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## **Pennsylvania's Need for Permanency: An Argument in Support of Workable Standards for Representing Children in Involuntary Termination of Parental Rights Proceedings**

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# Pennsylvania's Need for Permanency: An Argument in Support of Workable Standards for Representing Children in Involuntary Termination of Parental Rights Proceedings

Anne Marie Bingaman\*

## ABSTRACT

In cases of child abuse and neglect, Pennsylvania's dependency laws both empower courts to act to protect the child and offer opportunities to bolster the parent-child relationship. However, when courts determine that maintenance of the parent-child relationship is not in the child's best interest, termination of parental rights proceedings play an essential role in freeing the child for adoption.

Pennsylvania's General Assembly has recognized that termination proceedings are both a necessary mechanism for permanency and a significant intrusion in the life of a child. As a result, the General Assembly enacted 23 PA. CONST. STAT. § 2313(a), a provision in the state's Adoption Act requiring dependency

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courts to appoint legal counsel for children whose parents' rights are subject to involuntary termination. On its face, Section 2313(a) creates a child-centered representation model that acknowledges the importance of giving a voice to children who face permanent separation from their biological parents. Inherent complexities associated with effectively representing children across the developmental spectrum have, however, illuminated inadequacies in Section 2313(a)'s framework.

Between March 2017 and the publication of this Comment, Pennsylvania's Superior Court has remanded approximately 40 termination decrees based on noncompliance with Section 2313(a). This Comment argues that the struggles of courts and legal representatives to consistently apply Section 2313(a)'s representation mandate has created additional instability in the lives of vulnerable children. After providing an overview of the role that termination proceedings play in the child welfare system and discussing the predominant child representation models, this Comment analyzes Pennsylvania case law that interprets and applies Section 2313(a). This Comment concludes by offering practical recommendations for ways to enhance Section 2313(a)'s representation scheme, to avoid protracted termination proceedings, and to achieve permanent placements for children.

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## I. INTRODUCTION

The relationship that a child shares with his or her biological parents is foundational and fundamental; a healthy parent-child bond functions as the child's earliest source of security and identity.<sup>1</sup> Recognizing the significance of this bond, the Supreme Court has extended constitutional protection to the parent-child relationship.<sup>2</sup> This constitutional protection, however, is not absolute. In cases of child abuse and neglect, the state has authority<sup>3</sup> to intervene in the parent-child relationship to protect an at-risk child.<sup>4</sup>

In the most extreme cases, state laws empower courts to terminate the rights of a parent who is unable to provide his or her child with a safe and healthy home.<sup>5</sup> While termination of parental rights ("TPR") plays a necessary role in freeing an abused or neglected child for adoption,<sup>6</sup> legal severance of the parent-child bond has a palpable, everlasting impact on a child's life.<sup>7</sup> Child development

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1. See Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L. Q. 233, 237 (1986) (explaining the important role that a child's biological family plays in the child's development of identity and self-perception).

2. See *Lehr v. Robertson*, 463 U.S. 248, 256 (1983) (discussing the "intangible fibers" that exist between a parent and child); *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (explaining that the parent-child relationship is a "commanding" interest).

3. *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) (establishing that states have a "wide range of power for limiting parental freedom and authority"); see also LISA KELLY & KIMBERLY AMBROSE, REPRESENTING YOUTH 6 (2017) (explaining the concept of *parens patriae*, a doctrine in which the state acts as "common guardian of the community" and has "the authority to intervene in the parent-child relationship").

4. Tracey B. Harding, Note, *Involuntary Termination of Parental Rights: Reform Is Needed*, 39 BRANDEIS L. J. 895, 895 (2001) (explaining that the fundamental right of parenthood is suspended when parents abuse or neglect their children, in which case "[s]tates have a compelling right to enter the family sphere and proceed according to the best interests of the child").

5. Jamie D. Manasco, *Parent-Child Relationships: The Impetus Behind the Gregory K. Decision*, 17 L. & PSYCHOL. REV. 243, 246 (1993).

6. *Id.* at 247.

7. See *In re B.L.L.*, 787 A.2d 1007, 1013 (Pa. Super. Ct. 2001) (explaining that TPR "ends the parent/child relationship as unequivocally as the death of the child").

research shows that, despite inadequacies of a child's parent, TPR creates an experience of parental loss for the child.<sup>8</sup>

Recognizing these profound impacts, most states have enacted legislation guaranteeing some form of representation for children subject to child welfare proceedings, including TPR cases.<sup>9</sup> However, despite the consensus that representation for children is necessary,<sup>10</sup> significant debate exists among courts, within legislatures, and between scholars regarding *who* should represent a child and *how* a child's legal representative should function.<sup>11</sup> Most state laws incorporate components of two representation models<sup>12</sup>: the "best interest" model<sup>13</sup> and the "legal interest" model.<sup>14</sup>

In 1980, Pennsylvania's General Assembly enacted 23 PA. CONST. STAT. § 2313(a), a statute articulating the state's approach to representation for children involved in involuntary TPR pro-

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8. Kerri M. Schneider & Vicky Phares, *Coping with Parental Loss Because of Termination of Parental Rights*, 84 CHILD WELFARE 819, 820 (2005) (comparing the sense of loss a child experiences as a result of TPR to the loss a child experiences as a result of divorce or the death of the child's parents).

9. See generally CHILDREN'S ADVOCACY INSTITUTION, ET AL., A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN (3d ed. 2012), <https://bit.ly/2tjvSEL> [<https://perma.cc/N6BL-UFBU>] [hereinafter NATIONAL REPORT CARD] (presenting an overview of the representation models used across the United States and "grading" each representation model); CHILD WELFARE INFORMATION GATEWAY, REPRESENTATION OF CHILDREN IN CHILD ABUSE AND NEGLECT PROCEEDINGS (2017), <https://bit.ly/2TIITDG> [<https://perma.cc/NC3S-4AS3>] [hereinafter REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT PROCEEDINGS] (providing a summary of representation models used in each state and providing citations to each state's statutory scheme).

10. CHILD WELFARE LEGAL REPRESENTATION: ABA ATTORNEY STANDARDS 1 (AM. BAR ASS'N 2018) [hereinafter ABA ATTORNEY STANDARDS].

11. KELLY & AMBROSE, *supra* note 3, at 47 (discussing the "proliferation" of representation schemes and systems that exist throughout the United States); Lisa Kelly & Alicia LeVezu, *Until the Client Speaks: Reviving the Legal-Interest Model for Preverbal Children*, 50 FAM. L. Q. 383, 383 (2016) (describing the "widespread confusion and debate about the role of attorneys appointed to represent children").

12. See NATIONAL REPORT CARD, *supra* note 9, for a summary on representation schemes across the United States.

13. See Suparna Malempati, *Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings*, 11 U.N.H. L. REV. 97, 113 (2013) [hereinafter Malempati, *Beyond Paternalism*] ("The best-interest lawyer must generally substitute his or her own judgment about what outcome would be best for the child rather than receive direction from the child as to what the child desires the outcome to be.").

14. See KELLY & AMBROSE, *supra* note 3, at 48 (explaining that the "legal interest" model, which is also called the "stated interest" or "client-directed model," requires courts to appoint an attorney who is "bound by the Rules of Professional Conduct").

ceedings.<sup>15</sup> Section 2313(a) requires courts to appoint counsel for a child who is subject to an involuntary TPR proceeding in which at least one parent is contesting the termination.<sup>16</sup> In construing Section 2313(a), the Pennsylvania Supreme Court clarified that the statute requires courts to appoint a “lawyer who represents the child’s legal interests, and who is directed by the child.”<sup>17</sup> Additionally, the Pennsylvania Supreme Court has held that, if the child’s expressed desires conflict with the outcome that is in the child’s best interest, the court must appoint both a client-directed attorney and a best interest advocate.<sup>18</sup>

While Section 2313(a), on its face, creates a child-centered representation model and acknowledges the importance of giving a voice to children who are facing permanent separation from their biological parents, trial courts’ application of the statute has generated troubling instability: between January 2017 and the publication of this Comment, the Pennsylvania Superior Court heard approximately 170 TPR appeals addressing, among other issues, whether the trial court had appointed adequate representation for the affected children.<sup>19</sup> In approximately 40 cases, the Superior Court remanded the TPR decree for further proceedings, determining that the trial court failed to discern whether a child’s legal and best interest diverged and, therefore, failed to satisfy Section 2313(a)’s mandate.<sup>20</sup>

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15. 23 PA. CONST. STAT. § 2313(a) (2014).

16. *Id.* From here forward, any reference to “termination of parental rights proceedings” or “TPR” is to *involuntary* termination proceedings; 23 PA. CONST. STAT. § 2313(a) applies only to involuntary termination proceedings. Children are not granted the same right to counsel in voluntary terminations, terminations to which the child’s biological parents’ consent. *Id.*

17. *In re Adoption of L.B.M.*, 161 A.3d 172, 180 (Pa. 2017) (applying Section 2313(a)).

18. *In re T.S.*, 192 A.3d 1080, 1082 (Pa. 2018), *petition for cert. denied*, T.H.-H. v. Allegheny Cty. Off. of Children, Youth and Families, 139 S. Ct. 1187 (Feb. 19, 2019) (No. 18-6997) (establishing that, “where there is a conflict between the child’s legal interests and his best interests, an attorney-guardian *ad litem* . . . who advocates for the child’s best interests, cannot simultaneously represent the child’s legal interests”).

19. *See, e.g., In re D.L.B.*, 166 A.3d 322 (Pa. Super. Ct. June 15, 2017); *In re C.P.W.*, Nos. 267–279 WDA 2017, 2017 WL 2116955 (Pa. Super. Ct. May 15, 2017); *see also infra* Part III for a further discussion and additional case citations.

20. *See, e.g., In re P.G.F.*, No. 1464 WDA 2018, 2019 WL 1199986, at \*3–4 (Pa. Super. Ct. Mar. 13, 2019) (determining that, although the child’s attorney met with the child and was present at the TPR hearing, the attorney “did not argue Child’s preferred outcome” or indicate that the child was “unable to express his preferred outcome” and remanding the case for further proceedings); *In re N.S.S.*, No. 1342 MDA 2017, 2018 WL 831827 (Pa. Super. Ct. Feb. 13, 2018) (remanding the TPR decree after finding that the trial court failed to appoint separate counsel to re-

Collectively, the cases interpreting and applying Section 2313(a) indicate that Pennsylvania courts lack a unified understanding of how to implement the statute's representation mandate.<sup>21</sup> The purpose of this Comment is to demonstrate that, without a cohesive procedure for identifying and communicating a child's legal interests, Pennsylvania's representation mandate can prolong and complicate TPR proceedings, effectively increasing the instability that children face.<sup>22</sup>

Part II of this Comment presents an overview of the ways in which the nation's unfolding understanding of child abuse and neglect has influenced Pennsylvania's approach to TPR proceedings.<sup>23</sup> Part II also presents an overview of the representation models states use in child welfare proceedings, with a particular focus on how these models are reflected in Section 2313(a).<sup>24</sup> Finally, Part II analyzes Pennsylvania case law interpreting and applying Section 2313(a) to show the pressing need to create processes and procedures for discerning and representing a child's legal interest.<sup>25</sup> Part III responds to this need by presenting techniques for working with vulnerable children and recommends practical, standardized procedures for representing minors in TPR proceedings.<sup>26</sup>

## II. BACKGROUND

### A. *Focusing on Children: TPR and the Shift Toward Permanency Planning*

Awareness of the causes of, effects of, and solutions for child abuse and neglect has developed as part of a national conversation regarding how to listen and respond to the needs of America's children.<sup>27</sup> In the last 50 years, the country's approach to child welfare

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present the child's legal interests); see also *infra* Part III for a further discussion and additional case citations.

21. See, e.g., *In re A.M.R.*, No. 1367 EDA 2018, 2018 WL 5905934, at \*2-3 (Pa. Super. Ct. Nov. 9, 2018); *In re A.L.M.F.*, Nos. 741, 43, 2018 WL 4907783, at \*3 (Pa. Super. Ct. Oct. 10, 2018); *In re T.M.W.*, No. 397 WDA 2018, 2018 WL 4234137, at \*2-5 (Pa. Super. Ct. Sep. 6, 2018).

22. See, e.g., *In re Q.R.D.*, No. 1060 MDA 2018, 2018 WL 6735024, at \*4 (Pa. Super. Ct. Dec. 24, 2018) (finding that the lower court had incorrectly applied Section 2313(a) and remanding the case for further proceedings, while acknowledging that the court also "prolong[ed] the uncertainty of the [c]hild's future").

23. See *infra* Part II.A.

24. See *infra* Part II.B.

25. See *infra* Part II.C.

26. See *infra* Part III.

27. See generally LEROY ASHBY, ENDANGERED CHILDREN: DEPENDENCY, NEGLECT, AND ABUSE IN AMERICAN HISTORY (Joseph M. Hawes & N. Ray Hiner eds., 1997) (outlining the nation's understanding of and responses to issues of child

legislation has coalesced around the idea that children need stability and permanency to thrive.<sup>28</sup> While child welfare issues are a matter of state law, federal legislation promoting permanency planning<sup>29</sup> has had a significant impact on state intervention and representation schemes.<sup>30</sup> This federal legislation provides a backdrop for understanding the important role that TPR proceedings play on the state level and underpins the need to find effective ways to represent the voices of affected children.<sup>31</sup>

Additionally, the federal statutory provisions<sup>32</sup> governing representation of children in abuse and neglect proceedings have influenced the conversation regarding *who* should represent children and *how* children should be represented.<sup>33</sup> The ongoing dialogue continues to inform Pennsylvania's approach<sup>34</sup> to representing chil-

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abuse, neglect, and dependency throughout the history of the country); *see also infra* Part II(A)(1) (setting forth the major "eras" of the country's responses to child abuse and neglect).

28. *See* Karen Spar, CONG. RESEARCH SERV., RL30759, IMPLEMENTATION OF THE ADOPTION AND SAFE FAMILIES ACT (P.L. 105-89) 1 (2004), <https://bit.ly/2ByY4YN> [<https://perma.cc/V32E-VENQ>] [hereinafter IMPLEMENTATION OF ASFA] (describing the purposes of the Adoption and Safe Families Act which Congress enacted in 1997 and which is "considered the most sweeping change in federal child welfare law since 1980"). The Adoption and Safe Families Act, codified at 42 U.S.C. §§ 1305 *et seq.*, focused on expediting the process of permanent placement for children in the child welfare system. *Id.* *See also* Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights to Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L. Q. 121, 124 n.10 (1995) (citing the psychological research of Joseph Goldstein, Anna Freud, and Albert J. Solnit which "criticized the foster care system because it resulted in stress to children who were continually separated, first from their biological parents, and then from successive parental figures in foster care placements").

29. *See* Leroy H. Pelton, *Beyond Permanency Planning: Restructuring the Public Child Welfare System*, 36 SOC. WORK 337, 337 (1991) (defining "permanency planning" as the philosophy that "every child has a right to a permanent and stable home, preferably his or her own, and that a plan should be made for every child in foster care for a more permanent living arrangement").

30. *See* KELLY & AMBROSE, *supra* note 3, at 33 (observing that the commonalities between state dependency systems are primarily a result of the federal statutes providing funding for state statutes that comply with federal regulatory schemes).

31. *Id.* at 38 (explaining that federal statutes "create timelines that . . . place pressure upon parents to remedy their problems or face the possible termination of their parental rights").

32. *See infra* Part II.B. (reviewing the federal statutory provisions governing representation of children in dependency proceedings).

33. *See supra* note 30 and accompanying text; *see also* Malempati, *Beyond Paternalism*, *supra* note 13, at 109–10 (explaining that federal legislation "imposed the requirement that all children in abuse and neglect proceedings be represented" but also acknowledging that the flexibility and open spaces in the federal legislation has resulted in some state-to-state variation).

34. *See infra* Part II.C. (discussing Pennsylvania's representation scheme for children subject to contested involuntary TPR proceedings).



dren in TPR proceedings, particularly in the midst of the confusion surrounding the application of Section 2313(a).<sup>35</sup>

### 1. *A National Perspective*

Early child welfare interventions focused primarily on mitigating the effects of poverty.<sup>36</sup> In colonial America, local governments relied on indenture, a process through which the government separated dependent<sup>37</sup> children from their indigent parents and placed them with families who provided food, clothing, shelter, and education.<sup>38</sup> In exchange, children were obligated to work for and to serve the families with whom they were placed.<sup>39</sup>

In the early 1800s, governments and private organizations expanded child welfare interventions to address parental neglect but, nonetheless, remained primarily focused on alleviating the effects of poverty.<sup>40</sup> State and local governments, as well as private charitable organizations, placed neglected children in orphan houses or other institutional settings.<sup>41</sup> However, by the late 1800s, these institutional placements faced increasing criticism.<sup>42</sup> Private charities

35. See *infra* Part III for a discussion on application of Section 2313(a)'s representation mandate.

36. KELLY & AMBROSE, *supra* note 3, at 5 (explaining that early American child welfare interventions "primarily focused upon the children of the poor").

37. LEROY H. PELTON, *FOR REASONS OF POVERTY* 2 (1989) (defining dependent children as children "who are dependent upon society for financial support, either because their families are destitute or because they were orphaned").

38. Tim Hasci, *From Indenture to Family Foster Care: A Brief History of Child Placing*, 74 *CHILD WELFARE* 162, 163-65 (1995) (defining indenture and explaining its role in early American society); ASHBY, *supra* note 27, at 6 (setting forth common terms of indenture agreements and outlining the role that such agreements played in a society that was "virtually without children's institutions").

39. Hasci, *supra* note 38, at 163.

40. Marsha Garrison, *Why Terminate Parental Rights*, 35 *STAN. L. REV.* 423, 435 (1983) (explaining that "neglect officially replaced poverty as the legal basis for depriving parents of custody of their children" but that "for the most part poverty was simply equated with neglect").

41. Judith Areen, *Intervention Between the Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 *GEO. L. J.* 887, 904 (1975) (explaining that, after New York's legislature adopted the view that almshouses and other institutional placements were the best method of taking care of dependent children, other local and state governments began using similar institutional interventions); Hasci, *supra* note 38, at 166 (explaining that "between 1830 and 1860 orphan asylums became the nation's predominant method of caring for dependent children").

42. Hasci, *supra* note 38, at 166. See also ASHBY, *supra* note 27, at 34 (outlining criticisms of institutional placements for dependent and neglected children, including overcrowding and lack of adequate parental care).

and welfare agencies advocated for the deinstitutionalization of dependent children in favor of placement with families.<sup>43</sup>

Beginning in the early 1900s, states increasingly focused on child welfare issues and initiated organized interventions, which included financial support programs<sup>44</sup> for poor families and juvenile courts that functioned as centralized agencies for addressing the “problem of the dependent child.”<sup>45</sup> The development of juvenile courts marked a significant increase in state involvement in private family life.<sup>46</sup>

Although there was a brief lull in the nation’s focus on child abuse and neglect during the mid-1900s, the 1960s marked another resurgence in national awareness of child welfare issues.<sup>47</sup> Sparked by medical research that introduced the concept of “battered children,”<sup>48</sup> child abuse and neglect became a national social issue.<sup>49</sup> The medical profession’s focus on child abuse as “a set of symptoms associated with a disease, namely, inadequate parenting” precipi-

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43. Hasci, *supra* note 38, at 166 (discussing the development of “the idea of placing children in homes rather than institutions” and defining the concept as “placing-out”); ASHBY, *supra* note 27, at 35 (discussing the evolution of the “placing-out” movement and explaining that the push for private family placements for dependent children arose “out of fears of the growing urban underclass”).

44. Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. LEGIS. 239, 241 (2002) (explaining that many states implemented social welfare policies that promoted the “preservation of the natural family” by providing poor families with “income supplements called Mother’s Pensions”).

45. ASHBY, *supra* note 27, at 82. An advocate of the juvenile court movement explained that the fundamental idea of juvenile courts is “a return to paternalism, it is the acknowledgement by the State of its relationship as the parent to every child within its borders.” *Id.*

46. *Id.* at 81 (providing an overview of juvenile courts in America and explaining that all but three states developed juvenile courts by 1920).

47. *Id.* at 101, 125 (contrasting the lack of national focus on child welfare issues between 1920 and 1960 to the “explosion” of interest in children’s issues between the 1960s and 1980s).

48. ELIZABETH PLECK, *DOMESTIC TYRANNY 169–70* (2004) (discussing the 1962 publication of the “landmark article, ‘The Battered-Child Syndrome,’” in which author C. Henry Kempe discussed “nonaccidental physical injury to a child” by the child’s parents, called for temporary separation of the abused child from his or her parents, and “appeared to favor termination of parental rights if abuse continued”).

49. PELTON, *FOR REASONS OF POVERTY*, *supra* note 37, at 23 (explaining that the publication of “The Battered-Child Syndrome” attracted an “enormous amount of professional and media interest”).

tated the development of child abuse reporting laws<sup>50</sup> and eventually attracted the attention of federal legislators.<sup>51</sup>

In 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA),<sup>52</sup> the federal government's first major legislative scheme focused on preventing child abuse and neglect.<sup>53</sup> CAPTA required states to set forth specific definitions of child abuse and to enact protective custody laws to be eligible for federal child abuse prevention funding.<sup>54</sup> CAPTA effectively "shifted the emphasis of state laws away from simply reporting" child abuse and neglect and instead incentivized states to implement interventions and treatment programs.<sup>55</sup>

Since CAPTA's enactment, subsequent federal legislation has reflected a "conceptual framework"<sup>56</sup> of "permanency planning."<sup>57</sup> The Adoption Assistance and Child Welfare Act of 1980 (AACWA)<sup>58</sup> "'de-emphasize[d] the use of foster care and encourage[d] greater efforts to place children in permanent homes."<sup>59</sup> The AACWA requires states to use "reasonable efforts" to "preserve and reunify families."<sup>60</sup> However, in circum-

50. PLECK, *supra* note 48, at 171; *id.* at 173 ("Between 1963 and 1967, every state passed a child abuse reporting bill, usually after lobbying by pediatricians.").

51. *Id.* at 175–76 (outlining the relationship between medical conceptualizations and treatment of child abuse and federal involvement in the traditionally state-controlled sphere of child welfare interventions).

52. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. §§ 5101–5107 (2012)).

53. See John E. B. Myers, *A Short History of Child Protection in America*, 42 FAM. L. Q. 449, 456–57 (2008) (explaining that, before 1974, the "federal government played a useful but minor role in child protection" but that "Congress assumed a leadership role with the passage of the Child Abuse Prevention and Treatment Act of 1974").

54. CONG. RESEARCH SERV., R40899, THE CHILD ABUSE PREVENTION AND TREATMENT ACT (CAPTA): BACKGROUND, PROGRAMS, AND FUNDING 3 (2009), <http://bit.ly/2Icbyj8> [<https://perma.cc/MCU8-GELB>] (explaining that States receiving CAPTA funding are required to "define 'child abuse and neglect' to be consistent with [CAPTA] . . . [which defines the term] as 'at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm'" (citing CAPTA, 42 U.S.C. § 5106(g) (2012)).

55. Baldwin, *supra* note 44, at 246–47.

56. ASHBY, *supra* note 27, at 140.

57. Pelton, *Beyond Permanency Planning*, *supra* note 29, at 337 ("The permanency planning philosophy is that every child has a right to a permanent and stable home, preferably his or her own, and that a plan should be made for every child in foster care for a more permanent living arrangement.").

58. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified at 42 U.S.C. §§ 620 (2012)).

59. Baldwin, *supra* note 44, at 252 (internal citation omitted).

60. 42 U.S.C. § 671(a)(15) (2012).

stances warranting separation of a child from his or her biological parents, the AACWA requires states to “develop a case plan . . . detailing . . . what steps would be taken to return the child home or place the child up for adoption.”<sup>61</sup>

Congress most notably emphasized the importance of permanency efforts by enacting the Adoption and Safe Families Act of 1997 (ASFA).<sup>62</sup> ASFA calls for development of accelerated timelines focused on permanent placements to keep children from spending long periods of time in the foster care system.<sup>63</sup> As a result of ASFA’s push for permanency, TPR proceedings play a central role by freeing children for adoption;<sup>64</sup> ASFA requires states to consider terminating a parent’s rights when his or her child remains in foster care for 15 out of 22 months.<sup>65</sup>

## 2. *Pennsylvania’s Approach*

Both the AACWA and ASFA influenced the development of child welfare and dependency laws in many states, including Pennsylvania,<sup>66</sup> by incentivizing legislation focused on promoting permanent placements for children.<sup>67</sup> Outlining the statutes’ impacts, the Pennsylvania Superior Court explained:

61. Baldwin, *supra* note 44, at 252.

62. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. §§ 1305 *et seq.* (2012)).

63. See KELLY & AMBROSE, *supra* note 3, at 38 (explaining that the AACWA was “passed in reaction to ‘foster care drift’”). “Foster Care Drift” describes the idea that, after being removed from the homes of their biological parents, “many children were being harmed by a system in which they stayed indefinitely and drifted from one home to another, without close monitoring of their cases and without plans for more permanent and stable living arrangements.” PELTON, FOR REASONS OF POVERTY, *supra* note 37, at 79.

64. Jennifer Ayres Hand, Note, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1259 (1996).

65. See IMPLEMENTATION OF ASFA, *supra* note 28, at 6 (explaining that “[o]ne of the most significant provisions of the 1997 law requires states to initiate proceedings for the termination of parental rights . . . for children who have been in foster care for 15 of the most recent 22 months . . .”).

66. See *In re C.B.*, 861 A.2d 287, 295 (Pa. Super. Ct. 2004) (“Due to the requirements of the federal Adoption and Safe Families Act (“ASFA”) . . . and to obtain vital federal funding, the legislature amended the Pennsylvania Juvenile Act . . .”).

67. See D.H.S. CHILDREN’S BUREAU, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN I-4–I-5 (June 30, 1999) (summarizing the ways in which federal legislation, like the AACWA and ASFA, encourage child welfare practices designed to “facilitate more timely placement of children into foster and adoptive homes” and to address “critical permanency issues in child welfare and the law”).

It has been the national, State and local policy for many years . . . to remove children from foster placement limbo . . . . States such as Pennsylvania, which participate in the program[s], are required to make reasonable efforts to return the child to its home following foster placement, but failing to accomplish this due to the failure of the parent to benefit by such reasonable efforts, to move toward termination of parental rights and placement of the child through adoption.<sup>68</sup>

Pennsylvania's adoption and TPR laws, therefore, reflect the federal government's call to minimize the deference previously given to parental rights and to instead establish "unequivocally that the goals for children in the child welfare system are *safety, permanency and well-being*."<sup>69</sup>

Pennsylvania's Juvenile Act<sup>70</sup> sets forth the legal procedures for initiating a child welfare intervention.<sup>71</sup> The Juvenile Act establishes the definition of a "dependent child"<sup>72</sup> and outlines the grounds for removing a dependent child from the child's parent(s).<sup>73</sup> In alignment with ASFA, the Juvenile Act requires child welfare agencies to initiate TPR proceedings after a dependent child has been outside the care of his or her biological parent for at least 15 out of 22 months.<sup>74</sup>

Pennsylvania's Adoption Act<sup>75</sup> governs the technical and procedural requirements for TPR proceedings.<sup>76</sup> Though parents can voluntarily relinquish their rights, Pennsylvania law also creates procedures for termination without parental consent.<sup>77</sup> Involuntary TPR proceedings serve the purpose of "free[ing] the child for adoption" when it is in a child's best interest to be placed outside the

68. *In re B.L.L.*, 787 A.2d 1007, 1016 (Pa. Super. Ct. 2001).

69. *C.B.*, 861 A.2d at 295 (quoting *In Interest of Lilley*, 719 A.2d 327, 334 n.5 (Pa. Super. Ct. 1998)).

70. 42 PA. CONST. STAT. §§ 6301 *et seq.* (2016).

71. *Id.* § 6351.

72. *Id.* § 6302 (defining ten categories under which courts can adjudicate children dependent, the broadest category being a child who "is without proper care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals").

73. *Id.* § 6351(a)(2).

74. *Id.* § 6351(f)(9).

75. 23 PA. CONST. STAT. § 2501 *et seq.* (2016).

76. *See, e.g.*, 23 PA. CONST. STAT. § 2511 (2016) (setting forth the grounds for involuntary TPR); 23 PA. CONST. STAT. § 2512 (2016) (setting forth the process through which a party may file a petition for involuntary TPR); 23 PA. CONST. STAT. § 2513 (2016) (explaining the procedures required for scheduling and giving notice of an involuntary TPR proceeding).

77. OFFICE OF CHILDREN AND FAMILIES IN THE COURTS & ADMIN. OFFICE OF PA. COURTS, PENNSYLVANIA DEPENDENCY BENCHBOOK 17-1 (3d ed. 2019) [hereinafter PA. DEPENDENCY BENCHBOOK].

biological home but the child's parents refuse to consent to the termination of their rights.<sup>78</sup> While a Pennsylvania court cannot terminate a parent's rights "solely on the basis of environmental factors such as inadequate housing, furnishings, income, clothing and medical care,"<sup>79</sup> Pennsylvania's TPR statute sets forth nine grounds on which the court can involuntarily terminate a parent's rights.<sup>80</sup>

An involuntary TPR proceeding begins when a child welfare agency or other party<sup>81</sup> files a TPR petition,<sup>82</sup> which must clearly set forth facts that substantiate and serve as the basis for one of the nine grounds of termination.<sup>83</sup> During a TPR hearing, both Pennsylvania law and federal law require the judge to determine whether the TPR petition and testimonial evidence establish one of the nine grounds for termination by clear and convincing evidence.<sup>84</sup> Additionally, the judge must assess the effect that the proposed termination is likely to have on the child by carefully considering the child's developmental, physical, and emotional needs, as well as general welfare implications.<sup>85</sup> Pennsylvania case

78. *In re Adoption of A.B.M.*, 812 A.2d 659, 665 (Pa. Super. Ct. 2002).  
79. 23 PA. CONS. STAT. § 2511(b) (2016).

80. *Id.* § 2511. Examples of grounds for involuntary termination include:

(2) The repeated and continued incapacity, abuse, neglect or refusal of the parent [which causes] the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

. . . (5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child.

*Id.*

81. 23 PA. CONS. STAT. § 2512(a) (2016). A TPR petition can be filed by a parent, an agency, an individual who has custody or is standing in loco parentis to the child and who has filed a report of intention to adopt, or an attorney or guardian *ad litem* representing a child who has been adjudicated dependent. *Id.*

82. PA. DEPENDENCY BENCHBOOK, *supra* note 77, at 17-3.

83. 23 PA. CONS. STAT. § 2512(b) (2016).

84. *See In re B.L.L.*, 787 A.2d 1007, 1013 (Pa. Super. Ct. 2001) (explaining that "termination of parental rights for all practical purposes ends the parent/child relationship . . . and for that reason, the United States Supreme Court, in *Santosky v. Kramer*, 455 U.S. 745 (1982), set the standard of proof at clear and convincing evidence").

85. *See* PA. DEPENDENCY BENCHBOOK, *supra* note 77, at 17-14; 23 PA. CONS. STAT. § 2511(b) (2016).

law establishes that this assessment essentially consists of an examination of the emotional bond that exists between the parent and child.<sup>86</sup> Though Pennsylvania law does not require courts to order a “formal bonding evaluation,” the TPR hearing record must nonetheless show that the parties have presented evidence detailing the likely effect that the proposed TPR would have on the child.<sup>87</sup>

If the judge determines that the petitioning party has established a ground for termination by clear and convincing evidence, the judge will issue a TPR decree.<sup>88</sup> A TPR decree extinguishes all of a biological parent’s legal rights to his or her child, including the right to be notified of and to object to future adoption hearings.<sup>89</sup>

*B. Acknowledging the Child’s Voice: Toward Client-Directed Models for Representing Children in Involuntary TPR Proceedings*

The Pennsylvania Supreme Court has described TPR as “one of the most severe steps the court can take,” acknowledging that the “finality of the termination . . . [has] great emotional impact on both the child and the parent.”<sup>90</sup> Unlike the juvenile delinquency system where children have a constitutionally-protected right to counsel,<sup>91</sup> the Supreme Court has not yet recognized a right to counsel for children subject to dependency and TPR proceedings.<sup>92</sup> However, because of the profound impact of child welfare interventions,<sup>93</sup> both federal and state laws grant statutory representation rights to children throughout the dependency and termination processes.<sup>94</sup>

Along with its push for permanency, CAPTA requires participating states to appoint a guardian *ad litem* (GAL)<sup>95</sup> to represent children involved in abuse and neglect cases, including TPR pro-

86. See, e.g., *In re K.K.R.-S.*, 958 A.2d 529, 533 (Pa. Super. Ct. 2008).

87. PA. DEPENDENCY BENCHBOOK, *supra* note 77, at 17-15.

88. 23 PA. CONS. STAT. § 2512 (2016).

89. *Id.*

90. *In re Adoption of Sarver*, 281 A.2d 890, 891 (Pa. 1971).

91. See *In re Gault*, 387 U.S. 1, 37 (1967) (guaranteeing the right to counsel for juveniles in delinquency proceedings).

92. Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW. 183, 187 (2005).

93. See *Adoption of Sarver*, 281 A.2d at 891.

94. NATIONAL REPORT CARD, *supra* note 9, at 5 (explaining that the dependency process can involve years of hearings and includes various stages and legal proceedings including TPR hearings).

95. *Id.* at 11 (defining a GAL as “an individual appointed by the court to represent a child in court proceedings” who “may or may not be an attorney and may advocate for the child’s best interests, or their wishes, or both”).

ceedings.<sup>96</sup> In a statement supporting CAPTA's GAL mandate, Representative Brian Fraser explained that the general consensus is that children do have "certain rights and privileges," which a GAL is responsible for protecting.<sup>97</sup>

While requiring a court-appointed GAL to develop a personal understanding of the child's needs and to provide the court with recommendations concerning the best interests of the child,<sup>98</sup> CAPTA's representation mandate does not strictly define a GAL's qualifications and responsibilities.<sup>99</sup> Importantly, as long as the GAL receives appropriate training in child development, CAPTA does not require the GAL to be an attorney.<sup>100</sup>

Over half of the states have built upon CAPTA's requirements and enacted statutes requiring a child's representative to be a licensed attorney.<sup>101</sup> Significant variation exists, however, regarding the role that a child's attorney is required to play.<sup>102</sup> This variation derives primarily from adaptations of two models of representation: the "best interest" model and the "legal interest" model.<sup>103</sup>

### 1. *The "Best Interests" Model*

Under the best interests model, the child's attorney functions in a traditional GAL role; although the attorney may take the child's expressed interests into account, the attorney primarily func-

96. See 42 U.S.C. §§ 5106a(b)(2)(B)(xiii) (2016) ("To be eligible to receive a grant under this section, a State shall . . . [provide assurance] that[,] in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem . . . shall be appointed to represent the child in such proceeding.").

97. *To Establish a National Center on Child Abuse and Neglect*, Hearing on H.R. 5379, H.R. 10552, and H.R. 10968 *Before the Select Subcomm. On Educ. of the Comm. on Educ. and Labor*, 93rd Cong. 19 (1973) (statement of Brian Fraser).

98. 42 U.S.C. § 5106a(b)(2)(B)(xiii)(I)(II) (2016).

99. NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, ENHANCED RESOURCE GUIDELINES 46 (2016), <https://bit.ly/2UWRRx4> [<https://perma.cc/T96G-57PH>].

100. 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2016).

101. KELLY & AMBROSE, *supra* note 3, at 48 (summarizing a survey of state laws governing representation of children in child welfare cases and concluding that 61% of states require children to be represented by an attorney); see *generally* REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT PROCEEDINGS, *supra* note 9 (presenting an overview of representation statutes in all 50 states).

102. KELLY & AMBROSE, *supra* note 3, at 47 (describing the various forms that a child's representative can take, including GALs that are lawyers, GALs that are non-lawyers, and attorneys tasked with representing the child's "position and interests"); Atwood, *supra* note 92, at 193 (noting a "lack of uniformity . . . with respect to the professional role of children's representatives").

103. NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES 5 (2001).



tions as an officer of the court and is not bound by the wishes of the child.<sup>104</sup> The attorney is required to determine the outcome that is in the child's best interest and may substitute his or her own judgment when making recommendations to the court.<sup>105</sup> Recognizing the "unique vulnerability" of children who are subject to dependency hearings, particularly in cases that culminate in TPR proceedings, proponents of the best interests model view the attorney as a protector of and decision-maker for the child.<sup>106</sup>

## 2. *The "Legal Interests" Model*

Unlike the attorney's role in a best interest model, the attorney in a legal interest model functions in the role of a traditional attorney and owes a duty of loyalty and confidentiality solely to the child client.<sup>107</sup> The legal interest model critiques and abandons the "paternalistic" approach of the best interest model and operates out of an understanding that the child's perspectives and desires are valuable and should not be overpowered by the attorney's own opinions.<sup>108</sup> Also described as a "client-directed"<sup>109</sup> or "stated-interest"<sup>110</sup> model, the legal interest model requires attorneys to "advocate for the [child's] expressed preferences and positions."<sup>111</sup>

In a 1996 resolution, the American Bar Association published standards for child welfare legal representation ("ABA Attorney Standards").<sup>112</sup> The ABA Attorney Standards endorse a predomi-

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104. ABA ATTORNEY STANDARDS, *supra* note 10, at 3; Alberto Bernabe, *The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians*, 43 LOY. U. CHI. L. J. 833, 836 (2012); NATIONAL REPORT CARD, *supra* note 9, at 11.

105. Bernabe, *supra* note 104, at 836.

106. Atwood, *supra* note 92, at 190; see also ALA. CODE § 12-15-304 (2018) as an example of a best-interest model of representation. The statute provides, "[i]n all dependency and termination of parental rights proceedings, the juvenile court shall appoint a guardian ad litem for a child who is a party to the proceedings and whose primary responsibility shall be to protect the best interests of the child." *Id.*

107. NATIONAL REPORT CARD, *supra* note 9, at 11; KELLY & AMBROSE, *supra* note 3, at 48.

108. Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L. Q. 287, 292 (1983).

109. DONALD N. DUQUETTE, CHILDREN'S JUSTICE 21 (2016).

110. KELLY & AMBROSE, *supra* note 3, at 48.

111. NATIONAL REPORT CARD, *supra* note 9, at 11. See also LA. SUP. CT. R. XXXIII, Part III, Subpart II, Standard 4, for an example of a "legal interest" approach for representation of a child ("Counsel for a child . . . should [d]etermine the client's desires and preferences in a developmentally appropriate and culturally sensitive manner . . . and [a]dvocate for the desires and expressed preferences of the child and follow the child's direction throughout the case in a developmentally appropriate matter.").

112. See generally ABA ATTORNEY STANDARDS, *supra* note 10 (setting forth standards for representation of children in cases of abuse and neglect, specifically including TPR proceedings).

nately legal interest model,<sup>113</sup> calling for a “lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.”<sup>114</sup>

The ABA Attorney Standards recognize that a child involved in abuse and neglect proceedings has “discrete and independent views” and direct the appointed attorney to advance the child’s wishes and opinions by advocating for the child’s articulated position.<sup>115</sup> However, the ABA Attorney Standards also acknowledge the diversity of approaches to child representation that are codified throughout the country and suggest that a traditional legal interest model may be unachievable in exceptional cases.<sup>116</sup> While setting forth clear principles, definitions, and expectations for attorneys who represent children in abuse and neglect proceedings, the ABA standards simultaneously reveal the inherent complexity in representing and giving voice to the country’s most vulnerable children.<sup>117</sup>

### *C. Giving a Voice to Vulnerable Children: Pennsylvania’s TPR Representation Scheme and the Need for Workable Standards*

#### *1. Pennsylvania’s Statute Governing Representation in TPR Proceedings*

Prior to 1980, Pennsylvania’s children lacked a statutory right to counsel during TPR proceedings.<sup>118</sup> On two occasions in the late 1970s, Pennsylvania Supreme Court Justice Mandarino published passionate dissenting opinions reflecting on the significance of the parent-child relationship, illuminating the potentially drastic results

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113. *Id.* at 1 (“These standards . . . take the position that although a lawyer may accept appointment in the dual capacity of a ‘lawyer/guardian ad litem,’ the lawyer’s primary duty must still be focused on the protection of the legal rights of the child client.”).

114. *Id.* at 2.

115. *Id.*

116. *Id.* at 2–3.

117. *See id.* at 2–4 (setting forth the basic obligations of attorneys who represent children in child welfare proceedings and describing aspects of the client-attorney relationship that are unique to representing children, including a child’s susceptibility to manipulation and intimidation, the need for developmentally appropriate communication, and the potential benefit of utilizing interdisciplinary support from professionals like social workers throughout the representation).

118. *In re Adoption of N.A.G.*, 471 A.2d 871, 875 n.2 (Pa. Super. Ct. 1984) (“Prior to the passage of the Adoption Act in 1980, the appointment of counsel for children who were the subject of involuntary termination proceedings was unnecessary as long as the parties and the trial court provided for their best interests.”).

of the TPR process and critiquing the absence of a statutory right to counsel for children involved in TPR proceedings.<sup>119</sup> Justice Mandarino underlined the unrealistic presumption that “somehow all of the child’s interests [will] be advanced” without a statutorily-mandated right to counsel.<sup>120</sup> Emphasizing the “serious injustice” of denying a child legal representation, Justice Mandarino noted that, “[w]hen parental rights are being terminated, so too are the rights of the child.”<sup>121</sup>

Seemingly in response to Justice Mandarino’s arguments,<sup>122</sup> the Pennsylvania General Assembly enacted 23 PA. CONST. STAT. § 2313(a),<sup>123</sup> setting forth a mandatory requirement for courts to appoint legal counsel for children involved in contested TPR proceedings.<sup>124</sup> During the process of enacting Section 2313(a), Pennsylvania legislators debated the logistics of the representation mandate, particularly in cases involving young or preverbal children.<sup>125</sup> One representative proposed an amendment to strike Section 2313(a)’s mandatory language, arguing that the representation requirement would result in unnecessary costs and expenses while complicating the dynamics of TPR proceedings.<sup>126</sup> However, after further debate, during which a proponent of Section 2313(a) emphasized the significance of the TPR process, the General Assembly passed Section 2313(a) with its current mandatory language.<sup>127</sup>

After the General Assembly enacted Section 2313(a), the Pennsylvania Supreme Court interpreted the statute as a means of ensuring that children’s needs and interests are “advanced actively

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119. *In re Kapcsos*, 360 A.2d 174, 180 (Pa. 1976) (Mandarino, J., dissenting); *In re Thomas*, 399 A.2d 1063, 1064 (Pa. 1979) (Mandarino, J., dissenting).

120. *Thomas*, 399 A.2d at 1064.

121. *Id.*

122. *Adoption of N.A.G.*, 417 A.2d at 875 n.2 (asserting that Section 2313(a)’s “statutory requirement that counsel be appointed appears to have been the legislature’s response” to Justice Mandarino’s dissenting opinions).

123. Adoption Act of 1980, P.L. No. 163, § 1 (1980) (codified at 23 PA. CONST. STAT. § 2313(a) (2014)).

124. *Id.*

125. LEGIS. JOURNAL, H.R. 164-48, 1st Sess., at 1582–83 (Pa. June 16, 1980).

126. LEGIS. JOURNAL, H.R. 164-48, 1st Sess., at 1582 (Pa. June 16, 1980) (statement of Rep. Dorr) (presenting an amendment to strike the mandatory representation provision of Section 2313(a) because “in most cases these children are infants” whose “interests are protected by the law in that the court is required . . . to do what is best for the child”).

127. LEGIS. JOURNAL, H.R. 164-48, 1st Sess., at 1582 (Pa. June 16, 1980) (statement of Rep. Schweder) (opposing the amendment to strike Section 2313(a)’s mandatory representation provision and explaining that the termination of the rights of a child’s parent is “the most important decision that faces [the child] certainly for the rest of [the child’s] life”).

by an advocate whose loyalty [is] owed exclusively to them.”<sup>128</sup> Additionally, the court affirmed the mandatory nature of Section 2313(a)'s representation provision, establishing that a court's failure to appoint counsel for children pursuant to Section 2313(a) is a reversible error.<sup>129</sup>

## 2. *The Statute Applied: Section 2313(a)'s Mandate as a Source of Instability in Pennsylvania's TPR Process*

Though Section 2313(a)'s representation provisions are mandatory, Pennsylvania's courts have struggled to develop a conclusive and consistent understanding of the role that a child's Section 2313(a) attorney must play.<sup>130</sup> In March 2017, the Pennsylvania Supreme Court published its *In re L.B.M.* opinion,<sup>131</sup> which analyzed the proper role of Section 2313(a) counsel.<sup>132</sup> The court began its inquiry by pointing to the two categories of children's interests that are recognized in the legal field: the child's legal interest, which is the child's own preferred outcome; and the child's best interest, which is determined by the court throughout the dependency and TPR process.<sup>133</sup> After parsing Section 2313(a)'s representation provision, a majority of the court concluded that the statute's mandate is unambiguous and that the General Assembly's use of the term “counsel” requires a lawyer who represents the child's legal interests and who is directed by the child.<sup>134</sup> Throughout its decision, the court emphasized the General

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128. *In re Adoption of N.A.G.*, 417 A.2d 871, 874 (Pa. Super. Ct. 1984).

129. *In re E.F.H.*, 751 A.2d 1186, 1189–90 (Pa. 2000) (reviewing Section 2313(a)'s directive that “the court ‘shall’ appoint . . . counsel,” concluding that such language is mandatory, and holding that failure to appoint counsel pursuant to Section 2313(a) is a “reversible error of law”).

130. Compare *In re K.M.*, 53 A.3d 781 (Pa. Super. Ct. 2012), with *In re Adoption of L.B.M.*, 161 A.3d 172 (Pa. 2017), and *In re T.S.*, 192 A.3d 1080 (Pa. 2018). In *K.M.*, the Pennsylvania Superior Court determined that Section 2313(a)'s provisions are ambiguous regarding whether an attorney-GAL can serve as a child's legal counsel pursuant to Section 2313(a). *K.M.*, 53 A.3d at 787. In contrast, the *L.B.M.* court concluded that Section 2313(a) was unambiguous in its mandate for client-centered legal representation and that failure to appoint legal counsel was reversible error. *Adoption of L.B.M.*, 161 A.3d at 180. However, *L.B.M.* was a fractured plurality decision in which the court failed to clarify the process of how a trial court should appoint Section 2313(a) counsel and whether an attorney-GAL could fill the role. *Id.* at 181, 184, 188, 193. Finally, the *T.S.* court concluded that, “where there is a conflict between the child's legal interests and his best interest,” Section 2313(a) requires the court to appoint separate counsel to represent each interest. *T.S.*, 192 A.3d at 1082.

131. *In re Adoption of L.B.M.*, 161 A.3d 172 (Pa. 2017).

132. *Id.* at 174.

133. *Id.* at 174–75.

134. *Id.* at 179–80.

Assembly's intent to protect a child's interests by enacting Section 2313(a), which "codified a process that affords a full and fair opportunity for all of the affected parties to be heard and to participate in a TPR proceeding."<sup>135</sup>

Importantly, though the *L.B.M.* court issued a majority opinion regarding Section 2313(a)'s mandatory requirement for legal counsel, the court was significantly divided about whether a single attorney-guardian *ad litem* ("attorney-GAL") could simultaneously represent a child's best and legal interests.<sup>136</sup> Three justices assertively declared that an attorney-GAL, appointed to represent the child during the dependency process and tasked with representing a child's best interest, could not satisfy Section 2313(a)'s mandate for child-centered legal counsel.<sup>137</sup> However, four justices argued that an attorney-GAL representing both the child's best and legal interests *could* satisfy Section 2313(a)'s mandate, so long as the child's legal interests did not diverge from the outcome that was in the child's best interests.<sup>138</sup>

In the months following the fractured *L.B.M.* decision, the Pennsylvania Superior Court heard at least 75 appeals of involuntary TPR decrees and addressed, among other issues, whether the trial courts had appointed appropriate counsel for the children involved in the TPR proceedings.<sup>139</sup> Between April 2017 and August 2018, the Pennsylvania Superior Court remanded many TPR appeals, concluding that the lower court contravened Section 2313(a) by failing to ensure that counsel adequately represented the child's

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135. *Id.* at 183.

136. *Id.* at 180–82, 184–93.

137. *Id.* at 181.

138. *Id.* at 184 (Saylor, J., concurring) (arguing that the decision to appoint an attorney-GAL to represent both a child's best and legal interests "should be determined on a case-by-case basis, subject to the familiar and well-settled conflict of interest analysis"); *id.* at 185 (Baer, J., dissenting) (concluding that Section 2313(a) "does not mandate the appointment of counsel distinct from" the attorney-GAL "absent a conflict of interest between the child's best interests and legal interests"); *id.* at 192–93 (Mundy, J., dissenting) (arguing that Section 2313(a) does not require appointment of a second attorney "when a GAL attorney already represented the children in accordance with Section 2313(a)").

139. See, e.g., *In re K.L.*, Nos. 140-42 WDA 2018, 2018 WL 3341925, at n.2, 3 (Pa. Super. Ct. 2018); *In re B.G.G.*, No. 3713 EDA 2017, 2018 WL 2111015, at \*2–3 (Pa. Super. Ct. May 8, 2018); *In re Adoption of A.R.H.*, No. 1024 MDA 2017, 2018 WL 1404593, at \*4 (Pa. Super. Ct. Mar. 21, 2018); *In re J.W.*, No. 1385 WDA 2017, 2018 WL 1062687, at \*3 (Pa. Super. Ct. Feb. 27, 2018); *In re N.H.*, No. 73 WDA 2017, 2017 WL 4179728, at \*6 (Pa. Super. Ct. Sep. 21, 2017); *In re J.W.*, No. 389 WDA 2017, 2017 WL 3725277, at \*5–6 (Pa. Super. Ct. Aug. 30, 2017); *In re D.L.B.*, 166 A.3d 322, 329 (Pa. Super. Ct. June 15, 2017); *In re C.P.W.*, Nos. 276–279 WDA 2017, 2017 WL 2116955, at \*12 (Pa. Super. Ct. May 15, 2017).

legal interests.<sup>140</sup> Collectively, these TPR appeals illuminate the inconclusive nature of the *L.B.M.* decision and evidence the confusion and instability faced by lower courts attempting to apply *L.B.M.*'s fractured reasoning to the facts of specific TPR cases.<sup>141</sup>

In August 2018, the Pennsylvania Supreme Court published *In re T.S.*,<sup>142</sup> a second decision interpreting Section 2313(a)'s representation mandate. The court began the opinion by reflecting on *L.B.M.*, clarifying points of consensus from the plurality decision: (1) Section 2313(a) requires the court to appoint legal counsel for children in involuntary TPR proceedings; (2) when there is a conflict between a child's legal and best interests, an attorney-GAL cannot represent both interests; and (3) failure to appoint separate counsel to represent each interest when a child's best interest diverges from their expressed interest constitutes structural error.<sup>143</sup>

In an effort to clarify any lingering ambiguities and to resolve the case at bar, which involved questions about the proper representation of two preverbal children, the *T.S.* court also concluded that, "[a]s a matter of sound logic, there can be no conflict between an attorney's duty to advance a subjective preference on the child's part" when the child is incapable of expressing his or her own desired outcome.<sup>144</sup> In other words, the court held that, in the case of preverbal children, Section 2313(a) does not require a court to appoint a second lawyer to advance the child's "unknowable preference."<sup>145</sup>

In a dissenting opinion, Justice Wecht criticized the majority's reasoning, particularly the presumption against the possibility of

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140. See, e.g., *In re A.A.O.*, Nos. 154–158 EDA 2018, 2018 WL 3490998, at \*2–4 (Pa. Super. Ct. July 20, 2018) (remanding the case because the court was "unable to discern whether counsel adequately considered each Child's individual legal interest, in addition to his or her best interest"); *In re D.M.C.*, 192 A.3d 1207, 1213 (Pa. Super. Ct. July 9, 2018) (remanding the TPR decree based on the inability "to determine from the record whether Children received the benefit of their statutorily-required right to client-directed counsel serving their legal interests"); *In re J.R.L.*, No. 1630 WDA 2017, 2018 WL 2376617, at \*2–3 (Pa. Super. Ct. May 25, 2018) (remanding the trial court's TPR decree for failure to appoint Section 2313(a) counsel); *In re N.S.S.*, No. 1342 MDA 2017, 2018 WL 831827, at \*1 (Pa. Super. Ct. Feb. 13, 2018) (vacating and remanding the TPR decree based on the observation "that the trial court failed to appoint legal counsel to represent Child's legal interests as required" under Section 2313(a)).

141. See *supra* note 138.

142. *In re T.S.*, 192 A.3d 1080 (Pa. 2018), *petition for cert. denied*, T.H.-H. v. Allegheny Cty. Off. of Children, Youth and Families, 139 S. Ct. 1187 (Feb. 19, 2019).

143. *Id.* at 1082.

144. *Id.* at 1090.

145. *Id.*

conflict in cases involving preverbal children.<sup>146</sup> Justice Wecht argued that “[t]he Majority’s approach ensures that any such conflicts will likely be obscured and overlooked, and effectively validates *post hoc* justifications for trial court violations of Section 2313(a)’s commands. At best, today’s Majority has failed to provide adequate guidance for determining whether a conflict in fact exists.”<sup>147</sup> In the four months following *T.S.*, Justice Wecht’s concerns were shown to be well-founded. From August 2018 through December 2018, the Pennsylvania Superior Court remanded over 25 TPR decrees involving children ages 3 through 13 because the trial court failed to determine whether the child’s best and legal interests diverged and, therefore, did not comply with Section 2313(a)’s representation mandate as interpreted by the *T.S.* court.<sup>148</sup>

### III. ANALYSIS

Between March 2017 and the publication of this Comment, the Pennsylvania Superior Court addressed approximately 170 TPR appeals and remanded approximately 40 TPR decrees based on the trial courts’ noncompliance with Section 2313(a).<sup>149</sup> In many of these remands, the Superior Court instructed the trial court to first determine the child’s legal interest, and then, if necessary, to conduct a new TPR hearing with the child’s legal interest represented.<sup>150</sup> Therefore, the inability of courts to effectively and consistently assess children’s best and legal interests and to thereafter appoint appropriate representation has created additional instability in the lives of vulnerable children by prolonging the TPR

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146. *Id.* at 1099–1100.

147. *Id.* at 1101 (Wecht, J., dissenting).

148. *See, e.g., In re A.F.F.*, No. 1164 WDA 2018, 2018 WL 6629164, at \*2 (Pa. Super. Ct. Dec. 19, 2018); *In re A.M.R.*, No. 1367 EDA 2018, 2018 WL 5905934, at \*2–3 (Pa. Super. Ct. Nov. 9, 2018); *In re C.J.L.*, No. 168, 174 EDA 2018, 2018 WL 4922801, at \*6–7 (Pa. Super. Ct. Oct. 10, 2018); *Adoption of M.S.*, No. 305 MDA 2018, 2018 WL 4201781, at \*3–4 (Pa. Super. Ct. Sep. 4, 2018).

149. Data collected from Westlaw’s index of cases citing 23 PA. CONST. STAT. § 2313(a) (2014) by reviewing and tallying citing references from March 2017 through August 2019.

150. *See, e.g., In re P.G.F.*, No. 1464 WDA 2018, 2019 WL 1199986, at \*4 (Pa. Super. Ct. Mar. 14, 2019) (remanding the case as directing the lower court to “ascertain [the] [c]hild’s preferred outcome” and, if necessary, conduct a new termination hearing); *In re Q.R.D.*, No. 1060 MDA 2018, 2018 WL 6735024, at \*4 (Pa. Super. Ct. Dec. 24, 2018). On remand, the Pennsylvania Superior Court instructed the trial court to “determine whether a conflict existed between Child’s best interests and legal interests, if ascertainable.” *Id.* Then, “if a conflict is found to exist, the court shall reappoint legal counsel for the child, as well as a separate GAL, and conduct a new hearing in order to serve the substantive purpose of providing Child with an opportunity to advance his legal interests through his new counsel.” *Id.*

process and complicating efforts to establish permanent placements.<sup>151</sup> Because the Superior Court remanded many TPR decrees after the *T.S.* decision, the presumption that young or preverbal children's best and legal interests cannot diverge is neither a straightforward nor a uniformly-applicable solution.<sup>152</sup>

Collectively, the numerous remanded TPR decrees establish that Section 2313(a)'s representation mandate is ripe for judicial and legislative intervention. Judicial procedures must be effectuated to eliminate the rampant confusion over the role of Section 2313(a) counsel, to clarify TPR court records, and to minimize the likelihood of subsequent remands for lack of compliance with Section 2313(a). The General Assembly must also codify provisions that clarify the responsibilities of Section 2313(a) attorneys in cases involving both preverbal and older children.

#### A. *Clarifying the Role of Section 2313(a) Advocates Through Judicial Procedure*

The Pennsylvania Supreme Court has clarified that Section 2313(a)'s mandate unambiguously requires "the appointment of counsel who serves the child's legal interests" as distinct from an attorney-GAL tasked with representing a child's best interest.<sup>153</sup> While the *T.S.* court minimized the difficulty that may arise when an attorney-GAL serves as a Section 2313(a) attorney,<sup>154</sup> the plethora of remanded TPR decrees supports a careful, cautious, and informed approach to appointing Section 2313(a) counsel.<sup>155</sup>

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151. See *T.S.*, 192 A.3d at 1104 (Wecht, J., dissenting) (recognizing the tension between "delivering permanency . . . without undue delay" and the duty of the courts not to "overlook . . . the right to counsel that the General Assembly has bestowed" to children involved in contested TPR proceedings); see also MICHAEL E. LAMB, ET. AL., *Children and the Law*, in HANDBOOK OF CHILD PSYCHOLOGY AND DEVELOPMENTAL SCIENCE, vol. 3, at 496 (7th ed., 2015) (discussing the importance of developing child welfare interventions designed to minimize disruption to the attachment a child shares with his or her parent or caregiver).

152. See *supra* note 145 and accompanying text.

153. *In re Adoption of L.B.M.*, 161 A.3d 172, 180 (Pa. 2017).

154. *T.S.*, 192 A.3d at 1100 (Wecht, J., dissenting) (arguing that "[t]he Majority's desire to foster 'continuity of representation'" by allowing the attorney-GAL from the dependency stage to serve as the child's Section 2313(a) attorney "does not ameliorate" the "'two-hat' problem" arising from such dual representation).

155. *In re Adoption of T.M.L.M.*, 184 A.3d 585, 588 (Pa. Super. Ct. 2018). A three-judge panel determined that the court "must raise the failure to appoint statutorily-required counsel for children *sua sponte*, as children are unable to raise the issue on their own behalf due to their minority." *Id.* In September 2019, the Superior Court overruled *T.M.L.M.*, holding that "the Superior Court only has the authority to raise *sua sponte* the issue of whether the lower court appointed *any* counsel for the child, and not the authority to delve into the quality of the representation." *In re Adoption of K.M.G.*, Nos. 580–583 WDA 2018, 2019 WL



The plurality in *L.B.M.* strongly cautioned against appointing a dependency attorney-GAL as a Section 2313(a) attorney.<sup>156</sup> The court highlighted the nuanced yet vital differences between the roles each advocate plays and warned of the confusion that may arise from appointing an attorney-GAL as a Section 2313(a) attorney.<sup>157</sup> In many of the opinions that resulted in remanded TPR decrees, the Superior Court critiqued attorneys who previously served in a GAL role during dependency proceedings but had transitioned to the role of Section 2313(a) counsel in the TPR process for their failure “to clearly convey [the child’s] preferred outcome, focusing instead on [the child’s] best interests.”<sup>158</sup>

To avoid future instability in the TPR process, the child’s Section 2313(a) attorney must fulfill the role of traditional legal counsel by focusing on ascertaining the child’s legal interest or preferred outcome.<sup>159</sup> Therefore, if a child’s dependency attorney-GAL subsequently serves as the child’s Section 2313(a) attorney during TPR proceedings, the attorney must decisively shift his or her focus; because an attorney-GAL is ultimately a best interest attorney, the attorney must make it clear to his or her client that, as the child’s Section 2313(a) attorney, the attorney’s role has changed.<sup>160</sup> As le-

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4392506, at \*2 (Pa. Super. Ct. Sept. 13, 2019). The Superior Court suggested that it does not need to raise the issue *sua sponte* because of “numerous protections [that] exist to ensure that the GAL does not have a conflict at an involuntary termination hearing,” including the GAL’s professional responsibility obligation to alert the court of a conflict. *Id.* at \*4. However, the sheer number of remanded cases based on noncompliance with Section 2313(a) may indicate that these alleged “protections” are insufficient. *See, e.g., supra* note 140. Although the K.M.G. decision may reduce the number of remanded cases and quell the signs of instability highlighted herein, Pennsylvania’s children are now more at risk for losing their statutorily-mandated right to counsel, which is arguably more problematic than the plethora of remands caused by *sua sponte* review. Thus, trial courts must develop standards and procedures to protect children’s rights under Section 2313(a). *See infra* Part III.A.

156. *Adoption of L.B.M.*, 161 A.3d at 181.

157. *Id.*

158. *In re J.L.*, No. 82 MDA 2018, 2018 WL 4519848, at \*3 (Pa. Super. Ct. Sep. 21, 2018); *see also, e.g., In re C.M.*, No. 1900 WDA 2017, 2018 WL 6004782, at \*3 (Pa. Super. Ct. Nov. 15, 2018) (remanding the TPR decree after the appointed Section 2313(a) attorney “declined to inquire about [the child’s] preference” and “unilaterally pursued” what the attorney “deemed to be [the child’s] best interests”).

159. *See Adoption of L.B.M.*, 161 A.3d at 180 (emphasizing the difference between the role of an attorney-GAL and legal counsel).

160. *See* Emily Buss, “You’re My What?” *The Problem of Children’s Misperceptions of Their Lawyers’ Roles*, 64 *FORDHAM L. REV.* 1699, 1712 (1996) (explaining that, “[u]nless the child client understands that his lawyer will zealously advocate his positions, he will have no incentive to invest the time in client-lawyer consultations necessary for good, informed decision making, let alone the incentive to turn to his lawyer for advice, including advice involving confidential matters”).

gal counsel, the child's Section 2313(a) attorney's role is to provide child-centered, child-directed advocacy.<sup>161</sup>

While the Pennsylvania Supreme Court has established that a complete prohibition against an attorney-GAL serving as Section 2313(a) counsel is too restrictive, the *T.S.* approach is arguably also inadequate in its absence of workable standards.<sup>162</sup> Pennsylvania trial courts should adopt procedures focused on clarifying the role of a child's Section 2313(a) attorney and developing a record of both the attorney's role and the child's best and legal interests. The following procedure provides an approach that effectuates the purpose and plain meaning of Section 2313(a).

Immediately after a TPR petition is filed and the child's parents contest the termination,<sup>163</sup> the trial court should schedule a hearing ("Representation Hearing") to appoint a Section 2313(a) attorney.<sup>164</sup> If an attorney-GAL represented the child during the dependency process, the court should require that attorney to file a brief detailing the attorney's understanding of the role of a Section 2313(a) legal advocate,<sup>165</sup> the steps that the attorney has taken to determine the child's legal interest,<sup>166</sup> and a description of the child's preferred outcome.<sup>167</sup> Additionally, the brief should assert

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161. ABA ATTORNEY STANDARDS, *supra* note 10, at 2.

162. *See T.S.*, 192 A.3d at 1101 (Wecht, J., dissenting).

163. *See* MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS, § 3(a) (AM. BAR ASSOCIATION 2011), <https://bit.ly/37eqz15> [<https://perma.cc/6X63-YGAC>] [hereinafter MODEL ACT GOVERNING REPRESENTATION] ("The appointment of a child's lawyer must be made as soon as practicable to ensure effective representation of the child . . .").

164. *In re T.S.*, 192 A.3d 1080, 1103 (Pa. 2018) (Wecht, J., dissenting) (explaining that "it is the trial court's duty to determine, following argument and likely following [a] hearing, whether the attorney-GAL can continue as legal counsel or whether a new attorney must be appointed"). This procedure is particularly important in light of the court's recent decision in *In re Adoption of K.M.G.* *In re Adoption of K.M.G.*, Nos. 580–583 WDA 2018, 2019 WL 4392506, at \*4 (Pa. Super. Ct. Sept. 13, 2019). *See supra* note 153 and accompanying text.

165. *In re A.F.*, Nos. 589–592 WDA 2018, 2018 WL 4404354, at \*9 (Pa. Super. Ct. Sep. 17, 2018) (Strassburger, J., concurring) ("I use this opportunity to point out that it is best practice for attorneys . . . to place on the record a brief explanation of . . . the capacity in which the attorney represents the child, and whether the attorney is advocating for a child's preferred outcome, best interests, or both.").

166. ABA ATTORNEY STANDARDS, *supra* note 10, at 4 (requiring the use of developmentally appropriate interviewing techniques).

167. *See, e.g., In re A.D.*, No. 1183 MDA 2018, 2018 WL 6259207, at \*4 (Pa. Super. Ct. Nov. 30, 2018) (noting that "[t]he record is silent as to whether [the attorney] ascertained the preferred outcome of [the child]" and that the attorney "failed to file a brief . . . or join the brief of another party"); *In re J.M.H.*, Nos. 1925, 1930, 1931 EDA 2018, 2018 WL 6521064, at \*4 (Pa. Super. Ct. Dec. 12, 2018) (explaining that the Section 2313(a) attorney was present at the hearing but failed

whether the attorney believes the child's best interest diverges from the child's preferred outcome—e.g., if the child's preferred outcome is likely to put the child at risk of danger or harm such that the court should appoint a separate attorney-GAL to represent the child's best interest.<sup>168</sup>

During the Representation Hearing, the court should review with the attorney the expectations of a Section 2313(a) attorney by clarifying that the required role of a Section 2313(a) attorney is a client-centered advocate rather than a best interest GAL.<sup>169</sup> Ultimately, the information presented during the Representation Hearing should allow the court to determine whether the attorney-GAL can successfully serve as the child's Section 2313(a) attorney or whether the child's legal interests must be represented by a newly-appointed, child-centered attorney.<sup>170</sup>

The court should take special care to clarify the role of counsel if the client is very young or preverbal.<sup>171</sup> As part of the Representation Hearing, the court should make an on-the-record inquiry into the child's capacity to express a legal interest or preferred outcome,<sup>172</sup> ensuring that the attorney's brief outlines the developmentally-appropriate steps taken to determine the child's legal interest or inability to express a preferred outcome. Additionally, the court should reiterate the protracted nature of the TPR process, inform-

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to argue the child's preferred outcome, failed to indicate whether the attorney had ascertained the preferred outcome, and failed to file a brief).

168. ABA ATTORNEY STANDARDS, *supra* note 10, at 8.

169. *T.S.*, 192 A.3d at 1103 (Wecht, J., dissenting) (“Following argument (and, preferably, hearing) on the conflict inquiry, the trial court must ensure that the child’s right to counsel is protected and must remind all involved that, if the attorney-GAL is permitted to serve as the Section 2313(a) legal counsel, her role has changed from representing best interests to representing legal interests.”).

170. *See In re L.B.M.*, 161 A.3d 172, 180 (Pa. 2017) (explaining that, “when a child’s relationship with his or her birth family could be severed permanently and against the wishes of the parents, the legislature made the policy judgement . . . that a lawyer who represents the child’s legal interests, and who is directed by the child, is a necessity”); *see also* DUQUETTE, *supra* note 109, at 2–3 (arguing that, because the “American legal system is based on the premise that parties have a due process right to be heard and that competing independent advocacy produces just results in each case,” competent representation is “crucial for the child” to allow the judge to make informed decisions about the child’s future).

171. *See T.S.*, 192 A.3d at 1102 (Wecht, J., dissenting) (rejecting a “bright line” approach and suggesting that “[t]he trial court, which can observe the children closely and hear testimony about their particular abilities and circumstances, must do so”).

172. *In re A.F.*, Nos. 589–592 WDA 2018, 2018 WL 4404354, at \*9 (Pa. Super. Ct. Sep. 17, 2018) (Strassburger, J., concurring) (“The child has a statutory right to client-directed counsel who must advocate solely for the child’s preferred outcome . . . [t]hus, it is important that the record is clear as to what position the attorney is advancing.”).

ing the child's Section 2313(a) attorney of the need to regularly revisit the child's ability to express a legal interest or preferred outcome.<sup>173</sup>

### B. Legislating a Presumption of Capacity

Though the *T.S.* court held that a young or preverbal child cannot have a legal interest separate from the child's best interest,<sup>174</sup> this presumption is arguably oversimplified<sup>175</sup> and contravenes the plain meaning of Section 2313(a).<sup>176</sup>

Importantly, the Pennsylvania Supreme Court has established neither a bright-line age at which a court may presume that a child has the ability to profess a preferred outcome nor a definition of "preverbal" to guide trial courts.<sup>177</sup> Several of the cases in which the Pennsylvania Superior Court remanded TPR decrees for lack of compliance with Section 2313(a) involve children as young as four-years-old, suggesting that even very young children may possess the

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173. See *In re Adoption of L.L.*, Nos. 1882–1883 MDA 2017, 2018 WL 6288167, at \*4 (Pa. Super. Ct. Dec. 3, 2018) (noting that a child involved in the TPR proceedings had aged while the TPR appeal was pending and, consequently, directing the trial court to determine whether the child's "legal interests diverge from her best interests" on remand); see also ABA ATTORNEY STANDARDS, *supra* note 10, at 6 (rejecting the idea that "children of certain ages . . . lack capacity to determine their position in litigation" and advocating instead for a recognition that a child's disability is "contextual, incremental, and may be intermittent"); see also Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing To Do*, 27 PACE L. REV. 869, 913 (2007) (stating that "capacity is an evolving process and is contextual").

174. *T.S.*, 192 A.3d at 1090.

175. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000). In *Troxel*, Justice Stevens issued a dissenting opinion, remarking that, while the Supreme Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds . . . it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.

*Id.* at 88 (Stevens, J., dissenting). The *T.S.* presumption is arguably directly contrary to this proposition. See *T.S.*, 192 A.3d at 1092. Justice Wecht's dissent in *T.S.* reflects calls for a more nuanced approach, stating "I do not support a presumption that a pre-verbal child's legal interests always dovetail with the child's best interests . . . . Nor do I support a presumption that a pre-verbal child's legal interests always equate with preservation of the putative familial bond." *Id.* at 1101 (Wecht, J., dissenting).

176. See *In re Adoption of L.B.M.*, 161 A.3d 172, 179–80 (Pa. 2017).

177. *In re Adoption of L.L.*, Nos. 1882–1883 MDA 2017, 2018 WL 6288167, at \*2 (Pa. Super. Ct. Dec. 3, 2018) (explaining that the question of "how young is too young . . . is a "question this Court has grappled with" since the court's decision in *L.B.M.*). Though the *L.L.* Court characterized the *T.S.* presumption as a means of bringing the "line of demarcation into focus," arguably the concepts of "young" and "preverbal" are also exceptionally vague and variable. *Id.*

ability to express a preferred outcome.<sup>178</sup> A presumption that effectively negates 2313(a)'s legal representation requirement is, therefore, inadequate to address the complexity of child competency and will result in additional remanded TPR decrees or deprivation of statutorily-protected legal representation.<sup>179</sup> This subsection outlines an alternative approach, proposing that a nuanced, client-specific procedure for determining a child's ability to express a preferred outcome would allow for increased efficiency in the TPR process.

To effectuate the purpose and plain meaning of Section 2313(a),<sup>180</sup> the General Assembly should clearly delineate the responsibilities of a Section 2313(a) attorney by amending the current Juvenile Court rules<sup>181</sup> to set forth the duties of a Section 2313(a) attorney. The General Assembly should enact representation standards that call for an approach consistent with Pennsylvania's Rule of Professional Conduct 1.14,<sup>182</sup> which requires an attorney to begin each representation with a presumption of client capacity, maintaining a normal client-lawyer relationship as far as reasonably possible.<sup>183</sup> While determining a child's capacity to direct counsel is often difficult,<sup>184</sup> Section 2313(a)'s mandate for traditional legal

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178. See, e.g., *In re J.M.H.*, Nos. 1925, 1930, 1931 EDA 2018, 2018 WL 6521064, at \*4 (Pa. Super. Ct. Dec. 12, 2018) (remanding a TPR decree terminating the rights of a parent of a four-year-old child because the child had no indications of being nonverbal and yet the record did not state the child's preferred outcome).

179. See LAMB, *supra* note 151, at 464 (defining "children" as inclusive of "infants, toddlers, preschoolers, school-aged children, youth, and adolescents" and explaining that "[t]ogether, they are characterized by an extremely diverse and broad array of emerging cognitive, social, and emotional abilities," a fact which "complicates researchers' understandings of children's involvement, participation, and understanding of their roles in legal contexts").

180. See *In re Adoption of L.B.M.*, 161 A.3d 172, 179–80 (Pa. 2017) (explaining that "the recognized purpose of [Section 2313(a)] is to ensure that the needs and welfare of the children involved are actively advanced" and holding that the statute clearly and unambiguously "requires the appointment of counsel who serves the child's legal interests").

181. See PA. R.J.C.P. 1154. Rule 1154 sets forth detailed expectations and responsibilities of a GAL only. *Id.* The General Assembly should add a rule governing the role and responsibilities of Section 2313(a) attorneys.

182. PA. R. PROF'L CONDUCT 1.14, *Client with Diminished Capacity* (2018).

183. PA. R. PROF'L CONDUCT 1.14(a); Elrod, *supra* note 173, at 912–14 ("To ensure the child's voice is heard, we need to reverse the presumption of incapacity and start with a presumption of capacity.").

184. See Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interest Lawyering or No Lawyering at All?*, 53 ARIZ. L. REV. 381, 408–10 (2011) (describing the "protracted process" of child development and explaining that "[l]egal representation of a child—an individual who is in a state of becoming—is challenging precisely because of the fluid nature of children's identities"); see also DUQUETTE, *supra* note 109, at 59 ("The question of competency and

representation requires an individualized, client-specific review of each child's ability to express a legal interest or preferred outcome.<sup>185</sup> Therefore, Rule 1.14(a)'s direction for attorneys to attempt to maintain a normal client-lawyer relationship despite a client's young age is an appropriate guidepost for the Pennsylvania courts and General Assembly.<sup>186</sup>

The Comment to Rule 1.14 sets forth a nuanced, case-by-case framework through which an attorney must carefully ascertain the child client's ability to comprehend, process, and reflect on the TPR proceeding.<sup>187</sup> The ABA Attorney Standards build upon this framework, explaining the attorney's duty to "learn how to ask developmentally appropriate questions and how to interpret the child's responses."<sup>188</sup> Pennsylvania's General Assembly should enact legislation and court rules that require Section 2313(a) attorneys to demonstrate that, at a bare minimum, the attorney attempted to discern the child client's position and follow the child's direction.<sup>189</sup>

### C. Utilizing the Legal Interest Model for Preverbal Children

The ABA Attorney Standards acknowledge the unique challenge of representing preverbal children, a task which strains the contours of a normal client-attorney relationship.<sup>190</sup> Despite this challenge, Pennsylvania's General Assembly should demand a model of representation for preverbal children that most closely ap-

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maturity is an evolving and elusive judgment that . . . psychologists have a difficult time making.").

185. See *In re A.F.F.*, No. 1164 WDA 2018, 2018 WL 6629164, at \*2 (Pa. Super. Ct. Dec. 19, 2018) (calling for direct interviews with child clients to ascertain preferred outcomes); *In re T.S.*, 192 A.3d 1080, 1096 (Pa. 2018) (Donohue, J., concurring and dissenting) (explaining that "[children] unquestionably ha[ve] an interest in the outcome of a termination decision, as it dictates . . . whether the parent/child relationship will remain intact" and that the Pennsylvania General Assembly "recognized [the child's] . . . protectable legal interest" by requiring the court to appoint legal representation for the child).

186. PA. R. PROF'L CONDUCT 1.14(a) ("When a client's capacity to make adequately considered decisions . . . is diminished . . . because of minority . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.").

187. PA. R. PROF'L CONDUCT 1.14(a), cmt. 1.

188. ABA ATTORNEY STANDARDS, *supra* note 10, at 3–4.

189. *In re Adoption of T.M.L.M.*, 184 A.3d 585, 590 (Pa. 2018), *overruled on other grounds by In re Adoption of K.M.G.*, Nos. 580–583 WDA 2018, 2019 WL 4392506, at \*4 (Pa. Super. Ct. Sept. 13, 2019); Elrod, *supra* note 173, at 915 (noting that ABA standards "require that the lawyer must meet and get to know the child" and recommending that "the lawyer knows as much as possible about the child client, the child's developmental stage, the child's family, the child's activities and interests, and the child's needs").

190. ABA ATTORNEY STANDARDS, *supra* note 10, at 3–4.

proximates a traditional client-attorney relationship.<sup>191</sup> While the *T.S.* majority opinion presents a compelling and logical argument that Section 2313(a) does not require an attorney to advance a preverbal child's "unknowable preference,"<sup>192</sup> the choice to resort to best interest advocacy is arguably unnecessary.<sup>193</sup> Importantly, the best interest model has come under increasing scrutiny because of its endorsement of "substituted judgment" by lawyers, the concept of removing from the judge the power to determine the outcome that is in a child's best interest and placing it instead with legal advocates who may lack expertise in child development and complex child welfare issues.<sup>194</sup>

Though a best interest model may initially appear to be the most natural alternative to a traditional legal interest model, the ABA Standards presents a third approach: the Legal Interest Model.<sup>195</sup> The Legal Interest Model recognizes that, even if a child is unable or unwilling to express a preference about particular issues in the case, the child nonetheless has a variety of legal and procedural rights throughout the TPR process.<sup>196</sup> Instead of developing solely a best interest theory, the preverbal child's attorney is tasked with pressing for all of the legal and statutory rights available to the child.<sup>197</sup>

In addition to aligning with Section 2313(a)'s intent to provide legal counsel to all children involved in contested TPR proceedings, the Legal Interest Model also squares with Pennsylvania's Rule of Professional Conduct 1.14(b).<sup>198</sup> Rule 1.14(b) requires legal counsel to remain in a traditional attorney role but allows the attorney to take protective action when working with a very young client

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191. See *In re Adoption of L.B.M.*, 161 A.3d 172, 179–80 (Pa. 2017); *In re Adoption of N.A.G.*, 471 A.2d 871, 874 (Pa. Super. Ct. 1984).

192. *In re T.S.*, 192 A.3d 1080, 1090 (Pa. 2018).

193. See Kelly and LeVezu, *supra* note 11, at 414 (recognizing that the inability of very young children "to verbalize their needs makes them particularly vulnerable" but that such vulnerability does "not necessitate the granting of the extreme power that is currently bestowed on best-interest attorneys").

194. *Id.* at 392; DUQUETTE, *supra* note 109, at 20 (outlining criticisms of the best interest model, particularly that "attorneys lack expertise required to adequately determine children's interests, because legal training does not prepare a person to make the nuanced judgments the determination requires").

195. See ABA ATTORNEY STANDARDS, *supra* note 10, at 8 (setting forth the concept that, "[t]o the extent that a child does not or will not express a preference about particular issues, the child's attorney should determine and advocate the child's legal interests"); see also Kelly and LeVezu, *supra* note 11, at 392 (discussing the ABA's Legal Interest model as "a third model of representation, that of advancing only the child's 'legal interests'").

196. Kelly and LeVezu, *supra* note 11, at 383.

197. *Id.* at 386.

198. PA. R. PROF'L CONDUCT 1.14(b).

who is at risk of substantial physical or other harm, including by seeking appointment of a GAL.<sup>199</sup> When used in conjunction with Rule 1.14(b), the Legal Interest Model simultaneously prohibits attorneys from substituting “their own judgment for that of the client,”<sup>200</sup> while allowing the attorney to involve additional services or representatives to ensure that the child receives adequate protection.<sup>201</sup>

Therefore, the General Assembly should require Section 2313(a) attorneys to advocate for the legal and procedural rights available to children throughout the TPR process.<sup>202</sup> Additionally, the General Assembly should outline the dynamics and obligations of the Legal Interest Model, including the ability of the Section 2313(a) attorney to petition the court for appointment of a GAL pursuant to Model Rule 1.14(b).

#### IV. CONCLUSION

The involuntary TPR process can be fraught with trauma, pain, and vulnerability.<sup>203</sup> In addition to facing permanent separation from their biological parents, children involved in the TPR process must also wade through protracted and often complex court proceedings.<sup>204</sup> Consequently, Pennsylvania's General Assembly has unambiguously codified a child's right to be heard and represented throughout the TPR process.<sup>205</sup> However, the current instability surrounding the application of Section 2313(a) effectively deprives children of this statutory right and increases their experience of instability.<sup>206</sup>

The General Assembly must, therefore, intervene by enacting legislative guidance.<sup>207</sup> This legislation must acknowledge the

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199. *Id.*

200. Kelly and LeVezu, *supra* note 11, at 421–22.

201. *See* PA. R. PROF'L CONDUCT 1.14(b).

202. Kelly and LeVezu, *supra* note 11, at 386 (listing examples of legal and procedural rights available to children involved in child welfare proceedings, including “rights to services, to visits by caseworkers, and to placement preferences that favor family”).

203. *See* Brief of Juvenile Law Cntr. et al. as Amici Curiae Supporting Appellant, *In re Adoption of L.B.M.*, 161 A.3d 172 (Pa. 2017) (Nos. 84 & 85 MAP 2016), at \*15 (depicting the severity of the TRP process and outlining the associated traumas and losses for the child, including the loss of the parent-child relationship, the loss of the legal relationship to the child's extended family members, and the “risk of substitute care without a . . . permanent adoptive family”).

204. *See supra* Part II.A.2.

205. *See supra* Part II.C.1.

206. *See supra* Parts II.C.2. and III.A.

207. *See supra* Part III.



range of children's developmental stages,<sup>208</sup> provide a procedural framework for courts to use when appointing Section 2313(a) advocates,<sup>209</sup> and create standards for advocates to follow throughout the representation process.<sup>210</sup> Though the representation of children undoubtedly presents unique challenges, the General Assembly must amend Section 2313(a) so that courts and advocates can use its representation provision to effectively give voice to one of Pennsylvania's most vulnerable populations.<sup>211</sup>

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208. *See supra* Parts III.B. and III.C.

209. *See supra* Part III.

210. *See supra* Part III.A.

211. *See supra* Part II.C.