 37 FAM. L.Q. 485, 496 (2003).

b. THE GOVERNMENT’S INTERESTS ARE NOT IN TENSION WITH THE CHILD’S LIBERTY INTERESTS

The government’s *parens patriae* and administrative interests in a dependency proceeding align with the child’s commanding liberty interests. The government’s *parens patriae* role supplies its primary interest: ensuring a child’s safety and wellbeing. See *Kenny A.*, 356 F. Supp. 2d at 1361; see also *Gault*, 387 U.S. at 16. But as the federal court in *Kenny A.* explained, this primary interest does not conflict with the child’s right to independent legal counsel. 356 F. Supp. 2d at 1361; see also NRS 432B.420(2) (Nevada legislature recognizing the importance of a child’s independent legal counsel by mandating such an appointment in dependency proceedings). Instead, a child’s independent legal counsel advocates for the child’s protection, informing the court on the child’s concerns, desires, and experience. The role of independent legal

counsel thus complements the primary interest of the government. Indeed, by communicating the child’s perspective and desires to the court, counsel provides the court necessary information to determine the child’s best interests. *See Lassiter*, 452 U.S. at 27 (acknowledging that independent legal counsel for parties with potentially adverse interests serves the government’s interest where “the contest of interest may become unwholesomely unequal” otherwise).

The government’s secondary interest is financial: efficient and economic resolution of dependency proceedings. *See Kenny A.*, 356 F. Supp. 2d at 1361. A financial interest cannot outweigh fundamental rights. *Id.* But even more, independent legal counsel for a child facilitates the resolution of dependency matters, thereby saving taxpayer funds. *See* CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES, *Informational Memorandum No. ACYF-CB-IM-17-02* (Jan. 17, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf> (recognizing the “cost savings to state government due to reductions of time children and youth spend in care.”); Andrew E. Zinn & Jack Slowriver, CHAPIN HALL CENTER FOR

CHILDREN AT THE UNIVERSITY OF CHICAGO, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*, 22 (2008) (analyzing the cost of representation and the costs associated with children in state care); THE JUSTICE IN GOVERNMENT PROJECT AT AMERICAN UNIVERSITY, *Key Studies and Data About How Legal Aid Assists Children in Foster Care*, 2 (last updated Aug. 8, 2019), <https://www.american.edu/spa/jpo/toolkit/upload/foster-care-8-8-19.pdf> (“A study using data from the National Adoption Survey found that children who are adopted are less likely to rely on public resources” and “are less likely to have their healthcare subsidized by the state it follows[.]” meaning “the state can save resources” when adoption is expedited.”).

c. WITHOUT COUNSEL, THE RISK OF THE CHILD  
LOSING HIS LEGAL VOICE IS HIGH

The child’s paramount liberty interests call for independent legal counsel because the risk of the child being deprived of a legal voice in the absence of counsel is high. First, the necessity of counsel becomes heightened where a case is complex. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). Dependency proceedings are complex. See Donald N. Duquette & Ann M. Haralambie, *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and*

*Dependency Cases*, 166–67 (2d ed. 2010). A dependency proceeding implicates multiple provisions of both federal and state law. It also contemplates the opinions of several types of professionals, e.g., government attorneys, case workers, CASA volunteers, therapists, and other medical professionals.

Second, a child cannot effectively represent himself in a dependency hearing given the child’s age and inexperience, even without other obstacles. The need for independent legal counsel is amplified where a party is not “capable of speaking effectively for himself.” *Gagnon*, 411 U.S. at 791. As recognized by the Supreme Court in the context of juvenile delinquency matters, “the child requires the guiding hand of counsel at every step in the proceedings against him.” *Gault*, 387 U.S. at 36 (internal quotation omitted). The child requires a guiding hand to ensure that a child does not succumb to outside pressures to which the child is “more vulnerable to ... than [an] adult[.]” *J.D.B.*, 564 U.S. at 272–73 (internal citations omitted). Counsel’s guiding hand also helps the child “to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain [the

child’s legal rights].” *Gault*, 387 U.S. at 36; *see also Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (due process requires greater protection for individuals with “little education, learning disabilities, and mental impairments” due to legal endeavors being “well beyond [such an individual’s] competence[.]”). Stated otherwise: “[F]ew adults without legal training can influence or even understand [the most informal and well-intentioned of judicial proceedings]; ***certainly children cannot.***” *Gault*, 545 U.S. at 38 n.65 (emphasis added).

Third, neither the well-meaning concern of the court nor the government can substitute for a child’s due process rights. *Id.* at 18 (“Juvenile Court history has again demonstrate that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”). This is because independent legal counsel safeguards a child’s legal voice. *Id.* at 40 (“[C]ounsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition.”) (internal quotations omitted). Neither the court nor the government attorneys advocate for the actual interests of a child; independent

legal counsel alone preserves the child’s legal voice. *Kenny A.*, 356 F. Supp. 2d at 1361; *see also Gault*, 387 U.S. at 35–36.

Finally, the interest of a child is not necessarily the same as the other parties to the dependency proceeding. Where a child’s interests are adverse to the interests of the other parties and participants, an attorney should be afforded. *See Gault*, 387 U.S. 1 at 35–36 (recognizing that neither a probation officer nor a judge could act as counsel for a child in a delinquency hearing); *see also Lassiter*, 452 U.S. at 27 (noting that “our adversary system presupposes [that] accurate and just results are most likely to be obtained through the equal contest of opposed interests....”).

A child’s interest may differ from his parents, e.g., not seeking reunification until a parent completes rehabilitation. It may differ from a guardian *ad litem*’s opinion about the child’s best interests, e.g., a child’s desire to stay with a family member other than a sibling. And it may differ from the state’s prerogative, e.g., returning home to the parent from whom the child was taken. Consideration must be given to the risk that a child’s legal voice will be silenced—and his interests go un-

heard—if he is not represented by independent legal counsel. *See Las- siter*, 452 U.S. at 29. Thus, the *Mathews v. Eldridge* factors require in- dependent legal counsel on behalf of a child.

**2. *A Child Has a Due Process Right to Independent Legal Counsel Under Nevada Law Because the Child Cannot Adequately Represent Himself***

This Court employs the *Mathews v. Elridge* balancing test to de- termine the extent of due process afforded under Nevada law. *See In re Parental Rights as to N.D.O.*, 121 Nev. 379, 384, 115 P.3d 223, 226 (2005). Indeed, this Court recently examined the contours of due pro- cess in the context of dependency proceedings. *See Matter of I.R.H.H.*, Case No. 77969, 455 P.3d 846 (Nev. Jan. 23, 2020) (unpublished) (hold- ing a case-by-case analysis determines if an adult is entitled to repre- sentation in a proceeding for termination of parental rights). There, this Court reaffirmed that due process considerations include the com- plexity of a proceeding and whether a party cannot otherwise represent himself without counsel. *Id.* Thus, the complexity of a dependency pro- ceeding to the child and the child’s inability to effectively represent him- self requires independent legal counsel for a child. *See supra*, Section I.A.1.

**B. Leading Authorities Agree that a Child’s Independent Legal Counsel in Dependency Hearings is Necessary to Safeguard the Child’s Actual Interests**

Family-law experts and scholars overwhelmingly recognize a child’s right to independent legal counsel in dependency hearings. The ABA reaffirmed their support for independent legal counsel for children in all dependency proceedings, issuing its Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (“Model Act”). See Andrea Khoury, *ABA Adopts Model Act on Child Representation in Abuse and Neglect Cases*, 30 No. 7 CHILD LAW PRACTICE 106, 106–07 (2011). The Model Act succeeds the ABA’s previous standards, in which the ABA also advocated for a child’s right to counsel in dependency proceedings.<sup>7</sup>

The Model Act asserts that “[e]ach child who is the subject of an abuse and neglect proceeding has the right to attend and fully participate in all hearings related to his or her case.” Model Act, § 9(a). A child has the right to attend and fully participate in all hearings given

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<sup>7</sup> See *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375, 376 (1995).

that the proceeding “is about the child.” *Id.*, Commentary to § 9. Independent legal counsel is vital to the child’s participation; the counsel prepares the child for all hearing and explains the rulings and applicable rights to the child. *Id.*; *see also id.* § 7 (outlining duties of counsel). Thus, the Model Act mandates the “appoint[ment] of a child’s lawyer for each child who is the subject in an abuse and neglect proceeding” as immediately as practicable. *Id.* § 3(a).

Likewise, the Administration for Children and Families of the U.S. Department of Health and Human Services opines that “youth voice [is] critical to a well-functioning child welfare system,” including in dependency courts. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES, *Informational Memorandum No. ACYF-CB-IM-19-03* (Aug. 1, 2019), <https://www.acf.hhs.gov/cb/resource/im1903>. The administration advocates for the integration of a child’s voice into the planning of the child’s welfare, reasoning that the decisions being made are “critical decisions that affect [the child’s life].” *Id.* Indeed, a child and his family “are [the] best sources of information about the strengths and needs of their

families and communities.” *Id.* The administration therefore prioritized incorporating a child’s voice into welfare proceedings and to ensure “high quality legal representation” to advocate for the “expressed interest of [a child client].” *Id.*; *see also* CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES, *Informational Memorandum No. ACYF-CB-IM-17-02* (Jan. 17, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf>. To promote its mission, as of January 2019, the administration authorized states to seek up to 50% in reimbursement for administrative costs associated with the appointment of legal counsel for a child. 42 U.S.C. 674(a)(3); 45 C.F.R. 1356.60(c); *see also* CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES, *Child Welfare Policy Manual*, § 8.1B, Question 30, [https://www.acf.hhs.gov/cwpm/public\\_html/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=36](https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36).

Scholars and leading experts also recognize a child’s due process right to independent legal counsel in dependency proceedings.<sup>8</sup> For example, the National Quality Improvement Center on the Representation of Children in the Child Welfare System (“QIC”) conducted a seven-

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<sup>8</sup> See, e.g., Suparna Malempati, *Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings*, 11 U.N.H.L. REV. 97, 99–100 (2013) (“In order for the dependency court to effectively operate as a rights-based court and to protect the fundamental liberty interests and due process rights of children who come before it, the role of counsel must be clear. In dependency proceedings, a child’s right to counsel should mean a right to counsel who functions as an advocate[.]”); Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the “Right” Thing to Do*, 27 PACE L. REV. 869, 887 (2007) (calling for the “acknowledge[ment] that children have a constitutional right to counsel when their custody is at issue” and the right to direct such counsel); Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005*, *supra*, at 1030 (“It is time for American jurisdictions to focus on full expression of the child’s voice, to treat lawyers for children as instruments of their clients’ international human rights[.]”); Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1, 2 (2005) (“For many of these children, the legal proceedings in which they are involved determine the course of their lives and may be a matter of life and death.”); Jacob Ethan Smiles, *A Child’s Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, *supra*, at 493–94 (“Dependency proceedings implicate a child’s liberty interest because at stake for the child is his safety, his familial relationships, his emotional and social interests, and his interest in a stable and permanent home.”) (internal citations omitted); *Recommendations of the Conference on Ethical Issues in Legal Representation of Children*, 64 Fordham L. Rev. 1301 (1996) (calling for independent legal counsel for children in dependency proceedings).

year study and “identified a substantial consensus on the role and duties of the child’s lawyer.” QIC CHILDREP, <http://www.improvechildrep.org/>. The QIC suggested model of representation concurs with the ABA’s Model Act, opining that “all children subject to court proceedings involving allegations of child abuse and neglect should have legal representation[.]”) *QIC Best Practice Model of Child Representation*, QIC CHILDREP, <http://www.improvechildrep.org/QICModelSixCoreSkills/QIC-ChildRepBestPracticeModel.aspx> (last accessed March 16, 2020). The overwhelming support for independent legal counsel demonstrates the prudence in recognizing this fundamental right of a child subject to dependency proceedings.

## II.

### **THE SUBSTITUTED JUDGMENT MODEL OF REPRESENTATION ENSURES A CHILD’S LEGAL VOICE IS HEARD THROUGHOUT A DEPENDENCY MATTER**

To effectuate the child’s due process right to independent legal counsel, an attorney’s physical presence is not enough; the attorney must be permitted to use the substituted judgment model of representation where the child cannot communicate. This model is especially vital for individuals like S.B., who cannot communicate verbally.

**A. The Substituted Judgment Model of Representation Is Not the Same as the Best Interests Model of Representation**

The substituted judgment model of representation allows for an attorney to consider objective and subjective criteria to determine a child's *actual* interests. The model instructs an attorney to formulate a substituted judgment on behalf of the child that is (a) child-centered, (b) research-informed, (c) permanency-driven, and (d) holistic. Model Act § 7(d) & Commentary. These four pillars of the substituted judgment determination assists counsel in understanding the child's situation through the child's perspective. *Id.* The attorney must also "take into consideration the child's legal interests[.]" *Id.* Together, the pillars encourage a determination that "honor[s] client loyalty and dignity by replicating the client's wishes, as opposed to emphasizing the attorney's own personal, subjective judgment, as to what's best for the client."

Yael Zakai Cannon, *Who's the Boss?: The Need for Thoughtful Identification of the Client(s) in Special Education Cases*, 20 AM. U. J. GENDER SOC. POL'Y & L. 1, 41–42 (2011).

The substituted judgment model of representation comports with the duties and obligations placed on an attorney by the Model and the

Nevada Rules of Professional Conduct. RPC 1.2(a) requires an attorney to “abide by a client’s decision concerning the objectives of representation[.]” Even when a client lacks capacity due to age or mental impairment, “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” RPC 1.14(a). The substituted judgment model encourages representation, and thus the traditional client-lawyer relationship, by encouraging determinations be made from a client’s perspective. And Nevada has already approved of models of representation that comport with the Nevada Rules of Professional Conduct. *See Order Approving Additional Statewide Rules for Guardianship*, ADKT No 0507, Rule 9 (Nov. 7, 2019).<sup>9</sup>

On the other hand, the best interest model of representation calls for an attorney to decide which course of action is in the best interest of the child without any regard to the child’s perspective. Linda Elrod, *Client-Directed Lawyers for Children: It Is the “Right” Thing To Do*, 27

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<sup>9</sup> Under Guardianship Rule 9, a protected person “has a right to legal representation.” Rule 9(A). The attorney, in turn, has the right to act on behalf of her client to waive legal rights so long as the actions do not contradict the client’s express wishes. Rule 9(G). Under all circumstances, the attorney must protect her client’s legal rights. Rule 9(H)–(J).

PACE L. REV. 869, 910–11 (2007). By permitting the attorney to ignore the client’s perspective and proceed as the attorney determines best, the model cannot coincide with the Model or the Nevada Rules of Professional conduct. *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375, 376, cmt. a-1 (1995).

**B. A Nonverbal Individual’s Due Process Right to Independent Legal Counsel Cannot Be Satisfied Without the Substituted Judgment Model of Representation**

Those who cannot communicate verbally are entitled to at least the same constitutional rights as those who can speak with counsel. *See Order Approving Additional Statewide Rules for Guardianship*, ADKT No 0507, Rule 9(A) (Nov. 7, 2019) (explicitly recognizing a protected person’s right to counsel even where a guardianship is necessary and in place). Generally, client-directed representation is preferred. RPC 1.2; RPC 1.14; Model Act § 1(c), commentary; Andrea Khory, *The True Voice of the Child: The Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, 36 NOVA L. REV. 313, 314. But “there are times when a client’s capacity will be so

diminished to hinder communication and render a normal attorney-client relationship impossible.” Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 303 (2005). The substituted judgment prevents the law from “turn[ing] a blind eye toward children’s diminished capacity” and encourages a determination be made in accordance with the ethical rules of practice. Aditi D. Kothe-  
kar, *Refocusing the Lens of Child Advocacy Reform on the Child*, 86 WASH. U. L. REV. 481, 507–08 (2008); *see also* Model Act § 7(d). To preserve a nonverbal child’s constitutional right to counsel in dependency proceedings, counsel must have access to the substituted judgment model or representation.

### III.

#### **ALREADY PHYSICALLY VOICELESS, S.B. LOST HIS LEGAL VOICE OF COUNSEL, IN VIOLATION OF HIS DUE PROCESS RIGHTS**

As a child subject to a dependency hearing, S.B. had a due process right to independent legal counsel throughout the proceeding. That need for a legal advocate is especially necessary for S.B. because he can-

not communicate with his own voice. Thus, to effectuate S.B.'s constitutional rights, counsel advocated for S.B. under the substituted judgment model of representation by necessity. The district court permitted the representation through S.B.'s eighteenth birthday, rescinding counsel's authority only after it was too late for S.B. to pursue different legal vehicles to enter the AB 350 program, i.e., demanding a guardian *ad litem*. Because the district court determined that S.B. could not be heard through the substituted judgment model of representation only after S.B. aged out of the state's care, the district court denied S.B.'s due process right to be heard.

#### IV.

#### **THE FAMILY COURT DENIED S.B.'S STATUTORY RIGHT TO COUNSEL BY PRECLUDING COUNSEL FROM VOICING S.B.'S INTERESTS**

The district court not only denied S.B. his due process rights; it denied S.B. his statutory right to legal counsel under NRS 432B.420(2). NRS 432B.420(2) demands that “[t]he court shall appoint an attorney to represent the child” in an abuse or neglect proceeding. The statutory language unambiguously guarantees independent legal counsel to every child in a dependency proceeding. But the statutory language does not

delineate the model of legal representation afforded to a nontraditional client: the nonverbal child.

**A. This Court May Consider Legislative Intent to Determine the Model of Legal Representation to be Used in the Context of a Nonverbal Child**

Courts give effect to the plain language of statute that bears only one reasonable interpretation. *Nev. Attorney for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 1110, 1117, 146 P.3d 793, 798 (2006). However, where a statute is ambiguous, a court may consider the legislative intent behind the statute. *Id.* Legislators' statements aid where the statements "are a reiteration of events leading to the adoption of proposed amendments." *Id.* (citing *Khory v. Maryland Casualty Co.*, 108 Nev. 1037, 1040, 843 P.2d 822, 824 (1992)), *disapproved of on other grounds by Breithaupt v. USAA Prop. and Cas. Ins. Co.*, 110 Nev. 31, 34–35, 867 P.2d 402, 405 (1994).

**B. The Legislature Enacted NRS 432B.420(2) to Protect the Legal Voice of the Most Vulnerable Litigant: a Child**

The legislative history clarifies that NRS 432B.420(2) serves to give *every* child a voice in *any* dependency proceeding falling under NRS Chapter 432B. NRS 432B.420 previously gave a court discretion

to appoint independent counsel for a child in a dependency hearing. NRS 432B.420(2) (effective January 1, 2016). Introducing proposed amendments to NRS 432B.420 through Assembly Bill 305 in 2017, Senator Julia Ratti explained: “[A]ttorneys give children a voice and [are] an advocate to help them navigate one of their hardest and most confusing times in their lives, creating better outcomes for children.” Min. of Sen. Comm. on Health and Human Servs., 79th Sess., at 17 (March 29, 2017); *see also* Min. of A. Comm. on Judiciary, 79th Sess., at 23 (May 15, 2017). The amendment thus eliminated the district court’s discretion to withhold independent legal counsel from a child, making it mandatory in every dependency proceeding. *Compare* NRS 432B.420(2) (effective Jan. 1, 2016) *with* NRS 432B.420 (effective Oct. 1, 2017).

The legislative history also clarifies that NRS 432B.420(2) entitles every child to independent legal counsel in dependency proceedings regardless of a child’s age or nonverbal status. Legal Aid Center of Southern Nevada’s executive director, Barbara Buckley, testified in support of the A.B. 305. *See* Min. of A. Comm. on Judiciary, 79th Sess., at 33 (May 15, 2017). The Nevada Assembly questioned Ms. Buckley on whether

the mandate of independent counsel applied to children of all ages, including those that “may not be in a position [to] express ... their wishes.” *Id.* Ms. Buckley responded:

***This bill applies to every child, no matter how old. From day one to age 21, the children are receiving an attorney if they are in the foster care system.***

Fortunately, the American Bar Association (ABA) Center on Children and the Law spent years figuring out how an attorney represents a preverbal or a nonverbal child, let us say ***a child with severe autism who is eight who cannot communicate with you.*** What they have concluded is we follow the rules of ethics with regard to trying the best we can to establish that relationship, and then otherwise you represent their legal interest and their constitutional rights. [...] So what our attorneys and our pro bono lawyers do is we represent their legal rights. ***It is sometimes called a substituted judgment model,*** but the easiest way to think of it is you do not lose your legal rights and constitutional rights ***even if you cannot communicate what they are.***

Min. of A. Comm. on Judiciary, 79th Sess., at 33 (May 15, 2017) (testimony of Barbara Buckley) (emphasis added).

The Nevada Legislature passed the amendment, adopting the mandate of independent legal counsel for children in dependency proceedings, in May 2017. Thus, the legislature communicated its intent to

protect a child’s legal voice in dependency hearings—including nonverbal children through the substituted judgment model of representation.

**C. The Legal Voice of a Child Is Not Protected Where the Child’s Legal Representative Cannot Advocate for the Child’s Interests**

Where a district court bars an attorney from using substituted judgment to speak for her nonverbal client, the purpose of NRS 432B.420(2) is defeated. NRS 432B.420(2) demands appointment of counsel for every child in a dependency proceeding so a child’s legal voice is heard. The legislature intended for every child—verbal or nonverbal—to benefit from the mandatory appointment of independent legal counsel.

The mandate must be given force in the context of representing nonverbal children. NRS 432B.420(2) cannot be satisfied “merely by the State’s supplying a lawyer’s physical presence in the courtroom.” *Jamie TT*, 599 N.Y.S.2d at 892. The mandate instead requires independent legal counsel serve as the voice for the child’s actual interests. To do so for a nonverbal child, the substituted judgment model of representation is required. The Nevada Legislature considered and subsequently approved of this model of representation by amending NRS

432B.420(2) in 2017 in accordance with Assemblywoman Buckley’s testimony. *See supra*, Section IV.B. Indeed, the legislature did not carve out any exception to the appointment of legal counsel for nonverbal children; the mandate applies to *all* child of *all* ages.

**D. The District Court Denied S.B.’s Statutory Right By Prohibiting Counsel from Using the Substituted Judgment Model to Advocate for S.B.—a Nonverbal Child**

The district court rendered counsel’s participation throughout the case to a mere “physical presence in the courtroom” by denying S.B.’s election for continued jurisdiction. Counsel reminded the district court of S.B.’s special needs and nonverbal status in 2017—nearly two years before the court ruled on S.B.’s election for continued jurisdiction. Counsel simultaneously explained that she continued to represent S.B. through the substituted judgment model of representation. With this knowledge, the district court permitted the dependency proceeding to move forward. The district court, in fact, later rescinded its order to appoint a guardian *ad litem* for S.B. based on counsel’s sufficient representation of S.B.’s interests.

But once counsel filed S.B.’s election for continued jurisdiction after conferring with S.B.’s caregivers and prospective guardian, the state

belatedly challenged counsel's authority to use the substituted judgment model of representation. The court failed to resolve the parties' disagreement until after S.B. aged out of the foster care system. Indeed, six months later, the district court rejected S.B.'s election, prohibiting counsel from acting under the substituted judgment of representation. By doing so, the district court prevented counsel from projecting S.B.'s legal voice—contravening the purpose of NRS 432B.420(2).

**E. A Guardian *Ad Litem* Cannot Replace a Child's Independent Legal Counsel**

The district court erred by requiring a guardian *ad litem*, rather than S.B.'s counsel, to submit S.B.'s election for continued jurisdiction. A guardian *ad litem* typically has authority in civil proceedings to act on behalf of or make decisions for the ward. But in dependency proceedings, a guardian *ad litem* simply serves as an arm of the court, advocating for the best interests of a child rather than the actual interests. NRS 432B.500(2)(a); *see also* Min. of Sen. Comm. on Health and Human Servs., 79th Sess., at 14–17 (April 5, 2017) (discussing different roles of a child's appointed counsel and guardian *ad litem* and deciding to eliminate language allowing one person to serve both roles for a child); *see also* Min. of Sen. Comm. on Health and Human Servs., 79th

Sess., at 20–22 (March 29, 2017). A guardian *ad litem* serves a limited role in the dependency context because the state is tasked with most responsibilities of a traditional guardian. For example, the state removes the child from a dangerous home, *see* NRS 432B.390(5); it ensures a child receives necessary medical treatment, *see* NRS 432B.197; it facilitates alternative housing to care for the child’s well-being, *see* NRS 432B.390(6); and it becomes financially responsible for the child, *see* NRS 432B.594(4)(b).

Conversely, the child’s counsel advocates for the child’s actual interest, including through the substituted judgment model of representation when necessary. NRS 432B.420(2); *see supra*, Sections IV.B, D. Counsel was therefore within her authority when moving for continued jurisdiction on behalf of S.B. The district court erred by requiring a guardian *ad litem* accordingly.

**F. The District Court Denied S.B. the AB 350 Benefits to Which He Is Statutorily Entitled**

In addition to contravening the purpose of NRS 432B.420, the district court denied S.B. access to AB 350 benefits in direct contradiction to NRS 432B.594. AB 350 is codified in NRS 432B.591 to 432B.595.

The program requires the child to enter into a written agreement with

the state agency that provides child welfare services to the child. NRS 432B.594. Once the child enters into the written agreement, “the child is *entitled* to continue to receive services from the agency which provides child welfare services and *to receive monetary payments directly ... in an amount not to exceed the rate of payment for foster care[.]*” NRS 432B.594(4)(b), (7) (emphasis added).

Thus, NRS 432B.594 leaves a district court and the state agency with no discretion in determining when a child electing for continued jurisdiction may receive AB 350 funds. To allow otherwise would create a conflict of interest for the agency: the agency could choose to withhold the funds from the child at the detriment of the child.

The agency, in fact, attempted to do so here, depriving S.B. of funds that could otherwise supplement his social security benefits. The district court erred by redirecting the authority granted to a party and his attorney by NRS 432B.420(2) in conjunction with NRS 432B.594. Its decision should be reversed accordingly.

### CONCLUSION

For the foregoing reasons, this Court should (a) acknowledge a child’s due process right to independent legal counsel in dependency

proceeding, (b) recognize that counsel must employ the substituted judgment model of representation where a client is nonverbal, and (c) find that S.B. was denied his due process and statutory rights when the district court denied his election for continued jurisdiction. The judgment of the district court should be reversed.

Dated this 20th day of March, 2020.

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## CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 29(e) because it contains 6,214 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 20th day of March, 2020.

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**CERTIFICATE OF SERVICE**

I certify that on March 20, 2020, I submitted the foregoing AMI-CUS CURIAE BRIEF for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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