No More “Rag Dolls in the Corner”:
A Proposal to Give Children in Custody Disputes
a Voice, Respect, Dignity, and Hope

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I. INTRODUCTION

Divorce and custody decisions affect more than a million children every year.¹ These decisions may change the lives of those children in profound ways. These decisions often affect the child’s health care, what church they will attend, where the child will reside, where the child will go to school, when child support will end, and how often the child will see the other parent, the grandparents, siblings, and friends. The decisions affect other important issues concerning the child’s welfare. Yet, courts routinely fail to appoint representatives for children. In doing so, the courts deprive themselves of a valuable source of information about how best to serve the interests of the child, independent from the often biased information provided by the parents and their counsel. By relying on less reliable sources of information, the courts often fail to protect children’s rights. They may also fail to find an outcome fair to both parents.

A. Slow Recognition of the Rights of Children

Since the late 1800s, legislatures and courts have taken significant steps to protect the rights of children in legal proceedings. As the first major step, they developed the juvenile court system.² Illinois was the first state to create a juvenile court system. People v. Armour, 319 N.E.2d 496, 498 (Ill. 1974).

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system could not do. Additionally, court decisions spanning decades slowly recognized that children, like adults, need certain basic rights—both procedural and substantive—to ensure their welfare.

The United States Supreme Court first established the right of a child to be represented in a juvenile court proceeding in the 1967 landmark decision of In re Gault, a case involving a juvenile delinquency proceeding in which the court considered a juvenile’s freedom. In 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA). This act required the court to appoint a guardian ad litem to represent a child involved in a proceeding designed to determine whether a parent was abusing or neglecting the child. Congress amended this act in 1996 to allow either lawyers or lay volunteers to represent the child in abuse and neglect proceeding.

**B. Legal Representatives for Children in Court Proceedings**

The passage of CAPTA led to the development of the Court Appointed Special Advocate (CASA) program. This program trains lay volunteers to advocate effectively for children in abuse and neglect proceedings. Numerous studies have concluded that CASA volunteers provide the most effective form of representation for children.

Even though the United States Supreme Court has mandated the appointment of counsel for juveniles in delinquency proceedings and Congress has mandated the appointment of a representative for children who are the subject of abuse and neglect proceedings, they have not yet required the court to appoint a representative for a child in a custody dispute. Likewise, the laws of most states do not impose the obligation.

**II. THIS ARTICLE**

This article advocates for the appointment of representatives for children whose parents or guardians are fighting over custody. Part III of this Article explores the development of rights for children who are involved in legal proceedings, including the juvenile court system and the increasing grant of rights to children by courts. Part IV explains the history of the CASA program, describes how volunteers are trained, and discusses studies that show its success in representing children involved in court proceedings. Part V describes the “best interest of the child” standard and its application by courts. Part VI discusses initiatives of the American Bar Association to protect children in court proceedings. Part VII advocates for the use of child representatives in disputed

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3 387 U.S. 1 (1967).
custody proceedings. Part VIII suggests the use of CASA volunteers in contested custody proceedings, especially trained law students in law school-connected programs. It shows that well-trained CASA volunteers can provide the most effective representation for children in custody proceedings.

III. HISTORICAL OVERVIEW OF THE DEVELOPMENT OF THE RIGHTS PROTECTING CHILDREN

A. History of the Juvenile Court System

In 1874, the New York Commission of Charities and Corrections placed a little girl, Mary Ellen, with Mary McCormack Connolly and her husband. The court placed her with these guardians because “her father was dead and her mother could not care for her because she was destitute and had to work full time.” Subsequently, the child’s screaming upset the neighbors. They suspected that her guardian was abusing her. The neighbors reported their suspicions to a mission worker and asked that she check on the child’s situation. The mission worker found that Mary Connolly had often severely beat Mary Ellen, locked her in a room, rarely allowed her outside, and did not provide adequate food and clothing.

1. The Law Gave Children Fewer Rights than Animals

At that time, no juvenile court system existed. No one had created child protective agencies. Courts did not require the appointment of guardians ad litem for abused children. No one had yet envisioned volunteer representatives for children. The mission worker, having no where else to turn for assistance, appealed to Henry Bergh, the founder and president of the American Society for the Prevention of Cruelty to Animals. Bergh agreed to assist. He persuaded New York Supreme Court Judge Laurence to hear the case. Bergh believed that even if Mary Ellen had no rights as a human being to be free of physical abuse, she at least deserved the same protections against abuse that the law afforded to animals. He argued, “[t]he child is an animal. If there is no justice for it as a human being, it shall at least have the rights of the stray cur in the street. It shall not be abused.”

On April 9, 1874, a volunteer carried Mary Ellen into the courtroom wrapped in a blanket. She told the presiding judge the following:

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8 Id.
9 Id.
My father and mother are both dead. I don’t know how old I am. I have no recollection of a time when I did not live with the Connolly’s. Mamma [Mrs. Connolly] has been in the habit of whipping and beating me almost every day. She used to whip me with a twisted whip—a raw hide. The whip always left a black and blue mark on my body. I have now the black and blue marks on my head which were made by mamma, and also a cut on the left side of my forehead which was made by a pair of scissors. She struck me with the scissors and cut me; I have no recollection of ever having been kissed by any one—have never been kissed by mamma. I have never been taken on my mamma’s lap and caressed or petted. I never dared to speak to anybody, because if I did I would get whipped . . . I do not know for what I was whipped—mamma never said anything to me when she whipped me. I do not want to go back to live with mamma, because she beats me so. I have no recollection ever being on the street in my life.

Not only did the court rescue Mary Ellen from her abuser, but her case stirred so much public attention that people reported many more cases of child abuse. Her case also resulted in a nationwide concern for abused children. In response to her case and to growing public concern about child abuse, volunteers created the Society for the Prevention of Cruelty to Children.

2. The Creation of Juvenile Courts

In 1899, Illinois became the first state to pass an act establishing a juvenile court system. This act reflected decades of advocacy by the “child savers,” a group of men and women dedicated to improving the lives of children, especially those who experienced abuse and neglect. By creating the juvenile court system, the American legal system first recognized that children have physical and emotional needs that differ from those of adults.

After the passage of the Illinois Juvenile Court Act of 1899, the Juvenile Court of Cook County began operation on July 1, 1899 with Judge Richard Tuthill presiding. The court employed court clerks, prosecutors, probation officers,

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13 In re Gault, 387 U.S. 1, 14 (1967).
officers of private associations and institutions, and truant officers. The court decided cases only after someone completed an investigation into a child's home environment. Judges conducted the earliest hearings in the juvenile court system in an informal manner. They met with the child, the parents, and the officer who completed the home investigation, often in chambers, around a table. The court did not require attorneys to participate in these proceedings. By 1911, twenty-two other states had established juvenile court systems. By 1925, forty-five states had juvenile court systems. In 1933, the U.S. Children's Bureau called the nation's swift embrace of juvenile courts "probably the most remarkable fact in the history of American jurisprudence."


B. The Development of Laws Protecting the Rights of Children in Legal and Family Matters

1. Children Considered as Property of their Parents

Historically, the law considered children property of their parents. Parents had the acknowledged right to exercise almost complete control over their children. Aristotle, living in 384 to 322 B.C., linked a father's right over his children to that of the rights of a slave owner. "The justice of a master and that of a father are not the same as the justice of citizens," for a son or a slave is property and there can be no injustice to one's property. The law viewed children as incompetent in family and legal matters until they reached the age of majority. "Children, simply by virtue of being children, are denied legal rights that adults take for granted."

The United States Constitution does not define the rights of children. One legal scholar proposed two reasons why it neglected to mention children. "The

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16 Id.
17 Id.
18 Id.
19 See Abrams & Ramsey, supra note 14, at 1058.
20 Bernard Flexner et al., The Child, the Family and the Court: A Study in the Administration of Justice in the Field of Domestic Relations 12 (1933).
21 See Abrams & Ramsey, supra note 14, at 287.
22 Id.
23 See James Kent, Commentaries on American Law 202, 206 (5th ed. 1844).
most obvious [reason] is that it never occurred to the Framers that children, as
distinguished from adults, needed constitutional status. The assumption may well
have been that common-law parental power and authority over children, reinforced
by parental affection and concern, were sufficient to protect the children’s
interests.”

The same scholar also implicates the doctrine of states’ rights. “[S]tates, rather than the federal government, should regulate the relationship of
parent and child.”


28 Id.

29 BLACK’S LAW DICTIONARY 1144 (8th ed. 2004).

30 See CASA MANUAL, supra note 7, at V1–6 (from ADMIN. ON CHILDREN, YOUTH & FAMILIES,
U.S. DEP’T HEALTH & HUMAN SERVICES, CHILD MALTREATMENT xiii (2004), available at

31 Id.

32 Id.

33 Id.

34 4 Whart. 9 (Pa. 1839).
control is a natural, but not an unalienable one.” In 1890, a few decades after the Ex parte Crouse ruling, the United States Supreme Court held that the parens patriae doctrine was “inherent in the supreme power of every state... a most beneficent function and often necessary to exercise in the interests of humanity and for the prevention of injury to those who cannot protect themselves.”

Later, in two landmark decisions, the United States Supreme Court acknowledged that despite the parens patriae doctrine, courts must afford parents due process protections in disputes with the government involving their children. In Meyer v. Nebraska, parents of elementary school children hired a teacher to teach the children in the German language. The lower court convicted him for violating a state statute that required instruction only in English for students below the eighth grade. This ruling was reversed on appeal. Even though the Court recognized the state’s parens patriae authority “to compel attendance at some school and to make reasonable regulations for all schools,” and “to prescribe a curriculum for institutions which it supports,” the Court held that parents have a due process liberty interest in “establishing a home and bringing up children.” The Court balanced the state’s parens patriae authority against the parents’ due process rights and determined that the parents’ due process rights should not be infringed upon because there was no harm to the child in learning the German language. The Court, however, did not mention any rights for the children.

Likewise, in Pierce v. Society of Sisters, the United States Supreme Court held a state statute unconstitutional that required parents to send children between the ages of eight and sixteen to public school. The state statute did not allow parents to send their children to a private or parochial school. Even though the Court recognized the state’s parens patriae authority to “reasonably regulate all schools,” the parents had a due process right “to direct the upbringing and education of children under their control.” Again, the court did not mention any rights for the children involved in the dispute.

In 1944, the United States Supreme Court first recognized the rights of children when weighing the state’s parens patriae authority against parental due process rights. In Prince v. Massachusetts, the Court upheld a lower court conviction of a custodial aunt for violating the state’s child labor law by allowing her nine-year-old niece to assist her in selling Jehovah’s Witness publications on public streets. The Court denied the aunt’s claim that she should not be held in violation of the state’s child labor laws because it violated her rights to practice her religion. The Court, in upholding the conviction, considered the harmful

35 Id. at 11.
36 Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890).
37 262 U.S. 390 (1923).
38 Id. at 402.
39 Id.
40 Id. at 399.
41 268 U.S. 510 (1925).
42 Id. at 534–35.
possibilities to children in this circumstance due to emotional excitement, psychological or physical harm. Even though the Court recognized the child's independent right to exercise their religion, the Court still considered the rights of the child subordinate to those of the parents and the state.

3. The Recognition of Fourteenth Amendment Due Process Rights for Children, Including the Right To Counsel in Delinquency Proceedings

Over a century after the recognition of the doctrine of *parens patriae* in cases involving children, and over two decades after the rulings in *Meyer*, *Pierce*, and *Prince*, the United States Supreme Court began considering whether certain constitutional rights normally afforded to adults would also apply to children. In the 1967 landmark decision of *In re Gault*, the Court first recognized the applicability of Fourteenth Amendment due process rights to juveniles in the juvenile court system. The juvenile court adjudicated Gerald Gault, a fifteen-year-old delinquent, for making lewd telephone calls to a female neighbor. The judge did not advise Gault or his parents of the right to remain silent or the right to counsel. Nor did the court appoint him an attorney. The court committed him to the state industrial school until he reached the age of twenty-one, unless the court decided to release him earlier. If Gault had been an adult at the time of the offense, the law would have constrained his sentence. It would have imposed only a maximum fine of fifty dollars or imprisonment of two months. Because Gault was a juvenile at the time of the offense, the court incarcerated him the six years, which was the remainder of his minority.

On appeal, the United States Supreme Court held that children were "persons" under the Fourteenth Amendment and mandated some procedural safeguards as a matter of "fair treatment." The safeguards afforded to children in delinquency proceedings included advance notice of the charges against the juvenile, assistance of counsel, the opportunity to confront and cross-examine witnesses, a fair and impartial hearing, and the right against self-incrimination. The Court reversed the juvenile court's ruling on the ground that its procedures failed to comply with U.S. Constitution’s due process requirements. The *Gault* decision only dealt with juvenile delinquency proceedings. The court, however, stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." It recognized for the first time that minors have constitutionally-protected due process rights.

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44 387 U.S. 1 (1967).
45 *Id.* at 30; see, e.g., *Kent v. United States*, 383 U.S. 541, 555, 561 (1966) (holding that the right of a juvenile to be represented by counsel in a delinquency proceeding "is not a formality... It is of the essence of justice.").
47 *Id.* at 13.
4. The Enactment of CAPTA and Appointed Representatives for Children in Cases of Abuse and Neglect

Even though the Gault decision recognized a juvenile’s right to counsel in delinquency proceedings, the Supreme Court had not yet held that a child had a constitutional right to counsel in any other type of proceeding. Courts could place a child in foster care, terminate parental rights, or resolve child custody disputes without hearing from legal counsel for the child. Congress, however, created a statutory right in 1974 when it passed the Child Abuse Prevention and Treatment Act (CAPTA), the first major child welfare law in the United States. CAPTA sets guidelines for state courts dealing with child abuse and neglect, including a requirement that courts appoint a guardian ad litem for every child involved in an abuse or neglect proceeding. States that fail to comply with the requirement can lose federal funds.

In 1996, Congress amended CAPTA to require the appointed guardian ad litem to be either an attorney or a court appointed special advocate, or both. CAPTA further provides that the guardian ad litem (1) “obtain first hand a clear understanding of the situation and needs of the child”; and (2) “make recommendations to the court concerning the best interests of the child.” Amendments to CAPTA, passed in 2003, require that the appointed guardian ad litem, whether an attorney or a court-appointed special advocate, receive the training needed for the role he or she plays in the process.

With the passage of CAPTA, Congress has required the representation of children in child welfare cases. Additionally, the United States Supreme Court has required that all children in delinquency proceedings be afforded the right to counsel. However, neither Congress nor the Court has mandated the representation of children in private custody disputes.

5. The “Peculiar Vulnerability” of Children Requires the Appointment of a Representative for the Child in Contested Custody Disputes

In the 1979 case of Bellotti v. Baird, the United States Supreme Court again considered the constitutional protections afforded to children. The Bellotti case involved a state statute requiring that a minor obtain parental consent before she could have an abortion. The Court held the statute was invalid because a third party was given an absolute veto over the decision of a juvenile to have an abortion. The Court further held that if the minor can show she is mature enough to make the decision, then the parent’s consent is not needed. The Supreme Court

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48 Id.
51 Id.
52 See id.
stated that "the unique role in our society of the family, the institution by which "we inculcate and pass down many of our most cherished values, moral, and cultural," requires that the constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children."

In *Bellotti*, the court recognized three factors in determining the applicability of adult constitutional rights to children: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." According to *Bellotti*, "the State is entitled to adjust its legal system to account for children's vulnerability ..."

Based on this logic, children in contested custody cases should have the assistance of a trained representative due to their "peculiar vulnerability." Even though the United States Supreme Court and Congress have not yet taken this next step, several states have adopted the provisions of the Uniform Marriage and Divorce Act. It gives a court discretion to appoint a guardian *ad litem* for a child in a custody or visitation proceeding. Wisconsin, however, is the only state that requires the appointment of an attorney to represent the child in a contested custody case.

IV. THE HISTORY OF THE COURT APPOINTED SPECIAL ADVOCATE PROGRAM (CASA) AND ITS EFFECTIVENESS IN THE REPRESENTATION OF CHILDREN

A. The Development of the CASA Program

After CAPTA mandated the appointment of a guardian *ad litem* for all children in child abuse and neglect cases, courts began looking at different ways to satisfy the requirement. Judge David Soukup of King County in Seattle, Washington expressed dissatisfaction with the lack of individual records and case plans for each child that became the subject of a proceeding in his court. He believed that more individualized attention would produce better outcomes. He wanted to ensure that the court received all the facts and relevant information concerning each child's case. Courts could then determine the best long-term plan

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54 Id. at 634 (quoting Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977)).
55 Id.
56 Id. at 635.
58 See WISC. STAT. ANN. § 767.407(1) (West 2007) ("The court shall appoint a guardian *ad litem* for a minor child in any action affecting the family if ... [the legal custody or physical placement of the child is contested."]) (emphasis added). Cf. FLA. STAT. ANN. § 61.401 (West 2005) ("In an action for dissolution of marriage, modification, parental responsibility, custody, or visitation, if the court finds it is in the best interest of the child, the court may appoint a guardian *ad litem* ...") (emphasis added).
59 See CASA MANUAL, supra note 7, at V1-4.
60 Id.
for each child. Judge Soukup and his court staff began using community volunteers as advocates for children in court proceedings.

In 1977, the first volunteer guardian ad litem program began in Seattle. The court did not require that the guardians ad litem be attorneys, but the court required them to complete a training program. Judges in other states and counties soon began to use community volunteers to advocate for children in court. The CASA pilot program began with 110 volunteers advocating for 498 children. More than 50,000 CASA volunteers currently donate in excess of 4.5 million hours on behalf of an estimated 188,000 abused and neglected children in more than 900 jurisdictions.

B. The Requirements and Duties of CASA Volunteers

Court-appointed CASA volunteers serve as advocates for children who are the subject of abuse and neglect in court proceedings. Prior to entering the CASA program, program directors require each volunteer to submit an application with references and to undergo a background check. Judges, lawyers, social workers, court personnel, foster parents, and psychologists provide the training. These professionals teach the CASA volunteers effective advocacy techniques. A CASA volunteer also must learn about the juvenile court system and child protection proceedings. The CASA volunteers also learn about various topics relating to children, including risk factors for child abuse and neglect, stress in families, how children grow and develop, psychological and educational issues, how to communicate with children, issues of diversity and cultural heritage, and the impact of mental illness, substance abuse, domestic violence and poverty on children.

When the court appoints a CASA volunteer, he or she becomes an official part of the court proceedings. The CASA volunteer has a duty to advocate for the best interests of the child until the case ends. A CASA volunteer will: (1) conduct interviews and gather facts; (2) provide independent, factual information to the court through written reports and testimony in court; (3) advocate for what they

61 See CASA HISTORY, supra note 6, at 1.
62 Id.
63 Id.
64 See CASA MANUAL, supra note 7, at V1-4.
65 See CASA HISTORY, supra note 6, at 1.
67 See CASA MANUAL supra note 7, at V1-4.
69 Id. at 24.
70 Id.
71 Id. at 24; see CASA MANUAL supra note 7, at V3-V7.
72 CASA STANDARDS, supra note 68, at 25.
C. The Advocacy Process

When a person makes a report of suspected child abuse or neglect to a local child protection agency or law enforcement agency, an investigator responds within a specific time frame depending on the nature and seriousness of the allegations. The investigator determines the extent of the abuse or neglect and the risk of harm to the child. If the investigator does not confirm the report of abuse or neglect, the child protection agency will close the case. If the investigator confirms the abuse or neglect, the child protection agency will then determine if its staff should provide protective services to the child, parents, or guardian. The agency can also decide to file a petition with the court to intervene to protect the child or remove the child from the home. If the agency files a petition, the court will conduct a series of hearings to determine if the allegations of abuse and neglect are true, and if so, whether the child should be removed from the home. It will also determine what services the agency will offer to the parents for rehabilitative efforts. As soon as a proceeding is filed with the court, CAPTA requires the appointment of a representative for the child. Often, this representative is a CASA volunteer.

D. Results of Studies that have evaluated the Effectiveness of the CASA Program

Several entities have evaluated the effectiveness of CASA volunteers. In 1987, the National Center on Child Abuse and Neglect funded a comparative study of different methods for representing children. Specifically, this study compared the performance of lawyers, trained volunteers, and law students. The study showed that the lawyers, trained volunteers, and untrained law students all performed substantially alike as advocates for children. The study, however, concluded that trained volunteers were more likely than lawyers or untrained law students to have met with the child to assess the child and the child’s environment. Additionally, the study concluded that trained volunteers can function better than untrained attorneys in representing children in dependency cases.

73 Id. at 25–26.
74 See CASA MANUAL, supra note 7, at V2-14.
75 Id. at V2-14–15.
76 Id. at V2-16.
79 Id.
80 Id. at 372.
81 Id. at 390.
In 1988, CSR, Inc. produced the results of a study—the National Evaluation of the Impact of Guardian ad Litem in Child Abuse and Neglect Judicial Proceedings—on the use of guardians ad litem in advocating for children in five different models of representation. The study evaluated law school clinics, staff attorneys, paid private attorneys, lay volunteers, and lay volunteers working with private attorneys. The analysis determined that lay volunteers provided the most effective model of child advocacy.

In 1995, the United States Department of Health and Human Services conducted a national study on the effectiveness of the same five models of child representation. The study found that lay volunteers were much more likely than lawyers to perform fact-finding functions, such as observation of parent-child interactions and home visits. The results showed that approximately sixty-six percent of CASA volunteers observed parent-child interactions as compared to forty percent of staff attorneys and thirty-eight percent of private attorneys. Additionally, the results showed that ninety percent of CASA volunteers visited the home as compared to only thirty-three percent of the attorneys. The child advocate also plays an important role in monitoring the ongoing case. In playing this role, the advocate maintains contact with the child, monitors the child’s special needs, and follows up on court orders. The 1995 study found that CASA volunteers were much more likely than attorneys to perform these monitoring activities.

In January 2007, the National CASA Association released results of an audit. As required by Congress, the audit assessed the outcome in cases using CASA volunteers compared to cases using other types of representatives. Children represented by CASA volunteers had more favorable results than children represented by other persons. As found on the National CASA website, additional studies from 1986 to 2004 made other notable conclusions:

82 LARRY CONDELLI, CSR, INC., NAT’L EVALUATION OF THE IMPACT OF GUARDIANS AD LITEM IN CHILD ABUSE OR NEGLECT JUDICIAL PROCEEDINGS 1-1 to -3 (1988).
83 See id. at 4-4 to -5.
84 CSR, INC., FINAL REPORT ON THE VALIDATION AND EFFECTIVENESS STUDY OF LEGAL REPRESENTATION THROUGH GUARDIAN AD LITEM, at xii-xiii (1995).
85 Id. at 6-6, -7.
86 Id. at 6-7.
87 Id. at 6-4.
88 See id.
90 See id. at 34.
CASA volunteers spend most of their volunteer time in contact with a child.  
CASA volunteers spend significantly more time in contact with a child than a paid guardian ad litem.  
CASA volunteers are far more likely than paid attorneys to file written reports.  
CASA volunteers are highly effective in getting their recommendations accepted in court. In four out of five cases, all or almost all CASA volunteer recommendations are accepted.  
In cases in which a court appointed a CASA volunteer, the court will order a higher number of services for children and their families.

V. "BEST INTEREST OF THE CHILD" STANDARD

A. The "Best Interests of the Child" Standard and How Courts Apply It

In a custody proceeding, the courts in all states use the "bests interests of the child" standard. Courts began using this standard in the nineteenth century. Today, most states, by either statute or case law, have made it the applicable standard. Many jurisdictions have enacted statutes that give a detailed list of relevant factors that the court must consider in making a custody determination. The Uniform Marriage and Divorce Act, the source of the statutory factors

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92 Id. (citing CALLIBER ASSOC., NATIONAL CASA ASSOCIATION EVALUATION PROJECT (2004)).
93 Id. (citing Donald D. Duquette & Sarah H. Ramsey, Using Lay Volunteers to Represent Children in Child Protection Court Proceedings, 10 CHILD ABUSE & NEGLECT 293, 293 (1986)).
94 Id. (citing SHERRIR S. AITKEN ET AL., CSC, INC., FINAL REPORT OF THE VALIDATION AND EFFECTIVENESS STUDY OF LEGAL REPRESENTATION THROUGH GUARDIAN AD LITEM (1993); KAREN C. SNYDER ET AL., A REPORT TO THE OHIO CHILDREN’S FOUNDATION ON THE EFFECTIVENESS OF THE CASA PROGRAM OF FRANKLIN COUNTY (1996); Victoria Weisz & Nghi Thai, The Court-Appointed Special Advocate (CASA) Program: Bringing Information to Child Abuse & Neglect Cases, 8 CHILD MALTREATMENT 204 (2003)).
95 See source cited supra note 92.
98 See Commonwealth v. Briggs, 33 Mass. (1 Pick.) 203, 205 (1834) ("[T]he good of the child is to be regarded as the predominant consideration."); see also, Namazie, supra note 97, at 1018–19 ("By the tail end of the twentieth century, all fifty states had adopted the 'best interest of the child' standard over any preference toward the mother or father").
100 See, e.g., VA. CODE ANN. § 20-124.3 (2004); see also MINN. STAT. ANN. §518.17 (2006).
followed in most states, sets forth the following factors for the court to consider in custody matters: (1) the wishes of the child’s parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child’s best interest; (4) the child’s adjustment to his home, school and community; and (5) the mental and physical health of all individuals involved.\footnote{Id.}

Judges have broad discretion to award custody as they deem best for the child, often deciding cases according to their own values.\footnote{ANDRE P. DERDYN ET AL., MENTAL HEALTH ASPECTS OF CUSTODY LAW 31 (Robert J. Levy ed., 2005); see Robert J. Levy, Rights and Responsibilities for Extended Family Members, 27 FAM. L.Q. 191, 197 (1993) ("[T]he invitation the ‘best interests’ standard’s indeterminate qualities offers to judges to award custody to those litigants whose attributes and values most resemble their own").} Anything a judge finds important to the child’s best interests may weigh heavily in deciding custody. The decision can include the parents’ religious practices, their work schedules, and their lifestyle choices. In determining what is in the best interests of the child, “much must be left to the discretion of the trial court. Some statutory criteria will weigh more in one case and less in another and there is rarely an easy answer.”\footnote{See Maxfield v. Maxfield, 452 N.W.2d 219, 223 (Minn. 1990).}

B. Affect of Court’s Discretion on Parents and Children

Under the “best interests” standard, courts have broad discretion in determining which factors to consider in a particular case and how much weight to give each factor. Courts also have limited resources and often base decisions on imperfect or incomplete information. The broad discretion given to the trial court often results in indeterminate outcomes that hamper settlement negotiations.\footnote{See Randy Frances Kandel, Just Ask The Kid! Towards a Rule of Children’s Choice in Custody Determinations, 49 U. MIAMI L. REV. 299, 338 (1994).} Its use increases the likelihood that courts will misunderstand facts and apply their own biases and moral values in their decisions.\footnote{See id. at 339.} Moreover, courts will often make decisions without a full understanding of the cultural backgrounds of the parties.\footnote{See id.}

In addition to the problems courts face by using the “best interests” standard to determine the custody of a child, a court may wrongly presume that the parents will protect the child’s interest in a custody case. However, the interests of the child can easily be forgotten or minimized in the heat and hatred of their parents’ divorce. Parents, consumed by animosity and their desire for financial retribution, ignore their children’s desire to maintain a relationship with both parents; lawyers, anxious to make a “killing” for their clients but also to “settle” the divorce action short of trial, help parents treat their children as additional “marital assets;”
judges, anxious to clear their dockets and avoid litigation, cavalierly approve custody “deals” with no oversight.\textsuperscript{108}

Thus, lawyers representing the parents advocate for what the parents want in a custody dispute. The children, who are the most affected by a custody proceeding, usually have no one to advocate for them and their interests.\textsuperscript{109} “In our current system, a child is treated like a rag doll that quietly sits wherever it is placed.”\textsuperscript{110} Although children are the central subjects of divorce proceedings, the system silences their already-thin voices. They are not active participants in a process that may alter significantly their relationships with their parents, determine where they will go to school, and possibly interrupt relationships with friends and other family members.

The American legal system depends on the “notion that adversaries in a legal dispute will draw forth all information relevant to the contest in the process of putting forward their best positions, thereby allowing the decision maker to determine the ‘truth’ and to make the best decision.”\textsuperscript{111} Adversarial proceedings tend to “escalate conflict, diminish the possibility of civility between parents, exacerbate the win-lose atmosphere that encourages bitterness and parental irresponsibility, and weaken important parent-child relationships.”\textsuperscript{112} Thus, in disputed custody cases, the parents often cannot put the conflict they have with each other aside to focus instead on the best interests of the child.\textsuperscript{113} Parents will often hide or twist facts or try to escalate marital faults to gain advantage in the custody determination.\textsuperscript{114} Rules of evidence and procedure may prohibit some facts that seem relevant to the parties from being presented to the court.\textsuperscript{115} The nature of an “adversarial system,” coupled with the reality that children rarely have a voice in custody proceedings, often results in the legal system failing to gather the information it needs to serve the best interests of the child.

During a custody proceeding, judges often observe parents at their worst.\textsuperscript{116} Under the pressures of a disputed custody proceeding, the parents often show strong emotions, such as anger and hatred. One scholar described the often elevated emotions during custody litigation:

\textsuperscript{108} DERDY ET AL., supra note 103, at 299.
\textsuperscript{110} Id.
\textsuperscript{111} Gregory Firestone & Janet Weinstein, In the Best Interests of the Child, 42 FAM. CT. REV. 203, 203 (2004).
\textsuperscript{112} Joan B. Kelly, Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice, 10 VA. J. SOC. POL’Y & L. 129, 131 (2002).
\textsuperscript{114} See Firestone & Weinstein, supra note 111, at 204; Kelly, supra note 112, at 131; Rebecca Hinton, Giving Children a Right to be Heard: Suggested Reforms to Provide Louisiana Children a Voice in Child Custody Disputes, 65 LA. L. REV. 1539, 1550 (2005).
\textsuperscript{115} See Firestone & Weinstein, supra note 111, at 205.
\textsuperscript{116} DERDY ET AL., supra note 103, at 5.
Custody disputes may be seen as regressive crises in which a loss of parenthood status is threatened. Ensuing parental regression magnifies threats or perceived injury to self or children. As their anxiety increases, parents may lie, become provocative and insulting, or even appear close to psychosis. On the other hand, some parents handle the anxiety with denial and seem to be reasonable or calm.\footnote{\textsuperscript{117}}

The anger and hatred displayed during a custody proceeding by parents may represent a "psychological method of trying to avoid blame for the failure of the marriage."\footnote{\textsuperscript{118}} Anger always makes fact finding more difficult."\footnote{\textsuperscript{119}} When a parent displays hatred in a custody case, it can distort a parent’s true character and the apparent ability to parent, sometimes resulting in a flawed decision by the court.\footnote{\textsuperscript{120}}

In addition to anger and hatred, competition by the divorcing parents can be a tactic used by the parents "in the effort to protect themselves from hurt by the partner and to place blame for the failing relationship upon the partner."\footnote{\textsuperscript{121}} Immediately upon separation, children are usually the object of the parents’ most intense struggles."\footnote{\textsuperscript{122}} Disputes about child custody are one “route through which each spouse can continue to attempt to control, punish and frustrate the other.”\footnote{\textsuperscript{123}}

Custody litigation also drains the finances of the litigants. Funds that parents could use on services to help mend the family are instead used to pay attorneys, court costs, and expert witnesses.\footnote{\textsuperscript{124}} Attorneys may also encourage parents not to speak to each other during the litigation for various reasons.\footnote{\textsuperscript{125}} In addition, attorneys for parents sometimes prolong the process in an attempt to gain a strategic advantage.\footnote{\textsuperscript{126}} Finally, the adversarial process often causes the child to lose his position as the primary concern in the custody dispute.\footnote{\textsuperscript{127}}

In contested custody cases, the parents, as adversaries against each other, put the child in the middle. Sometimes this dynamic exposes the child to

\footnotesize\textsuperscript{117} Notes, Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce, 87(6) YALE L.J. 1126, 1131 (1978); see also C. Sager et. al., The Marriage Contract, 10 FAMILY PROCESS 311, 318 (1971).
\footnotesize\textsuperscript{118} DERDYN ET AL., supra note 103, at 6.
\footnotesize\textsuperscript{119} Id. at 95.
\footnotesize\textsuperscript{120} See id.
\footnotesize\textsuperscript{121} Id. at 52.
\footnotesize\textsuperscript{122} Id. at 53.
\footnotesize\textsuperscript{123} Id.
\footnotesize\textsuperscript{125} See Hinton, supra note 114, at 1547.
\footnotesize\textsuperscript{126} See Kim J. Landsman & Martha L. Minor, Note, Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce, 87 YALE L.J. 1126, 1129 (1977); see also Firestone & Weinstein, supra note 111, at 204–05; Hinton, supra note 114, at 1548.
\footnotesize\textsuperscript{127} Firestone & Weinstein, supra note 111, at 206–207; Weinstein, supra note 124, at 116.
From a child’s perspective, divorce is a cumulative experience with the breakup being the first unsettling event. Children are frightened and angry, terrified of being abandoned by both parents, and they feel responsible for the divorce. Most children are taken by surprise; few are relieved. As adults, they remember with sorrow and anger how little support they got from their parents when it happened. Psychological consequences often result from the interference in a child’s life caused by divorce. Often the divorce forces children to move and to disrupt relationships with the other parent, friends, siblings, grandparents, and other sources of emotional and psychological support. They lose the permanency and stability that existed prior to divorce. Experts find that children whose parents have divorced often show signs of clinical depression.

Children of divorced parents often face long-term negative consequences. Research suggests that children of divorce face trauma that can stay with them into adulthood. These children are more likely “to be poor, drop out of high school, bear out-of-wedlock off-spring and use drugs.” Children of divorce often suffer from low self-esteem.

VI. THE AMERICAN BAR ASSOCIATION’S RECOMMENDATIONS FOR SUPPORT OF CHILDREN INVOLVED IN COURT PROCEEDINGS

The American Bar Association (ABA), at its Youth at Risk Initiative Planning Conference, made several recommendations for assisting and protecting youths that face high risk for entering the juvenile and criminal justice systems. The ABA recommended that participants in the judicial system work toward “better hearing the voices of youth in court.” The conference reviewed the final report of the Pew Commission on Foster Care. That report found a “common failure of juvenile and family courts to assure that youth play a meaningful role in their judicial proceedings, as it is not uncommon to find their active in-court participation not promoted or discouraged. This same is true for proceedings arising from the divorce or separation of their parents.” The conference recommended that children should have meaningful involvement and therefore a positive participatory experience in all hearings affecting them, not only

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128 Landsman & Minor, supra note 126, at 1131.
129 See WALLERSTEIN ET AL., supra note 109, at 298.
130 Id.
133 WALLERSTEIN ET AL., supra note 109, at 129–30.
134 See generally The American Bar Association’s Youth at Risk Initiative, Recommendations from the ABA Youth at Risk Initiative Planning Conference, 45 FAM. CT. REV. 366 (2007) (setting forth the recommendations) [hereinafter Recommendations].
135 Id. at 367.
136 Id.
delinquency and dependency, but also custody, family violence, and other cases involving them.\textsuperscript{137}

The ABA also recommended "better supporting teens that experience high family conflict, domestic violence in the home, and divorce."\textsuperscript{138} As noted above, children who live in homes of elevated hostility due to divorce or separation and high conflict custody or visitation disputes are more likely to get into serious trouble with the law. The conference participants recommended that courts should devise methods and procedures to provide support for these children.\textsuperscript{139}

Additionally, the ABA made several recommendations about how to promote more direct and meaningful participation of children in court proceedings that affect their lives.\textsuperscript{140} The ABA recommended that courts give children notice of all proceedings affecting them, as well as, an opportunity to be present. The court or some other person should inform children of the court process, what can occur in court, and the consequences of court actions. The court should conduct the proceedings in an environment that assures confidentiality and avoids exposing the children to the humiliation of having their private lives discussed in public. Furthermore, the court should allow sufficient time for the children to have input into their cases and to have their questions answered in a language that they can understand. To the extent the courts rely on children's representatives, those representatives should have special youth-oriented skills and training.\textsuperscript{141}

The ABA has adopted Standards of Practice for Lawyers Representing Children in Custody Cases.\textsuperscript{142} These standards require the appointment of a lawyer for a child if mandated by state law.\textsuperscript{143} They also propose a list of circumstances a judge should consider when deciding whether to appoint a lawyer for the child.\textsuperscript{144} This list includes:

1. consideration of extraordinary remedies, such as supervised visitation, terminating or suspending parenting time, or awarding custody or visitation to a non-parent;
2. relocation that could substantially reduce the child's time with a parent or sibling;
3. the child's concerns or views;
4. harm to the child from illegal or excessive drug or alcohol abuse by a child or a party;
5. disputed paternity;
6. past or present child abduction or risk of future abduction;

\textsuperscript{137} See id.
\textsuperscript{138} Id. at 367–68.
\textsuperscript{139} See id. at 368–69.
\textsuperscript{140} Id. at 368.
\textsuperscript{141} See id. at 369–71.
\textsuperscript{143} Id. at 123–124, (citing American Bar Association, \textit{Standards for Practice for Lawyers Representing Children in Custody Cases}, 37 FAM. L.Q. 129, at VI. A. 1 (2003)).
\textsuperscript{144} Elrod, supra note 142, at 123–24.
7. past or present family violence;
8. past or present mental health needs of a child that require investigation or advocacy;
9. a high level of acrimony;
10. inappropriate adult influence or manipulation;
11. interference with custody or parenting time;
12. a need for more evidence relevant to the best interests of the child;
13. a need to minimize the harm to the child from the processes of family separation and litigation; or
14. specific issues that would best be addressed by a lawyer appointed to address only those issues, which the court should specify in its appointment order.\(^{145}\)

Even this list considers mostly high-risk circumstances as the trigger for the appointment of a child representative.

VII. USING COURT-APPOINTED CHILD REPRESENTATIVES

A. Taking the “Rag Doll” out of the Corner: The Appointment of a Representative for the Child Would Aid the Court in Conducting a “Best Interests” Analysis

In the *Gault* decision,\(^ {146}\) the United States Supreme Court first recognized a child’s right to representation in delinquency proceedings. The court based its decision on the constitutional right to procedural due process in cases in which the court might deprive a person of liberty. In *Gault*, the court placed great emphasis on the importance of an individual’s right to representation in the American judicial system.

Some legal commentators argue that “implicit in the *Gault* decision is the proposition that a child’s right to counsel is a procedural guarantee that extends to all cases where her interests are affected.”\(^ {147}\) The *Gault* decision, however, dealt with delinquency cases and the potential of a child being deprived of liberty. By contrast, most custody cases do not involve deprivation of liberty, but instead determine which parent will gain custody of the child.

Of all types of legal proceedings, children are most likely to experience divorce and custody disputes during their childhoods. “About forty-five percent of all children born in the 1980’s will experience parental divorce, thirty-five percent will experience parental remarriage, and twenty percent will experience parental

\(^{145}\) Id.
\(^{146}\) 387 U.S. 1 (1967).
Despite the high number of children subject to custody disputes, the United States Supreme Court, Congress, and most states do not require the appointment of a representative for the child.\textsuperscript{149} A recent ABA survey found that thirty-nine states grant discretion to the trial court to appoint a representative for a child in a custody dispute.\textsuperscript{150} The Uniform Marriage and Divorce Act provides that courts may appoint "an attorney to represent the interests of a . . . child" in cases of custody, visitation, and support.\textsuperscript{151} Approximately ten states require the appointment of a representative for a child in custody cases when one party has made allegations of abuse or alleged other designated circumstances.\textsuperscript{152} The corresponding Oregon statute requires the court to appoint a representative if the child requests one.\textsuperscript{153} Only one state, Wisconsin, requires the court to appoint a representative for a child in all contested custody disputes, unless certain conditions are present.\textsuperscript{154} In reality, courts rarely exercise the power to appoint a child representative in a custody proceeding primarily because of the costs of the representative.\textsuperscript{155} Often, the court charges the cost to one or both parents whose financial resources are already stretched to the limit due to the costs of divorce. Courts may also have a concern that an appointed lawyer-guardian \textit{ad litem} will lack training in the different stages of childhood development and other matters relating to child psychology.\textsuperscript{156} Attorneys typically do not acquire training in methods used to interview children at different stages of development in a way that minimizes the traumatic effects of court proceedings.

Additionally, lawyers appointed as guardians \textit{ad litem} are more likely to have little pre-hearing contact with the child-client and do not spend the time or resources to thoroughly investigate the facts.\textsuperscript{157} A 1988 evaluation conducted by the Department of Health and Human Services showed that thirty percent of private attorneys appointed to represent a child in a court proceeding reported that they had no contact with their clients prior to making a recommendation to the court.\textsuperscript{158} A study conducted in New York State, showed that in forty-seven percent of the observed attorney-child client relationships, the attorney had prepared little or not at all for the hearing. In five percent of the observed relationships, the attorney had not met with the client at all. In another thirty-seven percent of the

\textsuperscript{148} Vivaz, \textit{supra} note 131, at 532.

\textsuperscript{149} See \textit{supra} notes 58–59 and accompanying text.


\textsuperscript{152} See ABA Survey, \textit{supra} note 150, at 126–29.


\textsuperscript{154} See ABA Survey, \textit{supra} note 150, at 129.


\textsuperscript{157} See Condelll, \textit{supra} note 82, at 4-8 to -9, tbl.4-1.

\textsuperscript{158} \textit{Id.} at 4-6, tbl.4-1.
cases, the observers could not determine if the attorney had met with the child prior to the court proceeding. In thirty-five percent of the cases, the attorney did not talk to, or made only minimal contact with, his or her client during the proceeding.\textsuperscript{159} A similar study conducted in North Carolina concluded that lawyers only provided a “presence,” rather than actually influencing the court proceedings in which they were appointed to represent children.\textsuperscript{160}

Even though the law does not mandate the right of a child to representation in custody proceedings, many legal scholars take the position that children should have that representation.\textsuperscript{161} Providing a child with representation would directly and effectively meet the ABA’s conference recommendations outlined above.\textsuperscript{162} Several compelling reasons exist for appointing a representative. First, the “best interests of the child” standard is vague, indefinite, and inexact.\textsuperscript{163} Therefore, a judge needs more information to provide the needed insight into the child’s world that would allow the best application of the standard in each individual case. The more information the judge has available, the less likely he or she will feel compelled to make a ruling based on his or her own lifestyle preferences.

Appointing a representative who has the background, training, and inclination to provide such information insures that the court is appropriately educated.\textsuperscript{164} The court can learn more about each parent, the child’s needs, and the child’s relationship with each parent. The court might not otherwise have access to this information if parents choose to hide these facts for fear they can lead to an unfavorable decision, or if parents are unaware of the facts the child would provide a representative. Without a representative, a child would not have the means to relay this valuable information to the judge.

Second, a representative for a child in a contested custody case would compensate for the shortcomings in the judge’s background or training. Typically, the legal and court system trains judges to interpret and apply the law. The system does not typically train them to “deal with families in crisis,” high conflict parties, family dynamics, mental health issues that may fuel the conflict, emotions of divorce, or the psychological affects of this life-changing process.\textsuperscript{165} They have not
been educated about the effect of divorce on children, what helps or hinders their adjustment, or the needs of children at different developmental stages.\textsuperscript{166} They do not have the resources to have mental health experts, child psychologists, or experts in the field of childhood development function as a part of their staffs. Therefore, judges have to rely on their own life experiences and the information that the parties and their representatives present in court. Consequently, judges may leave out important factors in the custody decision process. Giving the child a representative—and thereby empowering the child and the judge—will result in a more informed decision.

Third, appointing a child a representative can enhance the child’s self-esteem.\textsuperscript{167} “[M]any studies suggest that affording children these opportunities can have a strong positive effect on children’s development: it has been shown to increase self-esteem, motivation and performance, to improve children’s ultimate decision making and exercise of control as adults, and in general, to produce happier children in stronger relationships.”\textsuperscript{168} Instead of feeling like the “rag doll in the corner,”\textsuperscript{169} the appointment of the personal representative makes the child a respected party in the decision-making process.\textsuperscript{170} It will help the child better understand the reasons for the court’s decision.\textsuperscript{171} It will keep the focus in the proceeding on the child’s best interests.

As noted above, a well-trained representative can explain the proceedings in ways that a child can understand, take the time to listen to the child’s concerns and fears, conduct a thorough investigation of the facts, monitor the child’s emotional status, and continue to educate the child about what to expect at each stage of the proceeding. Appointing a representative for the child also helps alleviate the “peculiar vulnerability” of the child.

VIII. USING CASA VOLUNTEERS TO REPRESENT CHILDREN IN CONTESTED CUSTODY CASES

A. CASA Volunteers Should Be Appointed To Represent Children in Contested Custody Cases

Using a CASA volunteer as the child’s representative in custody litigation offers several advantages. First, CASA volunteers financially cost the courts and parents nothing. Second, as noted above, studies show that CASA volunteers are

\begin{itemize}
  \item Id.
  \item Emily Buss, Confronting Developmental Barriers to the Empowerment of Child Clients, 84 CORNELL L. REV. 895, 948 (1999).
  \item See WALLERSTEIN ET AL., supra note 109, at 312.
  \item HARALAMBIE, supra note 170, at 12–15.
\end{itemize}
often better trained than other types of representatives in all aspects of the divorce process and its emotional and psychological toll.\textsuperscript{172} As noted above, they complete a minimum of thirty hours of training in the principles and concepts that guide CASA volunteer work, including many cross-disciplinary topics.\textsuperscript{173} In contrast, most attorney representatives have little, if any, training in law school or after law school to prepare them for the complexities involved in communicating with and representing children.\textsuperscript{174}

Third, as noted above, CASA volunteers often spend more time investigating the case than do attorneys who are appointed to represent children.\textsuperscript{175} Fourth, they are more likely to accept the duties of a child's representative in a custody hearing, which should include: (1) regularly meeting with the child; (2) explaining in age appropriate terms what is happening at each stage of the proceeding; (3) routinely investigating the facts concerning the parents and the child, including speaking with teachers, neighbors, relatives, doctors, mental health professionals, and any other person who has information regarding the case; (4) accompanying the child to all court proceedings when the court requires the child's presence; (5) being present when persons interview or evaluate the child; (6) submitting reports to the court regarding any findings made by the representative; (7) monitoring the child's status as the case progresses and after the court makes his or her decision; and (8) making recommendations to the court for any community services which may benefit the child in coping with the effects of the custody proceeding.\textsuperscript{176}

B. Barriers to the Use of CASA Volunteers in Child Custody Disputes

Barriers, however, exist to the wider use of this valuable resource in private custody disputes. First, most courts do not have access to a sufficient number of trained CASA volunteers. Second, a chronic lack of adequate funding for the CASA program inhibits the expansion of the program to private custody disputes. The financial support for the CASA program comes from a mix of private, local, state, and federal funding.\textsuperscript{177} Although CASA volunteers work without compensation, the program still incurs administrative costs. CASA estimates that the cost of appointing a volunteer to a child in a dependency proceeding in a suburban area runs about $820.\textsuperscript{178} Evidence shows that the investment pays off by reducing potential long-term costs—in crime, incarceration, welfare payments for high-school drop-outs, out-of-wedlock births, and other costs—related to the

\textsuperscript{172} See supra discussion Part IV.A–D accompanying notes 79–96.
\textsuperscript{173} See CASA STANDARDS, supra note 68, at 24.
\textsuperscript{174} See generally Jennifer R. Gavin, Child Welfare Law Curricula in Legal Education: Massachusetts' Untried Opportunity, 7 B.U. PUB. INT. L.J. 9 (1998) (discussing the need for an educational overhaul in Massachusetts' law schools with regards to child welfare curricula).
\textsuperscript{175} See supra Part IV.D and accompanying notes.
\textsuperscript{176} Elrod, supra note 142, at 120; Murphy-Farmer, supra note 161, at 566.
\textsuperscript{178} Id.
children they represent. A tax incentive could operate to increase the pool of CASA volunteers, whereby persons serving as volunteers would get the tax relief.

C. Use of Law Students as CASA Volunteers

Law students could also become CASA volunteers as part of a clinical or community service program. The ABA has challenged law schools to provide higher quality legal education in the representation of children. In addition, a recent report found that the family law curriculum in law schools today does not adequately prepare law students for the actual practice of family law. Family law practice requires a collaboration of many different professionals, as well as a thorough understanding of many issues and practices that traditional family law courses rarely provide. In response to these growing inadequacies of family law education, a group of law professors, family court judges, practicing lawyers, mental health professionals, and mediators conducted the Family Law Education Reform Project to discuss the shortcomings of family law education and how to improve it. Some areas where law schools could improve the quality of representation include skills instruction, including instruction in effective interview techniques for children, fact investigation, adolescent psychology, and interdisciplinary approaches to working with youth. Participation in proceedings as CASA volunteers would enhance law students’ knowledge and understanding of the skills needed to effectively represent children and their parents in family law matters.

In a recent survey, law students and professionals—including practicing attorneys, judges and law professors—were asked to identify the five topics most important to cover in a comprehensive family law curriculum. Over ninety-four percent of participants said the law itself was the most important topic in a family

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180 I.R.C. § 170 governs the allowance of deductions for charitable contributions. Currently, this section only allows deductions for tangible personal property that is donated to a charity. See I.R.C. § 170 (2000). This suggestion for a method of increasing the pool of CASA volunteers would require an amendment to the I.R.S. Code which would allow a deduction for volunteer services. Time spent as a volunteer could be measured and a deduction allowed for the fair market value of the time spent.


182 See O’Connell & DiFonzo, supra note 181, at 527.

183 See id. at 524.
However, nearly eighty-six percent of survey participants said that issues related to children—including custody disputes—were most important. Nearly fifty-three percent of survey participants felt that alternative dispute resolution processes, including mediation were important. Survey participants also identified as important topics financial matters in family law (40.3%), psychological dimensions of family law (38.0%), the court process (37.8%), understanding the effects of abuse and domestic violence (29.1%), communication skills—especially listening (27.3%)—and the legal skills of research and writing (26.7%).

This survey also looked at whether law students placed the same level of importance on the skills, knowledge, and attributes of family lawyers as did law professors and practicing lawyers. The survey found that law students, law professors, and practicing lawyers generally agreed that listening, identifying clients' interests, knowing family court procedure, knowing the governing law, and preparedness were all important skills, knowledge, and attributes of a family lawyer. Some disparity existed in the value law students placed on courtroom advocacy when compared to the value placed on this skill by lawyers and professors. A disparity also existed in the following categories: ability to question witnesses (law students 55.9%; lawyers 44.0%; law professors 44.4%), persuasive writing (law students 44.1%; lawyers 39.8%; law professors 33.3%), involving clients in decision making (law students 79.4%; lawyers 94%; law professors 100%), and the ability to work with clients in emotional crisis (law students 67.6%; lawyers 80.3%; law professors 88.9%). Thus, the participation of law students in the CASA program would likely help bridge the theory-to-practice gap this survey revealed.

D. One Law School’s Experience

The Appalachian School of Law (ASL) has community service as one of its stated missions. In the spring of 2000, representatives of ASL's faculty, staff, administration, Board, and student body drafted a statement of purpose defining the goals of ASL in its unique context of central Appalachia:

ASL exists to provide the opportunity for people from Appalachia and beyond to realize their dreams of practicing law and bettering their

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185 Id. at 607.
186 Id.
187 Id. at 607–08.
188 Id. at 608.
189 Id. at 608–09.
190 Id. At 609 (law students 61.8%; lawyers 52.3%; law professors 33.3%).
191 Id.
192 The ASL is located in Grundy, Virginia. The Twenty-Ninth Judicial District CASA Program serves the counties of Buchanan, Russell, Tazewell, and Dickenson in southwest Virginia.
communities. We attract a qualified, diverse and dedicated student body, many of whom will remain in the region after graduation and serve as legal counselors, advocates, judges, mediators, community leaders, and public officials. The program emphasizes professional responsibility, dispute resolution, and practice skills. The ASL community is an exciting student-centered environment that emphasizes honesty, integrity, fairness, and respect for others. We also emphasize community service and staff and faculty development. At the same time, we are a full participant in our community, serving as a resource for the people, the bar, and other institutions of the region.

Thus, the mission and purpose of ASL is, at the core, the mission of all law schools: to prepare students for service "as legal counselors, advocates, judges, [and] mediators." But, the unique position and location of the school addresses a need vital to central Appalachia—the training of "community leaders and public officials," many of whom remain to serve in the region.

As part of the students' community service commitment, several have participated in the CASA program. After completing the requisite application and background check, the students spend thirty hours in intensive training at the school to prepare for advocating for children in court. Currently, a second year student, who worked as a CASA volunteer for ten years prior to entering law school, coordinates the training sessions. The training sessions are held in classrooms on the law school campus, and the school provides the training materials to the students. The training coordinator schedules sessions with various persons in the community who provide insight to volunteers of how the community responds to cases regarding abuse and neglect of children. Those persons who assist in the training include social workers from the local child welfare agency, court clerks, police officers, medical providers, teachers, mental health workers, juvenile court judges and local attorneys.

After completing the training, each student is assigned to a case by the juvenile court judge. Each student meets with the child who they have been appointed to represent and interviews persons who have knowledge about their case, such as teachers, doctors, relatives, neighbors, and social workers. Upon completion of the investigation, the student volunteer prepares a written report for the court. The student appears at all court proceedings and advocates for the child. While the case is proceeding, the student volunteer continues to communicate with the child and explains to the child what is happening as the case progresses. Additionally, the student volunteer continues to monitor the case to assure that all services ordered by the court are provided to the child and the family. Law students develop effective interview techniques for children, methods of fact investigation, and skills to prepare competent reports for the court. The students also become more knowledgeable in issues that affect families such as cultural diversity, mental illness, substance abuse, and poverty. Additionally, they receive instruction in childhood development, adolescent psychology, and interdisciplinary approaches to working with youth. The CASA program is an important tool in
helping the law students build appropriate skills for effectively representing children in court proceedings.

From 2005 to 2008 a total of 95 students from the Appalachian School of Law have actively served as CASA volunteers in the local program. An average of 32 students per year participate in this program. During the last three years, local CASA volunteers have represented 125 children who have been the subject of abuse and neglect court proceedings. Of those 125 children, the law school students have served as advocates for 91 children. In 2008 there are currently 11 law students completing the training program to become active CASA volunteers.193

IX. CONCLUSION

Millions of children each year sit in a courtroom, corridor of a courthouse, or a location far away from the courthouse while their parents fight over their custody. Decisions are made that affect the child's daily life for the remainder of their childhood. These decisions are often made without any input from the children. The failure to appoint a representative for the child results in the custody decision being made without valuable information regarding the "best interests of the child." In considering a recurring problem in his courtroom, Judge David Soukup stated:

In criminal and civil cases, even though there were always many different points of view, you walked out of the courthouse at the end of the day and you said, "I've done my best; I can live with this decision," he explains.

But when you're involved with a child and you're trying to decide what to do to facilitate that child's growth into a mature and happy adult, you don't feel like you have sufficient information to allow you to make the right decision. You can't walk away and leave them at the courthouse at 4 o'clock. You wonder, "Do I really know everything I should? Have I really been told all of the different things? Is this really right?"194

"One of the most fundamental principles in the legal system is that when a person has an interest in the outcome of a legal proceeding, he has a right to representation."195 The failure to appoint a representative for the child results in the child not having a voice in the proceeding, and being denied dignity and respect.

193 Interview with Kristi Wagner, Director of the Twenty-Ninth Judicial District CASA Program, in Grundy, Va. (Mar. 12, 2008).
194 CASA HISTORY, supra note 6.
The CASA Program has served an important role in the representation of children in abuse and neglect proceedings. In appointing a representative for the child in these proceedings, the child has a voice and is granted the respect that all persons should be afforded when involved in legal proceedings. This same dignity and respect should be afforded to children whose parents are fighting for custody. The results of studies and evaluations have shown the effectiveness of the CASA volunteers in representing children. The instruction they receive in issues that affect children such as diversity, poverty, mental illness, substance abuse, and family conflict make them well prepared to perform the duties of an efficacious child advocate. Their training in effective communication with children, productive fact finding, and preparation of useful reports for the court make them competent representatives for the children they serve. The appointment of CASA representatives to advocate for children whose parents for fighting for custody will give the children a voice, dignity, respect, and hope. These children will no longer be the “rag dolls in the corner.”