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Lisa Kelly
University of Washington School of Law

Alicia LeVezu
University of Washington School of Law

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Until the Client Speaks: Reviving the Legal-Interest Model for Preverbal Children

LISA KELLY* & ALICIA LEVEZU**

I. Introduction

When the state intervenes in a child's life through a child abuse and neglect case, a court proceeding is initiated and a plethora of legal rights attach. Children in these situations need trained legal representatives to protect these rights. However, there is widespread confusion and debate about the role of attorneys appointed to represent children. In many states, these attorneys are expected to advocate for what they believe to be in the child's best interests. However, this best-interest method of advocacy has been widely criticized for allowing attorneys' implicit biases to dominate legal proceedings, fostering a lack of accountability, allowing inconsistency, assuming nonexistent expertise, serving state prosecutorial functions, and violating the ABA Model Rules of Professional Conduct.

The legal rights of preverbal children must be protected without falling prey to the drawbacks of the best-interest advocacy model. This article explores the concept of legal-interest advocacy as an alternative to best-interest representation for nonverbal clients, and it outlines how legal-interest advocacy can address the major criticisms of best-interest representation.

* Bobbe and Jon Bridge Professor of Child Advocacy and director of the Children and Youth Advocacy Clinic, University of Washington School of Law.
** Alicia LeVezu, J.D. 2014, Yale Law School; manager, the University of Washington School of Law's Access to Counsel Systemic Advocacy Project (ASAP). This position is a continuation of her work as an Equal Justice Works Fellow, which was sponsored by Intellectual Ventures and Perkins Coie, LLP, at the Children and Youth Advocacy Clinic. This article has not been approved or endorsed by Equal Justice Works, Perkins Coie LLP, or Intellectual Ventures. The authors would like to thank Professors Martin Guggenheim and Annette Appell for providing thoughtful comments on this article and Professors Elizabeth Porter, Kim Ambrose, and Angélica Cházaro for their willingness to discuss the theories presented in this article.
representation while ensuring that children’s legal rights are protected. When a client is unable to direct the attorney’s representation, the discretion of the attorney must be constrained in order to allow the child’s legal rights to be fully respected. The legal-interest model envisions a lawyer who is limited to enforcing legal rights that have been clearly articulated in statutory and case law.

One alternative to the “best interests” approach is a substituted-judgment model. This model is typically used with an adult client who has become unable to direct representation. The attorney reviews the client’s past statements and conduct to determine what the client’s goals would be if they could be expressed. However, a newborn, infant, or even young toddler has no prior life experience from which to draw conclusions about preferences, and the advocate is left to imagine what he or she would want if he or she were in this baby’s booties. This model fails for many of the same reasons that best-interest representation does. It is critical to find a way to ensure that the legal rights of children are protected without falling prey to the serious flaws of either the best-interest or substituted-judgment model.

In 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA), which mandated, among other things, that every child involved in the child welfare system must be appointed an advocate to represent his or her interests. Over the last forty years, a growing number of states have required this advocate to be an attorney. Meanwhile, the population of children in the child welfare system has gotten younger. In 2010, when CAPTA was up for reauthorization, many advocates championed amendments that would have required the child’s representative to be an attorney. With CAPTA overdue for reauthorization, the possibility of a federal mandate requiring attorneys for children is again upon us.

Now more than ever, the legal profession must critically consider the appropriate role of legal counsel for very young, specifically preverbal,

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3. See, e.g., Children’s Bureau, Foster Care Statistics (2014) (the median age of a child entering foster care in 2014 was 6.4 years old, which is a decrease from 7.7 years in 2005); see also U.S. Dep’t Health & Human Servs., Admin for Children and Families, Child Maltreatment 2014, at 22 (2016) (in 2014, states reported that twenty-seven percent of child abuse and neglect victims were under the age of three, with the highest rates of victimization reported for children under age one).
children. However, given the legal rights that all children in the complex child welfare system have, it is not enough to critique the models of representation in use. Attorneys who are serving an increasingly young set of clients need a workable alternative that allows them to ethically and effectively enforce the rights that babies have when they become subject to the state’s power.

This article seeks to revive and develop further the concept of legal-interest advocacy, which was first introduced by the American Bar Association in 1996. This overlooked model offers a workable alternative to both the best-interest and substituted-judgment representation models for preverbal clients. Through legal-interest advocacy, attorneys for preverbal children are charged with ensuring that the many rights given to infants are enforced, while withdrawing from attorneys the ability to impose their values on the child client. This article outlines how legal-interest advocacy representation can ensure that a child’s legal rights are protected and preserved until the child client can speak and direct his or her own representation.

Part II of this article provides an overview of the historical debate regarding the role of counsel for children and the limitations of that debate in terms of addressing the appropriate role of counsel for preverbal youth. Part III discusses the concept of legal-interest representation for preverbal children as a limitation on an attorney’s discretion, walking through various hypothetical case scenarios to describe how legal-interest advocacy can work in practice. Part IV addresses concerns about the legal-interest model and concludes that, ultimately, legal-interest representation is the most ethical way for attorneys to protect the rights of their preverbal child clients without substituting their own values for those of a client in need of legal protection and deserving of the right to mature into his or her own autonomous agent.

II. The Current Paradigm for Representation of Young Children

For decades, attorneys and policy makers have struggled with providing due process to children in the child welfare system, and especially those taken from their families and placed with strangers. Children in these

6. Congress passed CAPTA in 1974, which required states to provide representatives (in the form of a guardian ad litem, or GAL) to youth in child dependency proceedings to qualify for state funding of child welfare systems. This statute came during a time of discussion among attorneys about the need for legal representation for these children. See 42 U.S.C. § 5106a(b) (2)(B)(ix) (2012); see also Hillary Rodham Clinton, Children Under the Law, 43 HARV. EDUC. R. 487, 509 (1973) (“[I]ndependent counsel for children should not be restricted to children accused of delinquency, but should be required in any case where a child’s interests are being adjudicated.”).
situations are granted legal rights and are often appointed attorneys to protect those rights. Starting in the 1960s, New York State began appointing attorneys to act as “law guardians” for the children in the system. The role that an advocate was supposed to play in this setting was not clear, and studies on the effectiveness of these advocates were troubling. To complicate matters, many children in the child welfare system are very young and, due to their age or disability, are unable to express a position and direct representation.

Despite the inability to direct their representation, children caught in the child welfare system possess legal rights and their lives are governed by a legal system. Federal statutes and constitutional law grant affirmative rights to these children: rights to services, to visits by caseworkers, and to placement preferences that favor family. These are just a few of the rights that a judge must protect in review hearings, which must be held at least every six months. Because the child welfare system operates through this legal structure of courts, children need trained legal advocates to hold the state and other parties accountable. The nature of our judicial system relies upon licensed attorneys to enforce and protect our legal rights.


8. A 1984 study by the New York Bar Association discovered patterns of attorney behavior that were “disturbing to say the least.” Jane Knitzer & Merril Sobie, *LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN* (N.Y. State Bar Ass’n, 1984). According to the study, lawyers were providing inadequate representation in almost one-half of the cases and only providing effective representation in four percent of the cases. Id. Additionally, nearly half of the transcripts of the studied cases contained appealable errors by the law guardians or judges that went unchallenged. Id.


10. For a noninclusive list of legal rights granted by federal statute to children in child abuse and neglect proceedings, see App’x: Federal Legal Rights of Children in Dependencies, infra.

11. *See, e.g.*, Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W. L. REV. 16, 30 (1977) ("As juvenile courts become more cognizant of children’s rights, and as courts in general become more structured and sensitive to due process safeguards, the lay person is at an increasing disadvantage. If the purpose of an appointment is to protect the child’s interests, then it would seem axiomatic that such an appointment be made to one who understands the ‘system’ and how it can be used most effectively for the child’s interests.").

12. *See, e.g.*, Katherine Hunt Federle, *Lawyering in Juvenile Court: Lessons from a Civil Gideon Experiment*, 37 FORDHAM URB. L.J. 93, 119 (2010) ("It is the lawyer for the child who is in the best position to insist that the child’s rights are respected, valued, and considered. ‘The American conception of justice is not simply encapsulated in the notion of Due Process, but is encapsulated in a notion of Due Process defined in terms of adversarial presentation.’ Because the American legal system is adversarial, counsel fills an indispensable role in ensuring that individual claimants are respected and that the requisites of due process are met.” (quoting
Due in part to the language of CAPTA, which required that each child be appointed a guardian ad litem in his or her proceedings, the representation of children by an attorney was largely understood, at least originally, as akin to guardian ad litem representation.\footnote{42 U.S.C. \S 5106a(b)(2)(B)(xiii) (2012).} Guardians ad litem stand in for the client, direct the litigation themselves, and represent the client’s “best interests,” instead of allowing the client to self-direct the representation.\footnote{Guardian ad litem, BLACK'S LAW DICTIONARY (10th ed. 2014) (explaining that a guardian ad litem is someone who is “appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party” and expected to represent the party’s best interests and who can be either an attorney or a nonattorney.)} In 1984, Professor Martin Guggenheim described the instruction that many New York children’s attorneys received as a simple and vague command “to do just the right thing in every case.”\footnote{Martin Guggenheim, The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children, 59 N.Y.U. L. REV. 76, 99 (1984).} “In essence, this position merges the traditional roles of guardian ad litem and attorney. The lawyer is expected to determine for him- or herself what is best for the child and to then advocate that position in court.”\footnote{Id. New York has since revised its statutes to clarify that the attorney for the child is to act as an attorney. See N.Y. FAM. CT. ACT \S 241 (McKinney 2010).} One key feature of best-interest attorneys is the freedom to depart from the expressed position and direction of their child clients and the ability to pursue an alternative direction based on the attorney’s own determination as to what is ultimately best for the client.\footnote{See, e.g., Barbara Ann Atwood, The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism, 42 FAM. L.Q. 63, 83 (2008) (“[T]he best interests attorney is not bound by the child’s expressed objectives but must consider those objectives and give them due weight according to the underlying reasons and the child’s developmental level.”).}

Over the past few decades, there has been a robust discussion and debate about the appropriate role of counsel for these children: should attorneys act as attorneys and follow their client’s direction, or should attorneys serve as “guardians” for these children, relying on their own determinations as to what is best for the child to guide their advocacy?\footnote{See, e.g., Annette Ruth Appell, Representing Children Representing What?: Critical Reflections on Lawyering for Children, 39 COLUM. HUM. RTS. L. REV. 573, 573 (2008); Emily Buss, “You’re My What?’ The Problem of Children’s Misperceptions of Their Lawyers’ Roles, 64 FORDHAM L. REV. 1699, 1734 (1996); Fraser, supra note 11, at 17; Suparna Malempati, Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings, 11 U.N.H. L. REV. 97, 114–15 (2013).} Throughout these years of debate and discussion, best-interest representation has been critiqued in the legal community as an improper model of attorney representation. A common argument made against this model is that it assumes an attorney
is qualified to determine what is best for a child in a difficult situation.\textsuperscript{19} Attorneys are not formally trained or licensed experts in child welfare or infant mental health, and so expecting the attorney to be able to discern the best path forward for a particular child assumes an expertise the attorney simply does not have.\textsuperscript{20} Because attorneys do not have this expertise, it is likely that they will instead rely on their "gut instinct," which all too often is shaped by implicit bias.\textsuperscript{21} By allowing the individual attorney to control the direction of the representation, we allow the personal experiences and subjectivity of that individual attorney to control the litigation.

Such domination by an individual attorney allows, in turn, for inconsistent direction between one attorney and the next and a lack of transparency in the decision-making process. Without a client who can hold an attorney accountable, the attorney is allowed unfettered power to determine what is best for each child client. This unfettered power ties the direction of the litigation to the will of the particular attorney assigned to the case, leaving families with no way to predict the course of representation.\textsuperscript{22} Because this

\textsuperscript{19} See, e.g., Appell, supra note 18, at 634–35 ("The tenacity of this representation model is surprising in light of children’s attorneys’ increasing willingness to acknowledge that they do not know and are not trained to know what is best for children."); Buss, supra note 18, at 1746 ("[B]est interests are, in fact, extremely hard to define, and no honest . . . [guardian ad litem] can deny that some of her best-interest judgments ultimately did not produce the best results for her clients.").


\textsuperscript{21} See, e.g., Appell, supra note 18, at 595 ("[A]ttorneys are unlikely to share the same socio-economic background, cultural values, or kin as the children they represent; nor are they likely to know the children better than the children’s parents or the children themselves."); Randi Mandelbaum, Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers, 32 LOY. U. CHI. L.J. 1, 34 (2000) ("[M]any have expressed concern about legal representatives who represent a child’s best interest, according to which the attorney deems best (often and inevitably based upon the legal representative’s values and life experiences, albeit unwittingly at times) and the haphazard representation that ensues."); Peters, supra note 20, at 1526 ("I believe that this level of discretion makes it inevitable that the lawyer will sometimes resort to personal value choices, including references to his own childhood, stereotypical views of clients whose backgrounds differ from his, and his own lay understanding of child development and children’s needs, in assessing a client’s best interests. Especially for practitioners who must take cases in high volume, the temptation to rely on gut instinct, stereotype, or even bias is overwhelming.").

\textsuperscript{22} See, e.g., MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 95 (2005) ("The problem is compounded when we begin to believe there is something special about the views her randomly assigned lawyer chose to take. Amazingly enough, courts sometimes believe the position really is the child’s, when it is nothing more than the lawyer’s."); Mandelbaum, supra note 21, at 36 ("Not only is there a significant chance that these decisions and ensuing
system of attorney discretion also lacks transparency, families who suspect the influence of biases on the representation have no way of addressing those suspicions to hold the attorney accountable.\textsuperscript{23}

Best-interest advocacy has also been critiqued for disrupting the appropriate power balances, first, in a child's family, as the child's parent is generally understood to be charged with determining what is best for his or her own child,\textsuperscript{24} and second, in the courtroom, where the judicial officer is charged with determining the child's best interest as the ultimate question at issue.\textsuperscript{25} Critics have also charged best-interest advocacy with encouraging attorneys to act in overly protective ways and to advocate regularly in favor of removing the child from his or her family, thereby serving the prosecutorial interests of the state and acting as a second attorney supporting the state's arguments.\textsuperscript{26} At least one study out of Washington State provides some justification for this fear, noting that volunteer best-interest advocates in Washington only disagreed with the state's recommendations regarding parental visitation in six percent of cases.\textsuperscript{27}
Finally, some have questioned whether or not an attorney can act as a best-interest advocate within the scope of his or her ethical obligations as an attorney.\textsuperscript{28} Attorneys are governed by rules of professional conduct that require an attorney to maintain loyalty to his or her clients and ultimately be directed by those clients.\textsuperscript{29} The ability to supersede a client’s stated direction with the attorney’s own direction is not outlined in an attorney’s ethical code.

After decades of robust debate on the issue, scholars now recognize the validity of these critiques of best-interest representation and acknowledge the need for an attorney to act as an attorney and take direction from his or her client whenever possible.\textsuperscript{30} States are coming around to this view as well and are changing their statutes, court rules, and practice standards to clarify that client-directed attorneys should be appointed for all verbal children.\textsuperscript{31}


\textsuperscript{28} See, \textit{e.g.}, Buss, \textit{supra} note 18, at 1734 (“In shifting decision making from the child client to herself, the lawyer has, in effect, changed clients: Her ultimate client loyalty is owed, not to the child ‘in the flesh,’ but to the abstraction of the child’s best interests.”); Peters, \textit{supra} note 20, at 122–23 (“Moreover, it is not even clear that Model Rule 1.14 allows the lawyer to take on the full guardian ad litem role. Rule 1.14(b) authorizes a lawyer to ‘seek appointment of a guardian or take other protective action,’ but it is unclear if that protective action could include deciding the client’s best interests and pursuing them as a goal of the representation. At least one commentator has suggested that ‘other protective action’ is necessarily smaller than determining the client’s best interests and pursuing those lawyer-defined interests.”) (footnotes omitted)).

\textsuperscript{29} See \textit{MODEL RULES OF PROF’L CONDUCT r. 1.2} (AM. BAR ASS’N 1983) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”); \textit{id.} r. 1.7 (“[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”); \textit{id.} r. 1.14 (“[W]hen a client’s capacity to make adequately considered decisions in connection with a representation is diminished . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”).

\textsuperscript{30} In 2006, child advocates gathered at the University of Nevada, Las Vegas (UNLV) to discuss the role of a child’s attorney; this conference followed the 1996 Fordham Conference on the same issue. The UNLV Conference resulted in a compilation of published articles on the topic; the introduction to that compilation included the following sentiment: “During the nearly half century that legal norms have mandated appointment of counsel or other representation for children in legal proceedings, the children’s attorneys’ community has come to the conclusion that ethical legal representation of children is synonymous with allowing the child to direct representation.” \textit{Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham}, 6 NEV. L.J. 592, 592 (2006) [hereinafter Fordham Recommendations].

\textsuperscript{31} See, \textit{e.g.}, \textit{MINN. STAT. ANN. § 260C.163} (West 2013); \textit{CONN. R. SUPER. CT. JUV. § 32a-1}; \textit{LA. SUP. CT. R. XXXIII, pt. III, subpt. II, standard 4}; \textit{N.Y. FAM. CT. ACT § 241} (McKinney 2010). Other states use less precise standards for appointment of stated-interest attorneys, such as those declaring that the attorney should represent the child’s stated interest once the child is capable of “considered judgment.” See, \textit{e.g.}, \textit{OKLA. STAT. Tit. 10a, § 1-4-306} (West 1969); \textit{TEX. FAM. CODE ANN. § 107.004(a)(2)} (2013); \textit{MASS. COMM. FOR PUB. COUNSEL SERVS., PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD
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However, by focusing on the distinction between client-directed and best-interest lawyering, this debate has largely ignored the issue of how attorneys should best represent children who are unable to direct them.\textsuperscript{32} Attorneys are trained to act as advisors, but ultimately they are to take direction from their clients and to treat impaired clients as much like unimpaired clients as possible.\textsuperscript{33} When clients are preverbal or nonverbal, it is impossible for attorneys to advise their clients and take their direction.\textsuperscript{34}

One alternative to best-interest advocacy for young children is a "substituted judgment" model of representation. Substituted judgment representation requires advocates to put themselves in the place of their client, and in the context of their client's life, to make a decision that the client likely would have made had they been able to verbalize a position. This model is sometimes used in the medical field when patients are no longer able to direct their care and is often used with elderly clients.\textsuperscript{35} Professor Jean Koh Peters advocates for an approach to children's representation that resembles substituted judgment, asking attorneys to "individualize every representation, in a way that allows maximum possible participation of the child client, so that the representation reflects the child-in-context and the child's unique view of the world."\textsuperscript{36}

\footnotesize{WELFARE CASES 1.6(b) (2015); MD. FOSTER CARE CT. IMPROVEMENT PROGRAM, GUIDELINES FOR ADVOCACY FOR ATTORNEYS REPRESENTING CHILDREN IN CINA AND RELATED TPR AND ADOPTION PROCEEDINGS, guideline A (2001).

\textsuperscript{32} See Donald N. Duquette, Two Distinct Roles/Bright Line Test, 6 NEV. L.J. 1240, 1246 (2006) ("[T]he unique challenge in representing the youngest children [is]—how to determine the best interests of the child. This is among the least developed part of our jurisprudence and should be a central focus of our discussion as a field.").

\textsuperscript{33} See MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2015) ("a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued"); id. r. 1.4 ("A lawyer shall . . . (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter"); id. r. 1.14 ("when a client's capacity to make adequately considered decisions in connection with a representation is diminished . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client"); id. r. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.").

\textsuperscript{34} See, e.g., David R. Katner, Coming to Praise, Not to Bury the New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 14 GEO. J. LEGAL ETHICS 103, 103 (2000) ("State ethics codes were originally designed to regulate lawyers who represent adults, clients capable of making their own decisions and communicating their wishes to counsel. Applying these same codes to children's attorneys who represent clients ranging from preverbal infants to older adolescents is at best problematic.").

\textsuperscript{35} See, e.g., Norman L. Cantor, The Bane of Surrogate Decision-Making: Defining the Best Interests of Never-Competent Persons, 26 J. LEGAL MED. 155, 157 (2005) ("Under a substituted judgment formula, where a patient's religious values or philosophical preferences can be determinative of post-competence care").

\textsuperscript{36} JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 1 (3d ed. 2007).}
However, a child client, unlike an adult or elderly client, has not yet had the time to set a course for his or her life for the attorney to reflect upon and follow; a child client has not yet expressed religious or philosophical preferences for an attorney to use as a guide. Without this guide set by the client, the substituted-judgment model meets the same criticisms as the best-interest model. The substituted-judgment model continues to allow the individual attorney to control the direction of the representation, which allows for the domination of implicit biases, inconsistent advocacy, and a lack of transparency. The model also continues to assume nonexistent expertise because the attorney is to discern what a preverbal client would want, acting as a form of “baby whisperer” to decipher the preverbal client’s direction. The substituted-judgment model continues to wrest power from parents, who would normally be expected to interpret what their nonverbal children want, and to place that power in the hands of third-party strangers. Finally, like best-interest representation, there is no provision in the ABA Model Rules of Professional Conduct that allows for substituted-judgment representation.

In the 1990s, the American Bar Association adopted Standards for Attorney Representation that encouraged a third model of representation, that of advancing only the child’s “legal interests.” The standards supported the attorney acting as an attorney and following his or her client’s direction when the client was able to articulate a position. When a client is preverbal, the attorney is instructed to advocate for the child’s legal interests and request a separate guardian ad litem. The Standards explain:

37. See, e.g., Atwood, supra note 17, at 97 (“A lawyer’s interpretation of what the child would have wanted were the child able to express a position may mask arbitrary value judgements more than would a transparent assessment of best interests.”); Martin Guggenheim, A Paradigm for Determining the Role of Counsel for Children, 64 FORDHAM L. REV. 1399, 1400 (1996) (“The crucial difference between most impaired adults, such as the elderly, and young children, is that those adults have lived a full life, during which their personalities, values, and preferences became knowable. Young children, in contrast, have not yet reached the point in life when their values have been revealed. For this reason, the proposal that lawyers use ‘substituted judgment’ when representing incompetent adults has little meaning when applied to young children.”).

38. In fact, some have said that substituted judgment may fall into these traps even more than a best-interest advocate. See, e.g., Atwood, supra note 17, at 97 (“A lawyer’s interpretation of what the child would have wanted were the child able to express a position may mask arbitrary value judgements more than would a transparent assessment of best interests.”).


40. Id. at pt. I, Standard B-4. “The child’s attorney should elicit the child’s preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child’s attorney should represent the child’s expressed preferences and follow the child’s direction throughout the course of litigation.” Id.

41. Id. at pt. I, Standard B-4(1).
The determination of the child’s legal interests should be based on objective criteria as set forth in the law that are related to the purposes of the proceedings. The criteria should address the child’s specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available.42

This concept echoes language used by Professor Martin Guggenheim, who suggested that attorneys for young children focus on a child’s legal rights:43

For these reasons, when determining the role of counsel for children it is essential to engage in a careful study of the legal rights and powers children enjoy in the particular subject matter implicated by the proceeding. The role of counsel for young children necessarily will vary across a variety of legal matters. This is because the role of counsel is not developed in a vacuum. What a lawyer for a young child must or may do will depend directly on the rights of the young child in the particular matter involved. Because lawyers, above all else, are the enforcers of their client’s rights, the principal task when determining counsel’s role for young children is to examine the relevant legislation and case law in the particular subject area. Once those rights have been identified, the only remaining inquiry is to determine the most effective way to enforce them.44

In Guggenheim’s discussion of this concept, he explores hypothetical scenarios in the fields of education advocacy, reproductive rights, juvenile justice, family custody disputes, and child welfare, without going into great length on any one topic.45

The ABA Standards seem at first glance to mirror the ideal promoted by Professor Guggenheim: that of adhering to statutory and case law as the guiding principle and moving away from individual determinations regarding what is best. However, the Commentary following this Standard appears to suggest a more subjective and individualized approach that encourages attorneys to assess their child client’s individual needs based on the child’s circumstances and development.46 By asking an attorney

42. Id. at pt. I, Standard B-5.
43. In Professor Guggenheim’s assessment, this model should be used not only for preverbal children but also for children who could be considered “impaired” due to age. Guggenheim, supra note 37, at 1399–400.
44. Id.
45. Id.
46. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, supra note 39, cmt. to pt. I, Standard B-5 (“A child’s legal interests may include basic physical and emotional needs, such as safety, shelter, food, and clothing. Such needs should be assessed in light of the child’s vulnerability, dependence upon others, available external resources, and the degree of risk. A child needs family affiliation and stability of placement. The child’s developmental level, including his or her sense of time, is relevant to an assessment of need. For example, a very young child may be less able to tolerate separation from
to assess a client's physical and emotional needs and balance competing interests based on the preverbal child's needs, this standard starts to look more like the substituted-judgment model previously discussed.

Around the time the ABA Standards were released, children's advocates across the nation gathered for a conference at Fordham University to discuss the role of an attorney for the child. Scholars referred to the "legal-interest" standard in the resulting published Recommendations of the Conference. These recommendations, however, refer to a seven-step process for determining a child's legal interest that allowed for great discretion by the attorney and again seemed more to mirror a substituted-judgment ideology, asking attorneys to focus on the child in context, examine how the child is behaving, refer to nonlegal disciplines, and rely on experts. The varying interpretations of the term "legal-interest advocacy," as discussed by Professor Guggenheim, the drafters of the ABA Standards, and the Fordham Conference attendees, creates confusion about what this style of representation should look like in reality. Unfortunately, after the Fordham Conference, there was very little written about the legal-interest standard that might help develop the concept more robustly.

Adding to this confusion, soon after the ABA published its standards, the National Association of Counsel for Children (NACC) released its own standards for representation, which differed from the ABA Standards and allowed for greater use of best-interest representation. In 2011, the ABA adopted a Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings. The Model Act makes no reference to a legal-interest determination and instead explicitly instructs

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47. Fordham Recommendations, supra note 30, at 1311.
48. Id.
49. NAT'L ASS'N OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES 14-15 (2001) ("The distinction between the ABA Standards and the NACC Revised ABA Standards is that where the ABA remained consistent with the client directed attorney throughout, the NACC carved out a significant exception where the client cannot meaningfully participate in the formulation of his or her position. In such cases, the NACC's version calls for a GAL type judgment using objective criteria.").
attorneys to make a substituted-judgment determination when their child clients are preverbal.\(^{51}\)

Unsurprisingly, there continues to be much confusion among attorneys regarding the appropriate approach to the representation of preverbal children.\(^{52}\) While scholars and statutes sometimes refer to legal-interest representation, this concept has not been fully explored or significantly discussed since the 1990s. In this vacuum, we have created an unpredictable system of representation for our preverbal child clients and allowed the best-interest model to flourish despite its many flaws.\(^{53}\) Children deserve better.

### III. Reviving the Legal-Interest Model

The child welfare system needs a thoughtful alternative to client-directed advocacy for preverbal and nonverbal child clients. Scholarship and practitioners have largely agreed that when possible, client-directed advocacy is the ideal role for an attorney;\(^{54}\) however, we know that children are sometimes too young to communicate verbally. To avoid the many pitfalls of the best-interest and substituted-judgment models and remain committed to protecting the rights of children, child advocates should reexamine the concept of legal-interest representation for preverbal

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51. *Id.* at § 7(d). ("During a temporary period or on a particular issue where a normal client-lawyer relationship is not reasonably possible to maintain, the child's lawyer shall make a substituted judgment determination. A substituted judgment determination includes determining what the child would decide if he or she were capable of making an adequately considered decision, and representing the child in accordance with that determination.").

52. See, e.g., Duquette, *supra* note 32, at 1246 "[T]he unique challenge in representing the youngest children [is]—how to determine the best interests of the child. This is among the least developed part of our jurisprudence and should be a central focus of our discussion as a field."); Katner, *supra* note 34, at 107 ("Attorneys may be unable to resolve the confusion about their roles given some of the limitations present in juvenile dependency court proceedings."); Kasey L. Wassenaar, *Defenseless Children: Achieving Competent Representation for Children in Abuse and Neglect Proceedings Through Statutory Reform in South Dakota*, 56 S.D. L. REV. 182, 182 (2011) ("The lack of guidance is causing confusion and frustration for attorneys working in this unique field of law, which ultimately reduces the quality of representation.").

53. See, e.g., *IDAHO CODE ANN.* § 16-1614(1) (West 1976) ("In any proceeding under this chapter for a child under the age of twelve (12) years, the court shall appoint a guardian ad litem for the child . . . ."); N.M. *STAT. ANN.* § 32A-4-10(B)-(F) (West 2005) ("(c) At the inception of an abuse and neglect proceeding, the court shall appoint a guardian ad litem for a child under fourteen years of age . . . . The court shall assure that the child's guardian ad litem zealously represents the child's best interest . . . ."). This approach of best interest representation as a default for young children is also championed by Professor Duquette. See Duquette, *supra* note 32, at 1240 ("A better approach towards recognizing and accommodating the child's developing cognitive abilities and judgment would be to adopt a bright line age test, say at seven. At age seven (or eight or ten) and above the youth would receive a client directed advocate, that is, a child's attorney, and below the bright-line age a child gets a best interests (or substituted judgment) advocate.").

54. *See supra* note 30.
children. The legal-interest model can serve as an alternative in those instances where a child is unable to state his or her interest.

A legal-interest attorney would be charged, not with telling the court what the advocate thinks is best or what the advocate imagines the child would want, but with identifying the legal rights that are implicated in a given situation and advocating solely for the protection of those legal rights.\(^{55}\) This role highlights the unique skill set of lawyers—that of identifying legal issues and utilizing court processes—while moving away from roles that rely on the social work and child development skills that do not fall within a lawyer’s specific expertise. By replacing the best-interest model with a legal-interest model for preverbal and nonverbal children, we can protect the legal rights of the child while limiting the discretion of the otherwise unchecked advocate and increasing transparency in the system.

After a review of the dilemmas inherent in representing preverbal clients, one may be tempted to assume that the best approach is to remove the lawyer from the equation altogether. However, this approach ignores the legal rights that are explicitly granted by statutes to even the youngest children once the state intervenes into a family and wrests control from the child’s caregiver.\(^{56}\) Take, for example, the child’s statutory right to be placed with relatives, assuming relatives are available and safe.\(^{57}\) If the child’s parent has fallen out of touch or is in a dispute with relatives, the parent may not suggest the relative as a possible placement resource.

\(^{55}\) As discussed in Part II, supra, a similar approach has previously been suggested by Professor Guggenheim as a model to constrain the actions of child advocates for young clients, not just those clients who are pre- and nonverbal. See Guggenheim, supra note 37, at 1399.

\(^{56}\) See, e.g., Duquette, supra note 32, at 1246 (“Perhaps children below the bright line age cut-off, who cannot instruct counsel, should not have lawyers at all as Professor Guggenheim has argued. The better view is that children indeed need advocates in this complex and often-chaotic process. Children caught up in any complex, even well meaning, bureaucracy, such as a hospital, school, or the court process, still need someone with power to look out for them. Parents, ordinarily the first choice, cannot be depended on in child welfare cases because the parents’ ability to care for the child is the very issue before the court.”); Federle, supra note 12, at 119 (“It is not enough to suggest that because children are incompetent, or otherwise disabled, they lack rights—for it is very clear that children do have rights: constitutional, statutory, procedural, and substantive. Moreover, it is the lawyer for the child who is in the best position to insist that the child’s rights are respected, valued, and considered. ‘The American conception of justice is not simply encapsulated in the notion of Due Process, but is encapsulated in a notion of Due Process defined in terms of adversarial presentation.’ Because the American legal system is adversarial, counsel fills an indispensable role in ensuring that individual claimants are respected and that the requisites of due process are met.”); Marvin Ventrell, From Cause to Profession: The Development of Children’s Law and Practice, Colo. Law. 65, 65 (“[T]he experience of over a century has taught that children deserve more than sympathy; they also deserve fair processes that respect their autonomy as individuals, family members, and rights-based citizens.”).

Nevertheless, the child has the legal right to be placed with family. Without an attorney for the child, there is no mechanism to hold the state accountable for this obligation to the child.

Because the ABA originally proposed the legal-interest model for representation of preverbal children in the 1996 Standards, some states have incorporated the term "legal interest" into their state standards for child representation. However, in part because this role has not been discussed at length since the 1990s, there continues to be confusion as to how the concept of legal interests should be applied.

As noted in Part II, the drafters of the ABA Standards proposed the following guidance for determining a child's legal interests.

The determination of the child's legal interests should be based on objective criteria as set forth in the laws that are related to the purposes of the proceedings. The criteria should address the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available.

This definition could be interpreted to give wide discretion to the child's attorney in evaluating the child's needs and preferences, but such an evaluation is not one that an attorney is trained to make when the child is preverbal. However, if one focuses upon the guidance's primary exhortation, which is to rely upon the objective criteria embodied in the statutes that are related to the proceedings, it is possible to reconcile the

58. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, supra note 39.
60. See, e.g., Annette R. Appell, Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children, 64 FORDHAM L. REV. 1955, 1957 (1996) ("However, the [ABA & Fordham] guidelines do not provide sufficient direction for the representation of very young clients—newborns to toddlers—who may be nonverbal and lack both the developmental capacity to make reasoned decisions and a history of sufficient duration or depth to provide context and guidance to the attorney.").
62. See, e.g., Duquette, supra note 32, at 1242–43 ("[T]he ABA Standards, the NACC modification of these standards and the Fordham Conference Recommendations all contain within themselves opportunity for lawyer discretion about what position to take on behalf of the child that is unreviewed by anyone else, not guided by principled criteria, and potentially idiosyncratic . . . so that similarly situated children run a considerable risk of receiving different forms of advocacy and different levels of participation in the decision-making depending upon the personality and values of the lawyer assigned to the case.").
subsequent mention of a child’s needs and preferences. Rather than reading this second sentence as an undoing of the legal-interest model, it makes more sense to read it as an understanding that, in general, the relevant statutes should address the child’s needs and preferences, as well as the goals of expeditious resolution of the case in the context of child safety, permanency, and normalcy. Therefore, where clients cannot express their preferences and needs, in order to be truly transparent and accountable, legal-interest attorneys must think of the law as their master, instead of their client.

This conception of legal-interest advocacy as tying an attorney to the explicit wording of statutes and case law that set out affirmative legal rights for his or her child client allows for the attorney to protect the client’s legal rights while ensuring an appropriate sense of humility in the attorney and constraining the attorney’s power to areas in which he or she is trained. The ability to review a set of circumstances and identify the legal issues involved is one of the core skills an attorney possesses. This technique of legal-issue spotting is unique to the profession of lawyers and is necessary to ensure that an individual’s legal rights are protected. The legal-interest model draws upon these legal skills instead of encouraging lawyers to act outside of their professional training. In child welfare situations, attorneys often get thrown into the middle of complex family dynamics, cycles of poverty and abuse, and allegations of harm to children. In these challenging situations, reasonable minds may disagree about the best path forward. The legal-interest model ensures that someone will parse through the complexity to identify the explicitly enumerated legal rights at stake and utilize the court systems to ensure that those legal rights are protected when necessary.

The obvious first step of any attorney in this role is to gain a comprehensive knowledge of the federal and state laws that regulate the child welfare system. To properly issue spot, attorneys must have a comprehensive knowledge of the many legal rights at stake for their preverbal and nonverbal clients. The authors of this article have compiled a list of federal legal rights within the child welfare realm that would be applicable to very young preverbal children. This initial list is nearly four pages long and is limited to rights that would be applicable to a preverbal child; it does not include the legal rights that would be applicable to older

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64. See, e.g., Kristina V. Foehrkolb & Marc A. DeSimone Jr., Debunking the Myths Surrounding Student Scholarly Writing, 74 Md. L. Rev. 169, 173 (2014) (“The diagnostic ability to ‘issue spot’ is perhaps the greatest skill a practicing attorney can possess . . . .”).

65. See infra Appendix: Federal Legal Rights of Children in Dependencies.
youth and teens, rights such as those related to education and the transition to adulthood. Included in this list is the right to regular visits by a social worker,\textsuperscript{66} coordinated health care that includes regular screenings,\textsuperscript{67} and notification of adult relatives within thirty days of removal,\textsuperscript{68} to name a few. The list of legal rights granted to the child is even greater if the child falls under the ambit of the Indian Child Welfare Act (ICWA).\textsuperscript{69} While state statutes are often modeled on the federal law and states are required to implement federal laws to receive funding, many state statutes have language that varies slightly and/or expands the list of legal rights for young children. Any attorney advocating under the legal-interest model for a young child will need to begin by compiling a list of the legal rights explicitly granted in his or her state of practice.

Finally, for legal-interest advocacy to be most effective, an attorney must take a proactive approach to representation and not wait for conflicts to arise. By ensuring that the state is meeting its obligations, timelines are adhered to, and court orders are followed throughout the course of a case, the legal-interest attorney can avoid many frustrating situations that create conflicts between legal rights.\textsuperscript{70} A legal-interest attorney may need to retain experts who can act as witnesses in hearings about the child to flesh out the child's circumstances. Experts may be important in situations where another party is seeking to restrict a child's legal rights or in high-conflict situations.

To conceptualize the practical application of this legal-interest model, compare and contrast how best-interest and legal-interest attorneys\textsuperscript{71} would react to the hypothetical cases of Sasha and Blake.

\textit{A. Sasha}

Sasha is a one-month-old with special medical needs who just entered foster care last week after being discharged from the neonatal intensive care unit. \textsuperscript{66} 42 U.S.C. § 624(f)(1)(A) (2012). \textsuperscript{67} Id. § 671(a)(30). \textsuperscript{68} Id. § 671(a)(29). \textsuperscript{69} 25 U.S.C. § 1912(a)–(f) (2012). \textsuperscript{70} See, e.g., Merrill Sobie, \textit{The Child Client: Representing Children in Child Protective Proceedings}, 22 TOURO L. REV. 745, 819 (2006) ("For some issues, and in some cases, the task may be relatively easy. If the child needs specialized services, such as medical care, counsel's position concerning that topic should be clear. If the young child has been abandoned or seriously abused and an acceptable kinship arrangement is possible, the lawyer's strategy is obvious."). To be clear, the legal-interest attorney would have the responsibility to enforce court orders that protect the legal rights of the child, but also an obligation to appeal those that do not. \textsuperscript{71} Federal law is used in order to demonstrate the universal applicability of this model. Obviously, a legal-interest attorney would need to apply the statutes specific to his or her local jurisdiction and not rely solely on federal law.
care unit. Sasha is placed with nonrelative foster-to-adopt parents. Sasha’s biological parents are considering relinquishing their parental rights but have not yet done so. Sasha’s attorney has visited Sasha at her placement, and her foster parents are excited to adopt Sasha; they have set up a nursery for her and are caring for her well, and there are no apparent safety concerns. Sasha’s attorney has just been notified by the social worker that the Department of Social and Health Services (DSHS) has identified a relative in a neighboring community that is able to take Sasha; that relative, however, has limited resources and is not sure about the possibility of adoption at this point.

1. **BEST-INTEREST REPRESENTATION**

   Assuming the best-interest advocate had the time to do so, she might visit Sasha in her current placement and talk to her biological parents about the possibility of relinquishment. Based on her assessment, that attorney might advocate for keeping Sasha where she is, considering the ability of the foster parents to care for Sasha and the biological parents’ indication that they may wish to relinquish their rights.

2. **LEGAL-INTEREST REPRESENTATION**

   The legal-interest attorney would not have the same discretion as the best-interest attorney and would instead need to rely solely on the specific rights outlined in the statute. Sasha’s legal interests would arise out of statutory requirements for:
   - reasonable efforts to reunify the child and her biological parents;  
   - placement in a safe home, with background checks completed on placements; and  
   - preference for placements with relatives.

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72. Judges frequently rely upon best-interest advocates to investigate the circumstances of a child’s placement as well as alternative placements with families and relatives. In a national survey of 550 dependency judges, judges frequently cited the information-gathering role of the best-interest advocate as critical. Hon. J. Dean Lewis, *The Role and Responsibilities of the CASA/GAL Volunteer: What Do Judges Think?*, NAT'L CT. APPOINTED SPECIAL ADVOCATES (2009), http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5926225/k.6569/What_Do_Judges_Think.htm. Nonetheless, time constraints and caseloads may impact how well the individual advocate is able to fulfill this responsibility. *See supra* notes 8–9.


74. *See id. §§ 671(a)(10)(A), 5106a(b)(2)(B)(xxii).*

75. *See id. § 671(a)(19) (2012).* Title 42 U.S.C. § 671(a)(19) (2015) encourages, but does not require, states to adopt a preference for relative caregivers (“[T]he State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standard”). This example assumes a state’s adoption of this preference.
Sasha has a legal right to be placed with relatives, if possible, to maintain family ties. She does not have a legal right to the most well-resourced home. Although adoption is often the preferred outcome of some state officials, Sasha’s legal right to reunify with her parents would be safeguarded. Moreover, she does not have a right to the preference of one alternate permanent plan (such as adoption) over another (such as guardianship with the relatives).

A legal-interest attorney would advocate for a speedy investigation of the relative to ensure that he or she can provide a safe home. Assuming that the relative passes background checks, the attorney should advocate for that placement as soon as possible. The relative’s lack of commitment to adoption supports the appropriateness of this placement, as the child does not have a statutory right to adoption, but she does have a statutory right to reunification, and the latter is preserved.

B. Blake

Blake is a preverbal, developmentally delayed, two-and-a-half-year-old who was recently placed into foster care after being removed from his parents for chronic neglect. His parents have provided the names of maternal and paternal grandparents and one aunt out-of-state but have repeatedly told DSHS that no one in the family is in a position to take Blake, and, further, that “they are not good people.” The parents report that Blake’s last doctor’s appointment was a year ago and that he has no diagnoses of mental health or developmental disabilities. However, his new foster parents report that he wakes up screaming several times during the night.

1. BEST-INTEREST REPRESENTATION

Assuming the best-interest advocate had time, she might visit Blake in his foster home and assess the quality of care he is receiving. A best-interest advocate might also urge Blake’s foster parents to take him to the doctor for a check-up as soon as possible and follow up with the social worker to ensure that Blake gets a full screening. If the best-interest advocate believes Blake is getting proper care by the foster parents, she will likely recommend that Blake stay in their home. She may or may not assert Blake’s right to have his relatives considered a placement resource if she wants Blake to remain in his current foster home. The best-interest advocate’s position could also vary based on the value that advocate places on connections to relatives and respect for parental placement preferences.
2. Legal-Interest Representation

The statutes in this situation explicitly give Blake legal rights to:

- referral to early intervention services under the Individual with Disabilities Education Act (IDEA) once abuse or neglect is substantiated;\(^{76}\)
- coordinated health care that includes regular screenings, oversight of prescriptions, continuity of health care, and treatment of trauma associated with removal;\(^{77}\)
- notification of removal, and process for involvement and placement to all adult relatives, including grandparents, within thirty days of removal; and\(^{78}\)
- preference for relative placements.\(^{79}\)

The legal-interest attorney would be required, therefore, to press the state to identify, investigate, and consider all relatives for placement. The legal-interest attorney’s additional priorities would include ensuring that the social worker is prepared to submit an IDEA referral as soon as allegations of neglect are substantiated and that, in addition to a doctor visit, an infant mental health screening be conducted as soon as possible. Due to the chaos of the many moving pieces early in a case, it is the legal-interest advocate’s responsibility to ensure these issues are not lost in the fray and to bring a motion for a court order if these issues are not addressed in a timely manner. Both a best-interest and a legal-interest advocate would likely fight for the same access to resources for their clients; however, because the legal-interest advocate’s focus is solely on Blake’s legal rights and is not burdened by the added weight of trying to assess what is best, he or she may be better able to formulate legal solutions. Such solutions might include, for example, bringing a motion for enforcement to hold state actors accountable to Blake on timelines that meet Blake’s needs.

In the child welfare arena, statutes lay out specific rights for children and families. Occasionally, statutes grant legal rights that are unclear or undefined—especially those that incorporate the “best interests” standard into the explicit wording of the statute. A statute that states, for example, that a child has a right to be placed “in close proximity to the parents’ home, consistent with the best interest and special needs of the child” does not help a court to ascertain what those best interests might be. Additionally, statutes occasionally prescribe a standard that is vague or open to interpretation; an example would be a statute requiring

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\(^{77}\) See id. § 622(b)(15).

\(^{78}\) See id. § 671(a)(29).

\(^{79}\) See id. § 671(a)(19). See supra note 72.

“reasonable” efforts to reunify a family.81

When approaching unclear or undefined rights, legal-interest advocates cannot use their discretion to pursue any definition or clarity they think would be best. In those situations, the legal-interest attorney must refrain from substituting his or her own judgment about what the client should want or how these rights should be defined. Whenever there is room for interpretation, the legal-interest attorney, like any attorney, must look to case law for guidance on the definition and scope of the legal right.

Assuming case law is not helpful or is nonexistent, legal-interest attorneys must not interpret vague terms to suit their desired outcomes. Instead, any interpretation by a legal-interest advocate of qualifying adjectives within a statute must favor the protection of the underlying purpose of that statute. Statutes are written with the goal or purpose of protecting or promoting some principle. Often, they are imbedded with terms such as “unless it is not in the child’s best interest” in order to give judicial officers discretion to adapt these principles to the facts of the case. However, when legal-interest attorneys are interpreting these statutes, they should not focus on the exception to the rule, but on the rule itself—on what the goal or purpose of that statute is, on why it was written in the first place. Consider the application of this principle in Jamie and Michael’s hypothetical cases.

C. Jamie

Jamie is a one-year-old girl who was just removed from her drug-addicted parents due to chronic neglect. The state has located two suitable relatives for Jamie to be placed with: her maternal aunt, Kendra, and her paternal uncle, Richard. The state would like to place Jamie with Richard, who lives on the other side of the state about three hours away. Richard is married and has two children of his own, ages four and seven. His family lives in a large house in a nice neighborhood, and there is an extra bedroom for Jamie. Kendra, on the other hand, is a single woman who lives in a small duplex, which also has an extra bedroom. The duplex is less than five minutes away from Jamie’s mother’s home. Both Kendra and Richard have passed background checks and are willing to take Jamie for as long as necessary until Jamie’s parents are able to get clean and sober.

1. BEST-INTEREST REPRESENTATION

Time permitting, a best-interest advocate would likely attempt to visit both homes and talk with both potential caregivers. Based on Richard’s resources, his experience in parenting, and the additional childcare help of

81. See, e.g., id. § 671(a)(31)(A)–(B).
Richard’s wife, it is very possible that the best-interest advocate will agree with the state to promote placement with Richard. However, it is difficult to make assumptions about the course of action any particular best-interest advocate will take with any given set of circumstances because, as the critics point out, much depends on the individual best-interest advocate’s values and implicit biases.

2. Legal-Interest Representation

The applicable statutes give Jamie legal rights to:

- notification to all adult relatives, including grandparents, of her removal and of the process for becoming involved and taking placement of the child, within thirty days of removal;\(^8^2\)
- reasonable efforts to reunify the child and her biological parents;\(^8^3\)
- placement in a safe home, with background checks completed on potential placements;\(^8^4\)
- the least restrictive placement available and one in close proximity to a parent’s home, consistent with the best interests and special needs of the child.\(^8^5\)

Here, Jamie’s legal right to be placed in close proximity to her parents’ home is qualified by a statement regarding Jamie’s best interests. If the legal-interest attorney were authorized to interpret Jamie’s best interests however he or she sees fit, then the legal-interest attorney would function identically to the best-interest advocate. However, the legal-interest attorney is limited to interpretations of qualifying adjectives (i.e. “best” interests, “reasonable” efforts) that are the most favorable to the legal right being explicitly granted. In this instance, Jamie has an underlying legal right to be placed in close proximity to her parents’ home. Therefore, the legal-interest attorney must interpret what is in Jamie’s best interest in the light most favorable to the asserted right to be close to her parent’s home. Kendra’s home may not be the most well-resourced and Kendra might not be the most experienced parent, but Jamie is not given a legal right to either of those things. Instead, Jamie has a legal right to be placed in close proximity to her parents’ house. Therefore, the legal-interest advocate should challenge the state and encourage placement with Kendra, possibly through bringing a motion in court.

\(^8^2\) See id. § 671(a)(29).
\(^8^3\) See id. § 671(a)(15).
\(^8^4\) See id. §§ 671(a)(10)(A), 5106a(b)(2)(B)(xxii).
\(^8^5\) See id. § 675(5).
D. Michael

The state removed Michael at birth due to his mother’s substance abuse issues. Michael was first placed with his maternal aunt. However, that placement was disrupted after six months when the aunt had to move out of state for work. Michael then spent five months with his grandmother, but this placement was disrupted as well after the grandmother was hospitalized. Michael is now in licensed foster care and has been in out-of-home placement for fifteen months. His current foster parents are not licensed to adopt.

The DSHS offered inpatient treatment for the mother’s substance abuse. She participated and succeeded in the inpatient program. However, since discharge, she has had some relapses. Her relapses occur with less frequency and seem to be in a pattern moving toward extinguishment. Nevertheless, the mother relapsed three weeks ago. The mother has attended most visits, and supervisors note that she has been appropriate in her caregiving, but she has missed visits due to her relapse. A permanency planning hearing is scheduled in a month. The state has argued that the mother’s overall progress in treatment is compelling evidence that the child’s best interests would be served by allowing her another six months to succeed completely in treatment.

1. BEST-INTEREST REPRESENTATION

The best-interest advocate would be influenced by his or her personal values, sense of what the mother’s chances are for ultimate success, and sense of the nature of the child’s relationship with the mother. The best-interest advocate might choose to support the state’s argument for the best-interest exception to the termination of parental rights (TPR) filing requirement. In the alternative, the best-interest advocate might choose to recommend the filing of TPR so that the child can move toward permanency.

2. LEGAL-INTEREST REPRESENTATION

Michael’s relevant statutory rights in this situation include the right to:

- be transitioned to adoption (through filing a TPR petition and identifying, recruiting, processing, and approving a qualified family for adoption) if he has been in foster care for fifteen of the most recent twenty-two months86—unless he is placed in a relative’s care, the state agency has documented a compelling reason that adoption is not in his best interest, or reasonable efforts to reunify the family have not been made by the state in accordance with the case plan;

86. See id. § 675(5)(E).
• be placed in a home or facility that meets state standards for sanitation, safety, and protection of civil rights;\textsuperscript{87}
• have a permanency planning hearing, no less frequently than every twelve months after "entering foster care," to ensure he has a permanent plan of reunification, adoption, or legal guardianship, and to have a timeline for achieving that plan;\textsuperscript{88}
• receive placement, in a manner that is timely and consistent with the primary plan, and completion of steps necessary to finalize that plan.\textsuperscript{89}

For Michael, the statutory period for reunification efforts has passed, and it appears that the only possible exception to the filing requirement that applies is the best-interest exception. The burden of proving the compelling reason that supports the best-interest exception is on the state. The best-interest argument is the state’s to make, and the legal-interest attorney may not take a position on that question. While there is room for the legal-interest attorney to make sure that the state has fulfilled its duty to consider the best-interest exception before going forward with termination, the legal-interest attorney should make clear that Michael’s primary legal interest, as outlined in the statute, is now in permanency with a focus on adoption.

If the state does not succeed in carrying its burden of proof regarding the best-interest exception, the legal-interest attorney should fully explore the current foster parents’ interest in adoption and ability to adopt. If the current foster placement family is truly unable or unwilling, the legal-interest attorney should be prepared to press for a placement with new foster parents who are licensed and interested in adoption.

Just as the statutory rights of children are sometimes unclear or undefined, the constitutional rights of children may also be unclear or undefined.\textsuperscript{90} When approaching constitutional rights that are undefined or otherwise unclear under case law, legal-interest advocates cannot use their discretion to pursue any definition or clarity they think best. While statutory rights can be guided by the purpose of the statute, constitutional rights are not

\textsuperscript{87} See id. § 671(a)(10)(A).
\textsuperscript{88} See id. § 675(5)(C).
\textsuperscript{89} See id. § 671(a)(15)(C).
\textsuperscript{90} Scholars have previously noted this lack of clarity as a significant challenge of legal-interest advocacy. See, e.g., Donald N. Duquette, Legal Representation for Children in Protection Proceedings: Two District Lawyer Roles Are Required, 34 Fam. L.Q. 441, 454 (2000) ("[T]he legal interests of a child may be unclear because courts do not always apply constitutional doctrine consistently as applied to children's rights, while arguable constitutional protections may also be inconsistent with existing statutory or other substantive law."); Mandelbaum, supra note 21, at 48–49 ("[I]t will be difficult to identify the relevant legal interests. These interests are not always clear and may even be subject to multiple and conflicting interpretations.").
Case law is the primary vehicle that defines the contours of constitutional rights. The legal-interest lawyer should determine whether the case law exists and whether it is sufficiently specific and clear so as to grant rights to a child within his or her fact-specific situation. While attorneys who represent verbal children can and should continue to advocate on their client's behalf to define and expand the constitutional rights of their clients, legal-interest attorneys do not have such authority. Because a legal-interest attorney is not able to choose the direction of the litigation, the legal-interest attorney should consider undefined and vaguely worded constitutional legal rights to be outside the scope of his or her representation. This will be a frustrating limitation to many advocates. However, attorneys for verbal children will not be so limited, and they are encouraged to advocate for their clients' constitutional rights; this advocacy may result in case law that will better clarify the legal rights of all dependent children, allowing legal-interest attorneys to act based on clear precedent once it is established.

Another challenge for legal-interest attorneys is the issue of conflicting legal rights. Unfortunately, sometimes one legal right conflicts with another. Critics of the legal-interest model have pointed to the conflicts between vague constitutional rights as a reason to allow for greater attorney discretion. The legal-interest model, as described in this article, avoids many of these conflicts between vague constitutional rights by insisting on a focus on clearly and explicitly delineated rights. However, it is inevitable that occasionally even clearly defined statutory rights will conflict. In this situation, the legal-interest attorney is left without a clear path forward.

When examining conflicting legal rights, the legal-interest attorney must first determine if there is a true conflict—if the exercise of one right necessarily prevents the exercise of another. For example, one might be

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92. See, e.g., Duquette, supra note 90, at 448-49 ("[F]ocusing on the so-called 'legal interests' is very unsatisfactory. The child has a variety of legal interests, many of which are inconsistent with one another. For example, a child has a legal interest in being free from physical and mental harm, but is that interest served by continuing to separate the child from a parent who injured the child in the past, or by seeking a quick reunification of the child with the parent to whom he or she is attached under terms and conditions calculated to make the home safe?"); id. at 454 ("[T]he legal interests of a child may be unclear because courts do not always apply constitutional doctrine consistently as applied to children's rights, while arguable constitutional protections may also be inconsistent with existing statutory or other substantive law. Even the clearly defined legal interests of the child may conflict.").
tempted to see a situation where placement with a sibling or adult relative may conflict with the child’s right to reunification as a conflict between legal rights. However, a legal-interest attorney must first determine if placement with a relative actually jeopardizes reunification. If the relative lives far away, there may be a true conflict. However, if the issue is that the relative and the parents are not on good terms, assuming that the baby and parents continue to have ample access to visitation, this challenge may not actually jeopardize reunification. The legal-interest advocate’s first task is, therefore, to seek out solutions that would allow for the exercise of all seemingly conflicting rights and, if one such solution exists, to advocate for that path.

If the advocate determines that the case is at an impasse and a choice must be made between two conflicting legal rights, unlike a best-interest or client-directed advocate, the legal-interest attorney is not in the position to make that choice. Without a client to give direction and authorize the waiver of one legal right in favor of another, the only option is to present an analysis of both legal rights to an impartial decision maker who can make the ultimate determination.

Consider how this situation plays out in Austin’s case.

E. Austin

Austin is a developmentally on-track two-year-old who was removed from his parents at birth due to his testing positive for methamphetamine. Austin is biracial and has been placed with his white grandparents, who are

93. Scholars have also pointed to this issue of conflicting legal rights as a significant challenge of the legal-interest model. See, e.g., id. at 448–49. Mandelbaum, supra note 21, at 49–50 (“Clearly, there is confusion over what constitutes a child’s legal interests and rights at an adjudicatory hearing, or, if multiple rights are identified, how the differing interests should be ‘prioritized’ or resolved if in conflict.”). Because we are assuming that legal-interest advocacy would only ever be used when a client is unable to articulate a position, the tendency to refrain from placing children with caregivers who are likely to speak negatively about the parents will likely not have the same impact on a baby, who cannot fully understand those negative words, as it would for an older, verbal child.

94. Professor Guggenheim expands upon this directive to present issues to the court. He believes a legal-interest attorney should also be careful to ensure that choices are presented to the judicial officer in the way most likely to achieve a just result—by ensuring that both sides of the issue are adequately represented. See, e.g., Guggenheim, supra note 37, at 1431–32 (“Lawyers for children should help level the playing field. When they perceive an inadequate or overworked prosecution office, it will be important for children’s lawyers to ensure that all available facts supporting the agency’s case be placed before the judge . . . . Similarly, when the child’s lawyer perceives the parent’s attorney as inadequate or overworked, it is important for the lawyer to ensure that all facts supporting the parents be presented to the court.”). Because this approach requires the attorney to indulge his or her subjective view of whether an issue has been fairly presented, these authors do not adopt this approach, as it seems to open the door to an attorney favoring one right over another when the client is unable to provide direction.
currently not interested in adopting Austin but are willing to be a permanent placement for him through either long-term foster care or guardianship. Austin has been placed with his grandparents since birth, but his biological parents’ rights have not yet been terminated. Austin’s current permanent plan is guardianship in accordance with his grandparents’ preference. No guardianship petition has been filed.

The state is now interested in moving Austin to a nonrelative, foster-to-adopt placement so that Austin can find permanence in adoption. Austin is very bonded to his grandparents and has never met the potential new caregivers. However, the potential caregivers have adopted Austin’s half sibling, Jordan. Austin has not seen Jordan since he was a baby. The potential placement caregivers are African American.

1. **BEST-INTEREST REPRESENTATION**

The best-interest attorney should meet with Austin in his placement and meet with his grandparents; he or she should also meet with the potential new foster caregivers in their home. The eventual line of advocacy the best-interest advocate will choose is hard to predict and will likely vary based on the instincts and values of the individual advocate. If Austin is doing well in his current placement and seems bonded to his grandparents, the best-interest advocate might promote his continued placement in that home. However, if the advocate is not pleased with the quality of care Austin receives and thinks that Jordan seems to be doing well in the foster-to-adopt home, the advocate might encourage a transition to an adoptive home.

The best-interest advocate might also be influenced by the racial dynamics in this case. This influence may be implicit and unacknowledged by the advocate. It might be direct and deliberate. The advocate might believe strongly that Austin will need the help of a caregiver of color to assist him as he navigates his own racial identity, or the advocate might believe that the grandmother’s privilege better positions her to care for Austin.

Austin’s situation demonstrates the unpredictability that is associated with best-interest advocacy.

2. **LEGAL-INTEREST REPRESENTATION**

Under federal law, Austin has the right to:

- preference for a relative placement;\(^{96}\)
- preference for placement with siblings, and, if that is not possible, to visitation with siblings;\(^{97}\)

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97. See id. § 671(a)(31)(A)–(B).
a prohibition against considering race in placement decisions;\textsuperscript{98} 
no distinction in preference between permanent plans;\textsuperscript{99} 
placement consistent with a primary plan and timely completion of steps to finalize that plan;\textsuperscript{100} and 
a transition to adoption, through the filing of a TPR petition, once the child has been in out-of-home care for fifteen of the last twenty-two months, unless the child is placed with a relative.\textsuperscript{101}

Austin's legal rights to relative placement and sibling placement seem to conflict. Whenever rights conflict, the legal-interest attorney must present information on both options to the judicial officer without taking a position. However, the legal-interest attorney must also determine whether or not the legal rights at issue actually do conflict. Austin's right to continued sibling relationships does not necessarily conflict with his right to permanence, and a legal-interest attorney should investigate the possibility of sibling visitation so that Austin can develop a relationship with Jordan. After assessing the possibility of visitation, the legal-interest attorney should bring a motion on placement before the court and present all relevant information to the judicial officer, ensuring meaningful deliberation before Austin is removed from his grandparent's care.

Regardless of how the visitation investigation proceeds, the issue will need to be brought before a judicial officer. In the hearing, the legal-interest attorney should note for the judicial officer the statutory preference for placement with siblings and that the state is advocating and presenting evidence in support of that placement. Austin also has a right to placement consistent with his primary plan and a timely completion of that plan. Austin's primary plan is guardianship, which does not require a TPR. Further, the permanent plan of adoption is not granted any preference over the permanent plan of guardianship. Adjusting the permanent plan to adoption, seeking and obtaining a termination, and transition and approval of the new adoptive home would all work against Austin's right to timely permanence through his permanent plan.

The racial dynamics of this case must be confronted directly by the legal-interest attorney, both in the context of his or her own advocacy and in the actions of others. It would be naïve to assume that the mere existence of the statute will eliminate the legal-interest attorney's implicit or explicit biases, especially in a case in which the child's interest in permanence could converge with implicitly or explicitly racist assumptions.\textsuperscript{102} Nonetheless,

\textsuperscript{98} See \textit{id.} § 671(a)(18).
\textsuperscript{99} See \textit{id.} § 675(5)(C).
\textsuperscript{100} See \textit{id.} § 671(a)(15)(C).
\textsuperscript{101} See \textit{id.} § 675(5).
\textsuperscript{102} Similarly, we should not assume all statutes are written to best protect against racist
by prohibiting a consideration of race, the statute places a burden on the advocate to be vigilant with respect to not only his or her own attitudes but also to the attitudes and motivations of the remaining parties.

Ultimately, the judge will be tasked with determining the best outcome for Austin. The legal-interest attorney is ensuring that the state is held to its obligations to Austin and that any determination of what is best for Austin is made after careful and open consideration with the possibility of appellate review.

The limitations on an attorney to only advocate on behalf of clearly delineated and specified legal rights and to interpret unclear terminology to protect the enumerated right will be frustrating to many, as it is a departure from the normal course of attorney practice and a restriction on the tools the lawyer has available. However, it is essential to limit the power of a preverbal child’s attorney in order to ensure that the attorney is not empowered to subvert the will of his or her client by inserting the attorney's own will into the equation.

Most preverbal children will not remain preverbal forever and will, in a few short years, be able to articulate a considered position that would allow for more creative advocacy. Any legal model that substitutes the lawyer’s will for the client’s before the client is able to express his or her will undermines the client’s later ability to act as an autonomous agent.

IV. A Critical Examination of Legal-Interest Advocacy

Although the legal-interest model addresses many of the criticisms leveled at best-interest advocacy, it, too, is likely to generate criticism. When advocates first discussed the legal-interest model in the 1990s, scholars opined that the role, as then characterized, would fail as both too limited to be useful and too susceptible to abuse by individual attorneys. In addition to confronting these critiques, we must ensure that the legal-interest model actually addresses the problems set out to be addressed and actions. For example, the Interethnic Adoption Provisions of 1996, which amends the Multiethnic Placement Act of 1994, expressly prohibits the use of race in determining adoptive placements and was passed despite high controversy and the opposition of the National Association of Black Social Workers. Id. § 1996b; Position Statement, Nat'l Ass’n of Black Soc. Workers, Transracial Adoptions (Sept. 1972). The impact of this Act on the well-being of children of color continues to be debated. See, e.g., David J. Herring, The Multiethnic Placement Act: Threat to Foster Child Safety and Well-Being?, 41 U. Mich. J.L. Reform 89, 89 (2007); Cynthia R. Mabry, A MEPA-IEP Review from Adoption Attorneys' Perspectives: Continuing to Make Permissible Assessments Based on Race for the Best Interests of Children of Color, 38 Cap. U. L. Rev. 319, 319 (2009).

103. See, e.g., Appell, supra note 60, at 1963 (“[T]his model could limit constitutional challenges to, or defenses in, proceedings in which the applicable substantive state or federal law may be unconstitutional.”).
withstands the criticism leveled against best-interest advocacy. Part IV of this article attempts to explore and respond to each of these potential criticisms of legal-interest advocacy to demonstrate the value of this model moving forward.

A. Is Legal-Interest Advocacy Really Any Different than Best-Interest Advocacy?

For those staunchly opposed to the appointment of best-interest attorneys for small children, it may be hard to accept the notion that the legal-interest model will really be any different. Scholars have previously lamented that the legal-interest model would still allow best-interest notions to dominate.104 There is legitimate concern that the legal-interest model will continue to perpetuate the failures of best-interest advocacy while providing the cover of legitimacy, cloaking attorney biases in the language of legal rights so that these same biases now appear to have the authority of law.

However, the strict legal-interest model proposed here is self-conscious in its restraint. It takes to heart one of the most central tenets of the lawyer’s role, which is that it is inappropriate for lawyers to substitute their own judgment for that of their clients.105 Under this model, we know that legal-interest attorneys will be confined to championing only those outcomes that are protected by specific rights. Legal-interest attorneys do not have the authority to assert their will, and their power is constrained to those specific rights enumerated in statute or clearly delineated in case law. The legal-interest attorney is confined to this set list of enumerated rights, and any interpretation of unspecific phrasing must be limited to the interpretation that most protects a child’s specified statutory right. In this way, legal-interest advocacy is formulaic and without flexibility to fit the biases of an individual attorney.106

104. See, e.g., Atwood, supra note 17, at 97 (“[L]imiting a lawyer’s function to investigation and presentation of evidence is unlikely to accomplish the desired result of eliminating all subjective advocacy by lawyers for ‘impaired’ children . . . . A lawyer’s decision-making about which facts to bring to the court’s attention and which facts to deemphasize will inevitably involve preliminary judgments about the merits of the case . . . . One cannot evaluate the importance of evidence without asking, For what purpose?“); Emily Buss, Confronting Developmental Barriers to the Empowerment of Child Clients, 84 CORNELL L. REV. 895, 961 (1999) (“[T]here is no neutral position that a lawyer (indeed, anyone who engages in a relationship with a child) can take. Every approach will send some message, however subtle, to the child.”); Mandelbaum, supra note 21, at 52 (“By the very nature of what the attorney chooses to call to the judge’s attention, the attorney is likely emphasizing a particular point of view.”).

105. MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 2015) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”).

106. Some of those same scholars who criticize the attorneys for implicit bias in their
It may be tempting to get distracted by the appearance of the term "best interest" written into statutes regarding the rights of children. There are various examples of a child being granted a legal right so long as it is within his or her best interest; one would be a child's rights regarding placement that includes the right to "placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child." Just as an attorney is not qualified to make the ultimate best-interest determination, an attorney is not qualified to assess when it may be in children's best interest to be granted an exception to explicitly stated legal rights. When best interest is included in the statute, typically it is included either in a list of factors to be considered by the judicial officer or as the grounds for an exception to a specified legal right. Because an attorney is not qualified to determine the child's best interest and the determination of a child's best interest falls outside of the scope of the representation, a legal-interest advocate should never champion the best-interest exception to a legal right granted to the child or rely on best-interest factors in advocating a specific outcome. Instead, vague terms must be interpreted in the light most protective of the underlying legal right. Therefore, any application of the best-interest exception should only be advocated by the state or the parent or, as always, initiated by the judicial officer sua sponte.

representation point to the need to reduce discretion and increase reliance on objective criteria, which is the goal of legal-interest advocacy. See, e.g., Duquette, supra note 32, at 1242-43 ("[T]he ABA Standards, the NACC modification of these standards and the Fordham Conference Recommendations all contain within themselves opportunity for lawyer discretion about what position to take on behalf of the child that is unreviewed by anyone else, not guided by principled criteria, and potentially idiosyncratic."); Haralambie, supra note 20, at 178 ("[E]ven in a substituted judgment model, there is now consensus that the attorney should be guided by objective criteria, not merely the attorney's subjective views and experiences."); Mandelbaum, supra note 21, at 63 ("The solution lies in our ongoing attempts to answer the question of how lawyers for young children can provide principled and unbiased representation to young children. Any model that is developed must give sufficient guidance and direction so that the representation is less arbitrary, less biased, and hopefully true to the children's lived experiences.").


108. The reason for this limited scope of the best-interest standard is constitutional. The U.S. Supreme Court ruled in Troxel v. Granville that there are limitations on a state's power to intervene in a family and that consideration of the child's best interest alone is not sufficient to interfere with the rights of parents. 530 U.S. 57, 66-67 (2000) ("[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").
B. Is Legal-Interest Advocacy Too Limited to Provide Meaningful Value?

On the other side of the spectrum, attorneys who are accustomed to best-interest advocacy will likely decry any infringement on their use of discretion as a grave threat to the rights of children. Many will likely claim that best-interest representation is necessary to ensure that children are protected at a time when they are most vulnerable and a time that is critical to their emotional and intellectual development. Supporting these fears are scholars who have previously dismissed legal-interest advocacy as mere issue spotting and who have remarked that the role of the legal-interest advocate is too minimal to be useful in complex dependency proceedings.

Very young children caught in the child welfare system are at a critical time in their emotional and mental development, and their inability to verbalize their needs makes them particularly vulnerable. However, these truths do not necessitate the granting of the extreme power that is currently bestowed on best-interest attorneys who are unqualified to intervene in the child's family in an attempt to divine what is best for any individual child. By removing this ultimate power from the attorney and placing it with the judge, we create a situation in which all parties are able to raise any concerns on equal footing and no party is empowered to present his or her personal opinion as the ultimate authority.

As outlined in Part III of this article, the legal-interest model envisioned is more than mere issue spotting and a neutral presentation to a judicial officer. A legal-interest attorney is tasked with identifying legal rights and then fully advocating for their enforcement. Just as with any attorney, a simple understanding of the abstract legal rights is not sufficient. A legal-interest attorney must analyze the individual facts of each case to assess which grants of legal rights are applicable to each child and then zealously pursue those rights. This advocacy may include negotiations with parties out of court to ensure that legal requirements are being met and also court

109. See, e.g., P. Litzelfelner & C. Petr, Child Advocacy in Child Welfare, 42 SOC. WORK 392, 394 (1997) (“Children who have been abused or neglected represent a uniquely vulnerable population in need of case advocates. By definition, children are in need of adult spokespersons to look out for their best interests.”).

110. See, e.g., Duquette, supra note 32, at 1241–42 (2006) (“[T]he lawyer could merely take no position at all, but simply be sure the court is fully informed on the important issues. This seems of limited use to the court and overlooks the fact that in nearly all cases, parties come to court with agreements on various issues. The position-less child advocate will have little to contribute to a negotiated settlement if he or she takes no position on the litigation.”); Katherine Hunt Federle, The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client, 64 FORDHAM L. REV. 1655, 1694 (1996) (“The lawyer has obligations to the client stemming from the client’s legal rights and interests. Thus, if the client has no legal right, the lawyer would appear to owe nothing to the client.”).
motions to ensure that, for example, screenings and services, including mental health services, are provided; sibling visitation occurs; reunification is actively pursued; and relative placements are sought and vetted.

Only when legal rights conflict is an attorney for the child forced to identify the conflict and present it in a neutral way to a judicial officer. This is bound to happen from time to time, but, in the context and limited scope of a legal-rights approach, its frequency should be relatively limited. When an attorney is limited to this information-presenter role, his or her work will continue to provide value to the proceedings. An attorney's role is to sort through the myriad facts in a case and to identify and present the facts that are relevant to the question at issue. Attorneys can also retain expert witnesses to provide a greater understanding of the child's circumstances when the record is lacking that information.

The provision of a judge who is trained in the law will not sufficiently ensure that the legal rights of the child are identified at every stage. A judicial officer is experienced, not with identifying all relevant legal issues in play, but in responding to the legal issues raised by the parties. A child, like a parent and the state, needs an attorney to properly bring the issues to the judicial officer's attention. Although a neutral fact-presenter may appear to be less protective of the child than a zealous advocate, there remains value in ensuring that the rights of the child are considered and addressed on the record at every stage.

Without the attorney's presence, it is likely that the rights of children will be overshadowed and overlooked by the adults in the proceeding who are focused on the adversarial nature of the overarching conflict between removal and reunification. We only need to look to the various child-welfare class action lawsuits for confirmation of the reality that children's legal rights are all too often ignored in mandatory review hearings established to ensure court oversight. For example, the Southern District of Texas recently found that the Texas child welfare system caused an unreasonable risk of harm to a class of foster children, specifically finding that allegations of abuse by the child only received cursory reviews or were not investigated at all, that the state failed to follow court orders to return children to their families, and that children were appointed many different caseworkers during their time in care, with some children never meeting their caseworkers. ¹¹¹ One of the ordered remedies in this case was the appointment of an attorney to all children in the class of child litigants.¹¹² These stories of children's rights being ignored are all too common in state systems where children are left without legal representation. The presence

¹¹² Id. at 826.
of an attorney whose sole function is to protect the child's legal rights will ensure that courts and parties remain child-centered and will only improve on those outcomes.

C. Does Legal-Interest Advocacy Withstand the Critiques Aimed at Best-Interest Advocacy?

Before the legal community can gather behind the concept of legal-interest advocacy, we must ensure that it addresses the problems associated with the best-interest model, and, therefore, is, in reality, an improvement on our current system. As discussed in Part II, best-interest advocacy has been criticized for allowing implicit biases, lack of accountability, inconsistent application, and assumption of nonexistent expertise in an attorney; serving state prosecutorial functions; disrupting appropriate power balances; and violating the Model Rules of Professional Conduct. As discussed below, the legal-interest model addresses each of these criticisms.

1. Domination of Implicit Biases

The best-interest model has been criticized for allowing an advocate's implicit biases to dominate his or her representation. The legal-interest model does not allow for the domination of implicit biases by the attorney because it removes the ability of the attorney to choose between competing directions of the case. Under a legal-interest framework, determinations about what is best for a child will not be made by an unaccountable attorney who is likely to have a different set of assumptions and understandings about the world than the child and the child's family. Instead, these determinations will be left to judges, who are also likely to have a different set of assumptions and understanding about the world than the child and the child's family.

113. See supra discussion accompanying note 21.

114. It cannot be ignored that the child welfare system is subject to criticism as an extension of a long history of state power leveled against families of color and that children of color in foster care suffer heightened risk of abuse within the child welfare system itself. See, e.g., Tanya Asim Cooper, Racial Bias in American Foster Care: The National Debate, 97 MARQ. L. REV. 215, 218–19 (2013) (“Once in foster care, however, children face heightened risk for abuse and neglect within the system itself and generally suffer poorer outcomes and prospects, as studies and current events repeatedly demonstrate. What this means, therefore, is that African American and Native American children, especially those who are poor, are disproportionately more likely to enter foster care, where they are at high risk of secondary harm by the system itself.”); Stephanie Smith Ledesma, The Vanishing of the African-American Family: "Reasonable Efforts" and Its Connection to the Disproportionality of the Child Welfare System, 9 CHARLESTON L. REV. 29, 32 (2014) (“This latitude given to each state to define what is and what is not a reasonable effort, coupled with the internal biases created and supported by the master narrative, means that what constitutes reasonable efforts may vary greatly from one tribunal to the next. The result has led
The intrusion of implicit bias cannot be completely eliminated from our judicial system through an implementation of the legal-interest model. However, by moving the determination of the ultimate questions at issue to the purview of the judge, the parties have the ability to increase accountability through open hearings and the appellate process. When the best-interest attorney is acting on his or her implicit biases in making the determination as to what is best, that decision is made entirely within the confines of the attorney's head, and we are unable to see and assess the validity of that determination.

Of course, biases on the part of the legal-interest attorney could surface in the attorney's presentation of facts and legal analysis to the court. However, because these decisions and discussions will be made in an open courtroom, instead of within the advocate's own head, other parties and counsel will be able to see and assess the facts presented and raise any concerns about potential bias before the court's ultimate determination is made.

Neither the open hearing nor the appellate process is available as an accountability measure when a party believes that the child's attorney is making determinations based on implicit bias. Additionally, as described above, these opportunities for an attorney's biases to have any impact in the proceedings are limited to instances where conflicts between clearly delineated rights emerge.

By limiting the discretion of the attorney and ensuring that all key decisions are made in an open forum with accountability through the appellate process, implicit biases will be less likely to dominate the proceedings than when decisions are made in private by the advocates themselves.

our nation to a child welfare system that is rampant with racial and ethnic disproportionality, thereby resulting in generations of children who find themselves in need of protection from child protective service agencies.); Dorothy E. Roberts, Child Welfare and Civil Rights, 2003 U. ILL. L. REV. 171, 180–81 (2003) ("[D]isproportionate state intervention in black families reinforces the continued political subordination of blacks as a group. This claim does not seek to enforce a particular set of black cultural values. It seeks to liberate black families from state control so they may be free to form and pass on their own values. This, after all, is the role of families in a free society.").

115. See, e.g., Atwood, supra note 17, at 97 ("[A] lawyer's decision-making about which facts to bring to the court's attention and which facts to deemphasize will inevitably involve preliminary judgments about the merits of the case . . . . One cannot evaluate the importance of evidence without asking, 'For what purpose?'"); Buss, supra note 104, at 961 ("[T]here is no neutral position that a lawyer (indeed, anyone who engages in a relationship with a child) can take. Every approach will send some message, however subtle, to the child [and other parties for that matter]."); Mandelbaum, supra note 21, at 52 ("By the very nature of what the attorney chooses to call to the judge's attention, the attorney is likely emphasizing a particular point of view.").
2. **Lack of Accountability**

A related concern is the lack of accountability of individual best-interest attorneys. A legal-interest attorney is more accountable than a best-interest attorney because the legal-interest attorney is not authorized to make determinations between competing legal rights and is instead required to air any such conflicts in open court. There is always the possibility that the legal-interest attorney will act unethically and advocate outside of his or her authority for one legal right over another. However, this unethical behavior can be identified by the parents’ attorneys and judicial officers who are also trained in the law.

By limiting the advocacy of a preverbal child’s attorney to specific rights, parents’ attorneys, judicial officers, and states’ attorneys are also provided a basis to challenge the child’s attorney, whenever there is doubt as to the attorney’s true motivations. By tying the advocacy to specifically enumerated rights, an attorney must be able to defend that line of advocacy through the statute, whereas a best-interest attorney need not point to anything outside of his or her own instincts to defend the logic. By ensuring that the principles guiding the representation are not vague notions of child development and needs, but, rather, are to be found in statutes known to all parties, all parties are better able to protect against unethical insertions of an attorney’s will.

3. **Inconsistency**

A critical difference between the legal-interest and best-interest models is predictability. While the best-interest advocate is permitted to indulge his or her gut instinct, the legal-interest advocate is constrained by the law. Given the same case, two best-interest advocates may advocate for very different positions. The fact that sometimes the best-interest advocate would advocate for the same outcome as a legal-interest advocate is mere happenstance. By providing restrictions and limitations on the discretion of the attorney, the legal-interest model does not fall victim to the unpredictability of the best-interest model.

Legal-interest advocacy should be consistent within each state, as an application of the statutes to a case should not vary from one attorney to the next. It may be impossible to reach a place of true uniformity and objectivity. However, restricting advocates to a defined and specific list of rights to be protected will get us closer to the mark.

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116. See *supra* discussion accompanying note 23.
117. See *supra* discussion accompanying note 22.
118. Professor Guggenheim believes that uniformity of behaviors should be one of the two primary goals for child advocates. *See* Guggenheim, *supra* note 37, at 1414–15 ("Law should strive to achieve two goals in creating rules for child advocacy. The first is to ensure uniformity..."
4. Assumption of Nonexistent Expertise

Best-interest advocacy calls upon a lawyer to determine the best course of action for each particular child. To make this ultimate determination, a judge must take into account the advice of the social worker, child development experts, mental health therapists, the child's parents, and the judge's own experience with child welfare systems. Assigning this determination to a child's attorney assumes his or her expertise in child welfare systems, mental health, child development, and social work. Alternatively, legal-interest advocacy relies only on skills that are inherent to the legal profession that all lawyers are trained to practice: legal analysis, issue spotting, and the use of court processes to ensure systems remain accountable. Instead of assuming a child's attorney can and should be an expert in all of the professional disciplines operating within child welfare, the legal-interest model sets the more realistic and practical expectation: that attorneys be experts in the law. The legal-interest model allows for the retention of true experts in mental health, child development, social work, and other relevant fields, to provide a second opinion when a child's legal rights are at stake. This model reserves any reliance on opinions to those opinions offered by professionals with relevant expertise.

5. Service of State Prosecutorial Functions

According to best-interest critics, best-interest advocates often err on the side of removal and nearly always align with the state. As such, they are said to serve state prosecutorial functions. Alternatively, the legal-interest model will serve state prosecutorial functions to the degree that state statutes serve prosecutorial functions, but no more. While an attorney may argue for termination of parental rights in situations where the statute grants specific exceptions to reasonable efforts for reunification standards or after timelines for reunifications have passed, this service of prosecutorial functions is mandated by statutes that are transparent and revisable through the legislative process. To the extent that attorneys, of behaviors . . . . The second goal is to maximize the probability of advancement of a child's legal rights."

119. See, e.g., Fordham Recommendations, supra note 30 ("Lawyers should approach decision making on behalf of their clients with extreme caution. Nothing about legal training or traditional legal roles qualifies lawyers to make decisions on behalf of their clients.").
120. See supra discussion accompanying note 26.
121. 42 U.S.C. § 671(a)(15)(D)(ii) (2012) (explaining that reasonable efforts towards reunification are not required when, for example, the parent has been found to have murdered another of his or her children).
122. Id. § 675(5)(E).
parents, and child welfare officials are uncomfortable relying on state statutes, their energies would be better spent supporting legislative change instead of expecting the child's advocate to disregard or subvert the statute.

6. DISRUPTION OF APPROPRIATE POWER BALANCES

Best-interest advocacy has also been criticized for disrupting appropriate power balances by assigning the ultimate legal question—the course of action that is in the child’s best interest—to an attorney instead of the judicial officer. The appropriate power balance between the judicial officer and the child’s advocate remains in place with the legal-interest model. Under the best-interest model, the child's advocate is often charged with making the ultimate determination in the proceeding: what course of action is in the child’s best interest. The legal-interest model removes this determination from the attorney’s purview and returns it to the judicial officer, who has the authority to make such determinations. By doing so, all of the attorneys in the proceeding are empowered and encouraged to fulfill their advocacy roles to bring evidence and issues before the court so that the judge can make an informed best-interest decision.

Some may argue that the very existence of an attorney representing any child's legal interests wrests power from the parent, who should be in control of decision making for the child. However, this wresting of control from the parent is limited to situations where the state has already intervened in the family unit to disrupt the parent-child power balance. Once the state intervenes to override the will of the parent, the power balance is not what it once was, and the child now must also confront the power of the state in his or her life. Because legal-interest attorneys are not weighing in on the parent’s day-to-day opinions about what is best, but are instead limiting their actions to protect the child’s legal rights, the power imbalance in the parent-child relationship is kept to a minimum.

7. VIOLATIONS OF THE MODEL RULES OF PROFESSIONAL CONDUCT

Finally, some have argued that the best-interest model violates the Model Rules of Professional Conduct. No matter which approach an attorney chooses, the Model Rules do not spell out the ideal approach to representing preverbal clients. However, the legal-interest model is more

123. See supra discussion accompanying note 25.
124. See supra discussion accompanying note 24.
125. See, e.g., MODEL RULES PROF’L CONDUCT r. 1.14 cmt. 7 (AM. BAR ASS’N 2015) ("If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client’s interests. [. . .] In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may
consistent with a lawyer’s professional duties than the best-interest model. The Model Rules instruct attorneys to follow their client’s direction\(^{126}\) and to treat a client with diminished capacity as much like a client with full capacity as possible.\(^{127}\) By inserting the will of the lawyer into the equation, the best-interest lawyer is certainly departing from the normal attorney-client relationship.

Model Rule 1.14 allows an attorney to take protective action when “the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest.”\(^{128}\) According to the Model Rules, protective action can only occur when the client both has diminished capacity and is at risk of substantial harm unless action is taken. Despite this clear direction, the best-interest advocate presumes to take protective action at every stage of his or her representation without a preliminary showing of harm. Alternatively, a legal-interest attorney is only allowed to act to protect the child’s explicitly enumerated legal rights. Explained in the inverse, legal-interest representation is only active when a child is at risk of having a legal right violated. This kind of violation is certainly a harm that can be interpreted to authorize the use of protective action by the child’s attorney.

The ABA Comment on Rule 1.14 lists potential protective measures that an attorney might pursue, including “consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.”\(^{129}\) Neither insertion of the attorney’s own will nor a legal-interest framework is included in this list of potential protective measures. However, the list is not presented as an exclusive one. Best-interest advocates actively subvert the normal client-lawyer relationship by allowing the opposite of client-directed representation: lawyer-directed representation and the insertion of the lawyer’s will over

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\(^{126}\) *Id.* r. 1.2(a).

\(^{127}\) *Id.* r. 1.14(a) (“When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”).

\(^{128}\) *Id.* r.1.14.

\(^{129}\) *Id.* r. 1.14, cmt. 5.
the client. The Model Rules allow the appointment of a guardian ad litem to direct the attorney’s representation, but they do not consider allowing the attorneys themselves to act as guardians ad litem and provide their own direction to the representation.

The Comment goes on to say that protective measures should be governed by “such factors as the wishes and values of the client to the extent known, the client’s best interests and the goals of intruding into the client’s decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client’s family and social connections.” Legal-interest representation clearly fits within the goal of intruding “to the least extent feasible” by providing minimal advocacy that is limited exclusively to defined, specified, and nonconflicting legal rights. Further, the model encourages the use of client-directed representation as soon as the client is able to articulate a position, reserving for another day the opportunity for the client to decide what is in his or her own best interest, thereby maximizing the client’s capacity. Although no form of direct representation for preverbal child clients may fit perfectly under the Model Rules, it appears that legal-interest advocacy much more closely aligns with the spirit of the Rules than does best-interest advocacy.

Legal-interest advocacy allows for protection of a child’s legal rights and ensures accountability of the state to the needs of the child. There is no guarantee that a legal-interest attorney will ensure that the best outcome is achieved for every child client, but the difficult job of determining what is best is not for the attorney to do. By limiting the discretion of an attorney and increasing transparency, we can help ensure that legal representation does not result in the imposition of an individual attorney’s values, implicit biases, and inexpert opinions. We can also ensure that the judge is reminded at every turn of the rights of the child within the proceedings.

V. Conclusion

Over the last fifty years, attorneys have struggled with how to represent very young children. The need for legal representation continues to grow as the statutory system surrounding the child welfare system becomes more and more complex and children removed from their homes become younger and younger. Even without a federal mandate, a growing number of states are requiring that children have lawyers to help them navigate their state-regulated childhoods. At the federal level, as CAPTA moves toward reauthorization, the pressure is likely to build again for amendments requiring all states to provide counsel for children in the child welfare system.

130. Id.
With all of these forces coalescing towards requiring that the youngest children have lawyers to represent their legal rights, it is critical to determine the appropriate role for attorneys representing preverbal clients. The time has come for the legal-interest advocacy model to be revived as the ethical alternative to the best-interest and substituted-judgment advocacy models for preverbal children.

Appendix: Federal Legal Rights of Children in Dependencies

All citations to the U.S. Code in this Appendix are to the 2012 edition.

Before Removal
- Ability to authorize medical treatment through the courts. 42 U.S.C. § 5106a(b)(2)(C)(iii).

At Initial Removal
- Reasonable efforts to preserve the family before placement to prevent the need to remove the child. 42 U.S.C. § 671(a)(15)(B)(i).
- If a child qualifies as an Indian child under the Indian Child Welfare Act (ICWA, 25 U.S.C. § 1912, additional rights apply:
  - unless an emergency exists, deferral of a foster care placement hearing until tribe has had ample time to review;
  - active efforts to provide remedial services to prevent breakup of the Indian family, 25 U.S.C. § 1912(d);

At Hearing to Maintain Removal/Substantiation
- Referral to IDEA early intervention services if under age three once substantiated abuse or neglect. 42 U.S.C. § 5106a(b)(2)(B)(xxi).
- Within thirty days of removal, department must have made diligent efforts to identify and notify all adult grandparents, siblings, and relatives about the child’s removal and process for involvement and placement. 42 U.S.C. § 671(a)(29).

While in State’s Care
- Reasonable efforts by the state to reunify the child’s family, 42 U.S.C. § 671(a)(15)(B), except that a child, the state, or other parent may resist this requirement if:
• aggravating circumstances exist (sex abuse, parent committed murder, or parent has lost rights to a sibling), 42 U.S.C § 671(a)(15)(D)(ii)–(iii);
  • a parent is a registered sex offender. 42 U.S.C. § 5106a(2)(B)(xv).

• Least-restrictive placement available, in close proximity to parent’s home (unless case plan sets out why it is not in the child’s best interest). 42 U.S.C. § 675(5).

• Regular visits by a social worker:
  • if a child is placed out of state, in-person visit by this state’s social worker at least once every six months, 42 U.S.C. § 675(5)(A)(ii);
  • visits by case worker approximately monthly (state required to hit this target in ninety-five percent of cases), 42 U.S.C. § 624(f)(1)(A);
  • visits by caseworker at the child’s placement at least six times a year, 42 U.S.C. § 624(f)(2)(A);

• Coordinated health care, including regular screenings, oversight of prescriptions, continuity of health care, and treatment of trauma associated with removal. 42 U.S.C. § 622(b)(15).

• Updated health and education records provided to placement at the time of placement. 42 U.S.C. § 675(5)(D).

• Receipt of an education, though homeschooling is acceptable as allowed under state law. 42 U.S.C. § 671(a)(30).

• Placement in a home or facility that meets state standards for sanitation, safety, and protection of civil rights. 42 U.S.C. § 671(a)(10)(A).
  • If placed in an institution, child is to have one caregiver designated to apply the prudent parent standard to allow the child’s participation in age or developmentally appropriate activities. 42 U.S.C. § 671(a)(10)(D).

• Criminal background check for prospective placements. 42 U.S.C. § 5106a(b)(2)(B)(xxii). If placed with foster parents, child is to be placed with foster parents who have been trained on prudent parent standard. 42 U.S.C. § 671(a)(24).

• State consideration of a placement preference for relatives over nonrelated caregivers. 42 U.S.C. § 671(a)(19).

• Reasonable efforts by the state to place with siblings or at least provide frequent visitation or ongoing interaction unless it is documented that it is contrary to the safety or well-being of siblings. 42 U.S.C. § 671(a)(31).
• Siblings include former siblings whose legal relationship was extinguished through a termination of parental rights. 42 U.S.C. § 675(12).

• Race not to be used as a factor in placement or adoption decisions. 42 U.S.C. § 671(a)(18).

• A permanency planning hearing no less than every twelve months after entering foster care. Per 42 U.S.C. § 675(5)(C), the hearing shall:
  o determine a permanent plan of reunification, adoption, legal guardianship, or another planned permanent living arrangement (APPLA), such as long-term foster care;
  o determine a timeline for achieving the permanent plan;
  o not have “long-term foster care” or other APPLA plans listed as the permanent plan until children are age sixteen or older unless there is a compelling reason;
  o provide an analysis, for children fourteen and over, of the services needed to transition from foster care to adulthood (relevant for nonverbal/disabled youth: planning should not wait until age 17.5).

• Placement in a timely manner consistent with the primary plan and completion of steps necessary to finalize that plan. 42 U.S.C. § 671(a)(15)(C).

• Transition to adoption (through filing a Termination of Parental Rights petition and identifying, recruiting, processing, and approving a qualified family for adoption) if in foster care for fifteen of the most recent twenty-two months, unless certain exceptions apply. 42 U.S.C. § 675(5)(E). Child is not to be forced into a:
  o termination of parental rights if placed in a relative’s care.
  o termination of parental rights if the court has found that reasonable efforts to reunify the family consistent with the case plan have not been made by the state.
  o termination of parental rights if the state has documented a compelling reason it is not in the child’s best interest.

• Review of the child’s status at least every six months to determine necessity and appropriateness of placement, compliance with case plan, and progress. 42 U.S.C. § 675(5)(B). At the review:
  o project a likely date by which the child may reach permanency;
  o monitor the state’s efforts to ensure the placement is acting as a reasonable and prudent parent;
  o ascertain whether the child has regular, ongoing opportunities to engage in age or developmentally appropriate activities.

• If a child qualifies as an Indian child under ICWA, additional rights apply:
right to be placed within tribe if such placements are available. 25 U.S.C. § 1915(a).

At Termination of Parental Rights
- If a child qualifies as an Indian child under ICWA, additional rights apply:
  - Right to maintain parent-child relationship unless there is evidence beyond a reasonable doubt that custody is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(f).

Post Adoption
- If a child qualifies as an Indian child under ICWA, additional rights apply:
  - Right to be notified of biological parents and tribal affiliation, if requested. 25 U.S.C.A. § 1917.