Changing the Discretionary Nature of Appointing an Expressed Wishes Child's Attorney in D.C. Child Welfare Cases

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Introduction

This Note will propose changes to the appointment of a child's attorney for abused and neglected children involved in the child welfare court system. To illustrate the vital need for these changes as a remedy for ethical issues regarding the representation of minor clients, this Note will begin with a theoretical example.

Close your eyes and put yourself in the shoes of a twelve-year-old boy named John. John is entering the judicial system for the first time, in a particularly traumatizing way. His mother, who recently lost her job and suffers from chronic depression, is being charged by the D.C. family court with neglect. She has sent John to school without lunch money for the past two months, and his teachers have noticed his appearance has become increasingly unkempt as he appears to not shower or brush his teeth frequently. John's mother has a court-appointed attorney to represent her in the neglect case and John has a separate court-appointed guardian *ad litem* (GAL) to represent him.

John's GAL sits down with him before the first court appearance and asks John how he hopes the court will resolve his neglect case. John immediately tells his GAL that he wants to return to live with his mother because she takes good care of him. He also discloses that he has no meaningful relationship with his biological father and does not want to live with any extended family. The attorney considers John's opinion but, upon further investigation, decides that placement with John's father is in John's best interest, at least until John's mother gets help for her mental health issues. John vehemently protests to this case objective but his GAL assures him that he will also mention John's contrary expressed wishes to the judge.

At the fact-finding hearing, John's GAL presents a glowing picture of John's biological father, explaining to the judge how he has a 3-bedroom home in D.C., how he has remarried, and how well he takes care of his two stepchildren. His GAL also presents numerous witnesses that attest that John's mother lives in a small 1-bedroom apartment and has dealt with chronic depression over the past year, making it difficult for her to maintain a job. Before he rests his case, John's

GAL directly addresses the judge to inform him of John's expressed wishes. His GAL tells the judge that, despite the case he has just presented in favor of John's father and against John's mother, the record should reflect that John has expressed an interest in returning to live with his mother. The judge takes note of John's expressed wishes but ultimately finds in favor of John living, at least temporarily, with his biological father, relying heavily on the negative information about John's mother presented by John's GAL.

John walks away from the case disillusioned with the judicial system. He does not understand how someone tasked to navigate him through the complicated court system was able to advocate for a position that was directly contradictory to his expressed wishes. Ultimately, John realizes that the outcome of his case would have likely been the same if his attorney had never even presented his expressed wishes.

While John's case may seem hyperbolic, it is entirely plausible within the D.C. child welfare system. This Note will argue that there must be a better way to balance the child's alleged best interests with their contrary expressed wishes and will present one such proposal to remedy this ethical dilemma.

I. BACKGROUND

"The child welfare system is a group of services designed to promote the well-being of children by ensuring safety, achieving permanency, and strengthening families."[1] Abused and neglected children, who may be subject to any combination of physical, sexual, and emotional abuse or neglect—defined as the failure to have their "basic physical and emotional needs" met[2]—often find themselves entangled in the child welfare system.[3] Attorneys may play a variety of roles in this system[4] but one of the most important is that of the child's attorney, who provides legal representation for the abused or neglected child.[5] A child's attorney has clearly defined roles and specific goals to further in accordance with the attorney-client relationship, however these goals differ depending on the jurisdiction

1. CHILDREN'S BUREAU, HOW THE CHILD WELFARE SYSTEM WORKS 2 (2020).

2. CENTERS FOR DISEASE CONTROL AND PREVENTION, PREVENTING CHILD ABUSE AND NEGLECT, https://www.cdc.gov/violenceprevention/childabuseandneglect/fastfact.html [https://perma.cc/RMC8-JX43] (last visited Apr. 26, 2021).

3. *See generally* DC CHILD AND FAMILY SERVICES AGENCY, WHEN CHILD WELFARE INVESTIGATES YOUR FAMILY.

4. *See generally* Leonard Edwards, J., *Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment*, 63 JUV. & FAM. CT. J. 21, 23 (2012) (discussing "the appointment of counsel for parents and children in abuse and neglect and termination of parental rights cases"); SUPERIOR CT. OF D.C., CHILD ABUSE AND NEGLECT ATTORNEY PRACTICE STANDARDS i [hereinafter PRACTICE STANDARDS].

5. *See* William Booth, Angela Orkin, James Walsh & John Walsh, *Can Children's Attorneys Transform the Child Welfare System?*, AM. BAR ASS'N: CHILD. RTS. LITIG. (Jan. 15, 2019), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2019/winter2019-can-childrens-attorneys-transform-the-child-welfare-system/ [https://perma.cc/66UR-UY6A].

in which the child's attorney practices.[6] Some jurisdictions are "expressed wishes" or "client-directed" jurisdictions, meaning the child's attorney is tasked with taking "direction from their clients about the objectives of the representation," whether or not the attorney believes they are objectively in the child's best interest.[7] Other jurisdictions, like D.C., where John's attorney practices, are "best interests" jurisdictions, in which the child's attorney is deemed a GAL, and as such is obligated to "advocate . . . zealously" for what they believe to be the child's best interests, "regardless of whether the child agrees with that position."[8] Some jurisdictions are a combination of both, depending on the unique circumstances of the case or the unique structure of the rules.[9]

Because D.C. is a best interests jurisdiction, the child's attorney is a GAL who must advocate for "the child's best interest,"[10] despite the contentious relationship that may result if they disagree with their child client's expressed wishes. While a D.C. GAL whose client disagrees with their best interests finding is obliged to "notify the court of the child's [contrary] views," as John's attorney did when he presented John's expressed wishes to the court, the decision to appoint a separate attorney to maintain a more traditional attorney-client relationship with the child and zealously advocate for these contrary wishes is a discretionary one.[11] The discretionary nature of this appointment is the reason John's GAL was able to voice John's expressed wishes to the judge without appointing a separate attorney who could zealously advocate specifically for John's wishes, which in his case directly contradicted the best interests determination of his GAL. While John's GAL technically exercised this discretion appropriately and fulfilled his obligation to convey John's wishes to the judge,[12] without a zealous advocate to represent John's wishes, there was little hope that his contrary position would prevail in court.

This Note will argue that, given the ineffectiveness of the discretionary nature of such appointments, it is unethical under Rules 1.2 and 1.14 of the Model Rules of Professional Conduct for GALs in best interest jurisdictions to decline to request an attorney for a child of reasonable age and without any severe incapacities as soon as that child voices a material disagreement with the GAL's case objectives. Because each jurisdiction has highly specific and often unique guidelines governing the role and duties of a child's attorney in the child welfare system, the recommendations outlined in this Note are specific to the D.C. child

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6. *See* KATHRYN PIPER, ET. AL., THE ROLE OF THE CHILD'S ATTORNEY IN CHILD PROTECTION PROCEEDINGS: WHEN TO ADVOCATE A CHILD'S BEST INTERESTS VS. EXPRESSED WISHES 2 (2019).

7. *Id.* at 1.

8. *Id.* at 1.

9. *See id.* at 2.

10. PRACTICE STANDARDS, *supra* note 4, at i.

11. *Id.* at 7 ("[I]n some circumstances, an attorney *may* be appointed to represent the child's expressed interests.") (emphasis added).

12. *Id.* at 13.

welfare system. However, other jurisdictions with similar structures and roles should feel free to use these recommendations as a guide for similar reforms.

Part II will discuss the scope and ethical requirements of Rules 1.14 and 1.2 and how the discretionary nature of a child's attorney appointment in D.C. violates these rules when the child's case objectives diverge from those of their GAL. Part III will define the narrow scope of this recommendation and propose potential concrete criteria that dictate the circumstances under which a child's attorney must be appointed. Part IV will provide additional justifications for the proposed change beyond the ethical reasons, including the judicial practicability of changes and the normative effect on abused and neglected children. Finally, Part V will address counterarguments to a nondiscretionary requirement of appointing an attorney for the child, such as the additional costs to the court and the effect trauma has on a child's ability to make rational decisions.

II. THE LEGAL ETHICS OF REPRESENTING CHILD CLIENTS IN CHILD WELFARE CASES

A. THE ETHICAL REQUIREMENTS OF RULES 1.2 AND 1.14

Model Rule of Professional Conduct 1.14 ("Rule 1.14") requires that attorneys for clients with diminished capacity, including minors, "maintain" as "normal" of a "client-lawyer relationship" as possible.[13] This so-called "normal client-lawyer relationship" is outlined in Model Rule of Professional Conduct 1.2 ("Rule 1.2"), which requires that attorneys "abide by" their "client's . . . objectives" with regards to their "representation."[14] The comments to Rule 1.14 acknowledge that diminished capacity can sometimes have a significant bearing on whether a minor "is capable of making" informed decisions regarding their representation.[15] Nevertheless, the advisory committee charged with drafting the Model Rules of Professional Conduct clarifies that, barring any drastic incapacity, "children as young as five" years old "and certainly those . . . twelve" years and older are generally capable of "understand[ing], deliberat[ing] upon, and reach[ing] conclusions about" decisions, such as custody, that will directly affect their "own well-being."[16] The comment further states that these "opinions . . . are entitled to weight in legal proceedings" that affect the minor.[17]

B. THE IMPACT OF ETHICAL REQUIREMENTS ON D.C. CHILD WELFARE ATTORNEYS

In the D.C. child welfare system, children and parents that are parties to an abuse or neglect case "are entitled to [legal] representation at all critical stages

13. MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2009) [hereinafter MODEL RULES].
14. MODEL RULES R. 1.2(a).
15. MODEL RULES R. 1.14, cmt. 1.
16. *Id.*
17. *Id.*

of" their case.[18] More specifically, the GAL is the default representation for the child, with "a dual role" of "independent fact finder and . . . zealous advocate for the child's best interests."[19] However, the more zealously the GAL advocates for the child's perceived best interests, the more "the weight of the child's wishes diminishes and may be discounted by the court."[20] Because the GAL is primarily tasked with advocating for "the child's best interests," they are not required to follow their child client's case objectives, that is, "the purposes to be served by legal representation," "even if the expressed wishes of the child client" diverge from the GAL's "recommendations."[21] In this circumstance, the GAL must convey the child's conflicting expressed wishes to the court but is still tasked with zealously advocating for their independent best interests determination.[22] Despite the inherent conflict stemming from this dual role, the appointment of a separate child's attorney to zealously advocate for the child's wishes is *allowed* but never required.[23]

While the best interests GAL's job is a critical one given their numerous responsibilities regarding a child's wellbeing,[24] the discretionary nature of the appointment of a child's attorney to represent the child's expressed wishes leaves the GAL in a precarious ethical situation.[25] They are stuck with the unpleasant choice between tempering the zeal with which they advocate for the perceived best interests for their client, which would violate the child abuse and neglect practice standards adopted by the Superior Court of D.C. to "regulate the performance of attorneys practicing in the child abuse and neglect area,"[26] or tempering the zeal with which they advocate for their client's case objectives, which would violate Rule 1.2.[27] This exemplifies the unpleasant choice that John's GAL faced once John informed him that he would rather return to live with his mother than move in with his father, whom the GAL decided was objectively a better placement for John.

While Rule 1.14 may provide a GAL some protection from ethical violations when their child client is objectively too young or too "severely incapacitated" to

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18. PRACTICE STANDARDS, *supra* note 4, at 1.

19. *Id*. at 12.

20. Margaret E. Sjostrom, *What's a GAL To Do? The Proper Role of Guardians Ad Litem in Disputed Custody and Visitation Proceedings*, 24 CHILD. LEGAL RTS. J. 2, 12 (2004).

21. PRACTICE STANDARDS, *supra* note 4, at 21; MODEL RULES R. 1.2, cmt. 1.

22. *See* PRACTICE STANDARDS, *supra* note 4, at 21.

23. *See id*. at 7.

24. CHILDREN'S BUREAU, REPRESENTATION OF CHILDREN IN CHILD ABUSE AND NEGLECT PROCEEDINGS 22 ("The role of the GAL is to advocate for the child's safety, well-being, permanence, and best interests.") [hereinafter REPRESENTATION OF CHILDREN].

25. *See generally* Sjostrom, *supra* note 20, at 11–12.

26. *See* PRACTICE STANDARDS, *supra* note 4, at 12 ("A guardian *ad litem* fulfills a dual role, as an independent fact finder and as zealous advocate for the child's best interests."); *see also*, COUNSEL FOR CHILD ABUSE AND NEGLECT, GENERAL INFORMATION, https://www.dccourts.gov/superior-court/family-court-operations/counsel-for-child-abuse-and-neglect [https://perma.cc/VB6A-SS9Q] (last visited Apr. 26, 2021).

27. *See* MODEL RULES R. 1.2(a).

make reasoned decisions, GALs could find themselves in serious violation of Rule 1.14's requirement that, "as far as reasonably possible, [they] maintain a normal client-lawyer relationship" when their client is, for instance, a fifteen year old of average intelligence and maturity.[28] If John was three years old or had a severe mental disability, his GAL's conduct might have been ethical and appropriate, but given John's age and lack of an apparent mental disability that would preclude him from making an informed decision about what living arrangements would best suit his needs, his GAL would likely be unable to seek protection under this narrow category of clients governed by 1.14.[29]

Indeed, the ABA adopted a model act on child representation in abuse and neglect situations in 2011, which reinforced the fact that lawyers representing children are "bound by the rules of professional conduct, including . . . zealous advocacy."[30] Even if they fulfill the formal obligation of reporting the child's contrary wishes to the court,[31] however, it is unrealistic to expect a GAL to advocate for their independent best interests goal and the child's contrary expressed wishes with equal zeaL.[32] Because the GAL "is traditionally viewed [as] an agent of the court," their "primary duty of allegiance" to the court may sometimes "materially limit the lawyer's ability to effectively represent the child as client."[33] Therefore, the result of the child's case will likely be the same as if they had never presented the child's preference to the court.[34]

Furthermore, ABA guidance suggests, and "[m]any scholars and practitioners" confirm, that it is "categorically unethical" for a lawyer to act in the dual role of GAL and attorney to the same child client.[35] The ineffective and unethical nature

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28. MODEL RULES R. 1.14(a); MODEL RULES R. 1.14, cmt. 1.

29. *See* MODEL RULE 1.14, cmt. 1 ("For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.").

30. Andrea Khoury, *ABA Adopts Model Act on Child Representation*, AM. BAR ASS'N: CHILD LAW PRAC. TODAY (Sept. 1, 2011), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol30/september_2011/aba_adopts_modelactonchildrepresentation/ [https://perma.cc/74LA-Z8VU].

31. *See* PRACTICE STANDARDS, *supra* note 4, at 7.

32. *See Representing Child-Clients with "Diminished Capacity": Navigating an Ethical Minefield*, 24 THE PRO. LAW. (Mar. 1, 2016) ("Acting simultaneously in dual capacities presents the obvious prospect of a role conflict, where the lawyer's service as attorney demands compliance with the client's stated goals, but service in the role of a GAL compels the lawyer to disregard the client's instructions as inconsistent with her best interests.") [hereinafter REPRESENTING CHILD-CLIENTS], https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/representing_childclients_diminished_capacity_navigating_ethical_minefield/ [https://perma.cc/3WZU-HC5U].

33. Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1842 (1996).

34. *See* Sjostrom, *supra* note 20, at 12.

35. REPRESENTING CHILD-CLIENTS, *supra* note 32; *see also Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAMA L. REV . 1301, 1302 (1996); *see, e.g.*, Sjostrom, *supra* note 20, at 13 ("Some critics argue that because of the ethical conflicts inherent in incorporating champion functions into the advocate's role, it is ethically improper for an advocate to advance anything but her client's wishes.").

of such conflicting advocacy,[36] and the potentially devastating consequences that can result,[37] are demonstrated by John's GAL's presentation of the best interests case. If his GAL had advocated for John's expressed wishes with at least the same zeal with which he advocated for his independent best interests determination, John's position would have at least been taken seriously by the judge. However, John's attorney only included zealous arguments and numerous witnesses to support his own opinion about John's best interests, which was starkly contrasted by his secondary and cursory presentation of John's expressed wishes.

While John's GAL fulfilled the bare minimum of presenting John's wishes,[38] it would be nearly impossible to argue that this was done with sufficient zeal and sincerity to satisfy the Rules, much less to give John's position a fighting chance in court. Therefore, a better solution is necessary to simultaneously shield the GAL from an ethical violation[39] while still ensuring zealous advocacy for the competent, reasonably mature child client like John.[40] One such solution is to make the appointment of a child's attorney mandatory as soon as the child expresses contrary wishes that rise to the level necessary to report to the court. Only then will the GAL be able to ethically pursue the best interests goal while the child pursues his contrary case objective with adequate legal representation.

III. PROPOSED RECOMMENDATIONS

For a new requirement for the appointment of children's attorneys in D.C. to be both workable and in compliance with all governing ethics rules, there must be relatively strict criteria for determining the exact point at which a child's attorney must be appointed during a child welfare case. Accordingly, this Note posits that uniform criteria must be established to assist both the GAL and the court in recognizing when this requirement has been triggered. The following criteria are crafted for this Note and are based around principles of developmental psychology, legal ethics guidance, and scholarly research and data. First, there must be an actual disagreement between the GAL and the child about the objectives and goals for representation, such that the GAL cannot zealously advocate for a best interests' determination and the child's expressed wishes simultaneously. Second, the child must have reached a certain age and maturity, such that they can rationally weigh their options and make reasoned decisions regarding their case (i.e., an objective standard). Third, the child must not have such significant diminished capacity such that, irrespective of age, they are wholly incapable of making reasoned, informed decisions about their welfare (i.e., a

36. *See generally* REPRESENTING CHILD-CLIENTS, *supra* note 32.

37. *See* Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required*, 34 FAM. LAW Q. 441, 446 (2000) ("There is a great deal at stake for the child in the protection proceeding. He or she could lose mother, father, sister, brother, extended family, school, or community. On the other hand, the child faces the prospect of harm at the hands of an unfit caretaker.").

38. *See* PRACTICE STANDARDS, *supra* note 4, at 13.

39. *See* REPRESENTING CHILD-CLIENTS, *supra* note 32.

40. *See* Duquette, *supra* note 37, at 447.

subjective and fact-specific standard). When all three of these criteria are met in any given case, the court and GAL must have a nondiscretionary obligation to appoint a separate child's attorney to represent the child's expressed wishes while the GAL continues to advocate for the child's best interests.[41]

A. FACTOR ONE: MATERIAL DISAGREEMENT

The language and directives of Rule 1.2 are particularly informative to understand what should constitute a "material disagreement" under the proposed criteria.[42] Rule 1.2 requires lawyers to "abide by a client's decisions concerning the objectives of representation;" however, "the means by which" these objectives are to be accomplished are generally left to the discretion of the lawyer, either after reasonable consultation with the client or after the client has "impliedly authorized" the lawyer to act in furtherance of their case objectives.[43] What is deemed to be a case objective, as opposed to what is considered the *means* of accomplishing these case objectives, generally has to do with whether the decision is "substantive" or "procedural," respectively.[44]

In John's case, the decision about which parent or guardian he should live with was substantive because it affected his "essential" right to determine his overall preferred outcome for the case.[45] Hypothetically, if in furtherance of the case John's GAL was tasked with deciding whether "to extend a discovery deadline," this would almost certainly be procedural, and thus his GAL would be free to make that decision without first consulting with John.[46] In an ordinary case, the inability to reach an attorney-client consensus on a substantive case goal may even require the attorney to "withdraw from the representation" under Rule 1.16.[47] Under the solution proposed by this Note, however, a disagreement between a child welfare GAL and a child about a substantive case goal will not

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41. NOTE: While similar recommendations have been posited in other academic articles, they have not been seriously discussed in any detail, including the positive and negative effects of such a proposed change. Duquette states as follows:

> Although the statute does not impose a duty on the lawyer-GAL to ask for appointment of an attorney, but rather leaves it to the court's discretion, the better practice is for the lawyer-GAL to recommend appointment of an attorney where there is a conflict on a serious matter with a mature child. Another approach would be to require the court to appoint an attorney in the case of a conflict not resolved by counseling, where the child is a certain age, say twelve or fourteen.

See, e.g., Duquette, *supra* note 37, at 462.

42. *See* MODEL RULES R. 1.2(a).

43. MODEL RULES R. 1.2(a); *see also* R. 1.4(a)(2).

44. Seth L. Laver & Michael P. Luongo, *Who's the Boss: Attorney or Client?*, GOLDBERG SEGALLA: PRO. LIAB. MATTERS (Oct. 31, 2013), https://professionalliabilitymatters.com/legal-malpractice/whos-the-boss-attorney-or-client/#:~:text=Generally%2C%20attorneys%20have%20an%20ethical,they%20are%20to%20be%20pursued.&text=A%20classic%20example%20is%20that,deadline%20to%20her%20client's%20adversary [https://perma.cc/BMG7-6NVA].

45. *Id.*

46. *Id.*

47. Laver & Luongo, *supra* note 44; *see also* MODEL RULES R. 1.16(b).

require such drastic mitigating measures; instead, the GAL will simply be required to appoint a separate child's attorney and continue advocating for their independent best interests case goal while the child's attorney advocates for the child's preferred case goaL.

B. FACTOR TWO: AGE

It would be counterproductive to consider age subjectively on a case-by-case basis, both because the discretionary nature of the child's attorney appointment is precisely the problem that this Note seeks to resolve and because an appropriate universal cutoff age can be ascertained.[48] Therefore, when faced with a material disagreement between GAL and child, the court must determine whether the child has reached a specific age to make reasoned decisions and, if they have, then this criteria will be assumed to be met.

Based on principles of developmental psychology, children "may have the capacity to be decision-making competent" about their own wellbeing around age 12.[49] While this "decision-making competence" can be influenced, negatively or positively, by an adolescent's response to the emotions or heat of a situation, such fluctuations can be mitigated by "providing the child with adequate" and digestible "information" and processing time so they feel involved and can make fully informed decisions that are not disproportionately influenced by the heat of the moment.[50] Even the Model Rules suggest that "children as young as five or six years" old may be capable of making relatively informed decisions that warrant judicial consideration.[51] However, establishing the age of competency at twelve for purposes of appointing a child's attorney strikes an appropriate balance between competing interests. If this standardized cutoff age was established, children like twelve-year-old John would automatically meet the age requirement.

In light of multiple studies that affirm the competence and decision-making ability of adolescents that are fourteen years and older,[52] setting the minimum age at twelve in typical cases is actually a relatively lenient standard. It cannot be ignored that setting the age limit at twelve is controversial and may appear arbitrary, especially considering how it could unfairly limit the rights of particularly mature children younger than twelve and provide too much autonomy to particularly immature children twelve years and older. However, to make workable

48. *See generally* Petronella Grootens-Wiegers, Irma M. Hein, Jos M. van den Broek & Martine C. de Vries, *Medical Decision-making in Children and Adolescents: Developmental and Neuroscientific Aspects*, 17 BMC PEDIATRICS 1, 8 (2017); Kathryn Hickey, *Minors' Rights in Medical Decision Making*, 9 J. OF NURSING ADMIN. 100, 102 (2007); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1595 (1982).

49. Grootens-Wiegers, *et. aL.*, *supra* note 48, at 8 (discussing children's ability to make autonomous, competent medical treatment decisions).

50. *Id*. at 7–8.

51. MODEL RULES R. 1.14, cmt. 1.

52. *See* Hickey, *supra* note 48, at 102 (discussing the Mature Minor Doctrine in the context of medical treatment of a minor); *see also* Weithorn & Campbell, *supra* note 48, at 1595.

general recommendations, this Note will allow for such minor concessions in the interest of minimizing "judicial discretion"[53] and finding a middle ground to balance competing interests.[54] On the one hand, there is a need to respect the autonomy of older children by providing them competent representation to articulate their preferences.[55] On the other hand, there is pressure to not waste judicial resources[56] by providing a very young child with a separate attorney, knowing that the GAL's best interests' recommendation will so heavily outweigh the credibility of the young child's expressed preference. Some children younger than twelve may be especially mature or have extenuating circumstances that will require an *ad hoc* judicial determination. Similarly, some children that have reached the cutoff age may not be competent to make reasoned decisions. These exceptions to the general rule, however, will likely be rare and should not prevent the establishment of a baseline minimum age.

C. FACTOR THREE: SEVERE INCAPACITY

The third requirement for the appointment of a child's attorney to represent their expressed wishes is more subjective and requires determinations on a case-by-case basis. Although the goal of these proposed guidelines is uniformity in their application through objective standards, determining a child client's incapacity is necessarily an individualized decision,[57] though it can be made more uniform by the use of objective and standardized criteria. To determine whether a child is of such significant incapacity that they are incapable of making informed decisions about their own wellbeing,[58]—rendering the appointment of a separate child's attorney a futile endeavor that may result in a waste of time and resources or even significant harm to the child's welfare—the comments to Rule 1.14 provide helpful guidance.[59] Comment 1 makes it clear that a child's young age does not, in itself, constitute such incapacity that they cannot "understand, deliberate upon, and reach conclusions about matters affecting the client's own wellbeing."[60] On the contrary, the comment asserts that "children . . . of ten or twelve [] are regarded as having opinions that are entitled to weight in legal proceedings

53. Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59, 72 (2001) ("[A] firm rule promotes fairness by leaving little room for judicial discretion, leading to more consistent application and making it easier for citizens to understand the rule and act accordingly.").

54. *See generally* Duquette, *supra* note 37, at 460 ("Another reasonable choice would be to require that at a certain age, say twelve or fourteen, the court should appoint an attorney for the child instead of a lawyer-GAL.").

55. *See id.* at 447 ("It is a lonely voice in this debate that urges that such an older unimpaired child does not warrant the same zealous representation of his or her wishes as would an adult.").

56. *See generally id.* at 463.

57. *See* AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 1, 4 (1996) ("[D]isability is contextual, incremental, and may be intermittent.").

58. MODEL RULES R. 1.14, cmt. 1.

59. *See* MODEL RULES R. 1.14, cmt. 1, cmt. 6.

60. MODEL RULES R. 1.14, cmt. 1.

concerning their custody."[61] Therefore, while age may be a factor that diminishes a child-client's capacity, it does not rise to the level of incapacity that must be present under these criteria to bar the child from independent representation.

The objective factors that should be taken into account in making an individualized determination about incapacity should be modeled off of the considerations presented in comment 6.[62] Comment 6 recommends "consider[ing] and balance[ing] such factors" including "the client's ability to articulate reasoning leading to a decision . . . and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client."[63] In practice, if the child client is wholly incapable of voicing any rational basis for their contrary wishes or displays a lack of understanding for the practical consequences of their position and the court's decision due to some mental impairment, this third factor will likely bar them from having a separate child's attorney. If John had provided an irrational or superficial reason for wanting to live with his mother, such as the fact that his mother lets him eat fast food for dinner every night, his contrary wishes would not warrant the appointment of a separate child's attorney because they are not based in rational and mature reasoning. However, because John articulated a substantive underlying reason for his contrary wishes, that he had no meaningful relationship with his biological father, and because he presented a reasonable alternative solution, it is highly likely that this factor would not preclude him.

IV. ADDITIONAL JUSTIFICATIONS FOR PROPOSED CHANGES

In addition to the ethical justifications discussed above, there are numerous practical and policy reasons that support this change to D.C. child welfare representation guidance. First, it is not only beneficial for the judge to understand as much as possible about the case before making any final determination, but it is a doctrinal *requirement* according to the "entire mosaic" doctrine, which will be discussed in section IV-A, *infra*. Second, independent representation is not only critical to a judge's ability to make fully informed decisions but may also act as a crucial first step towards respecting the autonomy of abused children and aiding in their recovery from trauma.

A. JUDICIAL PRACTICABILITY

One key concept that is pervasive in the D.C. child welfare system is that "a trial court's inquiry in neglect proceedings must go beyond simply examining the most recent episode," requiring instead that "judge[s] must be apprised of the

61. *Id.*
62. *See* MODEL RULES R. 1.14, cmt. 6.
63. *Id.*

entire mosaic."[64] One of the most common legal uses of a "mosaic theory" is related to matters of privacy under the Fourth Amendment, initially addressed in *Maynard* and *Jones*.[65] As applied to child welfare cases, however, the entire mosaic theory is wholly different and was originally introduced in a child welfare case in which the dissenting opinion criticized the majority's focus on "the most recent episode" without broader context acknowledging a long history of abuse (or lack thereof, depending on the facts) in finding the child abused.[66] The dissent urged judges to instead examine "the entire mosaic" in order to "know as much as reasonably possible about" the child's circumstances.[67] This recommendation of the dissent in *In re S.K.* was apparently incorporated into D.C. child welfare doctrine by the time another child welfare case, *In re T.G.*, was decided, which defined "entire mosaic" as "an examination of" the child's "history of, but also the reasons for, neglect."[68] In light of this requirement,[69] reasonably mature children who have some countervailing reason to disagree with the GAL's best interest determination must be allowed to present these reasons to the judge and do so specifically through legal counsel whose sole objective is to advocate for the child's expressed wishes.

In John's case specifically, appointing a child's attorney to represent his expressed wishes would have allowed the judge to understand his unique situation fully. Without the context that only John's perspective could provide, it is easy to see why placement with his father was objectively preferable. However, John may have provided information about why his lack of a relationship with his father would negatively impact his mental health or why he was equipped to take responsibility for his own hygiene, which would significantly mitigate the issues that brought him to child welfare court in the first place. Whatever context the child may provide about their own preferences and circumstances, without that input, the judge will inevitably be missing a critical piece of the mosaic, thus failing in their duty to know as much as reasonably possible about the child.[70]

B. NORMATIVE EFFECTS ON ABUSED AND NEGLECTED CHILDREN

While it is important to examine how the appointment of expressed wishes attorneys will help protect lawyers from ethical violations and assist judges in reaching fully informed conclusions, it is equally as important, if not more so, to examine how this policy change will impact the abused child. First, because of

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64. *See, e.g.*, *In re* T.G., 684 A.2d 786, 788 (D.C. 1996) (internal quotations omitted).

65. *See* Gabriel R. Schlabach, *Privacy in the Cloud: The Mosaic Theory and the Stored Communications Act*, 67 STAN. L. REV. 677, 678–80 (2015).

66. *In re* S.K., 564 A.2d 1382, 1389 (D.C. 1989) (Schwelb, A.J., concurring in part and dissenting in part).

67. *Id.*

68. *In re* T.G., 684 A.2d at 788.

69. *Id.*

70. *See generally In re* S.K., 564 A.2d at 1389 (Schwelb, A.J., concurring in part and dissenting in part); *In re* T.G., 684 A.2d at 788.

the "shared experience[]" of lowered autonomy in abuse survivors,[71] it is imperative to foster abused children's autonomy, starting as soon as possible by giving them some independence over how their case is pursued in court. Second, knowing that the judge valued their opinion and thoughtfully considered it before making an ultimate decision is likely to increase the probability that children will respect the decision made, even if they do not agree with it. The outcome of John's case left him feeling discouraged and confused. He was likely disillusioned about the judiciary system because not only did his preferred outcome not come to fruition, but also his opinion was never even given a fair shot. It is not hard to see how his resistance to the judge's decision and his resentment towards his lawyer's nonchalance about his expressed preferences could lead to a general rebellion against authority that could easily manifest itself in behavioral issues in his father's home. Since the goal of the child welfare system is to protect children, these justifications are in furtherance of this ultimate goaL.

1. DEVELOP AUTONOMY

"The psychological effects of" certain "conditions" experienced to varying degrees by abuse survivors generally "induce autonomy deficits in" these survivors.[72] While developmental psychology has posed a variety of definitions for the manifestation of autonomy in the self, one model suggests that exercising autonomy "involves reflectively endorsing one's actions and feeling a sense of volition and choice about what one is doing."[73] In other schools of thought, developmental psychologists believe that the core of autonomy is independence.[74]

Regardless of the school of thought to which one conforms, at the center of each is the idea of personal choice in one's own decisions. Autonomy is particularly important for individual well-being because it is thought to "promote integrity, [and] autonomous motivation,"[75] as well as "higher-quality relationships, and greater well-being,"[76] all likely desirable qualities in a mentally healthy society. Given the importance of autonomy for personal development and well-being, and, given that "the fact that someone is a survivor of autonomy-impairing childhood trauma does not support the inference that recovery [of such autonomy] is impossible for that person,"[77] it is imperative to begin this recovery process as soon as possible. Weighty choices about case objectives could be an ideal place

71. Michelle Ciurria, *The Loss of Autonomy in Abused Persons: Psychological, Moral, and Legal Dimensions*, HUMANITIES, June 2018 at 1, 2 (discussing IPV but this discussion likely translates easily, if not directly, to child abuse survivors because they are both forms of abuse between intimately connected parties).

72. *Id.* at 11.

73. Edward L. Deci & Richard M. Ryan, *The Importance of Autonomy for Development and Well-being*, *in* SELF-REGULATION AND AUTONOMY 19, 24 (Bryan W. Sokol, Frederick M. E. Grouzet & Ulrich Müller eds., 2013).

74. *Id.* at 29.

75. *Id.* at 33.

76. *Id.* at 41.

77. Ciurria, *supra* note 71, at 6.

to begin fostering the survivor's independence, volition, choice, and autonomy, and the solemnity of the courtroom in which the child abuse survivor is making such choices will likely increase the positive effects of these initial steps towards recovery.

2. LEGITIMIZE COURT DECISIONS

Although there may be less hard evidence that supports the notion that children will respect judicial opinions that are made after the judge has seriously and thoughtfully considered the child's preference, this assertion makes logical sense. In custody decisions, for instance, "[a] paternalistic judicial determination that the child's best interest is served by a custody decision that the child affirmatively opposes" not only "violates [the child's] interest in autonomy," but also the child "may simply disregard the custody order."[78] This prediction about a child's reaction to a custody determination in which their opinion is not valued can be applied easily to a child welfare case in which the court does not seriously consider the child's preference,[79] which often involves a custody or placement determination,[80] if it differs significantly from the GAL's best interests determination. While child welfare determinations have the extra complicating factor of possible abuse or neglect, as long as the child's preferred caregiver does not pose an objective danger to the child, the court should legitimately consider this preference, as doing so is likely to help legitimize the decision in the child's eyes.

V. COUNTERARGUMENTS TO PROPOSED CHANGES

Despite the significant ethical, judicial, practical, and normative justifications for expanding the nondiscretionary autonomy and independence of children over the direction of their child welfare cases, a few countervailing issues must be taken into consideration. First, appointing additional counsel in a child welfare case, such that a child is now represented by both a GAL and an expressed wishes attorney, will inevitably impose additional costs on the court. Second, while encouraging autonomy in child victims is a laudable goal, measures taken towards achieving this goal must account for the effects of maltreatment on a child's ability to make rational decisions for their own wellbeing.

A. COST TO THE COURT

One counterargument that may arise when deciding whether to enact a policy that will require extra court expenses is whether the cost to the court of the

78. Elizabeth S. Scott, N. Dickon Reppucci & Mark Aber, *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1067–68 (1988).

79. *See generally* Sjostrom, *supra* note 20, at 12.

80. CHILDREN'S BUREAU, UNDERSTANDING CHILD WELFARE AND THE COURTS 1, 3 (2011) (discussing the types of decisions made at dispositional hearings and permanency hearings).

proposed additional expense is worth it.[81] However, access to effective representation is so fundamental[82] that it is hard to imagine a cost that would be too high to guarantee this access to all parties, as long as the additional appointed counsel is serving in a role that is arguably opposed to the role of the GAL.[83] Additionally, "seven states [already] require both an attorney and GAL" so there exists a precedent proving that such costs are manageable.[84] Admittedly, the trend in states that require both a GAL and a child's attorney is for the GAL to be a layman, although in Texas "the attorney may serve in the dual role of" GAL and child's attorney.[85] However, because a GAL in D.C. "must be an attorney,"[86] and because an advocate for the child's expressed wishes appointed under the currently discretionary regime also must be an attorney,[87] this Note assumes that both of these roles in D.C. will continue to be filled by attorneys if the recommendations of this Note are implemented. Nevertheless, most states provide for "reasonable compensation" for all attorneys and GALs[88] so the fact that not every state requires GALs to be attorneys[89] should not greatly influence the cost of appointing both an expressed wishes attorney and a GAL for one child client. Therefore, if at least seven states have made the appointment of an attorney and a GAL in *every* case a workable and economically viable solution, it follows that this more modest proposal, which only requires both a GAL and child's attorney under very specific circumstances, should be a manageable expense.

B. EFFECTS OF TRAUMA ON DECISION-MAKING ABILITY

Although it is of paramount importance to reinforce autonomy and allow children to have a meaningful voice in the outcome of their cases, it is also imperative to protect children from the risky decision-making that can accompany trauma.

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81. *See, e.g.*, Duquette, *supra* note 37, at 463 ("[D]uring the bill drafting process, those concerned about the fiscal implications pointed out . . . that it would be financially irresponsible to open up the possibility of dual representation of most Michigan children in protection proceedings.").

82. Mimi Laver & Cathy Krebs, *The Case for a Centralized Office for Legal Representation in Child Welfare Cases*, Child Law Prac. Today (2020) ("A family's outcomes should not depend on where they live. Research clearly shows that legal representation positively impacts outcomes for parents and children and improves the overall operation of child welfare courts.") (internal quotation marks omitted), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january-december-2020/the-case-for-a-centralized-office-for-legal-representation-in-ch/ [https://perma.cc/5WS8-DVRX]; Duquette, *supra* note 37, at 447 ("[T]he older, mature child deserves to have his or her voice heard and advocated, whether or not the child's view of his best interests is consistent with the lawyer's view.").

83. *See* REPRESENTING CHILD-CLIENTS, *supra* note 32 ("Acting simultaneously in dual capacities presents the obvious prospect of a role conflict, where the lawyer's service as attorney demands compliance with the client's stated goals, but service in the role of a GAL compels the lawyer to disregard the client's instructions as inconsistent with her best interests.").

84. REPRESENTATION OF CHILDREN, *supra* note 24, at 2.

85. *See generally id.* at 2 n.8.

86. REPRESENTATION OF CHILDREN, *supra* note 24, at 2; *see also* PRACTICE STANDARDS, supra note 4, at i.

87. PRACTICE STANDARDS, *supra* note 4, at 7.

88. REPRESENTATION OF CHILDREN, *supra* note 24, at 4.

89. *Id.* at 2.

"[A]dolescent decision-making abilities are affected by exposure to childhood maltreatment," which often manifests itself through "increased risk taking to avoid losses."[90] Given this correlation, judges have reason to worry about the decisions children in the child welfare system may make regarding their own representation by an expressed wishes attorney. Judges will assume, sometimes correctly,[91] that many adolescent victims will be unable to properly weigh risks and make decisions that will ultimately protect their safety. While these are certainly valid criticisms to factor into the calculus, they are likely to be less probative of whether children should be granted client-led representation and instead should go to the weight judges afford their expressed preferences. Because simultaneous representation by a GAL and an expressed wishes attorney is more likely to present the judge with the "entire mosaic" of the child's circumstances,[92] the judge will be aptly suited to recognize when a child's expressed preference is untenably risky to their wellbeing. In other words, the judge should not prematurely decide that a child's preference will be so risky as to overwhelm his interest in independent representation; it is more appropriate for the judge to allow this independent representation and *then* make a decision in the child's best interest, based on all relevant facts and preferences.

CONCLUSION

Implementing changes to the discretionary nature of appointing a child's attorney in the D.C. child welfare system will have a net positive effect on all parties involved. By establishing a hard cutoff age, the court will not face drawn-out, case-by-case decisions whenever a child has a material disagreement with their lawyer. However, the more fact-specific nature of the incapacity prong allows judges to invoke this factor in the rare instances when a child is severely incapable of making informed or reasoned decisions about their wellbeing. Additionally, the requirement of a material disagreement based on whether the conflict is substantive or procedural will prevent arbitrary appointments to resolve issues that have little impact on the child or the outcome of the case.

The proposed changes will ensure that attorneys adhere to the ethical requirement to zealously represent their clients and follow their client's case objectives while still conforming to D.C.'s requirement that GALs represent their client's

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90. Joshua A. Weller, Leslie D. Leve, Hyoun K. Kim, Jabeene Bhimji & Philip A. Fisher, *Plasticity of Decision-Making Abilities Among Maltreated Adolescents: Evidence from a Random Controlled Trial*, 27 DEV. AND PSYCHOPATHOLOGY 535, 545–46 (2015); *see also*, Rasmus M. Birn, Barbara J. Roeber & Seth D. Pollak, *Early Childhood Stress Exposure, Reward Pathways, and Adult Decision Making*, 114 PROC. OF THE NAT'L ACAD. OF SCIENCES OF THE USA 13549, 13550 (2017) ("[I]ndividuals who had experienced high levels of childhood stress exposure made poor decisions with regard to risk taking compared with individuals with lower early stress exposure, and those with high early life stress exposure appeared unable to effectively learn from loss trials to improve their subsequent risk assessments.").

91. *See* Birn, *et. aL.*, *supra* note 90, at 13550.

92. *In re* T.G., 684 A.2d 786, 788 (D.C. 1996).

best interests, even when they differ from the client's preference. Additionally, the court will obtain a fuller picture of the case via the GAL presenting their determination about the child's best interests while the child's attorney advocates for the child's contrary wishes. Finally, and perhaps most importantly, these proposed changes will foster autonomy in maltreated child clients and bolster their belief in the fairness of the judicial system. These symbiotic benefits will result in a more ethical body of attorneys, a more informed judiciary, and a more mentally healthy and stable young citizenry.