A CHILD'S RIGHT TO REAL REPRESENTATION IN DEPENDENCY CASES: A PROPOSAL TO MODIFY SOUTH CAROLINA'S CHILD REPRESENTATION SYSTEM

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I. INTRODUCTION

While child protection legislation is not a new concept, it largely did not exist nationally in the United States until the 20th century. Compulsory education laws were not a nationwide phenomenon until 1918,[1] and while individual communities and states had prohibitions or limitations on child labor, there was no federal statute regulating child labor until the Fair Labor

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1. *See* Emily Rauscher, *Educational Expansion and Occupational Change: US Compulsory Schooling Laws and the Occupational Structure 1850–1930*, 93 SOC. FORCES 1397, 1402 (2015).

Standards Act of 1938.[2] The same is true for child abuse and neglect, as the first national legislation defining child abuse and neglect and providing children with a form of legal representation was not passed until 1974.[3] Today, almost fifty years later, a version of this same federal statute still shapes the child abuse and neglect legislation and procedures of the individual fifty states and territories.[4]

The passage of the 1974 Child Abuse Prevention and Treatment Act (CAPTA) had an enormous impact on the rights of abused and neglected children because, for the first time, virtually every child in the United States was guaranteed a form of legal representation in a court proceeding of which they were the subject.[5] However, while CAPTA provided for the representation of children in abuse and neglect proceedings, it did not provide a clear standard or requirements for exactly what the representation of children was supposed to look like in the individual states.[6] As a result of CAPTA's broad suggestions for states, there is a lack of national consensus about representation of children,[7] and various systems for child representation exist throughout the nation.[8] Thus, since the passage of the bill in 1974 and its most substantive amendment in 1996, the debate surrounding representation in child abuse and neglect cases has centered on what that representation should look like.[9]

In South Carolina, since 2010, every child that is the subject of a child abuse or neglect proceeding has been assigned and represented by a volunteer

2. *See* CONG. RSCH. SERV., RL31501, CHILD LABOR IN AMERICA: HISTORY, POLICY, AND LEGISLATIVE ISSUES 1 (2013), https://www.everycrsreport.com/files/20131118_RL31501_008741c7351fd72ae2a262198ba9c0e44921a60a.pdf [https://perma.cc/T9DT-U7WF].

3. *See* Gerard F. Glynn, *The Child's Representation under CAPTA: It is Time for Enforcement*, 6 NEV. L.J. 1250, 1251 (2006).

4. *See id.*; EMILIE STOLTZFUS, CONG. RSCH. SERV., IF10590, CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING 2 (2023), https://crsreports.congress.gov/product/pdf/IF/IF10590 [https://perma.cc/E5L7-EYQ8].

5. *See* Merril Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. 745, 752–53 (2006). Also, please note that child abuse or neglect proceedings are also often called dependency cases, and these terms will be used interchangeably in this Note.

6. *See* Glynn, *supra* note 3, at 1252 (demonstrating that the 1996 Amendment to CAPTA only requires states to submit a plan for how they will provide a GAL to represent the best interest of children).

7. *See* Sobie, *supra* note 5, at 763.

8. *See* Child Welfare Information Gateway, *Representation of Children in Child Abuse and Neglect Proceedings,* CHILD.'S BUREAU, at 23 (June 2021) https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/represent.pdf [https://perma.cc/74Q8-NLTK].

9. *See* Randi Mandelbaum*, Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1, 2–5 (2000).

guardian ad litem (vGAL) and not an attorney.[10] While vGALs are generally thought to be competent and good investigators,[11] vGALs, as layperson volunteers, are bound by the "best interest" standard of representation and are somewhat limited in how they can represent the interests of the children.[12] South Carolina vGALs have a duty to report to the court what actions they believe the court should take after conducting an independent investigation in accordance with the child's best interests.[13] This leaves children with their own interests in a difficult position without an attorney present and able to represent them.[14] This is not to mention the burden placed on the court to attempt to discern the interests of the child who is not statutorily entitled to legal representation.[15] Therefore, though representation by a vGAL is a step in the right direction, it is unlikely that vGAL representation alone is sufficient to protect the rights and interests of a child who is the subject of child abuse or neglect cases. Consequently, assuming that vGAL representation alone is insufficient, South Carolina should change its statutes to provide for both vGAL and legal representation for all children in dependency cases.

Part II of this Note will provide a history of child representation for children who are the subject of a child abuse or neglect case in the United States broadly, as well as provide an overview of a vGAL and their role in a child dependency case. Part II will also break down child representation in South Carolina and the specific duties and limitations of South Carolina vGALs.

Part III will begin by establishing why child representation in abuse and neglect proceedings is so essential. Part III will then discuss issues with different forms of potential representation in South Carolina, including vGALs and attorneys who serve as GALs. Finally, Part III will suggest a modification plan that would change South Carolina's statutes to allow children to have representation both by an attorney and a vGAL while placing minimal burden upon the courts. Part IV will conclude the Note by arguing that South Carolina's current mode of representation for children in dependency cases is inadequate, and some change is required to best protect the rights and interests of the state's children.

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10. *See* In re: Amendments to Rule 608, South Carolina Appellate Court Rules, 2009 S.C. LEXIS 544 (S.C. 2009).

11. *See* Mandelbaum, *supra* note 9, at 23–24; Hollis R. Peterson, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1084–85 (2006).

12. *See* Glynn, supra note 3, at 1252; S.C. CODE ANN. § 63-11-510 (2008).

13. § 63-11-510.

14. *See* Sobie, *supra* note 5, at 781–82.

15. *See* SOPHIE I. GATOWSKI ET AL., ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 49 (Nat'l Council Juv. & Fam. Ct. Judges, 2016).

II. BACKGROUND

A. Brief History of Child Abuse and Neglect Legislation in the United States

In 2021, there were a reported 588,229 victims[16] of child abuse and neglect in the United States.[17] It is estimated that the actual number of child victims is closer to 600,000.[18] However, this is likely a conservative estimate given that the ongoing COVID-19 pandemic reduced children's contact with mandated reporters, such as teachers, and overall referrals in 2021.[19] To put that number in perspective, the estimated number of individual child victims of abuse or neglect in 2021 is greater than the entire population of Wyoming.[20] This is also almost four times more than the population of Charleston, South Carolina, South Carolina's largest city.[21] Child abuse and neglect is not a new issue, but given the emphasis placed on the protection of children today, it is difficult to imagine a time when the state did not offer children protection. Yet historically, there have been very few protections for children and virtually no representation for children in a court of law.[22] Even in the United States, a century had lapsed since the founding before the first organized child protection society was formed in New York in 1875.[23] Further, nearly another century passed before there was federal legislation that guaranteed some form of representation for all children who are the subject of abuse or neglect hearings. [24]

In Colonial America, the primary legal basis for protecting children in the United States came from English Poor laws, which did not differentiate between poor children and victims of maltreatment and often "assisted" children and families by binding the children to apprenticeships or indentured

16. A victim according to the National Child Abuse and Neglect Data System (NCANDS) is "a child for whom the state determined at least one maltreatment was substantiated or indicated; and a disposition of substantiated or indicated was assigned for a child in a report. This includes a child who died and the death was confirmed to be the result of child abuse and neglect." U.S. DEP'T HEALTH & HUM. SERV., CHILD MALTREATMENT 2021 20 (2023).

17. *Id.*

18. *Id.*

19. *See id*. at 10 (noting the large number of American schools that were virtual in 2021 and the result that children did not see teachers); *id.* at 78 (state's explanations).

20. U.S. Census Bureau, *QuickFacts: Wyoming* (July 1, 2023), https://www.census.gov/quickfacts/fact/table/WY/PST045222 [https://perma.cc/8XFS-EKU6].

21. U.S. Census Bureau, *QuickFacts: Charleston city, South Carolina* (July 1, 2022), https://www.census.gov/quickfacts/fact/table/charlestoncitysouthcarolina/PST045222 [https://perma.cc/B6MC-2JGS].

22. Sobie, *supra* note 5, at 747.

23. *See* Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 8 FUTURE CHILD. 23, 25–26 (1998).

24. *See* Sobie, *supra* note 5, at 752–53.

servitude.[25] As the nation developed, the courts became a tool to punish parents and caregivers who mistreated children through criminal prosecution, but prosecution was often reserved for extreme or publicly acknowledged cases.[26] However, while some states had an early form of child protection laws or means of intervention for children, legal intervention was extremely sporadic and not universally available. [27]

It wasn't until after the Civil War the issue of child abuse became more prevalent and anti-cruelty societies were formed.[28] The nation's first organized child protection society, The New York Society for the Prevention of Cruelty to Children, was founded in 1875 and was the first of over 300 child protection societies founded in the United States by the early twentieth century.[29] Child protection societies were privately funded child protection agencies that often focused on investigating reports of child abuse and bringing legal action across America, and had a huge impact on state legislation. [30] By 1900, most states had some form of child protection legislation, [31] but the federal government continued to play "an insignificant role in child welfare policy and funding."[32]

Aside from the Social Security Act of 1935, which extended funding to specific families and vaguely "encourag[ed] states to develop preventive and protective services for vulnerable children,"[33] the child saver movement lost momentum after a few decades. By 1956, only eighty-four child protection societies were left in the United States.[34] That number would drop to ten by 1967.[35] It wasn't until 1960 that the issue of child abuse and neglect re-entered the public consciousness in a new movement led by the medical community.[36] As medical professionals began to draw attention to the signs and impacts of child abuse, media attention on stories of abused children intensified, and scholars and professionals began to write on the topic, largely for the first time.[37] This renewed attention on child abuse and neglect spread across the

25. *See* Schene, *supra* note 23, at 24–25.
26. *See generally* John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 3, 3 (2008).
27. *Id.* at 4.
28. *See id.* at 4–5.
29. *Id.* at 3, 7.
30. *See id.* at 11.
31. Sobie, *supra* note 5, at 748–49.
32. Myers, *supra* note 26, at 7.
33. Schene, *supra* note 23, at 27.
34. Myers, *supra* note 26, at 8.
35. *Id.*
36. *Id*. at 9.
37. *Id.*

country, and by 1967, every state had reporting laws on the books.[38] As a result of these new reporting laws, approximately 60,000 cases of child abuse or neglect were reported in 1974.[39] Today, that number has grown to nearly 4 million reports every year.[40]

Despite all fifty states having formally passed child protection and mandated reporter laws by 1967,[41] there had been little development on the issue of child representation. Unlike adults or their delinquent counterparts, child victims of abuse and neglect were not guaranteed a right to any kind of representation in the cases that determined their welfare, either by the federal government or in many individual states.[42] It was not until 1974 and the passage of the Child Abuse Prevention and Treatment Act (CAPTA) that the federal government finally addressed the issue of child abuse and the representation of child victims in a meaningful way.[43] CAPTA established conditions for states that received federal funding that required participating states to: "have child abuse and neglect reporting laws; investigate reports of abuse and neglect; educate the public about abuse and neglect; maintain the confidentiality of Child Protective Services records; and provide a guardian ad litem to every abused or neglected child whose care results in a judicial proceeding."[44] The requirement for guardians ad litem was later expanded in the 1996 amendment to include "in every case involving an abused or neglected child which results in a judicial proceedings, a guardian ad litem, who may be an attorney or a court-appointed special advocate who has received training appropriate to that role."[45] While CAPTA was not necessarily binding on states and used financial aid as an incentive for compliance, the passage of CAPTA still represented the first time that virtually all children in the United States would have an opportunity to have representation in child protective hearings.[46] Today, all fifty states statutorily guarantee representation for children who are involved in a child abuse or neglect proceeding in the form of a guardian ad litem.[47] CAPTA remains a

38. NAT'L CHILD ABUSE & NEGLECT TRAINING & PUBLICATIONS PROJECT, CHILD ABUSE PREVENTION AND TREATMENT ACT 4 (U.S. Dep't Health & Hum. Servs., 2014) https://www.acf.hhs.gov/sites/default/files/documents/cb/capta_40yrs.pdf [https://perma.cc/LZ9F-T2DT].

39. *Id.* at 9–10.

40. U.S. DEP'T HEALTH & HUM. SERV., *supra* note 16, at 13.

41. Myers, *supra* note 26, at 10.

42. Sobie, *supra* note 5, at 745–46.

43. Glynn, *supra* note 3, at 1251.

44. Peterson, *supra* note 11, at 1089.

45. *Id*. at 1093 n.65.

46. *See* Glynn, *supra* note 3, at 1251–52.

47. Child Welfare Information Gateway, *supra* note 8, at 2.

considerable source of federal funding for states and is expected to provide over 200 million dollars in funding in fiscal year 2023.[48]

B. Guardians ad Litem (GALs)

A guardian ad litem (GAL), simply defined, is a "lawyer or non-lawyer appointed in court proceedings by the court to represent 'the best interests' of the child or children involved in that case."[49] According to CAPTA, which sets the standards by which states must abide to receive federal funding, a GAL serves two primary purposes: first, to "obtain first-hand, a clear understanding of the situation and needs of the child," and second, "to make recommendations to the court concerning the best interests of the child."[50] Typically, once appointed, the GAL will spend time speaking with the child and others in the child's life, ranging from family and friends to teachers and coaches, to conduct their own investigation before giving a report to the court. While CAPTA states that the GAL is to make recommendations based on "the best interests of the child," this standard is not universally defined.[51] In fact, only twenty-two states have statutes that define the factors courts should consider when determining the "best interests" of the child or children.[52] But generally, the best interest standard is thought to "refer to the deliberation that the courts undertake when deciding what type of services, actions, and orders will best serve a child, as well as who is best suited to take care of a child."[53]

While the role of the GAL in child abuse or neglect proceedings tends to be relatively consistent across states because of CAPTA, CAPTA did not establish any uniform system for states to adopt about who should be representing child victims.[54] While GALs can be either lawyers or trained advocates per the 1996 amendment to CAPTA, many states turned to volunteer lay people to serve as representatives, either as volunteer Court Appointed Special Advocates (CASAs) or volunteer Guardians ad Litem (vGALs) as an easy and affordable way to fulfill the requirements of CAPTA.[55] In fact, since 1977, utilizing GALs or CASAs as child representatives in child abuse or neglect cases has become increasingly

48. STOLTZFUS, *supra* note 4, at 2.

49. S.C. BAR, GUARDIAN AD LITEM, https://www.scbar.org/public/get-legal-help/common-legal-topics/guardian-ad-litem/ [https://perma.cc/5HJ4-4WZU].

50. 42 U.S.C. § 5106a(b)(2)(B)(xiii); *see also* Child Welfare Information Gateway, *Determining the Best Interest of the Child*, CHILD.'S BUREAU (June 2020), https://cwig-prod-prod-drupal-s3fs-us-east 1.s3.amazonaws.com/public/documents/best_interest.pdf?VersionId=8wFhzxFlBt6sN.atr5x2BrqB0qohXJM9 [https://perma.cc/2SDN-U3K9].

51. Child Welfare Information Gateway, *supra* note 50, at 2.

52. *See id.*

53. *Id.*

54. *See* Glynn, *supra* note 3, at 1252.

55. Sobie, *supra* note 5, at 753–54.

popular, and today, there are 939 state CASA and vGAL programs in forty-nine states and the District of Columbia.[56] The use of vGALs and CASAs is so widely accepted that it has been endorsed by the National Council of Juvenile and Family Court Judges and the American Bar Association.[57] Only sixteen states, the District of Columbia, and the Virgin Islands require the GAL to be an attorney instead of just a trained volunteer. [58]

Generally, vGALs and CASAs are thought to be "effective at advocating the best interest of the child," and volunteers are often praised for their dedication.[59] However, their lack of legal education or experience can be concerning, especially when representing the rights and desires of the children who are the subject of the proceedings.

C. Role of GALs in South Carolina

South Carolina's modern child protection and representation history closely follows the United States. In 1977, likely in response to the regulations set forth by CAPTA, South Carolina passed the Child Protection Act, which "established a system for reporting and investigation of child abuse and neglect" and mandated the appointment of GALs for children for the first time.[60] Shortly thereafter, in 1984, the first vGAL program was established in just four judicial districts but became statewide in 1988, except for Richland County, which had a pre-existing CASA program.[61] Much like the rest of the United States, the use of vGALs and CASA representatives continued to grow, and starting in 2010, 100% of children that come before the court in a child abuse or neglect proceeding in South Carolina are represented by a vGALs.[62]

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56. *State and Local Programs*, CT. APPOINTED SPECIAL ADVOCS. & GUARDIANS AD LITEM, https://nationalcasagal.org/our-work/programs/ [https://perma.cc/XD8F-RQBY]; *see generally* THE STUDY COMMITTEE, JOINT STUDY COMMITTEE ON THE GUARDIAN AD LITEM PROGRAM (2005), https://www.scstatehouse.gov/Archives/Misc/GuardianadLitem3.pdf [https://perma.cc/Y2W3-3ETH].

57. *National CASA History*, CT. APPOINTED SPECIAL ADVOCS. OF LEXINGTON, https://casaoflexington.org/history-of-casa [https://perma.cc/8AYH-W2AL].

58. Child Welfare Information Gateway, *supra* note 8, at 2.

59. Peterson, *supra* note 11, at 1084.

60. CHILD.'S L. CTR. UNIV. S.C. SCH. L., MANDATED REP. GUIDE 2 (S.C. Dep't Soc. Serv., 2018), https://dss.sc.gov/media/1903/dss-brochure-1955-jan-19.pdf [https://perma.cc/SQN6-6B9N].

61. *See* S.C. Dept. of Child.'s Advoc., *About Us*, CASS ELIAS MCCARTER GUARDIAN AD LITEM, https://gal.sc.gov/about **[**https://perma.cc/AN28-CXES**].**

62. *Id.; see also* In re: Amendments to Rule 608, South Carolina Appellate Court Rules, 2009 S.C. LEXIS 544 (S.C. 2009).

1. Appointment, Qualifications, and Duties of SC vGALs

South Carolina statutes provide for both private and volunteer guardians ad litem, and GALs can be appointed in a variety of cases involving children, including custody and name-change cases.[63] This article will focus primarily on the use of vGALs as representatives for victims in child abuse or neglect proceedings, so it will not be necessary to explore the statutory provisions or requirements for private GALs.

In South Carolina, a GAL must be appointed in all child abuse and neglect proceedings per South Carolina Code Section 63-7-1620. There is no statutory restriction that the GAL must be an attorney or volunteer, but if the GAL is a volunteer either with the South Carolina Guardian ad Litem program or Richland County CASA, the vGAL must be represented by an attorney.[64]

To qualify as a vGAL, volunteers must pass a background check, not be on the South Carolina Department of Social Services Central Registry or Abuse and Neglect, and must be interviewed and provide a character reference.[65] The Cass Elias McCarter Guardian ad Litem Program serves as the state's training program and provides supervision for vGALs who are appointed to child abuse or neglect proceedings, with the exception of the CASA program in Richland County.[66] Both the South Carolina GAL program and Richland County CASA use the national CASA approved curriculum,[67] but the content of the training is not regulated by state statute. Traditionally, the thirty hours of training vGALs receive is in various areas, including "child development, child maltreatment, permanency planning, the legal system, and other topics," as well as continuing education.[68]

The responsibilities of a GAL are similar to those set forth by CAPTA and include seven enumerated duties listed in Section 63-11-510:

1) Represent the best interest of the child;
2) Advocate for the welfare and rights of a child involved in an abuse or neglect proceeding;
3) Conduct an independent assessment of the facts, the needs of the child, and the available resources within the family and community to meet those needs;

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63. *See* S.C. CODE ANN. § 63-7-1620 (2013).

64. § 63-7-1620(1).

65. CHILD.'S L. CTR. UNIV. S.C. SCH. L., GUARDIAN AD LITEM RESOURCE MANUAL 11 (2008), https://dc.statelibrary.sc.gov/bitstream/handle/10827/8494/CLC_Guardian_ad_Litem_Resource_Manual-2009.pdf?sequence=1&isAllowed=y [ttps://perma.cc/HGU7-L8QG].

66. S.C. CODE ANN § 63-11-500(A) (2019).

67. *See* S.C. Dept. of Child.'s Advoc., *Training*, CASS ELIAS MCCARTER GUARDIAN AD LITEM, https://gal.sc.gov/volunteer/training [https://perma.cc/VXV6-SHTN].

68. CHILD.'S L. CTR. UNIV. S.C. SCH. L., *supra* note 65, at 11–12.

4) Maintain accurate, written case records;
5) Provide the family court with a written report, consistent with the rules of evidence and the rules of court, which includes, without limitation evaluation and assessment of the issues brought before the court and recommendations for the case plan, the wishes of the child, if appropriate, and subsequent disposition of the case;
6) Monitor compliance with the orders of the family court and make the motions necessary to enforce the orders of the court or seek judicial review;
7) Protect and promote the best interests of the child until formally relieved of the responsibility by the family court.

In addition to the responsibilities of the GAL, there are certain things the GAL is authorized to do, including:

1) Conduct an independent assessment of the facts;
2) Confer with and observe the child involved;
3) Interview persons involved in the case;
4) Participate on any multidisciplinary evaluation team for the case on which the guardian ad litem has been appointed;
5) Make recommendations to the court concerning the child's welfare;
6) Make motions necessary to enforce the orders of the court, seeks judicial review, or petition the court for relief on behalf of the child.[69]

Additionally, the guardian can introduce, examine, or cross-examine witnesses "in any proceeding involving the child and participate in the proceedings to any degree necessary to represent the child adequately," although these actions have to be done exclusively through counsel.[70] All the rights, responsibilities, and authorized activities of the GAL go back to the mandate to "represent the best interest of the child," which is listed as the first responsibility of a GAL in South Carolina.[71]

Noticeably missing from South Carolina statute, however, is the right of a child in a child abuse or neglect proceeding to have legal counsel.[72] Unlike the vGAL, which must have an attorney appointed, a child is permitted to have legal counsel appointed, but it is not required.[73] If the child is appointed legal

69. S.C. CODE ANN. § 63-11-530(B) (2010 & Supp. 2023).
70. § 63-11-530(C).
71. S.C. CODE ANN. § 63-11-510(1) (2008).
72. *See* S.C. CODE ANN. § 63-7-1620(2) (2013).
73. *See id.*

counsel, the counsel may not be the same as the child's guardian ad litem.[74] While the child is represented by the vGAL, who is supposed to "provide the wishes of the child, if appropriate" to the court, the vGAL is only obligated to consistently report what they perceive as in the child's best interest.[75] This lack of formal legal representation for children is at the center of the debate over what child representation should look like in America.[76]

III. ANALYSIS

A. The Importance of Child Representation

Though child representation in child abuse and neglect proceedings is a relatively modern concept,[77] it is virtually undisputed that representation for the child is important.[78] Yet, a child's right to a representative in a dependency case is fundamentally different than the constitutionally guaranteed Sixth Amendment right to legal counsel in a criminal proceeding.[79] The importance of child representation is evident when considering that the outcomes of dependency cases hinge on recommendations made by advocates for the child. These hearings have the potential to alter the lives and futures of children substantially.[80] There is evidence that a "significant link exists between childhood trauma and later delinquency and literature suggests that the act of terminating parental rights and placing a child in foster care . . . can be a traumatic event in and of itself."[81] Because of the structure of the dependency hearing, "it is vital that all parties in child abuse and neglect cases have adequate access to competent representation so that judges can make well-informed decisions."[82]

It is also a logical conclusion that children, though they may be incapable of making all decisions independently, "deserve to have their opinions heard in matters affecting their lives."[83] The United Nations Convention on the

74. *Id.*

75 *See* S.C. CODE ANN. § 63-11-510(1), (5) (2010 & Supp. 2023).

76 *See, e.g.*, Mandelbaum, *supra* note 9, at 4–7.

77. Sobie, *supra* note 5, at 823.

78. *See id.* at 745–46.

79. *See id.* at 757–58.

80. Shirley A. Dobbin et al., *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice*, TECH. ASSISTANCE BULL. (Nat'l Council Juv. & Family Court Judges, Nev.), March 1998, at 5.

81. Shanna N. Felix et al., *An Evaluation of a Court Appointed Special Advocates (CASA) Program in the Rural South,* 83 CHILD. & YOUTH SERVS. REV., 48, 48 (2017) (citation omitted).

82. Dobbin et al., *supra* note 80, at 5.

83. Debra H. Lehrmann, *Advancing Children's Rights to be Heard and Protected: The Model Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, 28 BEHAV. SCI. & L., 463, 465 (2010).

Rights of Children "requires a child be given the opportunity to be heard in any judicial proceeding affecting the child."[84] Children, even young children, have their own interests at stake, just like any other party privy to the dependency hearing.[85] Children's interests include their own safety and well-being, maintaining the integrity of their familial and other relationships, their autonomy, and the services they are entitled to receive. [86] The interests of children, though they can be similar to those of the state and the parents, are not always identical.[87] Therefore, the unique interests of children deserve independent and comprehensive representation.

While there appears to be a consensus that child representation is important, there is no national standard for representation owed to children. The 1996 amendment to CAPTA only requires states to provide a plan for how they will provide representation for abused or neglected children in judicial proceedings; it does not actually provide a structure for states to adhere to.[88] As a result, states vary significantly in the requirements for child representation and the function and qualifications of GALs.[89] This lack of uniformity has "precipitated the current uncertainties, dilemmas, and conflicts concerning the legal representation of children."[90]

B. Issues Surrounding Child Representation in South Carolina

While representation by a GAL, whether an attorney or a layperson volunteer, is better for a child in a dependency case than no representation at all, many potential and actual concerns surround different methods of child representation.

1. Issues with the vGAL model

vGALs are often praised for their success as guardians and are "consistently evaluated as the most effective at advocating the best interests of the child and the most successful at procuring a safe and permanent home

84. Glynn, *supra* note 3, at 1250.
85. *See* Sobie, *supra* note 5, at 781–82.
86. *Id.* at 782–87.
87. *See* Mandelbaum, *supra* note 9, at 57 n.223.
88. *See* Glynn, *supra* note 3, at 1252.
89. While all states "provide for the appointment and representation for a child involved in a child abuse or neglect proceeding in their statutes," 16 states require that the GAL be an attorney, while only 46 States "address the qualifications and training required for a person who can be assigned to represent a child involved in a child abuse or neglect proceeding," and only 41 states "provide for the appointment of a GAL to represent the best interests of the child." Child Welfare Information Gateway, *supra* note 8, at 2–3.
90. Sobie, *supra* note 5, at 763.

for the child in the shortest time."[91] There is also evidence that the vGAL program has greatly succeeded in South Carolina. Due to the size and success of the South Carolina GAL program, the South Carolina Bar's Rule 608 Task Force requested that the Court amend South Carolina's appellate court rules to "eliminate the appointment of attorneys as GALs."[92] As a result, since July 1, 2010, all children in South Carolina involved in an abuse or neglect proceeding have been appointed a vGAL to represent them.[93] However, despite the perceived general success of the CASA model and vGALs, there are still concerns about vGAL representation, which are relevant to the South Carolina CASA system.

First, there is the fact that vGALS are, at their core, just volunteers who are not required to have any specific professional experience or legal training. Since CAPTA requires GALS to "make recommendations to the court concerning the best interests of the child,"[94] and South Carolina statutes require that the GAL "represent the best interest of the child" and "provide the family court with a written report" that includes their evaluation of the issues and a recommendation for the case;[95] vGALs must be qualified to make these determinations. However, though vGALs tend to be dedicated volunteers, they generally have no legal training and are not child welfare or development experts. The South Carolina GAL program's website reports that "being a GAL requires no specialized degrees or legal experience" and only requires a "free 30-hour training course to prepare you for your work as a GAL."[96] South Carolina volunteers are trained through the National CASA approved curriculum. Yet, there is no doubt that thirty hours is not enough time for a volunteer to become an expert on the issues impacting children.[97] Additionally, though the training provided by national CASA may be comprehensive, it is not overseen by the state. In South Carolina, for instance, there are no statutory requirements for training.[98]

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91. Peterson, *supra* note 11, at 1084.

92. In re: Amendments to Rule 608, South Carolina Appellate Court Rules, 2009 S.C. LEXIS 544 (S.C. 2009).

93. *Id.*

94. 42 U.S.C. § 5106a(b)(2)(B)(xiii)(II).

95. S.C. CODE ANN. § 63-11-510(1), (5) (2010 & Supp. 2023).

96. S.C. Dept. of Child.'s Advoc., *Frequently Asked Questions*, CASS ELIAS MCCARTER GUARDIAN AD LITEM, https://gal.sc.gov/volunteer/faq [https://perma.cc/Z58Z-32WS].

97. For reference, to earn your juris doctorate with a concentration in children's law at the University of South Carolina, you must—in addition to completing your law degree—take four full-time courses in the children's law concentration and produce a thirty-page paper on a children's law related topic. *See Children's Law Concentration*, UNIV. S.C., https://www.sc.edu/study/colleges_schools/law/internal/current_students/childrens_law_concentration/ [https://perma.cc/H7G6-B9FC].

98. *See generally* S.C. CODE ANN. § 63-7-1620(1)–(4) (2010 & Supp. 2023).

Finally, though attorneys are not child welfare experts either and have been criticized for their lack of child-related training,[99] vGALs also have the added disadvantage of not having legal training. South Carolina has presumably tried to address this concern by appointing an attorney to represent vGALs.[100] However, this does not address the impact of not having legal training on developing their opinions or ability to be an objective source.

The most pressing issue with the representation of children by a vGAL is that vGALs are obligated by CAPTA and the state to represent the child according to the "best interest" standard.[101] The "best interest" standard is a subjective, ill-defined standard that puts the GAL in a position where she may have to advocate for placements and services that do not align with the child's desires.[102] vGALs in South Carolina can "provide the wishes of the child, if appropriate," per state statute,[103] but their first duty as a vGAL is to "represent the best interest of the child."[104] The standards for vGAL reveal that he or she is not there to advocate for the wishes of the child and has no real obligation to do so. The limitations the "best interest" standard imposes on GALs have been the subject of "widespread dissatisfaction" because "to a large degree . . . [it] leaves the determination of what is best for the child clients to the discretion of the legal representatives."[105]

Additionally, the confining nature of the "best interest" standard regarding child representation by a vGAL puts an additional burden on judges. The National Council of Juvenile and Family Court Judges Enhances Resources Guidelines suggests that when a vGAL serves as a child's representative, "the judge should take extra steps to determine what the child's wishes are."[106] This is problematic for several reasons. First, the child may not be present in the courtroom. Though it is also the official policy of the National Council of Juvenile and Family Court Judges that "children of all ages be brought to court, unless the judge decides it is not safe or appropriate,"[107] the reality is that children are not always included. The South Carolina GAL website even explains that GALs advocate for the child

99. *See* Mandelbaum, *supra* note 9, at 35.

100. S.C. CODE ANN. § 63-7-1620(1) (2010 & Supp. 2023).

101. *See* Glynn, *supra* note 3, at 1257 n.38; *see also* S.C. CODE ANN. §§ 63-11-510(1), -530(A)(1) (2010 & Supp. 2023).

102. *See* Morgan E. Cooley et al., *A Qualitative Examination of Recruitment and Motivation to Become a Guardian ad Litem in the Child Welfare System,* 99 CHILD. & YOUTH SERVS. REV., 115, 115–16 (2019).

103. S.C. CODE ANN. § 63-11-510(5) (2010).

104. *Id.*

105. Mandelbaum, *supra* note 9, at 37.

106. GATOWSKI ET AL., *supra* note 15 at 49.

107. Elizabeth Whitney Barns et al., *Seen, Heard, and Engaged: Children in Dependency Court Hearings*, TECH. ASSISTANCE BULL. (Nat'l Council Juv. & Family Court Judges, Nev.), Aug. 2012, at 4.

"without having to traumatize them in a courtroom setting."[108] There are no official statistics on what percentage of children attend the hearings for dependency cases, but one can imagine that it is not always appropriate to have the child in the room when a parent or caregiver has been charged with child abuse or neglect. If the child is present, the judge has absolutely no opportunity to consult the child for their wishes. Even if the child is present, the judge has a very limited amount of time for each proceeding, and it would be challenging to have enough time to get to know the child and adequately ascertain their desires.

Further, it is impossible for the judge to "simultaneously act as an advocate for the child and as an impartial arbiter in the case."[109] Part of the purpose of the vGAL in South Carolina is to deliver a report to the court analyzing the issues at hand and making a recommendation.[110] The judge is there to balance the interests of the state, the parents, and the child, not to serve as the child's advocate. For the child to receive the best representation possible, they must have an advocate who can put their wishes and desires first, and a vGAL is not in a position to do that.

2. Problems with Attorneys as GALs

Like in any kind of legal proceeding, it is often thought that "quality legal representation of children is essential in obtaining good outcomes"[111] in dependency cases. However, while vGALs are not a perfect solution for child representation, this does not automatically mean that having an attorney GAL is the more appropriate answer. First and foremost, this is not a solution in South Carolina because, since 2010, the South Carolina Appellate Court Rules prohibit attorneys from serving as GALs in family court.[112] However, changing the rules to allow attorneys to serve as GALs would come with its own set of ethical and practical issues.

An attorney is generally best equipped to represent the desires and wishes of a client. Additionally, the Model Rules of Professional Conduct Rule 1.3, which South Carolina has adopted, requires that lawyers "act with reasonable diligence and promptness in representing a client."[113] The committee commentary for the Rule went on to define the role of the lawyer as "act[ing]

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108. S.C. Dept. Child.'s Advoc., *Volunteer*, CASS ELIAS MCCARTER GUARDIAN AD LITEM, https://gal.sc.gov/volunteer [https://perma.cc/HP7S-GG52].

109. Mandelbaum, *supra* note 9, at 54 (quoting Shannan L. Wilber*, Independent Counsel for Children*, 27 FAM. L.Q. 349, 350 (1993)).

110. *See* S.C. CODE ANN. § 63-11-510(5) (2010).

111. Lehrmann, *supra* note 83, at 463.

112. In re: Amendments to Rule 608, South Carolina Appellate Court Rules, 2009 S.C. LEXIS 544 (S.C. 2009).

113. MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR. ASS'N 2020).

with commitment and dedication to the interest of the client," meaning that not only is a lawyer the best person to represent the wishes of the client, they are obligated to do so.[114] This is true even for young children, and the American Bar Association suggests that "to the extent that a child cannot express a preference, the child's attorney should make a good faith effort to determine the child's wishes and advocate accordingly."[115] But, when an attorney is appointed to serve as a GAL in a child abuse or neglect proceeding, their duty to the court to represent the child's best interest can be at odds with his or her ethical duty to represent the express wishes of their child-client.[116]

There are also practical issues when attorneys are chosen to serve as GALs. A GAL's primary function is investigation, which requires a great deal of time to get to know the child and conduct interviews with those who know the child, including teachers, caregivers, and medical professionals.[117] Typically, the attorney does not have that much time to devote to a child, especially when there is little or no compensation for the work of a GAL.[118] Because of the time commitment and poor compensation, it is often thought that the "attorneys appointed are too inexperienced and don't have sufficient understanding of the law and court process," as they usually are very new attorneys.[119]

Additionally, law school does not prepare attorneys to represent children, and "few lawyers have had any significant training in law school, or elsewhere, on how to represent a child client" or "training in representing clients from cultural and socioeconomic backgrounds that are different from their own."[120] Since attorneys are not volunteers, they usually do not go through the thirty-hour national CASA training that a vGAL would undergo. As a result, attorneys serving as GALs are sometimes criticized for having "too much discretion" when making decisions for the children.[121]

C. Proposed Amendments for South Carolina

South Carolina currently provides a court-appointed vGAL for all children who are the subject of a child abuse or neglect judicial proceeding

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114. MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR. ASS'N 2020).

115. Sobie, *supra* note 5, at 816–17.

116. Victoria Sexton, *Wait, Who am I Representing? The Need for States to Separate the Role of Child's Attorney and Guardian ad Litem*, 31 GEO. J. LEGAL ETHICS 831, 836–37 (2018).

117. S.C. Dept. Child.'s Advoc., *supra* note 108.

118. *See* Shirley A. Dobbin et al., *supra* note 80, at 65.

119. *Id.* at 52.

120. Mandelbaum, *supra* note 9, at 35.

121. *Id.* at 34 (quoting Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, *Recommendation of the Conference*, 64 FORDHAM L. REV. 1301, 1309 (1996)).

since attorneys are not permitted to serve as GALs.[122] While this approach avoids the ethical and practical issues accompanying an attorney GAL, South Carolina vGALs are still lay volunteers constrained by the "best interest" standard.[123] This means that children, no matter their age or competency level, are being represented by a volunteer who can only include the child's wishes in their reports to the court "if appropriate" and is under no obligation to do so.[124] While the children of South Carolina may benefit from the dedicated and thorough work of a vGAL, they do not have a legal representative advocating for their unique interests. The vGAL, on the other hand, is appointed a legal representative to help them navigate the courtroom.[125]

Fortunately, with a slight modification to the existing statutes, South Carolina has a potentially easy solution to provide legal representation to all children in dependency cases without depriving them of the benefits children receive by working with a vGAL. If South Carolina were to adopt a statutory structure that would shift the guaranteed legal representation for vGALs to the children themselves, South Carolina would be able to provide legal representation to all children and sibling groups while also still providing a vGAL to independently investigate and make recommendations based on the state's "best interests standard."

Shifting the assigned attorney from representing the vGAL to representing the children in the case would allow children to have legal representation without any additional financial burden on the state, as this plan would require no additional attorneys. This plan would still allow courts to appoint a vGAL to serve the child or children and do what they do best: independently investigating and getting to know the children.[126] Assigning an attorney to the child or children would alleviate any pressure from the vGAL to try to advocate for the child's wishes or desires. The vGAL would then be able to be a more objective source of recommendation that isn't also tasked with advocating for the child in the courtroom without any prior legal experience. Likewise, this would also reduce the burden on Family Court judges as they will not have to take special care to make sure the wishes of the child are represented without adequate time to get to know the child or the dilemma of ruling for a child that is not present in the courtroom.

As far as attorneys are concerned, the ethical and practical limitations of having a hybrid attorney GAL would be lifted. Attorneys with their more constrained schedules would not be obligated to interview individuals and complete an investigation into the different parts of the child's life. Attorneys

122. S.C. CODE ANN. § 63-7-1620(1) (2010 & Supp. 2023).
123. *Id.* §§ 63-11-510(1), -530(A)(1) (2010 & Supp. 2023).
124. § 63-11-510(5).
125. § 63-7-1620(1).
126. *See* Peterson, *supra* note 11, at 1099–1100.

would be able to simply meet with their child-client and discuss the child's unique interests and what they view as their wishes with no pressure to accommodate a "best interests" standard. This conversation would be much less time-intensive, and an attorney already has the training necessary to properly advocate for the interest of the child, as it should be very similar to representing any adult client. If, for some reason, the attorney has questions about the child or their situation the child would not be capable of answering, the vGAL would be a great way to bridge the gap between the child and the attorney. vGALs have no stated duty of confidentiality, unlike the attorney,[127] and could discuss the case with the attorney. The American Bar Association's Model Act on Child Representation also allows attorneys to consult "with the best interests advocate when appropriate"[128] and should not present any ethical or practical dilemma.

When considering the child's competency, it is true that there is no set age when a child should be statutorily guaranteed a legal representative. Obviously, very young children may not be able to communicate about their interests and would not have the capacity to understand the proceedings anyway. But this is not a reason to exclude young children from receiving legal representation altogether. Children do not become competent or able to communicate their interests and desires at any specific time, and some children may be able to understand the proceedings and the implications of different visitation schedules or services at different levels.[129] Therefore, the appointment of legal representation for the child can be made on a case-by-case basis. This is not a profound or new idea[130] and is actually the basis for assigning an attorney for children in dependency cases in Florida.[131] This determination can either be made by the court or a vGAL after assignment, and they can inform the court of the need for an attorney to be appointed after assessing the child's interests and competency level.[132] This approach will likely not require any new training for vGALs, as any qualified volunteer would be able to determine whether a child can communicate their interests and understand, to some extent, the nature of the proceedings.

The biggest potential problem when shifting the attorney from representing the vGAL to the child is the concern that the vGAL will have difficulty navigating the court proceeding. The statute allows the vGAL to do

127. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR. ASS'N 2020).

128. Andrea Khoury, *ABA Adopts Model Act on Child Representation*, AM. BAR. ASS'N (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/8P8M-GEMW].

129. *See* Sobie, *supra* note 5, at 821.

130. *See generally* Sexton, *supra* note 116.

131. Sobie, *supra* note 5, at 843–44.

132. *Id.*

many things in South Carolina, but only through their assigned representation.[133] This does have the potential for an issue, but since the primary responsibility of the vGAL is to investigate and present a report to the court,[134] it seems unlikely that impairing their ability to act independently in the courtroom would have a huge impact. When it comes to the vGAL's appearance in the courtroom, the judge could easily take care to treat the vGAL much like a pro se litigant and take some extra care making sure that the court fully understands the vGAL's recommendation and any concerns the vGAL may have. It is not unusual for Family Court judges to take extra time and care with pro se litigants anyway,[135] and since the bulk of the vGAL's responsibilities fall outside of the courtroom, there should be no interference with their ability to do their job. If the judge felt the vGAL still needed some representation, an attorney could still be appointed for the vGAL. Though this would be an extra cost, the role of the vGAL's attorney would be minimal and would not be very time-consuming, aside from a few meetings and court dates, which would presumably reduce the financial burden. The judge is also more than capable of balancing the recommendations from the state, the vGAL, and the advocacy from the child's attorney to make decisions about the child's future and would have the capacity to fully make sure they understand any recommendations or concerns of the vGAL. Finally, there should be no greater burden placed on the court administration as all the procedures could remain intact.

IV. CONCLUSION

The existence of legislation[136] providing for the representation of children who are the subjects of child abuse or neglect cases implies that Americans, or at least their legislators, recognize the value of child representation in dependency cases. Yet, while the federal government has enacted legislation requiring states to ensure that children are provided with representation, the lack of further guidance means that states' systems are not necessarily the most effective.[137] The states also do not have a clear consensus on how children should be represented, and the inconsistencies between jurisdictions

133. *See* S.C. CODE ANN. § 63-11-530(A)–(C) (2010 & Supp. 2023); § 63-7-1620.

134. Sexton, *supra* note 116, at 835–36.

135. *See generally* MARK JUHAS, WORKING WITH PRO-SE LITIGANTS: A GUIDE FOR FAMILY COURT BENCH OFFICERS (Ass'n Fam. & Conciliation Cts., 2017) https://www.afccnet.org/Portals/0/Committees/Guide%20for%20Judges%20SRLs.pdf [https://perma.cc/VX8V-ZBEW]. *See generally* MARK JUHAS, WORKING WITH PRO-SE LITIGANTS: A GUIDE FOR FAMILY COURT BENCH OFFICERS (Ass'n Fam. & Conciliation Cts., 2017) https://www.afccnet.org/Portals/0/Committees/Guide%20for%20Judges%20SRLs.pdf [https://perma.cc/VX8V-ZBEW].

136. *See* Sobie, *supra* note 5, at 823.

137. *See* Glynn, *supra* note 3, at 1253–57.

only contribute to confusion on what is best for children.[138] Given the potential impact the dependency hearings can have on a child's life and future, children should be entitled to legal representation that will look out for their rights and interests and are better prepared to represent them in a courtroom.[139] Ideally, this is in addition to a GAL who is prepared to tell the court about what he or she views as in the best interest of the child.

By providing a vGAL to every child at the center of a child dependency case in the state, South Carolina's system for child representation is a step in the right direction. However, by only providing a vGAL for representation, South Carolina is placing a burden on the child victims and the court system. vGALs, while dedicated volunteers who have proven successful at conducting independent investigations, are not competent legal representatives themselves.[140] Children, even young children, have their own interests and a right to represent those interests to the court.[141] Under the current system, judges have the additional weight of trying to determine a child's interests when the judge should be free to act as an impartial arbiter.[142] A trained attorney working alongside a vGAL would be a valuable addition to a child's team and help protect the rights and interests of the child in a way that the vGAL cannot do when acting under the statute.

Therefore, it is in the best interests of children and the state of South Carolina to consider reforming the current statutory system of child representation. South Carolina's utilization of vGALs and attorneys to represent vGALs means that there is a simple yet effective solution that would help increase the quality of representation children receive in the state. By trading in a legal representative for the vGAL and using those same resources to provide an attorney who can work alongside each child's vGAL in a dependency case, South Carolina can easily provide an attorney for each child without incurring new significant financial or logistical responsibilities. South Carolina judges are perfectly capable of ensuring that the vGAL is adequately heard in a courtroom without an attorney representing them. Additionally, judges can easily balance the recommendations of the vGAL and the child's attorney along with any other information provided by the state or parents and caregivers, even if the parties disagree. By making this small change, South Carolina can significantly improve the representation of children in dependency cases and help the overall success and function of the child welfare system in the state.

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138. *See* Sobie, *supra* note 5, at 763.

139. *See generally supra* Section III.A.

140. *See generally supra* Section III.B.1.

141. *See* Sobie, *supra* note 5, at 786.

142. *See* Mandelbaum, *supra* note 9, at 54 (quoting Shannan L. Wilber*, Independent Counsel for Children*, 27 FAM. L.Q. 349, 350 (1993)).