Empty Promises? How State Procedural Rules Block LGBT Minors from Vindicating Their Substantive Rights

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Introduction

LESBIAN, GAY, BISEXUAL, AND transgender ("LGBT") adolescents occupy a unique position in the American legal landscape. They are disproportionately at risk of harm when they go through the normal adolescent process of trying on identities, finding out who they are, and proclaiming their identities to their peers. For instance, consider the case of Jamie Nabozny. For four years, Nabozny suffered homophobic verbal and physical harassment from students at his public high school in Ashland, Wisconsin. These students pretended to rape him, urinated on him, and kicked him so many times he needed stomach surgery. When Nabozny reported the harassment to school officials, they told him he should expect it for being gay. Nabozny eventually attempted suicide and dropped out of school.

Sadly, Nabozny's story is not unique. A large number of minors face harassment every day, and many suffer in silence. Because minors currently lack a clear legal right of access to courts—one that does not involve the minor's parents—minors brave enough to en-

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1. See infra Part I.A–C (disusing adolescent process).
2. See Nabozny v. Poldesny, 92 F.3d 446, 449 (7th Cir. 1996).
3. See id. at 451–52.
4. Id.
5. Id. at 452.
6. See infra Part I.
force their rights face huge obstacles. If a minor is being harassed or wants to challenge a legal policy, but does not want her parents to know her sexuality, she essentially has no options. This Article argues that state legislatures should amend their procedural rules by giving minors explicit rights to petition for the appointment of guardians ad litem\(^7\) in situations where they need to exercise their legal rights. For example, Jamie Nabozny's story has a semi-happy ending. Because his parents were supportive of his lawsuit, Nabozny was able to sue his former school.\(^8\) This suit led to the first ever finding that a public school could be held liable for failing to stop anti-gay abuse (the case ultimately settled for approximately one million dollars).\(^9\) It also sent a message to other schools that they, too, could be held liable for permitting the harassment of gay students.

This case illustrates the importance of access to courts. Nabozny was able to go to court because he told his parents about his sexual orientation and his parents supported his lawsuit. But many minors wishing to keep their sexual orientation from their parents do not have access to the courts, simply because they happen to live in the wrong states. A right of access to courts independent of one's parents would allow these minors to seek enforcement of pre-existing statutory rights, and to challenge the constitutionality of a statute or of a school district's action. Even if only a few minors invoked this right, it would benefit many other minors, in the same way that Nabozny's case sent a message to other school districts. And, the existence of such a right could eventually lead to the creation of similar rights for minors in other areas where they are currently lacking.

Part I discusses the unique situations LGBT adolescents face and how a right of access to courts would help these minors. Part II discusses United States Supreme Court jurisprudence regarding parents' rights and minors' rights, and how to resolve conflicts between the two. Part II concludes that the Supreme Court has consistently privileged the best interests of the minor and recognized the importance of assisting minors in making informed decisions and developing into mature adults. Part III reports the results of a fifty-state survey on state procedural statutes, detailing the current state of the law for minors in

\(^7\) Some states use the term "next friend" rather than "guardian ad litem." This Article uses the term "guardian ad litem" to refer to anyone appointed to represent a minor in a pending legal action.

\(^8\) Nabozny, 92 F.3d at 453.

need of access to the judicial process, and how those laws have been interpreted by state courts. Part IV discusses the current legal treatment of adolescence and the mature minor doctrine, and finds a national trend toward increased state law rights for adolescents. Part V explores theories of adolescent decision-making, and argues that adolescents are capable of making the decision to go to court. Parts VI and VII conclude that minors should be allowed to bring cases through guardians ad litem without parental notification/consent, and explore potential ways to codify this right.

I. LGBT Minors and Identity Rights

A. LGBT Teens and Their Parents

Many LGBT teens do not feel able to come out to their parents. For example “[s]tudies suggest that approximately one out of every four [LGBT] youth are forced out of their homes because of conflicts with families over their sexual orientation or gender identity.” Moreover, as many as half of all LGBT youth may encounter some form of parental rejection because of their sexual orientation. LGBT minors have also faced conversion therapy and institutionalization. For the minors unfortunate enough to live in intolerant families, coming out presents a serious risk of emotional and physical danger.

Even minors who do not face such drastic consequences may not want to disclose their sexuality to their parents. Adolescence is a time for identity exploration, a process that involves differentiating oneself from one’s parents and receiving input from one’s peers. Thus, it may be developmentally critical for a gay teen to disclose her identity to her peers or to other adults before disclosing her identity to her parents.

B. LGBT School Issues

On February 12, 2008, in Oxnard, California, fifteen-year-old Lawrence King was murdered by a fellow eighth grader inside his jun-

11. Id. (referencing a study conducted by the Hetrick-Martin Institute).
13. See infra Part I.D.
ior high school’s computer lab. The killing reportedly occurred because King was openly gay. King’s murder starkly emphasizes that America’s schools are not yet safe for America’s lesbian, gay, bisexual, and transgender youth.

In the 2007 Gay, Lesbian, and Straight Educational Network School Climate Survey, almost two-thirds (60.8%) of LGBT high school students reported feeling unsafe at school because of their sexual orientation, and 38.4% felt unsafe because of how they expressed their gender. A majority of students reported experiencing some form of harassment or violence at school: 86.2% had been verbally harassed because of their sexual orientation, and 66.5% had been verbally harassed because of their gender expression. Over one third of the students (44.1%) had been physically harassed because of their sexual orientation, and over one quarter (30.4%) were physically harassed because of their gender expression. Nearly one fifth (22.1%) were physically assaulted because of their sexual orientation, and over a tenth (14.2%) were assaulted because of their gender expression. Almost all students in the survey reported some form of “relational aggression (such as being the target of mean rumors or lies), and having their property damaged or stolen,” and 55.4% had been the victim of “cyberbullying.” Finally, 73.6% of students reported hearing homophobic remarks such as “faggot” or “dyke” frequently or commonly at school. Thus, at a time when most teens are freely exploring their identities, these teens are busy hiding, or risking harassment and violence if they choose to be open about who they are.

Slowly, legislatures and school districts have passed anti-gay harassment policies and laws to respond to this harassment. While anti-harassment policies can be ineffective if left unenforced by administrators, anti-harassment statutes give LGBT adolescents powerful legal

15. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
22. See infra Part IV.
23. See infra Part III.
recourse. However, these statutes are only as effective as the state procedural laws applicable to these adolescents. If a state law does not permit a minor to bring a cause of action without parental involvement and the harassed minor either does not want her parents to know her sexual orientation, or does not think her parents would be supportive of a lawsuit, her only legal remedy is barred.

Many high school students have responded to this continuing harassment by forming gay-straight alliances. The importance of these alliances to an LGBT minor’s identity development cannot be understated. Association with similar individuals is a key part of identity development. These alliances may make the difference between the LGBT teen developing a healthy identity and the LGBT teen facing mental health issues such as depression and even suicide. Despite these benefits, many school districts have fought the creation of gay-straight alliances, or have responded to the creation of an alliance by requiring parental-consent before a student joins any club. This places the minor afraid to come out to her parents in a Catch 22. Although these school policies may be unconstitutional, in many states a minor cannot get to court to challenge them without parental consent/notification. Yet a minor afraid to join a gay-straight alliance because she does not want her parents to know about her sexuality is unlikely to seek parental consent to pursue such a lawsuit.


25. See infra Part V.

26. See infra Part V.


28. See infra Part III (discussing results of fifty-state survey).
C. Transgender Minors

Another group targeted for abuse and harassment by their peers are transgender teenagers. The term transgender comprises a wide range of individuals, including “transsexuals, transvestites, male and female impersonators, drag kings and queens, male-to-female persons, female-to-male persons, cross-dressers, gender benders, gender variant, gender nonconforming, and ambiguously gendered persons.”

Although many children who identify as transgender do not continue to do so, rates of those continuing to identify as transgender during adulthood are much higher for adolescents than children. There is also evidence that for some members of the transgender population, puberty brings with it intense emotional distress that can be reduced by beginning a gender transition. Because of this, the Harry Benjamin International Gender Dysphoria Association’s (“HBIGDA”) Standards of Care—the most widely accepted treatment standard for transgender individuals—recommends that adolescents proceed slowly through three stages. These stages encourage clinicians to balance the fact that gender identity may be malleable—especially in young children—against the intense distress that a transgender adolescent may face.

In the first stage, termed “pubertal delay,” the minor receives treatments designed to suppress hormones, in effect delaying puberty. This treatment is fully reversible, as it merely allows the minor to delay the decision about whether to permanently transition until the minor is older and can make a more informed decision. In the second stage, HBIGDA recommends hormone treatment to masculinize or feminize the individual's body. This stage is partially reversible and is not recommended before age sixteen. The third stage, irreversible intervention, such as surgical procedures, is not recom-

31. Id. at 557.
33. STANDARDS OF CARE, supra note 32, at 8.
34. Id. at 10.
35. Id.
36. Id.
mended until the individual is over age eighteen.\textsuperscript{97} This treatment protocol includes adult guidance for the transgender minor.\textsuperscript{38} The standards require giving the adolescent time to discuss his or her gender identity with adult mental health professionals.\textsuperscript{39}

A transgender minor’s appearance is of the utmost importance to healthy identity development. Studies show that allowing adolescents to begin the gender transition process before reaching adulthood improves their mental health.\textsuperscript{40} While the effects of hormone treatment designed to delay puberty are reversible and the effects of hormones to masculinize or feminize the body are partially reversible, the effects of allowing puberty to occur are often irreversible.\textsuperscript{41} Therefore, an adult who decides to transition after puberty may experience an inferior transition.\textsuperscript{42}

Making the decision to delay puberty is one of the most important decisions in a minor’s life. This decision affects the minor’s right to assert control over her body in a fundamental—albeit, not permanent—way. Under current law, this decision turns on whether the minor’s parents consent to the procedure, even though it is the minor who will suffer irreversible effects if there is no intervention.\textsuperscript{43} A right of access to courts would be invaluable to a minor making the decision to delay puberty (with the advice of a competent adult), as it would allow her to challenge statutes, and ask for an injunction if her parents denied her treatment.

It is important to recognize that not all transgender minors wish to delay puberty. The costs of hormone treatment place the option out of reach for most, and many individuals who identify as transgender or gender variant have no desire to modify their bodies or take

\begin{itemize}
\item \textsuperscript{97} \textit{Id.} at 11.
\item \textsuperscript{38} \textit{See id.} at 10.
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{41} \textit{See Cohen-Kettenis et al., supra note 32, at 264.}
\item \textsuperscript{42} \textit{See id.; Shield, supra note 40, at 379 (citing Smith et al., Gender Identity Disorder, supra note 40, at 472–73).}
\item \textsuperscript{43} \textit{Shield, supra note 40, at 361–62.}
\end{itemize}
hormones. Nevertheless, a right of access to courts would be empowering for many transgender minors.

Two common situations illustrate the importance of court access rights for transgender minors. School dress codes often require transgender minors to wear clothing for the gender opposite which they identify, a situation likely to cause severe emotional distress. A minor in this situation would have no recourse if her parents opposed her gender expression.\(^\text{44}\) Similarly, a minor wishing to use a bathroom in school other than the bathroom "assigned" to her biological gender may face serious obstacles from an unwilling administration. For these reasons, as well as the reasons discussed relative to lesbian and gay minors, transgender minors will benefit from a right of access to courts.

D. LGBT Minors and Identity Development

Sections A, B, and C of Part I share a common thread: they involve minors seeking a safe place to explore and develop their identities. The importance of identity development is not unique to LGBT minors, nor are they the only ones who benefit from being able to explore the possibility of an LGBT identity.\(^\text{45}\) Indeed, social science shows that exploration is an important part of identity development.\(^\text{46}\) Especially for teens who are exploring LGBT identities, the ability to decide whom to disclose these potential identities to is crucial.\(^\text{47}\) The fact that a teen may choose to disclose to her peers or to other adults rather than to her parents is a normal part of development.\(^\text{48}\) Being able to disclose one's identity to a supportive group has documented benefits for all teens, but especially for LGBT teens.\(^\text{49}\) As the law currently stands, however, many states unwittingly block minors from the processes that would allow them to vindicate important identity-related rights.

\(^{44}\) See infra Part III (discussing results of fifty-state survey).
\(^{45}\) See Ritch Savin-Williams, The New Gay Teenager 74–76 (2005) (discussing the fluidity of sexuality). Indeed, many minors who will grow up to identify as straight or to identify outside of conventional labels may still experiment with these identities. \(\text{Id.}\)
\(^{47}\) \(\text{Id.}\) at 332.
II. The Rights of Parents and the Rights of Their Children

The United States Supreme Court has spoken at length about the constitutional rights of children and parents. The Court has held that parents have an interest in the care, custody, and upbringing of their children. Minors have constitutional rights, including the right to free speech, due process protections in criminal proceedings, due process proceedings against deprivations of property, and the right to privacy, which encompasses the right to have an abortion. Still, minors’ constitutional rights may be limited in ways that the rights of adults may not.

Parents' rights and minors' rights sometimes conflict. The Court has discussed this conflict, with various commentators reaching different conclusions about how the Court is balancing rights. Arguments for a broad zone of parental autonomy are based on the assumption that minors have underdeveloped decisional capabilities and that parents are in the best position to protect minors' interests. Other arguments reference the parents' position as "head of the family," stating that either because of the child's economic dependence on the parents, or because of the underlying sanctity of the family, courts should be reluctant to intervene. Under this view, children only have rights against very egregious harm, such as child abuse or neglect. Other commentators construe the cases more narrowly, arguing that the Court's decisions only protect the rights of parents against the state. Some have taken a middle ground, arguing that even if the case law once supported a broad right of parental autonomy, evolving norms have changed the nature of the right.

52. See In re Gault, 387 U.S. 1, 55 (1967).
55. See McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971) (holding juveniles in juvenile criminal proceedings are not entitled to jury trial under the Sixth or Fourteenth Amendments).
56. See Alison M. Brumley, Comment, Parental Control of a Minor's Right to Sue in Federal Court, 58 U. Chi. L. Rev. 333, 342 (1991) (categorizing arguments in favor of parental control).
57. See id. (categorizing arguments in favor of parental control).
Arguments for parental autonomy derive from a general interest in the minor’s well-being. The Court has never recognized an interest in parental authority based solely on the minor’s economic dependence or familial sanctity, without also analyzing the minor’s best interests. The Court’s jurisprudence consistently emphasizes the need for minors to develop into mature adults, the need to protect minors from harm, and the need to assist minors in decision-making. The Court privileges these concerns and the best interest of the child over a stand-alone interest in parental authority.

A. The Beginnings of the Court’s Parent-Child Jurisprudence

In Meyer v. Nebraska, the Court found that a state could not prevent a school from teaching German to its students. In explaining its reasoning, the Court stated that parents have the liberty to “establish a home and bring up children.” The Court admonished “legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.” Meanwhile, the Court emphasized that learning German would not harm the minors.

In Pierce v. Society of Sisters, the Court again addressed the issue of parental rights, this time finding unconstitutional a compulsory education law that would have prevented children from attending private schools. The Court again spoke of the right of parents to “direct the upbringing and education of children under their control.” The Court added, “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”

From early on, the Court made clear that parental liberty interests in child rearing are not absolute. The Court held that states can regulate and prohibit child labor, and can compel vaccination of a

60. See infra Part III.D.
61. See infra Part III.D.
62. 262 U.S. 390 (1923).
63. Id. at 401.
64. Id. at 399.
65. Id. at 400.
66. Id. at 403.
67. 268 U.S. 510 (1925).
68. Id. at 534–35.
69. Id.
70. Id. at 535.
child, even if parents object on religious grounds.\footnote{72}{See Jacobson v. Massachusetts, 197 U.S. 11, 28–29, 38 (1905).} For example, \textit{Prince v. Massachusetts}\footnote{73}{321 U.S. 158 (1944).} is one of the first cases limiting the rights of parents. In \textit{Prince}, the Court upheld a child labor law prohibiting a child from distributing religious literature in the streets, even though the child’s parents supported the practice.\footnote{74}{Id. at 170.} The parents’ argument was based on an expansive reading of parental liberty.\footnote{75}{Appellant’s Brief at *16–17, Prince v. Massachusetts, 321 U.S. 158 (1944) (No. 98), 1943 WL 54417.} They argued that “in a democracy the family is the primary force and the socializing agency through which the child acquires most of moral, social and cultural values,” and that the family and the home are fundamental institutions secured by the Bill of Rights.\footnote{76}{Id. at *170.} Under the parents’ theory, courts would only be justified in intervening upon:

[A] positive showing that the parent’s manner of exercising control over the child is an abuse which so greatly jeopardizes the welfare of the child as to require intervention on the part of the State to sever the relation between the guardian and child and declare the child a ward of the state.\footnote{77}{Id. at *19.}

Thus, the parents argued for a very broad right to parental authority based on their inherent rights to raise a family.

Massachusetts argued for a more limited conception of parental authority.\footnote{78}{Brief on Behalf of the Appellee the Commonwealth of Massachusetts at *15, Prince v. Massachusetts, 321 U.S. 158 (1944) (No. 98), 1943 WL 54418.} Under its view, since the Constitution protects only civil rights, and since parental rights are natural, not civil, parental rights are not protected by the Constitution.\footnote{79}{Id. at *15–16.} Massachusetts argued that it is within the State’s power to limit the parents’ interest in child rearing, if doing so protects the child.\footnote{80}{Id. at *15.} Massachusetts’s brief stated, “This Court has repeatedly stated that all questions relative to the care, control and custody of minor children belong exclusively to the State.”\footnote{81}{Id. at *14 (citing Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Pierce v. Soc’y of Sisters, 268 U.S. 510, 527 (1925)).
not an unconstitutional interference with the parent's freedom of
religion, even though such legislation runs contra to a particular
parent's religious beliefs.\textsuperscript{82}

Under this view, the only thing that matters is the best interest of the
child.

Although the Court did not discuss the natural-rights and civil-
rights distinction, it sided with Massachusetts in its decision. The
Court enshrined into law the idea that parental liberties may yield
where there is potential harm to the child, even where this harm is
less severe than that typically at issue in abuse and neglect cases. The
Court spoke of a need to balance "freedom of conscience and relig-
ious practice," and with it, "the parent's claim to authority in her own
household and in the rearing of her children" against "the interest of
youth itself, and of the whole community, that children be both safe-
guarded from abuses and given opportunities for growth into free and
independent well-developed men and citizens."\textsuperscript{83} In the end, the
Court privileged the latter, finding the ordinance constitutional and
noting that the state's duty to protect children extends into "matters
of conscience and religious conviction."\textsuperscript{84} The Court emphasized that
"[t]he state's authority over children's activities is broader than over
like actions of adults . . . . A democratic society rests, for its continu-
ance, upon the healthy, well-rounded growth of young people into
full maturity as citizens, with all that implies."\textsuperscript{85}

The parental liberty described in early cases derives primarily
from a natural-rights perspective of the family. Parents are granted the
right to care for their children as they see fit because of the family's
inherent sanctity. The family is protected because of its vital role in
child-rearing, because parents often know what is best for their chil-
dren, and because the family is primarily where child education and
growth occur. There is a certain reasonableness to these natural law
arguments. The family has been one of society's most important insti-
tutions for thousands of years. Most parents act in the best interests of
their children, and it is hard to picture a society without parents teach-
ing their children important values. Still, even in these cases, the
Court recognizes that the rights of parents are not absolute and that
while parents often act in their children's best interests, there are
times when parents are misguided. Where parents' actions are harm-

\textsuperscript{82.} Brief on Behalf of the Appellee the Commonwealth of Massachusetts, \textit{supra} note
78, at *17.
\textsuperscript{83.} \textit{Prince}, 321 U.S. at 165.
\textsuperscript{84.} \textit{Id.} at 167.
\textsuperscript{85.} \textit{Id.} at 168.
ing their children, parents have always been prevented from using their beliefs as a shield. Parents have the liberty to raise their children as they see fit, provided their practices do not cause harm to their children or to others.

B. Wisconsin v. Yoder

In 1972, the United States Supreme Court decided Wisconsin v. Yoder,\(^86\) which revisited the issues discussed in earlier cases. In Yoder, the Court found that Wisconsin's compulsory education law unconstitutionally burdened the Amish by forcing minors to attend school until they turned sixteen years old.\(^87\) The Court held that parents have the right to direct the care and upbringing of their children. Yoder is often cited as an important case in the Court's parent-child jurisprudence; however, it is not a case about conflicting rights between parents and children. Instead, the parties devoted much of their argument to the First Amendment.\(^88\) Even the parents' brief barely mentions the right to rear children.\(^89\) The Supreme Court emphasized this was not a situation where the rights of parents and children conflicted, and that a different outcome may have been appropriate had the children wished to attend secondary school.\(^90\) That Yoder is primarily a free exercise case, not a case suggesting a new, broader theory of parental rights, explains Yoder's narrow holding.

Moreover, the case can be read to highlight the earlier cases' focus on preventing harm. The Court stated that parental power can be limited where it "jeopardize[s] the health or safety of the child, or ha[s] a potential for significant social burdens."\(^91\) Yoder explained that forcing children to attend secondary school would cause them harm, but allowing them to stop after eighth grade would not. This is largely because Amish practices lead children to develop into mature adults.\(^92\) For example, the Court emphasized that Amish children are adequately prepared for life as Amish adults, and that the Amish are a highly successful, self-sufficient unit of society.\(^93\) The Court stated that these adolescents will be prepared for adulthood even if they leave

\(^{86}\) 406 U.S. 205 (1972).
\(^{87}\) Id. at 234.
\(^{88}\) Id. at 232–34.
\(^{90}\) Yoder, 406 U.S. at 231–32.
\(^{91}\) Id. at 234.
\(^{92}\) Id. at 232.
\(^{93}\) Id. at 222.
Amish society, noting that the Amish provide "'ideal' vocational education," and that "[t]here is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society."94 Thus, the decision focused on protecting adolescents' mental health and ability to develop; it just happened that siding with the parents was the way to protect these adolescents.

To the extent the Court defers to parents' rights, it does so because it is confident that the children's best interests are protected. In *Yoder*, this confidence was reasonable, as it was based on extensive testimony about the Amish system of education and its positive effects, and on the testimony of one child concerning her desire to leave school and join the Amish community.95 The case suggests that where the interests of parents and children are aligned and the child is not harmed, the Court will not substitute its decision for that of the parents.

As Justice Douglas's dissent emphasized, however, *Yoder* is not a blanket endorsement of parental authority in situations where the interests of the parent and the minor child are at odds and the minor can show she will be harmed by parental deference. Justice Douglas dissented because he questioned the Court's decision to ignore the desires of the Amish children. Thus, Justice Douglas stressed the centrality of the courtroom as potentially the sole forum for hearing the minor's voice. "As the child has no other effective forum, it is in this litigation that his rights should be considered."96

Justice Douglas argued the Court should consider the minors' views and potentially privilege them over their parents' views.97 The majority in no way altered the contours of the minor's right; they only disagreed with Douglas as to whether the minors should have had input in the education decision, and whether that lack of input caused them harm. *Yoder* does not preclude the cases of an Amish child who affirmatively expresses a desire to leave the Amish community, nor an openly gay Amish child who can show "great psychological harm"98 if forced to withdraw from public school.

94. *Id.* at 224.
95. See Brief for Respondents, *supra* note 89, at *20.
97. See id.
98. *Id.* at 212 (noting that experts stated compulsory high school education could result in "great psychological harm to Amish children").
C. The Abortion Cases

In Planned Parenthood v. Danforth, the Court directly considered what happens when a parent’s rights conflict with her child’s constitutional rights. In Danforth, the Court found a blanket parental consent requirement for minors seeking abortions to be unconstitutional, and one which did not contain a judicial bypass option. The Court noted, “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority,” and “the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy, regardless of the reason for withholding the consent.” While stating that parents have an interest in such authority, the Court questioned whether allowing a parental veto would in any way strengthen the family structure, and emphasized that “[a]ny independent interest the parent may have in the termination of the minor daughter’s pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.” Thus, in Danforth the minor’s rights took precedence over the parent’s.

In Bellotti v. Baird (“Bellotti II”), the statute at issue provided a judicial bypass for minors seeking an abortion without parental consent, but required parental notice for minors using the bypass. In finding the notice provision unconstitutional, the Court again weighed the respective interests of parent and child: “[w]e have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”

The first two of these considerations are straightforward—both the peculiar vulnerability of children and their inability to make critical decisions suggest the Court’s desire to protect minors from harm. At first glance, the third is relatively more controversial; perhaps the importance of the parental role in childrearing suggests a decision to

100. Id. at 52–53, 74.
101. See id. at 74–75.
102. Id. at 74.
103. Id.
104. Id. at 75.
106. Id. at 634.
privilege the parent's rights over the child's. However, the Court lists two reasons for deferring to parental control. First, it states that "[t]he State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors." This is an extension of the principle that minors may not always make the best decisions. By requiring parental consent, the state ensures that minors will consult an adult before making important decisions.

The Court's second justification is more directly connected to the traditional idea of parental authority. The Court quoted Pierce and Yoder for the idea that a child must be taught moral standards and religious beliefs. The Court reasoned that "[t]his affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens." At first blush, this appears to give parents wide latitude in making decisions on behalf of their children. The Court presumed, however, that no harm flows from this authority. Instead, parental authority is listed as "important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." Where that authority instead prevents this growth, parents are not entitled to deference.

In Bellotti II, the Court explicitly attempted to protect minors from harm. The Court mentioned "the unique nature and consequences of the abortion decision," and found these make an absolute parental veto of the abortion decision inappropriate. The Court mandated:

[I]f the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.

A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

107. Id. at 637.
108. Id. at 637-38.
109. Id. at 638.
110. Id. at 638-39.
111. Id. at 643.
112. Id. at 643-44 (footnote omitted).
The Court commands parental authority yield to the minor's will where the minor proves capable to make the decision on her own or where the minor can show that the exercise of parental authority inherent in obtaining parental notice/consent would not be in her best interest. Although the Court grounds its decision in the uniqueness of the abortion decision, *Bellotti II* is thematically similar to the other cases that recognize an interest in parental authority where conducive to mature development, but limited it where it poses harm to the minor.

Following *Bellotti II*, the Court again faced an abortion-related clash between minors' rights and parental rights in *Hodgson v. Minnesota*. This time, the Court struck down a statute mandating a minor notify both parents of an abortion decision. The Court found that states can require a minor notify both parents, as long as the statute contains a judicial bypass option. The Court emphasized that parental consent requirements are designed to assist the minor in making difficult decisions: "The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." The language of *Hodgson* appears to foreclose any arguments that parents have an independent right of parental authority. The Court spoke strongly about weighing parents' rights against the child's: "Indeed, the constitutional defects that Justice Powell identified in the statute [(at issue in *Hodgson*)] . . . are predicated on the assumption that the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child." Thus, parental involvement is encouraged when minors face difficult decisions. Parental involvement will often assist the minor in making these decisions, and can help the minor grow into a mature, independent adult. When parental involvement harms the child, however, the parent will not receive deference, even if the parent has a strong conviction that something is "right" for her child.

In *Planned Parenthood v. Casey*, the Supreme Court briefly revisited the issue of a parental notice provision, upholding the part of Pennsylvania's abortion statute that required either informed parental

114. *Id.* at 422–23 (striking down subdivision two of Minn. Stat. § 144.343 (1988)).
115. *Id.* at 455.
116. *Id.* at 444.
117. *Id.* at 453–54 (emphasis added) (internal citations omitted).
consent or judicial bypass. Although some of the briefs in *Casey* argued about the increased burden these requirements would have on minors, the Court did not directly address these concerns. Instead, the Court wrote a short section affirming its earlier cases upholding notification statutes as long as they contain judicial bypass provisions. The Court did not find the informed consent part of the statute problematic:

> [S]ome of the provisions regarding informed consent have particular force with respect to minors: the waiting period, for example, may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in the context of the values and moral or religious principles of their family.

One might question the Court's willingness to ignore social science evidence. In spite of this, the Court has still shown that it will defer to parental authority when in the best interests of the minor, but will intervene when the parents fail to act in the minor's best interests.

### D. Other Cases

The Supreme Court has also touched upon the scope of a parent's right to rear children in a few other situations, most recently in *Troxel v. Granville*. While the Court used sweeping language to describe this right, none of these cases contradict the basic principle that a child's best interest is superior to the parent's right to rear the child as the parent sees fit. In *Troxel*, the Court stated that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." Still, the Court criticized Washington's statute for not requiring a showing of harm, and left open the possibility of other, more circumspect visitation statutes being upheld. Similarly, in *Parham v. J.R.*, the Court allowed...

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120. *Casey*, 505 U.S. at 899.
121. Id. at 899–900.
122. For example, the statute in this case mandated that parents must act in the best interests of their minor child when considering the abortion decision. See 18 PA. STAT. ANN. § 3206(a) (2007) ("In deciding whether to grant . . . consent, a . . . parent . . . shall consider only their child's . . . best interests." (emphasis added)).
123. 530 U.S. 57 (2000).
124. Id. at 65.
125. Id. at 63.
great deference to a parent’s decision to commit a child to a mental hospital. However, the Court based this deference on the premise that parents generally act in their children’s best interests. The Court was comfortable making this presumption because of the many institutional safeguards already present. For example, formal court hearings were required before a child could be admitted to a mental hospital.

While the Court may sometimes use sweeping rhetoric in describing parents’ rights to raise children, this rhetoric should not be read broadly. Although parents have the right to be free from government interference and are often be presumed to act in the best interests of their children, these rights have limits. Where a child is old enough to voice her own opinion and can show the capability to make mature, intelligent decisions, the presumption in favor of the parent is at its weakest. There is no reason for a court to favor parent’s rights over the child’s, especially if the parental action is not in the child’s best interest. In these situations, the Court has instead privileged the child’s rights.

E. Conclusions

As illustrated above, a variety of interests are at stake, for both parents and their minor children. Parents have an interest in teaching their children beliefs and values and ensuring that they grow into mature citizens. The reasons the Court may wish to protect these interests range from natural law views of the family to the practical fact that parents are often best situated to teach important lessons. This is eminently plausible, as public policy discourages courts from intervening in private matters, especially when it is unknown if the court’s judgment is any better than the parental judgment. As argued later in Part V, social science evidence supports the assertion that minors benefit from the involvement of an adult in the decision-making process. Thus, there are many sound reasons for deferring to parental rights, and in most cases, it is likely courts will continue to do so.

The Court’s jurisprudence has also consistently shown, however, that parental rights are not absolute. The Court has spoken at length
about the parens patriae obligation to the child (i.e., the courts’ obligation to protect minors from harm). In the most egregious situations—cases of abuse and neglect—courts have always privileged minors’ rights over their parents’ rights. And, even in less egregious situations, the Court has frequently recognized the state’s right to protect minors’ well-being. Thus, in *Prince*, the Court upheld an ordinance preventing a child from distributing literature in the street, despite the fact that there was no showing of actual harm to the child. In *Yoder*, the Court suggested an interest in protecting minors, even where the harm faced by the minor is primarily psychological. In the abortion cases, the Court relied on the principle that minors have constitutional interests, and that, where the rights of parents and their minor children conflict, the best interest of the child should control. Together, these cases suggest that, while important, parental interests must be understood in terms of their effect on the child. Courts should defer to parents when they appear to represent the best interests of the child, but take action to protect the child when they do not.

### III. State Procedural Statutes and Case Law

#### A. Introduction

State statutes and cases provide a context for how the constitutional conflict discussed in Part II has been interpreted on a state level. This Article conducts and analyzes a fifty-state survey of state law issues affecting whether a minor could get into court without parental notification or consent. The results of the survey are summarized in Table 1. The analysis compares state equivalents of Rule 17(c) of the Federal Rules of Civil Procedure, which states that a minor cannot appear in court unless represented by a guardian ad litem. Every state except Indiana has either incorporated Rule 17(c) into its civil procedure code or has a similar rule requiring a minor appear by guardian ad litem or next friend. The state procedural rules are listed in Table 1, Column 2 (“Source of Rule”).

In addition to equivalents of Rule 17(c), thirty states have gone further, crafting specific requirements for how a guardian ad litem/
next friend is to be chosen for a minor. The statutes are listed in Table 1, Column 3 ("Specific Guidelines for Appointment"). In the statutes specifying procedures for the appointment of a guardian ad litem, eighteen states also distinguish minors age fourteen or older. Also, Arizona does not have a specific rule for appointing a guardian ad litem, but does distinguish minors over fourteen in its law on trusts and estates. Drawing a line at age fourteen suggests that these legislatures are more confident in the decision-making capability of minors over age fourteen. Table 1, Column 4 ("Distinction for People over Fourteen") lists whether each state has such a distinction.

This Article also examines state constitutions, identifying states with an explicit right of access to the courts, and those that have case law explicitly extending that right to minors. Thirty-eight states have such a right, and five have explicitly extended it to minors. If a state has an explicit right of access to courts, then minors have stronger claims for judicial access, because minors can argue that their state constitutional rights are being abridged. Whether a state has an explicit right of access to the courts and where in the state constitution it can be found is listed in Table 1, Column 5 ("Right of Access to Court").

Next, this Article analyzes state statutes to compare which states require parental notice/consent before a minor can obtain an abortion and, if so, discusses the text of its judicial bypass statute. Thirty-seven states require parental notice/consent; thirteen do not. The state judicial bypass statutes are important as they show how to craft a bypass. Additionally, in the thirteen states that do not require parental notice/consent for abortions, minors can argue that the same reasoning should apply to their petitions for appointment of guardians ad litem. The results of this search and location of state judicial bypass statutes are in Table 1, Column 6 ("Judicial Bypass Statute").

Finally, this Article discusses federal and state law cases addressing the conflict between parent’s rights and their children’s rights in the context of bringing lawsuits and appearing in court. Twenty-four states have relevant case law, revealing how state courts have resolved conflicts between parents and their minor children.

B. Rule 17 (c) of the Federal Rules of Civil Procedure

Rule 17(c) states:

(1) With a Representative. The following representatives may sue or defend on behalf of a minor or incompetent person: (A) a gen-
eral guardian; (B) a committee; (C) a conservator; or (D) a like fiduciary.

(2) Without a Representative. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action. 136

This rule is used to provide protection for minors, as well as infants. Although parents are often appointed to represent their children, "[no] parent [ ] may claim to be a guardian ad litem of his minor child as a matter of right." 137

Interestingly, neither the advisory committee notes to Rule 17(c) nor various commentaries on the rule address the issue of conflict between a minor and a parent. 138 This may be because the specific interpretations of the rule are left to the states, or it may be because the drafters and commentators only contemplated the usual situation where the interests of parent and child align. Commentaries focus on the proper plaintiff to represent a minor in the common situation where a minor's parent seeks to vindicate her child's tort claim. However, these commentaries ignore situations where minors wish to bring civil rights lawsuits without parental notice or consent. Still, the language of Rule 17(c) and subsequent interpretations is consistent with the notion that the minor’s rights are to be favored in the conflict between a minor and her parents. For example, while the rule explicitly protects minors, it does not mention parents. In stating that guardians ad litem are to be appointed where direct conflict exists between the minor and her parent, courts have affirmed that the court’s job is to protect the best interest of the child, not to defer to her parents’ authority.

C. State Statutes

The specific requirements for a guardian ad litem are a matter of state law. 139 Since states are free to craft their own rules about the

136. FED. R. CIV. P. 17(c).
137. Gonzalez v. Reno, 212 F.3d 1338, 1352 (11th Cir. 2000) (quoting Fong Sik Leung v. Dulles, 226 F.2d 74, 82 (9th Cir.1955)).
138. FED. R. CIV. P. 17(c) note.
139. Ins. Co. v. Bangs, 103 U.S. 435, 438 (1881) ("It is the State and not the Federal government, except in the Territories and the District of Columbia, which stands, with reference to the persons and property of infants, in the situation of parens patriae. Accordingly provision is made by law in all the States for the appointment of such guardians, whose duties and powers are carefully defined.").
appointment of guardians, this Article examines state rules of civil procedure. The results of this search, along with relevant quotations from the statutes, are located in Table 2. Specifically, this Article looks at what the state rule is, where it can be found, whether it is a variant of Rule 17(c), and, if so, whether the state expanded Rule 17(c). ²⁴⁰ Twenty-eight states have adopted Rule 17(c) or a slight variant as their state rule of civil procedure, and twelve of these states have added their own provisions for the appointment of a guardian ad litem. Twenty-two state statutes contain language different from Rule 17(c) and are coded in Table 1 as non-Rule 17(c) states; thirteen of these state statutes include specific provisions for the appointment of a guardian ad litem.

Rule 17(c) does not address how to appoint a guardian ad litem or whether parental consent/notice is required for the appointment of a guardian; the sixteen states which do not go further than Rule 17(c) are also inconclusive. Similarly, nine of the twenty-two Rule 17(c) equivalent states have provisions which, though using different language, are substantively similar to Rule 17(c) and are also inconclusive. For these twenty-five states, statutes and rules of civil procedure fail to provide guidance as to whether a minor may bring a lawsuit without parental notice/consent.

The other twenty-five states are more specific about the requirements for appointing guardians ad litem, and are often more specific concerning issues of notice and consent. These states can be separated into four categories: states explicitly allowing minors over age fourteen to bring lawsuits without parental notice/consent ("Category 1"), states that draw a line at age fourteen but that do not specifically discuss the issue of notice or consent ("Category 2"), states explicitly prohibiting minors from bringing lawsuits without parental notice/consent ("Category 3"), and states that have more specific rules but do not address age or notice and consent ("Category 4").

1. Category 1 States: Minors Explicitly Allowed to Bring Lawsuits Without Parental Notice/Consent

Six states fit into Category 1. In these states, the language of the procedural rules suggests that minors may petition for the appointment of guardians ad litem without parental notice, as long as they are over age fourteen. ²⁴¹ For example, Minnesota’s rule states that a mi-

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140. In the Appendix infra tbl.1, these states are listed as Y+.
141. However, the fact that a law is written in a way that suggests this result does not mean courts will actually allow minors to bring claims without parental notice.
nor over the age of fourteen may apply for the appointment of a guardian ad litem, and if the appointment is applied for by the minor, the court may hear the application with or without parental notice.\textsuperscript{142} Missouri, North Dakota, and South Carolina, have similar provisions.\textsuperscript{143} Connecticut provides that "[a]ny appointment of a guardian ad litem may be made with or without notice."\textsuperscript{144} Although the statute does not specify whether it refers to parental notice or some other form of notice, this language suggests a minor can argue for the court to appoint a guardian absent parental notice.

In these states, legislatures seemingly decided that minors over age fourteen are capable of decisions concerning their representation, without their parent's involvement. Perhaps the legislatures realized that adult involvement in the case is inherent (since the guardian will be an adult), and trust that this, combined with a minor's decisional capacity, will sufficiently safeguard the minor's best interests.

2. Category 2 States: Drawing Some Distinction at Age Fourteen

Twelve states fit into Category 2. These states draw a distinction for minors over age fourteen; however, they do not explicitly state how this distinction affects issues of notice or consent. For example, Tennessee law states that the court may waive the appointment of a guardian ad litem if the petitioner for the appointment is a minor over age fourteen.\textsuperscript{145} Alabama, California, Montana, Michigan, Nevada, Oregon, Utah, and Washington provide that a guardian ad litem may be appointed upon the application of a minor if the minor is over age fourteen.\textsuperscript{146} Arizona and Delaware have similar provisions, though they are located in state code sections on the appointment of a testamentary guardian.\textsuperscript{147} Pennsylvania code contains a provision for decedents stating that a person nominated by a minor over age fourteen shall be preferred as guardian of her person.\textsuperscript{148} These states recognize the increased decision-making capacity of minors over age fourteen.

\textsuperscript{142} MINN. R. CIV. P. 17.02.
\textsuperscript{143} See MO REV. STAT. § 507.130 (2003); N.D. CENT. CODE § 28-03-01 (2006); S.C. R. CIV. P. 17(d) (1976).
\textsuperscript{144} CONN. GEN. STAT. § 45a-132(d) (2004).
\textsuperscript{145} TENN. CODE ANN. § 34-1-107(2)(B) (2007).
\textsuperscript{146} ALA. R. CIV. P. 17(d); CAL. CIV. PROC. CODE § 373(a) (West 2004); MICH. R. CT. 2.201(E)(2)(i); MONT. CODE ANN. § 25-5-301(2) (2007); NEV. REV. STAT. § 12.050(2) (2008); OR. REV. STAT. § 27(a)(1) (2008); UTAH CODE ANN. § 17(c)(1) (2008); WASH. REV. CODE ANN. § 4.08.050(2) (2005).
\textsuperscript{147} ARIZ. REV. STAT. ANN. § 14-5204 (2005); DEL. CODE ANN. tit. 12, § 3902(c)–(e) (2001).
\textsuperscript{148} 20 PA. CONS. STAT. ANN. § 5113 (West 2005).
and suggest that courts must recognize the minor's chosen representative.

3. **Category 3 States: Explicitly Preventing Minors from Bringing Suits Without Parental Notice/Consent**

Three states fit in Category 3. These states prevent minors from bringing lawsuits without parental notice/consent. Louisiana law states that "[t]he father... is the proper plaintiff to sue to enforce a right of an unemancipated minor who is the legitimate issue of living parents who are not divorced or judicially separated."149 The law also states the mother is the proper plaintiff where the father is unable to bring suit.150 The statute further states "[u]pon application of the tutor or parent who would otherwise be the proper plaintiff to sue... the court shall appoint or substitute as the proper plaintiff the best qualified among the tutor, parent, or appointed attorney."151 Consequently, there is a small possibility Louisiana would allow suit by a minor.

Maryland law notes:

When a minor is in the sole custody of one of its parents, that parent has the exclusive right to sue on behalf of the minor for a period of one year following the accrual of the cause of action, and if the custodial parent fails to institute suit within the one year period, any person interested in the minor shall have the right to institute suit on behalf of the minor as next friend upon first mailing notice to the last known address of the custodial parent.152 Maryland law thus explicitly prevents a minor from bringing suit without parental notice. Still, consent remains an open question, and it may be that a minor may bring suit without parental consent, if the parent is given proper notice.

New York law draws a distinction at age fourteen, allowing a minor over fourteen to move for the appointment of a guardian ad litem.153 However, it also provides that "[n]otice of a motion for appointment of a guardian ad litem for a person shall be served upon the guardian of his property... or if he has no such guardian... upon the person with whom he resides."154 New York therefore seems to preclude cases without parental notice, although not necessarily

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150. Id.
151. Id. art. 683(D).
cases without parental consent. Still, the wording of this provision suggests that it developed as a means of protecting minors’ interests. The court requires that an adult close to the minor be aware of the motion, which ensures the minor’s ability to contest the motion. Thus, it may be that the rule simply was not designed to deal with the contexts discussed in this Article.

The constitutionality of these state statutes is not clear. They effectively provide parents with an absolute veto over their children’s rights of access to courts. This is true even where going to court may be in the best interest of the child. The case for minors is especially strong in Louisiana and Maryland, where state constitutions grant rights of access to courts (Maryland’s constitution has even been explicitly extended to minors). Allowing parents to deny their minor children access to the courts seems contrary to the language of the decisions discussed later in section D.

4. Category 4 States: More Specific Rules for the Appointment of a Guardian Ad Litem

Six states fit in category four. These states have more specific rules for the appointment of a guardian ad litem, but do not address the issues of parental notice or consent. These states are Arkansas, Idaho, Maine, Mississippi, New Jersey, and Virginia. Although these states have more detailed rules than Rule 17(c), these rules do not shed any light on the question of whether a minor may seek the appointment of a guardian ad litem or sue without parental notice/consent, nor do they draw any age-specific lines.

5. Conclusions

When all of these rules are considered together, an interesting trend emerges: twenty-nine states do not address the issue of parental notice/consent. Of the twenty-one that address notice/consent, only three explicitly require parental notice/consent. The remaining eighteen draw a line respecting the increased capacity of minors over age fourteen, with six explicitly permitting minors to petition for guardians ad litem without parental notice/consent. Where states

155. See N.Y. C.P.L.R. 1202 note (Legislative Studies and Reports)
157. States that do this do so because of their belief that the parent has internalized the minor’s best interest. For more on this, see discussion infra Part III.D.4.
have chosen to address this issue, they have overwhelmingly come down on the side of recognizing the increased maturity and decisional capacity of minors over age fourteen. This strongly suggests that states are attempting to protect minors through guardian ad litem requirements.

D. Case Law

In addition to state statutes, both state and federal case law is useful evidence of how courts interpret Rule 17(c) and the state statutes concerning minors’ procedural rights. Some cases directly address the issue of a minor attempting to get into court without parental consent. Outside the abortion context, most states have not ruled on this issue. Still, the Eighth Circuit, Michigan, and Missouri have explicitly held in favor of minors attempting to bring suit without parental consent/notice, and Colorado allows minors to waive the guardian ad litem requirement. In addition, many state cases discuss minors’ rights to court access, stating the principle that parents cannot extinguish a minor’s legal claims. Taken together, these cases suggest that minors may be able to bring cases without parental notice/consent. On the other end of the spectrum are cases emphasizing the parental right to rear children. In these states, it is harder to argue that a minor should have judicial access without parental notice/consent.

1. Cases Directly Allowing Minors to Go to Court Without Parental Notice/Consent

In *M.S. v. Wermers*,158 a minor seeking access to contraceptives appealed an order dismissing the suit because of the minor’s refusal to give her parents notice of a pending proceeding for appointment of a guardian ad litem.159 The Eighth Circuit found in favor of the minor, noting, “Since it would be inappropriate to appoint the parents in this case, it was equally inappropriate and unnecessary to condition the further progress of the lawsuit upon notification to the parents of the hearing on the appointment.”160 The court worried that requiring parental notice would have “an obvious chilling effect upon appellant’s efforts to vindicate her constitutional rights.”161 Here, the court echoes Danforth’s concern about allowing parents to veto their children’s

158. 557 F.2d 170 (8th Cir. 1977).
159. Id. at 173.
160. Id. at 176.
161. Id.
exercise of constitutional rights.\textsuperscript{162} As a result, in the Eighth Circuit minors have the right to petition for guardians ad litem without parental notice or consent. However, the court limited its holding to the stage of petitioning for a guardian ad litem, and did not rule on whether a minor could proceed with an entire lawsuit without parental notice or consent.\textsuperscript{163}

Michigan law also provides precedent for a minor who seeks to go to court without parental notice or consent. In \textit{Buckholz v. Leveille},\textsuperscript{164} a minor sought, contrary to his parents' wishes, to bring a suit challenging a high school dress code regulation.\textsuperscript{165} The court emphasized the need for courts to be open to all citizens,\textsuperscript{166} and found the sixteen-year-old plaintiff had the right to bring a lawsuit in his own name, against the wishes of his parents.\textsuperscript{167} In its opinion, the court emphasized the distinction drawn by the legislature in permitting minors over age fourteen to petition for their own guardians:

The rule makes a distinction between minors over the age of 14 years and minors under the age of 14 years and incompetents. While minors under the age of 14 and incompetents must have their next friend nominated by a relative or friend, minors over the age of 14 may nominate their own next friend. The differentiation between the two classes evidences a recognition on the part of the drafters of the rule that minors over the age of 14 years are sufficiently mature to exercise a greater degree of control over the prosecution or defense of the case.

It is the opinion of this Court that the above-cited sections of GCR 1963, 201, evidence a clear intention to allow minor children 14 years of age or over, who have a duly-appointed next friend, to institute and prosecute suits in this state absent any consent by, and in fact contrary to the wishes of, the minor's parents.\textsuperscript{168}

The court found the only situation requiring consent is one "so peculiar to parental control that their consent is necessary," but did not give any examples of such a situation.\textsuperscript{169} Since the parents in \textit{Bucholz} knew about the case, \textit{Bucholz} is limited only to the issue of consent and does not touch the issue of notice. Interestingly, however, the court allowed the minor to proceed in his own name.\textsuperscript{170} Grounded in

\textsuperscript{163} Wermers, 557 F.2d at 176.
\textsuperscript{165} \textit{Id}. at 428.
\textsuperscript{166} \textit{Id}. at 427.
\textsuperscript{167} \textit{Id}. at 429.
\textsuperscript{168} \textit{Id}. at 428–29.
\textsuperscript{169} \textit{Id}. at 429.
\textsuperscript{170} \textit{Id}. at 428.
its appreciation of the minor's maturity, one reading of the decision is that the court was sufficiently convinced of the minor's ability to make his own decision without adult involvement. Another interpretation is that the court was reassured because the minor would still have an adult, his attorney, consulting with him and assisting him in his decision-making. Either way, Bucholz is important precedent, as minor plaintiffs in other states can argue by analogy to Michigan that they too should be able to bring cases without parental consent.

Missouri courts have also interpreted its state civil procedure rule to afford more rights to minors over age fourteen. In Strahler v. St. Luke's Hospital,\textsuperscript{171} the court found Missouri Civil Procedure Rule 52.02(c) did not relieve the disability of minority. Nonetheless, the rule means that “in the case of a minor who is fourteen or older, appointment of a next friend can be made without notice to the persons with whom the minor resides, and it can be accomplished without formal application to the court.”\textsuperscript{172} Since Strahler dealt with a two year statute of limitations rather than a minor's petition to bring suit without parental notice or consent, it did not address the issue in the same manner as Bucholz and Wermers. Still, Strahler suggests that minors over age fourteen can make decisions concerning who should represent them and petition for the appointment of guardians ad litem without parental notice.

Colorado has also ruled on the ability of a minor over age fourteen to gain access to court. In Foe v. Vanderhoof,\textsuperscript{173} a minor sought to bring an action challenging Colorado's parental consent to abortion act.\textsuperscript{174} The minor had attorneys and the court found they were sufficient to protect her interests:

\begin{quote}
We conclude that plaintiff's interests were sufficiently protected by her attorneys and social worker in this matter so as to obviate the necessity of appointment of a guardian to represent her. She has evidenced understanding of the legal and personal implications of this action and is capable of bringing the action on her own behalf.\textsuperscript{175}
\end{quote}

The court looked at the age of the minor, her capacity to make decisions, and the protection inherent in having adults represent her. The court decided that, together, these factors sufficiently protected

\textsuperscript{171} 706 S.W.2d 7 (Mo. 1986) (en banc).
\textsuperscript{172} Id. at 9.
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 957.
her interests. This case is limited because it does not discuss the issues of parental notice or consent. Still, Foe is important because the court draws a bright line at age fourteen, finding that a minor over age fourteen is mature enough to bring a suit on her own behalf. This result is consistent with the cases from Michigan and Missouri, allowing minors over age fourteen greater freedom to bring lawsuits.

2. Cases Stating Parents Cannot Waive Their Children’s Causes of Action

Many state courts have determined that parents cannot waive their children’s rights of action. This prohibition is enforced either by a refusal to find valid pre-injury release forms signed by parents on behalf of their children, or by a refusal to uphold statutes of limitations that are dependant on parental enforcement. These cases suggest that Danforth’s admonition against providing parents with an absolute veto of their children’s rights extends beyond the abortion context, to situations where a minor has a right of action and needs to enforce that right in court. Additionally, these cases present a limit to the presumption that parents act in the best interests of their children. Although courts may sometimes honor this presumption, they have been unwilling to do so when parents attempt to waive their children’s substantive rights.

Courts in Alaska, Arizona, Maryland, Missouri, New Mexico, Ohio, Texas, Utah, and West Virginia have refused to enforce statutes of limitations which depend on a parent bringing suit on behalf of the minor. This suggests that parental authority does not extend to the decision to extinguish a child’s legal claim.

The language of these cases is protective of minors and their legal rights. For example, the Alaska Supreme Court noted that “the State cannot lightly close the courthouse doors to minors.” The Missouri Supreme Court discussed the need to “safeguard the minor’s constitutionally guaranteed right of access to the courts,” and the Utah Supreme Court stated:

176. Id.
178. Sands, 156 P.3d at 1136.
179. Strahler, 706 S.W.2d at 11.
The law must guard the rights of children, many of whom, unfortunately, live in families where attention to a child’s needs may be wanting. The possibility that a child’s rights may be lost through a parent’s or another caregiver’s neglect, indifference, or abandonment is too great for the law to ignore.”

In these examples, courts are not worried about invading the province of parents who may have decided not to bring suit. Instead, the court is concerned with protecting the rights of minors who would otherwise be unable to access courts. This logic also supports removing obstacles for minors to get to court in other situations where they will be unable to bring their claims after age eighteen, or where they will be harmed by waiting until they are age eighteen. This is especially true in states providing a constitutional right of access to the courts.

Courts have also directly refused to defer to parents decision-making about their children when parents have tried to release their children’s legal claims. Courts in Colorado, Connecticut, Florida, Kansas, Maine, New Jersey, Tennessee, Texas, Utah, and Washington have invalidated parental releases of minors’ legal claims (such as when parents sign injury release forms on behalf of their children). These courts generally rely on the need to protect children, suggesting that parental authority must yield if a question of harm to the child arises. Additionally, the Colorado Supreme Court discussed how the decision to waive a claim is fundamentally different from those involved in the “care, custody, and control” of one’s children. In Cooper v. United States Ski Association, the court noted that waiver of a child’s litigation rights is “not of the same character and quality as those rights recognized as implicating a parents’ fundamental liberty interest in the ‘care, custody, and control’ of their

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180. Lee, 867 P.2d at 590.
183. Global Travel Mktg., Inc. v. Shea, 908 So. 2d 392, 397 (Fla. 2005).
191. See, e.g., Cooper v. Aspen Skiing, 48 P.3d 1229, 1232 (Colo. 2002); Global Travel Mktg., Inc. v. Shea, 908 So. 2d 392, 397 (Fla. 2005); Munoz, 863 S.W.2d at 210.
192. Cooper, 48 P.3d at 1232.
children." The court also noted that even if the parent's right was implicated, that right is not absolute and must yield to protect the child's well-being.

Although these cases all dealt with tort claims, the principle enunciated appears applicable in the case of a minor seeking to bring a lawsuit without parental notice/consent. Just as the decision to release a child's tort claim is of a different character than the decisions generally protected by the right to rear children, so too is the decision to prevent a child from bringing a claim to vindicate her right under a harassment statute or the Constitution. While a child is not harmed by a parent's decision to raise the child to follow a certain religion, a child is harmed when she is prevented from bringing a lawsuit to challenge a school policy. This harm is comparable to a child whose tort claim is permanently extinguished by her parent. That a parent has religious beliefs concerning homosexuality is irrelevant if the child desires to vindicate a statutory right, just as a parent's religious belief that obtaining money in a settlement is immoral would not give that parent the right to waive her minor child's tort claim.

3. Other Cases Supporting the Rights of Minors

In Mendillo v. Board of Education, the court endorsed a theory similar to Janet Dolgin's, that the "decisions of the United States Supreme Court over the last thirty years reflect a growing awareness that the legal status of children has changed, like that of women, 'from that of a chattel to that of a person entitled to legal redress for wrongs done to [the child].'"

And, in Kirkpatrick v. Eighth Judicial District Court, the Nevada Supreme Court used reasoning similar to Hodgson to invalidate a law requiring both parents consent before a minor could marry. It noted that while the rights of parents are fundamental, "they are not absolute . . . . The state also has an interest in the welfare of children and may limit parental authority . . . . If the state can completely eliminate all parental rights, it can certainly limit some parental rights when the
competing rights of the child are implicated."199 The Tennessee Court of Appeals, meanwhile, stated that minors over age fourteen have a common law rebuttable presumption of capacity to consent to medical treatment.200

4. Cases Expanding the Rights of Parents

While many states have found in favor of minors when there is a clash between minors and parents, others have stated strong presumptions in favor of parental rights, going beyond the United States Supreme Court. California directly addressed the issue of children bringing lawsuits when their parents object, and twice stated that parents may control their minor children’s lawsuits. In Aronson v. Superior Court,201 the court wrote:

Except in egregious situations calling for interference with legal custody, the parents, not the courts, make decisions for the minor. The decision to file a malpractice action is one such decision. Nowhere in the statute is there language authorizing special exceptions for the minor whose parents simply refuse to sue when, perhaps, some person would conclude they should . . . . Nor is a court in any event well situated to judge the wisdom of the parental choice to sue or not to sue. We are not inclined to hold as a matter of law that a lawsuit is always the best use of family resources and energy. Nor are we inclined, or authorized, to take over the decisions relative to the care of minors.202

In Williams v. Superior Court,203 the court agreed with Aronson, noting in dicta that “[t]he [f]ather argues that Aronson recognized that parents have the right to determine if and when their child should bring a civil lawsuit. We have no quarrel with this principle.”204

However, these cases dealt with very different situations than those at issue in this Article. In Aronson, the minor was left mentally impaired at his birth, and unable to select his own guardian.205 The only relevant question for the court was whether to privilege the parent’s decision not to sue over another adult’s desire to sue. Thus, Aronson should be understood in context: as a tort case where there was no evidence of the parent acting contrary to the best wishes of the minor. Similarly, in Williams, also a tort case, the parent lost his chal-

199. Id. at 1059 (footnotes omitted).
202. Id. at 351.
203. 54 Cal. Rptr. 3d 13 (Ct. App. 2007).
204. Id. at 25.
lenge arguing that he should be appointed guardian ad litem. The court mentioned briefly in dicta that parents have the right to determine if and when their children bring a lawsuit. There is no language to suggest the court considered, let alone ruled on, the situations discussed in this Article. Thus, not only is California the only state to explicitly hold that parents control the minor’s right to sue, it is unclear whether this decision even applies outside of the medical malpractice context.

Louisiana, 206 Maryland, 207 and Virginia 208 have upheld statutes of limitations preventing minors from bringing lawsuits unless their parents act on their behalf. Courts in Massachusetts 209 and Ohio 210 have held that pre-injury releases signed by parents are valid. However, these cases generally do not include in-depth balancing of the rights of parents and their minor children. To the contrary, the Louisiana, Maryland, and Virginia cases discuss the legislature’s ability to draw statutes of limitations to limit medical malpractice “crises.” In doing so, these states presume parents will act in the best interests of their children. For example, the Virginia Supreme Court notes, “The legislature was thus free to presume that some adult responsible for the minor’s welfare, usually a parent, would act diligently and prudently to protect the minor’s interests.” 211

Regarding the pre-injury release cases, both appear limited to activities in which the minors had no underlying rights to participate. The Massachusetts case rested on the fact that the minor had no independent right to participate in extracurricular athletic activities. Therefore the parent could release the minor’s claim for injury from participation. 212 The Ohio cases considered recreational activities, where the children again had no inherent right to participate. This calculus may change where the parent prevents a child from exercising a right derived from a constitutionally protected interest.

Courts have considered the conflict between a minor and a parent in other situations. In Newman v. Cole, the court refused to abrogate the doctrine of parental tort immunity, and stated: “[P]arental authority will not be interfered with, except in case of gross miscon-
duct or where, from some other cause, the parent wants either the capacity or the means for the proper nurture and training of the child.”213 In State v. Iban C., the Connecticut Supreme Court found a “strong but rebuttable presumption exists that the responsibility for making decisions and speaking for minor children vests in the parents” and that this presumption can only be overcome in “exceptional cases.”214 The Florida Court of Appeals, meanwhile, found Florida’s right to privacy grants parents the right to make decisions concerning their children’s welfare without third-party interference.215

5. Conclusions

The state cases reflect the idea that the parental right to rear children is designed to protect the best interests of the minor and to create conditions in which minors can make “good” decisions. Nine state courts ruled that statutes of limitations must be extended to allow minors to bring claims, and ten stated that parents cannot release their children’s tort claims. However, only three have found that statutes of limitations may restrict minors’ rights of access to courts, and only two have found that parents may release their children’s tort claims (and only in certain contexts). States that value greater parental authority have consistently defended their positions on the grounds that more parental authority will not harm minors. Overwhelmingly, then, the focus is on the best interests of the minor.

E. State Rights of Access to Courts

Thirty-three states provide a constitutional right of access to courts.216 In addition to these thirty-three states, five have a judicially recognized right.217 Thus, thirty-eight states consider access to courts a fundamental state-law right. Of these thirty-eight states, five have explicitly extended this right to minors.218 The cases extending the right to minors show a familiar concern for the child’s well-being. For ex-

216. See infra app. tbl.1 col. 5 (Right of Access to Court).
217. See infra app. tbl.1 col. 5 (Right of Access to Court).
ample, in *Strahler* the Missouri Supreme Court noted that "the general tolling provisions of section 516.170 preserve the cause of action for a minor and safeguard the minor's constitutionally guaranteed right of access to the courts—even if parents, guardians or others having custody of a child fail to protect the child's legal rights." In these states, minors should be able to argue that parental notice/consent statutes unfairly burden their fundamental right of access to courts. Like a minor whose tort claim would otherwise be extinguished, minors in these situations may never be able to exercise their rights, unless they are allowed to do so without parental notice/consent.

F. State Abortion Statutes

Although thirty-seven states have abortion statutes requiring parental notice/consent, thirteen do not. In these thirteen states, minors have the right to receive abortions without parental notice/consent. Some of these states lack statutory law about this issue, while others have modified the *Bellotti II* requirements. Connecticut law requires physician counseling about the possibility of involving the minor's parents, and Maryland law substitutes the physician's judgment for the judicial bypass. This provides another example of legislatures more concerned with ensuring that minors make informed decisions than with protecting parental authority.

Three states with abortion statutes have cases that have arguably invalidated the statutes. California, Florida, and New Jersey courts have all interpreted state constitutions as providing minors with greater abortion rights. In *American Academy of Pediatrics v. Lungren*, the California Supreme Court stated that there exists a state constitutional interest in personal autonomy. This interest extends to minors and can only be infringed by a compelling state interest. Thus, the court found unconstitutional a statute requiring a minor obtain either parental consent or judicial authorization before an abortion.

219. *Strahler*, 706 S.W.2d at 11.
220. See infra app. tbl.1 col. 6 (Judicial Bypass Statute).
221. See infra app. tbl.1.
222. CONN. GEN. STAT. § 19a-601 (2007); MD. CODE ANN., HEALTH-GEN. § 20-103(C) (LexisNexis 2004).
Florida similarly invalidated a statute requiring parental notice or judicial authorization, finding it infringed on minors’ rights to privacy.\(^{227}\) And in \textit{Farmer}, the New Jersey Supreme Court invalidated a statute that conditioned a minor’s abortion on parental notification or judicial bypass.\(^ {228}\) Relying on state privacy provisions, the New Jersey Supreme Court favored the rights of minors over parents. The court noted that the maturity of minors is respected in other areas, such as consenting to caesarian sections,\(^ {229}\) and that minors choosing abortions do not “suffer greater psychological problems.”\(^ {230}\) Additionally, the court noted that many minors come from abusive families and are justified in not wanting to notify their parents.\(^ {231}\) In these three decisions, the courts found that (1) minors have rights, (2) minors are capable of exercising those rights in a mature fashion; and (3) a minor attempting to exercise her rights may be burdened by parental notice/consent.\(^ {232}\)

G. Conclusions

Taken together, these statutes, rules, and case law suggest that states generally impose a screening process on minors’ cases not imposed on adults. This screening requires minors go to court through a guardian ad litem to protect the minor’s best interests. Courts presume that parents are usually the best people to represent the best interests of the minor, and thus parents make ideal sponsors for minors’ lawsuits. However, if the parent is not acting in the best interest of the minor, then courts will appoint a responsible adult to represent the minor. On the whole, both state statutes and case law support the proposition that when parents’ and minors’ rights conflict, legislatures and courts should look to the minor’s best interest. In making this assessment, the court should take the course of action that best enhances the minor’s decision-making capability, without harming the minor.

\(^{227}\) \textit{N. Fla. Women’s Health \& Counseling Servs.}, 866 So. 2d at 622.
\(^{228}\) \textit{Farmer}, 762 A.2d at 638–39.
\(^{229}\) \textit{Id.} at 636.
\(^{230}\) \textit{Id.}
\(^{231}\) \textit{Id.} at 634 (citing H.L. v. Matheson, 450 U.S. 398, 438–39 (1981)).
\(^{232}\) \textit{See} Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 811 (Cal. 1997) (holding that minors have rights and may exercise those rights); \textit{N. Fla. Women’s Health \& Counseling Servs.}, 866 So. 2d at 622 (acknowledging that requiring parental notification makes exercising rights difficult); \textit{Farmer}, 762 A.2d at 638.
IV. Expanding the Mature Minors Doctrine

A. The Legal Construction of Adolescence

Adolescents occupy a unique place in society: they are not yet adults, but are also no longer children. The legal status of adolescents is equally mixed. Adolescents cannot receive the death penalty, vote, drink, or sign binding contracts. They cannot marry, join the military, or have surgery without parental consent. Yet the law allows them to consent to certain types of healthcare,\(^*\) they may be sexually active,\(^\ast\ast\) may purchase contraceptives,\(^\ast\ast\ast\) and may drive. And, the justice system frequently treats them as adults. Many adolescent cases are transferred to adult court, and the age of eligibility for transfer to adult court has been lowered in recent years.\(^*\ast\ast\) Recent bills have also tried to lower the age at which adolescents can be treated as adults for federal prosecutions.\(^\ast\ast\ast\) Thus, adolescents occupy an in-between position in the eyes of the law.

Some argue that the legal construction of adolescence is the result of changes in the nature of the family.\(^*\ast\) Adolescence was not described and identified until the early twentieth century,\(^\ast\ast\) and some believe it has recently been re-defined.\(^\ast\ast\ast\) Thus, it is not surprising that most laws codifying the special status of adolescence have been passed in the last fifty years. The newness of these doctrines should not be overstated. Although they were recently codified, there

\(^{233}\) See Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 73 (1976); Farmer, 762 A.2d at 638.

\(^{234}\) See OFFICE OF PUB. HEALTH & SCI., STATE LAWS ON AGE REQUIREMENTS AND SEX (2008), http://www.4parents.gov/sexrisk/teen_sex/statelaws_chart/statelaws_chart.html. Many state rape statutes set the age of consent at age 16, allowing minors over this age to consent to sexual activity. Even for states that set the age at 18, most draw an exception for younger minors having sex with a partner their age. Id.


\(^{236}\) See Dolgin, supra note 196, at 426-29.

\(^{237}\) Id. at 426.

\(^{238}\) Id. at 349-50. Dolgin argues there have been wide-ranging changes in the nature and meaning of the family, from a site of industrial production to a place of individual, autonomous, non-market fulfillment. Id. at 351-52. The shift to viewing children as autonomous individuals has thus blurred the boundary between childhood and adulthood. As the ones closest to adulthood, adolescents occupy this blurred zone. It is thus no surprise that the law is conflicted, viewing them sometimes as children and sometimes as adults. Id. at 352.


is ample precedent in older cases recognizing the increased capacity of mature minors.\textsuperscript{241}

\section*{B. The Mature Minor Doctrine}

With the formalization of adolescence and the development of adolescent medicine came the legal recognition of the mature minor doctrine: that minors over a certain age are presumed mature and can consent to certain procedures. This doctrine fits with the idea that parent-child cases are about protecting minors’ decision-making abilities. In certain situations, legislatures have concluded that minors are capable of making competent decisions. Assured that minors have achieved sufficient maturity, neither legislatures nor courts concern themselves with abridging parental rights.

Almost every state has legislation allowing mature minors to consent to treatment of sexually transmitted diseases ("STDs").\textsuperscript{242} These states vary in the age at which they allow minors to consent.\textsuperscript{243} They also vary in the level of protection given minors, with some always allowing minors to consent and others only allowing minors to consent if their parents are unwilling or unable.\textsuperscript{244} Some states allow minors to consent, but give the treating physician authority to override the minor’s wishes and notify a parent if the physician believes it in the minor’s best interest.

\textsuperscript{241} There is the common law rule of sevens, for example. This rule was first described in an 1845 English case, The Queen v. Smith Cox C.C. 260 (Crim.) (1845). Arshagouni, \textit{supra} note 240, at 332. Arshagouni describes the case as creating the proposition that:

[M]inors under seven years of age carry an irrebuttable presumption of no capacity (incapable of harmful intent). Minors between the ages of seven and fourteen have a rebuttable presumption of no capacity. Minors from the ages of fourteen to twenty-one have a rebuttable presumption of capacity. Those over twenty-one are presumed to have full capacity.

\textit{Id.} This rule was cited in a 1996 Tennessee case, \textit{Roddy v. Volunteer Medical Clinic, Inc.}, 926 S.W.2d 572, 576 (Tenn. Ct. App. 1996) (citing \textit{Cardwell v. Bechtol}, 724 S.W.2d 799 (Tenn. 1987)).


\textsuperscript{243} California, Delaware, Illinois, and Vermont set the age at twelve. \textit{See} CAL. FAM. CODE \textsection 6926 (West 2008); DEL. CODE ANN. tit. 13 \textsection 710 (1999); 410 ILL. COMP. STAT. 210/4 (1997); VT. STAT. ANN. tit. 18, \textsection 4226 (1982). Idaho sets it at age fourteen. IDAHO CODE ANN. \textsection 39-5801 (2008). The rest of the statutes do not state an age requirement.

\textsuperscript{244} Alaska, for example, allows minors who still live with their parents or legal guardian to consent, but only if the minor’s parent is unwilling to consent. ALASKA STAT. \textsection 25.20.025 (2008).
In addition to the STD-treatment statutes, twelve states have HIV-testing statutes that mention minors. Like the STD-treatment statutes, their age requirements vary, with some allowing all minors to consent, and others limiting the right to minors above a certain age. The state HIV-testing statutes also vary in levels of confidentiality and degree of parental involvement required.

Many of these statutes allow physicians to override the minor’s decision and notify the minor’s parents, or provide for physician counseling about the benefits of parental notification. States also provide statutory protection for minors seeking to undergo substance abuse treatment. Many of these provisions do not explicitly provide


247. North Carolina, for example, allows minors to consent to HIV testing, but only in situations in which “the parent or guardian has refused to consent to such testing and there is reasonable suspicion that the minor has AIDS virus or HIV infection or that the child has been sexually abused.” N.C. Gen. Stat. § 130A-148(h) (2007). Iowa, meanwhile, allows minors to consent to HIV testing, but mandates parental notification if the test result is positive. Iowa Code § 141A.7(3) (2008).

248. Colorado allows all minors to receive confidential treatment, but also provides that for a minor under age sixteen, the physician “may” notify the minors’ parents. Colo. Rev. Stat. § 25-4-1405(6) (2007). The statute also requires physician counseling about the benefits of notifying one’s parent. Id. Michigan allows minors to consent to HIV testing and treatment, but also provides that a physician may override the minor’s decision and inform his parents. Mich. Comp. Laws § 333.5127(1)–(2) (West 2008). Connecticut law provides for parental consent, but allows the physician to waive this consent. Conn. Gen. Stat. § 19a-592(a) (2007). While more restrictive than other state statutes, the Connecticut statute implicitly recognizes that some minors will not seek treatment unless they can receive it confidentially, and appears to determine that the harm to untreated minors is greater than any benefit from forcing minors to obtain parental consent.

age limits, though a few provisions limit the testing right to older minors.²⁵⁰ Like HIV-testing statutes and substance abuse treatment statutes, the states vary in levels of protection granted to minors.²⁵¹ Many states vest the physician (or substance abuse counselor) with discretion concerning whether to notify the minor’s parents.²⁵² Additionally, some states provide that adolescents may obtain access to family planning services without parental notice/consent, and that minors may consent to pregnancy-related services.²⁵³ These statutes commonly allow physicians to notify parents if they believe notification is in the minor’s interests.²⁵⁴ Together, these statutes reflect


²⁵¹ Connecticut provides that parents may only be notified if the minor consents to parental notification. Conn. Gen. Stat. § 17a-688(d) (2007). New Jersey only mentions parental notification in cases of sexual assault and states that except where required by law, information between the patient and physician is to be considered confidential. N.J. Stat. Ann. § 9:17A-4 (West 2007). Illinois, meanwhile, provides for making reasonable efforts to involve the family in the minor’s treatment. 410 Ill. Comp. Stat. 210/4 (2008). Nevada allows physicians to treat patients without parental consent, but then provides that “any physician who treats a minor pursuant to this section shall make every reasonable effort to report the fact of treatment to the parent, parents or legal guardian within a reasonable time after treatment.” Nev. Rev. Stat. § 129.050(3) (2007).


the objectives of the state procedural rules discussed earlier in section III.255 The statutes protect minors when their parents are not acting in their best interests, and commonly require another responsible adult (usually the treating physician) to verify that any action taken is indeed in the minor's best interest.

Recently, states have begun passing mental health statutes that protect the confidentiality of minors. At least fourteen states and the District of Columbia allow minors to consent to mental health services. The majority of these states set a minimum age for consent to these services.256 Some of these states also give clinicians the right to decide whether parents should be notified.257 Interestingly, some of these statutes provide for judicial bypasses similar to those present in abortion statutes. For instance, Wisconsin allows minors over age fourteen to consent, though they must first petition a county officer for the right to do so.258 Meanwhile, the District of Columbia and New


257. California, for example, allows the clinician to determine whether parental involvement would be detrimental to the minor. Cal. Fam. Code § 6924(d) (West 2007). Similarly, in Maryland, clinicians are allowed to determine that parental notification is in the minor’s best interest. Md. Code Ann., Health-Gen. § 20-104(b)(1) (West 2008). Connecticut, meanwhile, allows minors to consent to receive mental health services (excluding psychotropic drugs), provided the clinician believes they are mature enough to receive them and has reason to believe parental notification is not in the child’s best interest, though the law leaves it to the doctor’s discretion the number of sessions a minor may receive without parental consent. Conn. Gen. Stat. § 19a-14c (2007).

York allow minors under age sixteen to seek judicial authorization to receive psychotropic medications.\textsuperscript{259}

Thematically, the STD-treatment statutes, pregnancy care statutes, substance abuse treatment statutes, and mental health care statutes are similar. They all privilege the needs of the minor over the parents and facilitate the minor's decision-making process. Minors may consent, and where the physician thinks this consent is in the minor's best interest, the minor's judgment is usually respected. However, where the physician believes otherwise, then the physician may notify a parent, presumably based on the premise that not doing so will harm the minor. Notification is more likely required in dangerous situations, such as when a minor is admitted to a hospital. It is less likely in lower stakes situations, such as when a minor seeks mental health counseling. This is probably because legislatures believe minors better able to make less dangerous decisions on their own.

Also interesting are the age ranges in the statutes. Although many of the treatment and testing statutes do not set minimum ages for consent, almost all of the mental healthcare statutes set such a minimum. This may be due to the nature of the activities being treated, as lawmakers may have assumed mature minors are more likely to engage in sexual activity and substance abuse, and thus found age limits unnecessary in these statutes. In contrast, there is nothing unique to older minors seeking mental health treatment. Here, lawmakers may have found it more important to draw lines reflecting differential abilities to consent.

Despite their prevalence, mature minor statutes are a relatively recent legal development. One of the first was a California statute enacted in 1953; most of the others were passed between the late 1960s and the late 1980s.\textsuperscript{260} The mental health decision-making statutes are even more recent, with the majority of them enacted in the past twenty years. The fact that so many of these statutes have been passed in the last sixty years suggests that legislatures have become more receptive to the idea that adolescents can make some decisions without parental input. All of these statutes have converged on the idea that there are certain areas where minors need protection from harm. In these areas, minors are granted the rights to make important decisions without notifying their parents. In some states, other adults, such as physicians, become the responsible adult "screen" of the minor's

\textsuperscript{259} See D.C. Code § 7-1231.14(c)(1) (2008); N.Y. Mental Hyg. Law § 33.21(e)(2) (Consol. 2008).

\textsuperscript{260} Abigail English & Madlyn Morreale, supra note 255, at 71, 75.
decision, a safety net designed to ensure that the minor not make a decision contrary to her long-term best interests. In other states, legislatures have determined minors are capable of making decisions on their own and can consider their best interests, absent adult oversight.

The mature minor doctrine is not perfect. Indeed, some scholars have argued for its expansion within the medical context. Still, mature minor statutes provide an example of what could be done in the context of a minor seeking access to court. State legislatures could similarly draw the line at a certain age, and allow minors above that age to petition for the appointment of guardians ad litem without parental notice/consent, provided the judge agrees such petition is in the minor’s best interest. If a guardian ad litem is appointed, then states can either allow the minor to proceed with the case without parental notice/consent, or give this decision to the guardian, who would only notify the minor’s parent of the lawsuit if the guardian found notification to be in the minor’s best interest.

V. Theories of Adolescent Decision-Making

Adolescence is the time when minors are faced with the task of “grow[ing] into free and independent well-developed men and citizens.” Minors need space in adolescence to develop their identities, and the law should protect this space so that minors may explore and develop into mature, emotionally healthy adults. When the minor makes certain decisions on her own, this development process is furthered. This Part explores research on adolescent decision-making and concludes adolescents are capable of making the decision to seek the appointment of a guardian ad litem.

A. Minors and Decision-Making

At issue in this Article is a minor’s ability to make informed decisions without the assistance of her parents. Studies show that while there are some areas where adolescents exercise impaired judgment relative to adults, there are also areas where adolescents are capable of making informed decisions.


Piagetian developmental theory suggests cognitive development occurs in predictable stages, with the highest stage reached between ages eleven and fourteen, when adolescents become capable of reasoning abstractly and deductively.263 As Elizabeth Cauffman and Laurence Steinberg noted, Piaget’s theory suggests that “adolescents who have reached the formal operational stage have cognitive abilities equivalent to those of adults.”264

Many recent studies found little to no difference between an adolescent’s and an adult’s ability to make decisions. Adolescents perceive relative risks (i.e., risks to themselves as opposed to others) as accurately as adults do.265 Perhaps because of the issues visibility, many of these studies have focused on abortion, concluding that adolescents are equally competent at making this sensitive decision.266 Additionally, studies show that adolescents have similar competence to adults in making other health-care decisions.267

In 2003, J. Shoshanna Ehrlich published a study analyzing 490 interviews and referrals conducted by the Planned Parenthood League of Massachusetts, and interviews with twenty-six minors who received judicial authorization for abortions.268 Ehrlich’s results confirm those of earlier studies suggesting adolescent capacity to make the abortion decision. Notably, she found that: “they all had clearly-articulated reasons for why having a child was not a present option for them, reflecting both an understanding of their present circumstances and a dynamic grasp of future possibilities.”269 These minors were able to weigh the present and the future, and to distinguish between their present selves and their future selves, predicting a time when they would like to bring children into the world.270


264. Id.


269. Id. at 107.

270. Id. at 110.
Although they did not consult their parents, every minor inter-
viewed for the Ehrlich study consulted at least one adult prior to mak-
ing the abortion decision.\(^{271}\) Ehrlich also found the minors took the
decision not to tell their parents “very seriously,” and that “they had
multiple reasons that were well-grounded in the realities of their
lives.”\(^{272}\) These reasons included fear of severe adverse parental reac-
tion/parental anger, concern for the minor’s relationship with the
parent, concern for the parent, lack of relationship with the parent,
and parental pressure/ideology.\(^{273}\) All of these concerns are likely fac-
tors in the situation of a minor who wishes to hide her sexuality from
her parent. Since as many as 99.6% of judicial bypass provisions are
granted,\(^{274}\) there is no reason why Ehrlich’s results should not be gen-
eralized to the majority of minors. The results suggest minors are ca-
ble of making the decision to go to court without parental notice/
consent.

Still, some recent scientific studies found differences in adoles-
cent brains, suggesting that adolescents and adults make some deci-
sions differently. For example, newer studies suggest the brain
continues to undergo important developmental processes until the
early twenties.\(^{275}\) In particular, researchers had long believed the
brain undergoes a process of overproduction, pruning, and culling
brain cells in the first few years of life. However, some neuroscientists
now believe the brain undergoes a second wave of overproduction,
and then culls these cells into the early twenties.\(^{276}\) During adoles-
cence the brain increases myelation of dendritic connections, “im-
prov[ing] the speed and efficiency of electro-chemical
transmission.”\(^{277}\) The cerebellum, a part of the brain important to
higher-order thinking and complex problem-solving,\(^{278}\) does not ma-
ture until the early twenties.\(^{279}\) The prefrontal cortex within the fron-
tal lobe, meanwhile, is important to “decision-making, risk assessment,

\(^{271}\) Id. at 108.
\(^{272}\) Id. at 122.
\(^{273}\) Id. at 131–39.
\(^{274}\) See Shield, supra note 40, at 410 (explaining that the “trial court in Hodgson found
that 3558 of 3573 bypass petitions were granted”).
\(^{275}\) Arshagouni, supra note 240, at 330 n.94.
\(^{276}\) Id. at 347–48.
\(^{277}\) Id. at 348.
\(^{278}\) See Arshagouni, supra note 240, at 349 n.203 (citing Interview with Jay Giedd, PBS
giedd.html (last visited May 1, 2009)).
\(^{279}\) Id.
and the ability to judge future consequences," and appears underdeveloped in adolescents.280

Thus, adolescents may make some decisions differently than adults. For example, the frontal lobe moderates signals from the amygdala, a part of the brain which plays an important role in emotional processing.281 A minor with an underdeveloped frontal lobe may have less control over the amygdala, causing the teen to be less able to control her emotions and more prone to impulsive, risk-taking behavior.282 Additionally, these cognitive differences may cause adolescents to weigh priorities differently, perhaps privileging the short-term over the long-term.283 They are also more likely to engage in sensation-seeking behavior, preferring activities with high degrees of novelty and intensity.284 Adolescents may also be more susceptible to peer influence, though this peaks at early adolescence.285

In writing about these cognitive differences, Paul Arshagouni emphasizes that cerebellum development "is more influenced by environmental factors than genetic ones."286 The very act of making an important decision involving a minor's critical reasoning skills can assist the minor's development, assuring the minor has the skills she needs when she reaches adulthood.287 Because of this interaction between environment and development, Arshagouni believes the way to support teenage development is not to prevent adolescents from making any decisions, but "that the law ought to foster a system that encourages adolescents to develop their own critical reasoning and risk assessment skills during this critical phase of brain development."288 Thus, he believes the law should respect minors' decisions in areas where they are not "immature, or inexperienced, or lacking in judgment," and believes this includes "a great many health care decisions."289

Arshagouni argues for a presumption of capacity to consent for "all routine, low-risk health care procedures that do not involve potential adverse long-term consequences," while simultaneously suggesting

280. Id. at 350.
281. Id. at 350–51.
282. Id.
283. See Cauffman & Steinberg, supra note 240, at 1772–73.
284. See id. at 1773.
285. See id.
286. Arshagouni, supra note 263, at 349.
287. Id. at 349–50.
288. Id.
289. Id. at 343.
a rebuttable presumption of no capacity for “high-risk medical procedures, or procedures with potentially adverse long-term consequences.”

B. Conclusions

Minors are capable of making the decision to go to court and seek the appointment of guardians ad litem. The decision to file a case is not usually done out of emotion, impulse, or teenage risk-taking. Thus, it seems to fall on the part of the decision-making spectrum in which adolescents are most capable of making informed decisions. Furthermore, the judge, attorney, and adult guardian’s presence in the suit will serve as checks against any irrationality in the minor’s decision. For example, the Model Rules of Professional Conduct require that the attorney representing the minor protect the minor’s interests.

VI. Applying the Mature Minor Doctrine to the Right of Access to Courts

A. Designing a Right of Access to Courts for Minors

There are a few ways legislatures can design statutory rights of access to courts. One possibility allows minors to bring causes of action in their own names, as the Colorado court did in Strahler. A bright-line rule allowing minors over a certain age, perhaps fourteen, to go to court without parental notification/consent would solve many of the problems listed in this Article. Yet, this approach has its limitations. First, although research suggests that many minors are able to make the decision to bring a lawsuit and gauge whether doing so is in their best interests, not all are able to do so. As Part V discusses, there are differences between the adolescent brain and the adult brain. Many of the statutes recognizing the mature minor doctrine do so in situations where a mature adult supervises the minor’s decision. Thus, it may be more desirable to have a judge and guardian ad litem verify that the minor is acting in her long-term best interests.

Also, an approach allowing all minors over age fourteen to bring their own lawsuits would be hard to reconcile with the Court’s parent-child jurisprudence. The Court has emphasized the role of the parent in assisting the minor in decision-making, and many parents truly do act in the best interests of their minor children. Thus, a rule allowing

290. Id. at 359.
291. See Model R. of Prof’l Conduct 1.14.
all minors to bring lawsuits without parental notice/consent, without a showing that notice/consent would harm the minor, is likely to be seen as unwanted judicial encroachment on the parental right to rear children.

Allowing minors to bring their own lawsuits would also possibly be problematic for other doctrines that protect minors in situations where their decisional capacity is at its weakest. For example, a rule allowing all minors to bring lawsuits may imply minors are mature enough to receive the death penalty. Or, it might threaten the rule that minors can void contracts. Additionally, since such a broad rule is substantially different from those already in existence and threatens parent's rights, it would likely not be politically feasible.

A better solution is to incorporate judicial-bypass provisions to state procedural statutes concerning appointment of guardians ad litem. These could be straightforward and modeled after state abortion and mental health care statutes. This solution is a modest extension of existing law. States already allowing minors above age fourteen could add provisions clarifying that parental notice/consent is not required for the minor to petition for the appointment of a guardian. Even in states that do not expressly allow minors above age fourteen to petition for a guardian, allowing minors to do so would not be an extreme departure from existing law. Most of those states have statutes granting minors access to courts and procedures allowing minors to appoint a guardian ad litem. Thus, any change would be relatively small. Support for this change could be found in the statutes of states that have already drawn this distinction.

Accordingly, states that do not draw the line at fourteen should consider modeling their statutes after the states that do, such as Michigan and Missouri. States should also consider adding provisions stating that a minor aged fourteen (or fifteen or sixteen) is allowed to petition for a person of her choice to serve as her guardian ad litem. In addition to other states' laws, such a change is amply supported by the statutes codifying the mature minor doctrine, which allows minors over a certain age to consent to certain types of health care. This simple statutory change will clarify minors' legal rights in these states.

This change would be less far-reaching than allowing minors to bring their own causes of action. It would rationally advance state policy goals of protecting minors' best interests, without upsetting existing legal doctrines. States have an interest in protecting minors, and should protect minors' procedural right of access to courts. The decision to seek judicial vindication can be important to the minor's iden-
tity development and general cognitive development. Providing the safeguards of judicial petition and the presence of a guardian assure the minor is able to make the decision to go to court when it is in her best interest.

Practical considerations ensure this modest extension of existing law would not prove detrimental to the parent-child relationship. While some minors may be able to obtain funding for such a suit from outside sources, the costs of the lawsuit will likely induce many minors to notify their parents. Lawsuits are fairly public, time-consuming events. Thus, most minors will probably find it far easier to notify their parents than to try bringing lawsuits in secret. In fact, the only minors likely not to notify their parents are minors whose parents are already distant and uninvolved in their decision-making process. These minors will benefit most from provisions allowing them to seek appointment of a guardian ad litem without parental notice/consent, since it will allow them to get more adult input about whether bringing a lawsuit is in their best interests.


While helpful, provisions allowing minors to get to court without parental notice/consent will not solve all of the problems listed in Part I. First, it is likely that only a small subset of minors will be able to use them, as most minors lack the resources to support a lawsuit. Second, a judicial bypass provision will be of little help for minors afraid to go to court. Thus, in addition to better rights of access to courts, continued advocacy for direct rights is important.

Still, the rights advocated in this Article are an important first step. First, in situations where statutory rights already exist (such as with an anti-harassment statute), a judicial bypass would allow a minor to vindicate her statutory rights despite an unwilling parent. Otherwise, the courts are closed to that minor. Second, in a situation where a minor wishes to challenge the constitutionality of a statute, a judicial bypass would be a necessary beginning. Even though not all will be able to use such a bypass, those who do bring cases will affect the rights of the other minors who cannot, as is the nature of impact litigation. Finally, the existence of a right of access to courts may make it easier to advocate for legislative change in other areas. If this right

exists for a few years and legislators see adolescents are capable of using it in a mature manner, without disrupting familial harmony, then state legislators may be more willing to extend similar rights to adolescents in other areas.

VII. Conclusion

The legal status of LGBT minors is unique. They are granted statutory rights, yet not given the procedural rights needed to enforce them. While most minors are granted the legal space to develop into mature, healthy adults, LGBT minors are often denied the resources needed for healthy identity development. A procedural right of access to courts is an important safeguard for these minors, and would allow them to enforce their constitutional and statutory rights.

A right of access to courts fits with the Supreme Court’s parent-child jurisprudence, and with the social science literature on healthy development and adolescent decision-making. Therefore, state legislatures should work to codify such a procedural right in their statutes, making it clear that mature minors have the right to petition for guardians ad litem without parental notice/consent.

Such a right would not automatically allow a minor to join an LGBT youth group, or stop a minor from being harassed at school. Nonetheless, it would allow the minor to argue that her rights should be vindicated, and if successful, the minor’s case could extend rights to many other minors who would otherwise stand no chance of having these rights realized. For example, consider a minor who wants to be out to peers at school and seeks to stop harassment, yet does not want to be out to her parents. Unless that minor can get to court with the assurance her parents will remain uninformed, her statutory right is meaningless. Thus, although it lacks the immediate effect of a direct policy change, the right of access to courts would ultimately provide minors with broader protection; whenever a new law or policy is passed, minors will have the ability to go to court and challenge the law.

With a right of access to courts, a minor lacking supportive parents will be included in the legal system, rather than effectively barred from it. A minor wishing to challenge a school policy forbidding her from joining gay-straight alliances without parental consent will have a mechanism to protest. Regardless of her parents’ opinion, a minor harassed in school is guaranteed a cause of action. Similarly, transgender minors will have the right to challenge school policies regardless of how their parents feel about their gender expression. In short,
it will help lesbian, gay, bisexual, and transgender minors secure the rights necessary to develop healthy identities, rights long granted to their heterosexual peers.
## Appendix

### Table 1

<table>
<thead>
<tr>
<th>State</th>
<th>Source of Rule</th>
<th>Specific Guidelines for Appointment</th>
<th>Distinction for People over Fourteen</th>
<th>Right of Access to Court</th>
<th>Judicial Bypass Statute</th>
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<tr>
<td>Alabama</td>
<td>ALA. R. Civ. P. 17(c)</td>
<td>ALA. R. Civ. P. 17(d)</td>
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<td>Mentioned in cases</td>
<td>ALA. CODE § 26-21-4 (1992)</td>
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<td>Colorado</td>
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<td>N</td>
<td>N</td>
<td>COLO. Const. art. II, § 6</td>
<td>COLO. REV. STAT. 12-37.5-107 (2007)</td>
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<td>Distinction for People over Fourteen</td>
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<td>Judicial Bypass Statute</td>
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<td>Hawaii</td>
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<td>No parental consent statute</td>
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<td>Distinction for People over Fourteen</td>
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<td>Judicial Bypass Statute</td>
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<td>Minn. Stat. § 144.343 subdiv. 6 (2007)</td>
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<td>N.M. DIST. CT. R. CIV. P. 1-017(c); N.M. STAT. § 38-4-10 (2008)</td>
<td>N.M. STAT. § 38-4-10 (2008)</td>
<td>Y (for defendant)</td>
<td>N.M. CONST. art. II, § 18 (cases say this provides rt. of access to courts)</td>
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<td>Ohio REv. CODE ANN. § 2151.85 (West 2008)</td>
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<td>Or. R. CIV. P. 27</td>
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<td>R.I. CONST. art. 1, § 5</td>
<td>R.I. GEN. LAWS § 23-4.7-6 (2007)</td>
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<td>UTAH R. Civ. P. 17(c)</td>
<td>Y</td>
<td>UTAH Const. art. I, § 11</td>
<td>UTAH CODE ANN. § 76-7-304.5 (2007)</td>
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<td>VT. R. Civ. P. 17(c)</td>
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<td>VT. CONST. ch. I, art. 4</td>
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Table 2: State Procedural Rules

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<tr>
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<th>Text of Rule</th>
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<tr>
<td>Federal</td>
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<td><strong>FED. R. CIV. P. 17(c).</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(1) With a Representative. The following representatives may sue or defend on behalf of a minor or incompetent person: (A) a general guardian; (B) a committee; (C) a conservator; or (D) a like fiduciary.</td>
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<tr>
<td></td>
<td></td>
<td>(2) Without a Representative. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.</td>
</tr>
<tr>
<td>Alabama</td>
<td>Y+</td>
<td><strong>ALA. R. CIV. P. 17(c)–(d).</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(c) Minors or Incompetent Persons. Whenever a minor has a representative, such as a general guardian or like fiduciary, the representative may sue in the name of the minor. Whenever an incompetent person has a representative such as a general guardian or a like fiduciary, the representative may sue or defend in the name of the incompetent person. If a minor or an incompetent person does not have a duly appointed representative, that person may sue by that person's next friend. The court shall appoint a guardian ad litem (1) for a minor defendant, or (2) for an incompetent person not otherwise represented in an action and may make any other orders it deems proper for the protection of the minor or incompetent person. When the interest of an infant unborn or unconceived is before the court, the court may appoint a guardian ad litem for such interest. Moreover, if a case occurs not provided for in these rules in which a minor is or should be made a party defendant, or if service attempted upon any minor is incomplete under these rules, the court may direct further process to bring the minor into court or appoint a guardian ad litem for the minor without service upon the minor or upon anyone for the minor.</td>
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<td></td>
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<td>(d) Guardian ad litem; how chosen. Whenever a guardian ad litem shall be necessary, the court in which the action is pending shall appoint to serve in that capacity some person who is qualified to represent the minor or incompetent person in the capacity of an attorney or solicitor, and must not select or appoint any person who is related, either by blood or marriage within the fourth degree, to the plaintiff or the plaintiff's attorney, or to the judge or clerk of the court, or who is in any manner connected with such plaintiff or such plaintiff's attorney, or who has been suggested, nominated, or recommended by the plaintiff or the plaintiff's attorney or any person for the plaintiff. If the guardian ad litem is to be appointed for a minor fourteen (14)</td>
</tr>
</tbody>
</table>

293. For consistency, all emphasis has been removed from the reproduced sections.
years of age or over, such minor may, within thirty (30) days after perfection of service upon the minor in such cause, have the minor's choice of a guardian ad litem to represent the minor in said cause certified by an officer authorized to take acknowledgments, but if such minor fails to nominate a guardian ad litem within the thirty-(30-) day period or before any hearing set in the action, whichever is earlier, the court shall appoint a guardian ad litem as before provided. In all cases in which a guardian ad litem is required, the court must ascertain a reasonable fee or compensation to be allowed and paid to such guardian ad litem for services rendered in such cause, to be taxed as a part of the costs in such action, and which is to be paid when collected as other costs in the action, to such guardian ad litem.

<table>
<thead>
<tr>
<th>State</th>
<th>Code</th>
<th>Statute</th>
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<td>Alaska</td>
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<td><strong>Alaska R. Civ. P. 17(c).</strong></td>
</tr>
<tr>
<td>Arizona</td>
<td>Y</td>
<td><strong>Ariz. R. Civ. P. 17(g).</strong></td>
</tr>
<tr>
<td>Arkansas</td>
<td>Y+</td>
<td><strong>Ark. R. Civ. P. 17(b).</strong></td>
</tr>
</tbody>
</table>

**Alaska R. Civ. P. 17(c).**

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

**Ariz. R. Civ. P. 17(g).**

Whenever an infant or incompetent person has a representative, such as a general guardian, or similar fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative the infant or incompetent may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

**Ark. R. Civ. P. 17(b).**

Infants or Incompetent Persons. Whenever an infant or...
incompetent person has a guardian, the guardian must sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed guardian, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent. No judgment shall be rendered against an infant or incompetent until after a defense by a guardian or guardian ad litem, who shall be appointed by the court upon application of any interested party and who shall promptly respond to the claim against the infant or incompetent as provided by these Rules.

**ARK. CODE ANN. § 16-61-103 (2005).**

Actions by infants.

(a) The action of an infant must be brought by his or her guardian or his or her next friend.

(b) Any person may bring the action of an infant as his or her next friend, but the court has power to dismiss it if it is not for the benefit of the infant, or to substitute the guardian of the infant, or another person, as the next friend.

**California**

**CAL. CIV. PROC. CODE § 372 (West Supp. 2009).**

Minors and incompetent persons as parties

(a) When a minor, an incompetent person, or a person for whom a conservator has been appointed is a party, that person shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to appoint a guardian ad litem to represent the minor, incompetent person, or person for whom a conservator has been appointed, notwithstanding that the person may have a guardian or conservator of the estate and may have appeared by the guardian or conservator of the estate. The guardian or conservator of the estate or guardian ad litem so appearing for any minor, incompetent person, or person for whom a conservator has been appointed shall have power, with the approval of the court in which the action or proceeding is pending, to compromise the same, to agree to the order or judgment to be entered therein for or against the ward or conservatee, and to satisfy any judgment or order in favor of the ward or conservatee or release or discharge any claim of the ward or conservatee pursuant to that compromise. Any money or other property to be paid or delivered pursuant to the order or judgment for the benefit of a minor, incompetent person, or person for whom a conservator has been appointed shall be paid and delivered as provided in Chapter 4 (commencing with Section 3600) of Part 8 of Division 4 of the Probate Code.

Where reference is made in this section to "incompetent
person," such reference shall be deemed to include "a person for whom a conservator may be appointed."

Nothing in this section, or in any other provision of this code, the Civil Code, the Family Code, or the Probate Code is intended by the Legislature to prohibit a minor from exercising an intelligent and knowing waiver of his or her constitutional rights in any proceedings under the Juvenile Court Law, Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code.

**CAL. CIV. PROC. CODE § 373 (West 2004).**

**Guardian ad litem; appointment procedure.**

When a guardian ad litem is appointed, he or she shall be appointed as follows:

(a) If the minor is the plaintiff the appointment must be made before the summons is issued, upon the application of the minor, if the minor is of the age of 14 years, or if under that age, upon the application of a relative or friend of the minor.

(b) If the minor is the defendant, upon the application of the minor, if the minor is of the age of 14 years, and the minor applies within 10 days after the service of the summons, or if under that age, or if the minor neglects to apply, then upon the application of a relative or friend of the minor, or of any other party to the action, or by the court on its own motion.

<table>
<thead>
<tr>
<th>State</th>
<th>Y/N</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado</td>
<td>Y</td>
<td>COLO. R. CIV. P. 17(c).</td>
</tr>
</tbody>
</table>

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, or such representative fails to act, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person, provided, that in an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown person who might be an infant or incompetent person.
have an interest in the proceedings, and that one or more of them are minors, incompetent persons or persons undetermined or unborn at the time of the proceeding.

(b) The appointment shall not be mandatory, but shall be within the discretion of the judge or magistrate.

(c) Any order or decree passed or action taken in any such proceeding shall affect all the minors, incompetent persons or persons thereafter born or determined for whom the guardian ad litem has been appointed, in the same manner as if they had been of the age of majority and competent and present in court after legal notice at the time of the action or the issuance of the order or decree.

(d) Any appointment of a guardian ad litem may be made with or without notice and, if it appears to the judge or magistrate that it is for the best interests of a minor having a parent or guardian to have as guardian ad litem some person other than the parent or guardian, the judge or magistrate may appoint a disinterested person to be the guardian ad litem.

(e) When the appointment is made in connection with the settlement of a decedent’s estate or the settlement of the account of a trustee or other fiduciary, the person so appointed shall be authorized to represent the minor or incompetent, undetermined or unborn person in all proceedings for the settlement of the estate or account and subsequent accounts of the trustee or other fiduciary, or until his appointment is terminated by death, resignation or removal.

(f) The guardian ad litem may be removed by the judge or magistrate which appointed him, without notice, whenever it appears to the judge or magistrate to be in the best interests of the ward or wards of the guardian.

(g) Any guardian ad litem appointed under the provisions of this section may be allowed reasonable compensation by the judge or magistrate appointing him and shall be paid as a part of the expenses of administration.

Delaware


(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, trustee, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The Court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.


(a) Except in accordance with § 925(15) of Title 10 and § 3904 of this title, no person shall have any right or authority as guardian of a disabled person unless the per-
son has been duly appointed by the Court of Chancery or admitted by a court of law or equity to defend a suit as guardian ad litem.

(b) The sole surviving parent of a minor child may, by written declaration or last will, name a guardian of the person or property or both of the parent's child, who shall be appointed if there is no just cause to the contrary. Any parent may by written declaration or will name a guardian as to the property which the parent's child may inherit from any person, who shall be appointed if there is no just cause to the contrary.

(c) When there is no designation of guardian by written declaration or last will of the minor's sole surviving parent, or there is just cause for not appointing the guardian so designated, a minor 14 years of age or over and resident in this State may choose a guardian and the Court, if there is no just cause to the contrary, shall appoint the person chosen.

(d) When there is no designation of guardian by written declaration or last will of the minor's sole surviving parent, or there is just cause for not appointing the guardian so designated, and a minor is under the age of 14 years, or is resident out of the State or neglects to choose a proper guardian, the Court may appoint a guardian according to its discretion.

(e) When a guardian is appointed for a minor under 14 years of age, unless such appointment is according to a written declaration or the last will of a minor's sole surviving parent, if the minor, after arriving at the age of 14 years, chooses another person for a guardian, the Court shall appoint the person so chosen, if there is no just cause to the contrary and the preceding guardianship shall be thereby superseded.


(b) Infants or Incompetent Persons. When an infant or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.


(c) Infants or Incompetent persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may bring or defend an action on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may bring an action by his next friend or by a
The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. No next friend shall be permitted to receive the proceeds of any personal action, in the name and on behalf of an infant, or incompetent person, until such next friend shall have entered into a sufficient bond to the Governor, for the use of the infant and the infant's representatives, conditioned well and fully to account for and concerning such trust, which bond may be sued on by order of the court in the name of the Governor and for the use of the infant. Such bond shall be approved by the court in which the action is commenced and such approval shall be filed in such clerk's office.

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<tr>
<th>Location</th>
<th>Result</th>
<th>Notes</th>
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<td>Hawaii</td>
<td>Y</td>
<td>HAW. R. CIV. P. 17(c). (c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a guardian, whether appointed as to that person or property, such guardian appointed as to property, or if no guardian has been appointed as to property, then such guardian appointed as to that person, may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed guardian that person may sue by that person's next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.</td>
</tr>
<tr>
<td>Idaho</td>
<td>Y+</td>
<td>IDAHO R. CIV. P. 17(c). (c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative the person may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.</td>
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<tr>
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</table>

When an infant or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending in each case, or by a judge thereof, or a probate judge. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient, to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him.
Indiana

Sec. 1. All courts have the authority to:
(1) appoint a guardian ad litem to defend the interests of any person under eighteen (18) years of age impleaded in a suit; and
(2) permit any person, as next friend, to prosecute a suit in a minor's behalf.

Iowa

An action of a minor or any person adjudged incompetent shall be brought by the person's conservator if there is one or, if not, by the person's guardian if there is one; otherwise the minor may sue by a next friend, and the incompetent by a conservator or guardian appointed by the court for that purpose. If it is in the person's best interest, the court may dismiss such action or substitute another conservator, guardian or next friend.

Kansas

KAN. CIV. PROC. CODE ANN. § 60-217 (West 2005)
(c) Minors or incapacitated persons. Whenever a minor or incapacitated person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the minor or incapacitated person. If a minor or incapacitated person does not have a duly appointed representative the minor or incapacitated person may sue by the minor or incapacitated person's next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for a minor or incapacitated person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incapacitated person.

Kentucky

Ky. R. Civ. P. 17.03.
(1) Actions involving unmarried infants or persons of unsound mind shall be brought by the party's guardian or committee, but if there is none, or such guardian or committee is unwilling or unable to act, a next friend may bring the action.

(2) Actions involving unmarried infants or persons of unsound mind shall be defended by the party's guardian or committee. If there is no guardian or committee or he is unable or unwilling to act or is a plaintiff, the court, or the clerk thereof if its judge or judges are not present in the county, shall appoint a guardian ad litem to defend unless one has been previously appointed under Rule 4.04(3) or the warning order attorney has become such guardian under Rule 4.07(3).

(3) No judgment shall be rendered against an unmarried infant or person of unsound mind until the party's guardian or committee or the guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he is unable to make defense.

Louisiana

A. An unemancipated minor does not have the procedural
capacity to sue.

B. Except as otherwise provided in Article 4431, the tutor appointed by a court of this state is the proper plaintiff to sue to enforce a right of an unemancipated minor, when one or both of the parents are dead, the parents are divorced or judicially separated, or the minor is an illegitimate child.

C. The father, as administrator of the estate of his minor child, is the proper plaintiff to sue to enforce a right of an unemancipated the legitimate issue of living parents who are not divorced or judicially separated. The mother, as the administratrix of the estate of her minor child, is the proper plaintiff in such an action, when the father is mentally incompetent, committed, interdicted, imprisoned, or an absentee. Moreover, with permission of the judge, the mother may represent the minor whenever the father fails or refuses to do so; and in any event she may represent the minor under the conditions of the laws on the voluntary management of another's affairs.

D. Notwithstanding the provisions of Paragraph A, B, or C, an attorney appointed by the court having jurisdiction over an unemancipated minor who is in the legal custody of the Department of Social Services is the proper plaintiff to sue to enforce a right of an unemancipated minor. Upon application of the tutor or parent who would otherwise be the proper plaintiff to sue pursuant to Paragraph B or C, the court shall appoint or substitute as the proper plaintiff the best qualified among the tutor, parent, or appointed attorney.

Maine

Me. R. Ct. Civ. P. 17

(b) Guardians and Other Representatives. Whenever a minor or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. A minor or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person. In any action in which there are or may be defendants who have been served only by publication and who have not appeared, the court may appoint an agent, guardian ad litem, or next friend to represent them.

Me. R. Ct. Guardians Ad Litem II (2007)

B. Appointment on and after March 1, 2000. On and after March 1, 2000, a judge may appoint, without any findings, any person then listed on the roster. In addition, a judge may, for good cause shown and recited in findings in the order of appointment, appoint any person who, after consideration of all of the circumstances of the particular case, in the opinion of the appointing judge has the necessary
skills and experience to serve as a Guardian and represent the best interests of the child or children in that matter.

(b) Suits by individuals under disability. An individual under disability to sue may sue by a guardian or other like fiduciary or, if none, by next friend, subject to any order of court for the protection of the individual under disability. When a minor is in the sole custody of one of its parents, that parent has the exclusive right to sue on behalf of the minor for a period of one year following the accrual of the cause of action, and if the custodial parent fails to institute suit within the one year period, any person interested in the minor shall have the right to institute suit on behalf of the minor as next friend upon first mailing notice to the last known address of the custodial parent.

Massachusetts | Y | MASS. R. Civ. P. 17.
(b) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

(a) If a minor or incompetent person has a conservator, actions may be brought and must be defended by the conservator on behalf of the minor or incompetent person.
(b) If a minor or incompetent person does not have a conservator to represent the person as plaintiff, the court shall appoint a competent and responsible person to appear as next friend on his or her behalf, and the next friend is responsible for the costs of the action.
(c) If the minor or incompetent person does not have a conservator to represent the person as defendant, the action may not proceed until the court appoints a guardian ad litem, who is not responsible for the costs of the action unless, by reason of personal misconduct, he or she is specifically charged costs by the court. It is unnecessary to appoint a representative for a minor accused of a civil infraction. Appointment of a next friend or guardian ad litem shall be made by the court as follows:
(i) if the party is a minor 14 years of age or older, on the minor’s nomination, accompanied by a written consent of the person to be appointed;
(ii) if the party is a minor under 14 years of age or an incompetent person, on the nomination of the party’s next of kin or of another relative or friend the court deems suitable, accompanied by a written consent of the person to be appointed; or
(iii) if a nomination is not made or approved within 21 days after service of process, on motion of the court or of a party.

(b) The court may refuse to appoint a representative it deems unsuitable.

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<tr>
<th>Minnesota</th>
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<tr>
<td><strong>MINN. R. CIV. P. 17.02.</strong></td>
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<td>Whenever a party to an action is an infant or is incompetent and has a representative duly appointed under the laws of this state or the laws of a foreign state or country, the representative may sue or defend on behalf of such party. A party who is an infant or is incompetent and is not so represented shall be represented by a guardian ad litem appointed by the court in which the action is pending or is to be brought. The guardian ad litem shall be a resident of this state, shall file a consent and oath with the court administrator, and shall give such bond as the court may require. A guardian ad litem appointed under this Rule is not a guardian ad litem within the meaning of the Rules of Guardian Ad Litem Procedure in Juvenile and Family Court and is not governed by those Rules except when appointed in a paternity suit.</td>
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<td>Any person, including an infant party over the age of 14 years and under no other legal disability, may apply under oath for the appointment of a guardian ad litem. The application of the party or the party’s spouse or parents or testamentary or other guardian shall have priority over other applications. If no such appointment is made on behalf of a defendant party before answer or default, the adverse party or a party’s attorney may apply for such appointment, and in such case the court shall allow the guardian ad litem a reasonable time to respond to the complaint.</td>
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<td>The application for appointment shall show (1) the name, age and address of the party, (2) if the party is a minor, the names and addresses of the parents, and, in the event of their death or the abandonment of the minor, the name and address of the party’s custodian or testamentary or other guardian, if any, (3) the name and address of the party’s spouse, if any, and (4) the name, age, address, and occupation of the person whose appointment is sought.</td>
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<td>If the appointment is applied for by the party or by a spouse, parent, custodian or testamentary or other guardian of the party, the court may hear the application with or without notice. In all other cases written notice of the hearing on the application shall be given at such time as the court shall prescribe, and shall be served upon the party, the party’s spouse, parent, custodian and testamentary or other guardian, if any, and if the party is an inmate of a public institution, the chief executive officer thereof. If the party is a nonresident or, after diligent search, cannot be found within the state, notice shall be given to such persons and in such manner as the court may direct.</td>
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<td>Montana</td>
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incompetent person has a representative, such as a general guardian, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person, or in any case where the court deems it expedient a guardian ad litem may be appointed to represent an infant or incompetent person, even though the infant or incompetent person may have a general guardian and may have appeared by that general guardian.


When a guardian ad litem is appointed by the court, he must be appointed as follows:

(1) when the minor is plaintiff, upon the application of the minor if he be of the age of 14 years or, if under that age, upon the application of a relative or friend of the minor;

(2) when the minor is defendant, upon the application of the minor if he be of the age of 14 years and apply within 10 days after the service of the summons or, if under that age or if he neglects so to apply, upon the application of a relative or friend of the minor or of any other party to the action;

(3) when an insane or incompetent person is party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person or of any other party to the action or proceeding.

Nebraska


Except as provided by the Nebraska Probate Code, the action of an infant shall be commenced, maintained, and prosecuted by his or her guardian or next friend. Such actions may be dismissed with or without prejudice by the guardian or next friend only with approval of the court. When the action is commenced by his next friend, the court has power to dismiss it, if it is not for the benefit of the infant, or to substitute the guardian of the infant; or any person, as the next friend. Any action taken pursuant to this section shall be binding upon the infant.

Nevada


(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.
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<tr>
<th>State</th>
<th>Code</th>
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Nevada

When a guardian ad litem is appointed by the court, he must be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant if he be of the age of 14 years, or, if under that age, upon the application of a relative or friend of the infant.

2. When the infant is defendant, upon the application of the infant if he be of the age of 14 years and apply within 10 days after the service of the summons, or, if under that age or if he neglect to so apply, then upon the application of a relative or friend of the infant, or any other party to the action.

New Hampshire

When before or during the hearing on any proceeding in any court it appears to the court that the interest or rights of a legally incapacitated person by age or other cause or circumstance are not fully represented or upon the request of any interested person, the court may appoint a competent and disinterested person to act as guardian ad litem for such legally incapacitated person and to represent such person’s interest in the case. The guardian ad litem shall have none of the rights of the general guardian. The person appointed guardian ad litem shall make oath to perform such duty faithfully and impartially. A bond may be required of the guardian ad litem at the discretion of the court.

New Jersey

(a) Representation by Guardian. Except as otherwise provided by law or Rule 4:26-3 (virtual representation), a minor or mentally incapacitated person shall be represented in an action by the guardian of either the person or the property, appointed in this State, or if no such guardian has been appointed or a conflict of interest exists between guardian and ward or for other good cause, by a guardian ad litem appointed by the court in accordance with paragraph (b) of this rule.

(b) Appointment of Guardian Ad Litem.

(2) Appointment on Petition. The court may appoint a guardian ad litem for a minor or an alleged mentally incapacitated person, upon the verified petition of a friend on his or her behalf. In an action in which the fiduciary seeks to have the account settled or has a personal interest in the matter, the petition shall state whether or not the guardian ad litem therein nominated was proposed by the fiduciary or the fiduciary’s attorney. Each petition shall be accompanied by the sworn consent of the proposed guardian ad litem, stating his or her relationship to the minor or alleged mentally incapacitated person and certifying that he or she has no interest in the litigation, or if such interest exists, setting forth the nature thereof, and that he or she will with undivided fidelity perform the duties of guardian ad litem, if appointed. The court shall appoint the guard-
ian ad litem so proposed unless it finds good cause for not doing so, in which case it shall afford the petitioner opportunity to file a new petition seeking the appointment of another person within 10 days of the rejection. If such new petition is not filed within such time, or if filed, is not granted, the court, when designating some other person as guardian ad litem, shall state for the record its reasons for rejecting petitioner’s nominee. A conflict of interest between the petitioner and the minor or alleged mentally incapacitated person shall be good cause for rejection of the petitioner’s nominee. Only one guardian ad litem shall be appointed for all minors or alleged mentally incapacitated persons unless a conflict of interest exists.

New Mexico

Y

N.M. R. Civ. P. 1-017.

C. Infants or incompetent persons. When an infant or incompetent person has a representative, such as a general guardian, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

New York

N


Unless the court appoints a guardian ad litem, an infant shall appear by the guardian of his property or, if there is no such guardian, by a parent having legal custody, or, if there is no such parent, by another person or agency having legal custody, or, if the infant is married, by an adult spouse residing with the infant, a person judicially declared to be incompetent shall appear by the committee of his property, and a conservatee shall appear by the conservator of his property. A person shall appear by his guardian ad litem if he is an infant and has no guardian of his property, parent, or other person or agency having legal custody, or adult spouse with whom he resides, or if he is an infant, person judicially declared to be incompetent, or a conservatee as defined in section 77.01 of the mental hygiene law and the court so directs because of a conflict of interest or for other cause, or if he is an adult incapable of adequately prosecuting or defending his rights.


(a) By whom motion made. The court in which an action is triable may appoint a guardian ad litem at any stage in the action upon its own initiative or upon the motion of:

1. an infant party if he is more than fourteen years of age; or
2. a relative, friend or a guardian, committee of the property, or conservator; or
3. any other party to the action if a motion has not been made under paragraph one or two within ten days after completion of service.
(b) Notice of motion. Notice of a motion for appointment of a guardian ad litem for a person shall be served upon the guardian of his property, upon his committee or upon his conservator, or if he has no such guardian, committee, or conservator, upon the person with whom he resides. Notice shall also be served upon the person who would be represented if he is more than fourteen years of age and has not been judicially declared to be incompetent.

(c) Consent. No order appointing a guardian ad litem shall be effective until a written consent of the proposed guardian has been submitted to the court together with an affidavit stating facts showing his ability to answer for any damage sustained by his negligence or misconduct.

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<td>(b) Infants, incompetents, etc.—</td>
<td>(1) Infants, etc., Sue by Guardian or Guardian Ad Litem.—</td>
<td>In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided; but if the action or proceeding is against such guardian, or if there is no such known guardian, then such persons may appear by guardian ad litem.</td>
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<td></td>
<td>(c) Guardian ad litem for infants, insane or incompetent persons; appointment procedure.—</td>
<td>When a guardian ad litem is appointed to represent an infant or insane or incompetent person, he must be appointed as follows:</td>
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<td>(1) When an infant or insane or incompetent person is plaintiff, the appointment shall be made at any time prior to or at the time of the commencement of the action, upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion.</td>
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<td>(b) Infants or Incompetent persons. Whenever an infant or incompetent person has a representative, such as a general guardian, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it considers proper for the protection of the infant or incompetent person; or, if the court considers it expedient, may appoint a guardian ad litem to represent an infant or incompetent person, even though the infant or incompetent person may have a general guardian and may have appeared.</td>
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<td>When an infant is plaintiff, a guardian ad litem may be appointed upon the application of the infant if the infant</td>
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is at least fourteen years of age. If the infant is under that age, the application may be made by the infant’s guardian or conservator, if the infant has one, or by a relative or friend of the infant. If the application is made by a relative or friend, notice thereof must be given to the guardian or conservator, if there is one, and if not, then to the person with whom the infant resides.

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<th>Location</th>
<th>Application Requirement</th>
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<tr>
<td>Ohio</td>
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<tr>
<td>Oklahoma</td>
<td>Y</td>
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<tr>
<td>Oregon</td>
<td>N</td>
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Ohio R. Civ. P. 17.

(B) Minors or incompetent persons.

Whenever a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative the minor may sue by a next friend or defend by a guardian ad litem. When a minor or incompetent person is not otherwise represented in an action the court shall appoint a guardian ad litem or shall make such other order as it deems proper for the protection of such minor or incompetent person.


C. INFANTS OR INCOMPETENT PERSONS. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Or. R. Civ. P. 27.

A. Appearance of minor parties by guardian or conservator. When a minor, who has a conservator of such minor’s estate or a guardian, is a party to any action, such minor shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought. If the minor does not have a conservator of such minor’s estate or a guardian, the minor shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

A(1) When the minor is plaintiff, upon application of the minor, if the minor is 14 years of age or older, or upon application of a relative or friend of the minor if the minor is under 14 years of age.

A(2) When the minor is defendant, upon application of the minor, if the minor is 14 years of age or older, filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the minor fails so to apply or is under 14
<table>
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<tr>
<th>State</th>
<th>Override</th>
<th>Rule Reference</th>
<th>Description</th>
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<tbody>
<tr>
<td>Pennsylvania</td>
<td>N</td>
<td>PA. R. Civ. P. 2027.</td>
<td>When a party to an action, a minor shall be represented by a guardian who shall supervise and control the conduct of the action in behalf of the minor.</td>
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<td>PA. R. Civ. P. 2031.</td>
<td>(a) A minor plaintiff may select a guardian, but such selection shall not bar the court from removing the guardian for cause in accordance with these rules.</td>
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<td>(b) If a minor party to an action is not represented, the court shall appoint a guardian for the minor either upon its own motion or upon the petition of (1) the minor party, (2) a guardian of the minor appointed by any court of competent jurisdiction, or by a will duly probated, (3) any relative of the minor, or (4) any other party to the action.</td>
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<td>(c) The petition shall state the name and address of the person proposed as guardian, and the guardian's relationship, if any, to the subject matter of the action or to any of the parties thereto. In case the person proposed as guardian is a guardian appointed by any court of competent jurisdiction or by a will duly probated, the petition shall contain a reference to the record of such appointment.</td>
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<td>(d) When the petition is filed by the minor the court may make the appointment ex parte.</td>
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<td>(e) When the petition is filed by a person other than the minor, the court shall direct a rule to be served upon the minor or upon such other person as the court may designate to show cause why the prayer of the petition should not be granted.</td>
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<td>PA. Cons. Stat. § 5113 (West 2005).</td>
<td>A person of the same religious persuasion as the parents of the minor shall be preferred as guardian of his person. A person nominated by a minor over the age of 14, if found by the court to be qualified and suitable, shall be preferred as guardian of his person or estate.</td>
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<tr>
<td>Rhode Island</td>
<td>Y</td>
<td>R.I. R. Super. Ct. 17.</td>
<td>(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, the infant or incompetent person may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.</td>
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| South Carolina| Y+       | S.C. R. Civ. P. 17.     | (c) Minor or Incompetent Persons. Whenever a minor or
incompetent person has a representative, such as a general
guardian, committee, conservator, or other like fiduciary,
the representative may sue or defend on behalf of the
minor or incompetent person. If a minor or incompetent
person does not have a duly appointed representative he
may sue by his next friend or by guardian ad litem. The
court shall appoint a guardian ad litem for a minor or
incompetent person not otherwise represented in an
action or shall make such order as it deems proper for the
protection of the minor or incompetent person. A person
imprisoned outside this State shall appear by guardian ad
litem in an action by or against him; but if imprisoned in
this State, and not a minor or incompetent, the court may,
in its discretion appoint a guardian ad litem or order him
to be brought personally to the trial to testify in ac-
cordance with Rule 43(a).

(d) Guardians Ad Litem. Guardians ad litem appearing in
the courts of this State, or before any agency, board or
commission from which an appeal to the courts of this
State shall lie, shall be qualified and appointed in ac-
cordance with the provisions of this rule.

(1) Who May Appoint. Guardians ad litem may be
appointed by the court in which the action is pending, the
judge of probate, the clerk of court, or the master-in-equity
of the county wherein the minor, or incompetent or
imprisoned person resides, or in the county in which the
action is pending or is to be filed.

(2) Who May Be Appointed. The general guardian of a
minor or incompetent person may be appointed guardian
ad litem, if he has no interest adverse to that of the person
whom he represents in the action. No other person may be
appointed guardian ad litem of a minor or incompetent or
imprisoned person unless he be fully competent to under-
stand and protect the rights of the person whom he repre-
sents, has no interest adverse to that of the person whose
interest he represents, is not connected or associated with
the attorney or counsel of the adverse party, and is not the
attorney for the adverse party. If the guardian ad litem is
an attorney, it shall not be necessary that he be repre-
sented by an additional attorney; but the attorney of the
adverse party shall not represent the guardian ad litem.

(3) Minors. The guardian ad litem for a minor party shall
be appointed upon the application of the minor, if he be
of the age of 14 years or over; if under that age upon the
application of his parent, general or testamentary guard-
ian; or of a relative or friend. If application be made by a
relative or friend, other than a parent, notice thereof must
first be given to the minor's general or testamentary guar-
dian, if he has one; if he has none, then to the person with
whom such minor resides.

South Dakota | Y | S.D. CODIFIED LAWS § 15-6-17(c) (2001).
Whenever a minor or incompetent person has a guardian
or conservator, such guardian or conservator may sue or
defend on behalf of the minor or incompetent person. If
the minor or incompetent person does not have a guardian or conservator, he may sue by a guardian ad litem. The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person and may make such appointment notwithstanding an appearance by a guardian or conservator. Unless the court otherwise orders, no guardian ad litem shall be permitted to receive any money or other property of his ward except costs and expenses allowed to such guardian ad litem by the court or recovered by the ward in the action until such guardian ad litem has given sufficient security approved by the court to account for and apply such money or property under direction of the court. Such guardian ad litem may with the approval of the court settle or compromise in behalf of his ward, the case in which he is appearing and any judgment entered therein.

Tennessee

TENN. R. CIV. P. 17.03.

Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, or if justice requires, he or she may sue by next friend. The court shall at any time after the filing of the complaint appoint a guardian ad litem to defend an action for an infant or incompetent person who does not have a duly appointed representative, or whenever justice requires. The court may in its discretion allow the guardian ad litem a reasonable fee for services, to be taxed as costs.


(a) (1) Except as otherwise provided in this subsection (a), on the filing of a petition for the appointment of a fiduciary, the court shall appoint a guardian ad litem to represent the respondent. The court also may appoint a guardian ad litem to represent the interest of the minor or disabled person in any proceeding brought by the fiduciary. If the respondent is represented by adversary counsel who has made an appearance for the respondent, no guardian ad litem shall be appointed.

(2) The court may waive the appointment of a guardian ad litem if the petitioner or at least one (1) of the petitioners for the appointment is:

(A) A parent of the minor for whom a guardian is sought;  
(B) A minor who has attained fourteen (14) years of age; or  
(C) An adult respondent.

(3) The court may waive the appointment of a guardian ad litem if the court determines the waiver is in the best interests of the minor or disabled person.

Texas

TEX. R. CIV. P. 44.

Minors, lunatics, idiots, or persons non compos mentis
who have no legal guardian may sue and be represented by "next friend" under the following rules:

(1) Such next friend shall have the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.

(2) Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plaintiff in such suit.

(b) Minors or incompetent persons. An unemancipated minor or an insane or incompetent person who is a party must appear either by a general guardian or by a guardian ad litem appointed in the particular case by the court in which the action is pending. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted expedient to represent the minor, insane or incompetent person in the action or proceeding, notwithstanding that the person may have a general guardian and may have appeared by the guardian. In an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown party who might be a minor or an incompetent person.

(c) Guardian ad litem; how appointed. A guardian ad litem appointed by a court must be appointed as follows:

(1) When the minor is plaintiff, upon the application of the minor, if the minor is of the age of fourteen years, or if under that age, upon the application of a relative or friend of the minor.

(2) When the minor is defendant, upon the application of the minor if the minor is of the age of fourteen years and applies within 20 days after the service of the summons, or if under that age or if the minor neglects so to apply, then upon the application of a relative or friend of the minor, or of any other party to the action.

(3) When a minor defendant resides out of this state, the plaintiff, upon motion therefor, shall be entitled to an order designating some suitable person to be guardian ad litem for the minor defendant, unless the defendant or someone in behalf of the defendant within 20 days after service of notice of such motion shall cause to be appointed a guardian for such minor. Service of such notice may be made upon the defendant's general or testamentary guardian located in the defendant's state; if there is none, such notice, together with the summons in the action, shall be served in the manner provided for publication of summons upon such minor, if over fourteen years of age, or, if under fourteen years of age, by such service on the person with whom the minor resides. The guardian ad litem for such nonresident minor defendant shall have 20 days after appointment in which to plead to the action.
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<th>State</th>
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<tr>
<td>Vermont</td>
<td>Y</td>
<td>Vt. R. Civ. P. 17.</td>
<td>(b) Guardians and Other Representatives. Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. In any action in which there are or may be defendants who have been served only by publication and who have not appeared, the court may appoint an agent, guardian ad litem, or next friend to represent them.</td>
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<tr>
<td>Virginia</td>
<td>N</td>
<td>Va. Code Ann. § 8.01-8 (2007).</td>
<td>Any minor entitled to sue may do so by his next friend. Either or both parents may sue on behalf of a minor as his next friend.</td>
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| Washington  | N   | Wash. Rev. Code § 4.08.050 (2005).                     | Except as provided under RCW 26.50.020 and 28A.225.035, when an infant is a party he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act. Said guardian shall be appointed as follows:  
(1) When the infant is plaintiff, upon the application of the infant, if he or she be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.  
(2) When the infant is defendant, upon the application of the infant, if he or she be of the age of fourteen years, and applies within thirty days after the service of the summons; if he or she be under the age of fourteen, or neglects to apply, then upon the application of any other party to the action, or of a relative or friend of the infant. |
| West Virginia| Y   | W. Va. R. Civ. P. 17.                                  | (c) Infants, Incompetent Persons, or Convicts. Whenever an infant, incompetent person, or convict has a representative, such as a general guardian, curator, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant, incompetent person, or convict. An infant, incompetent person, or convict who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court or clerk shall appoint a discreet and competent attorney at law as guardian ad litem for an infant, incompetent person, or convict not otherwise represented in an action, or shall make such other order as it deems proper for the protection of the infant, incompetent person, or convict. A guardian ad litem is deemed a party for purposes of service; failure to serve a guardian ad litem in circumstances
where service upon a party is required constitutes failure to serve a party.

Wisconsin  


(3) Minors or individuals alleged or adjudicated incompetent.

(a) Appearance by guardian or guardian ad litem. If a party to an action or proceeding is a minor, or if a party is adjudicated incompetent or alleged to be incompetent, the party shall appear by an attorney, by the guardian of the estate of the party who may appear by attorney, or by a guardian ad litem who may appear by an attorney. A guardian ad litem shall be appointed in all cases in which the minor or individual alleged to be incompetent has no guardian of the estate, in which the guardian fails to appear and act on behalf of the ward or individual adjudicated incompetent, or in which the interest of the minor or individual adjudicated incompetent is adverse to that of the guardian. Except as provided in section 807.10, if the guardian does appear and act and the interests of the guardian are not adverse to the minor or individual adjudicated incompetent, a guardian ad litem may not be appointed. Except as provided in section 879.23(4), if the interests of the minor or individual alleged to be or adjudicated incompetent are represented by an attorney of record, the court shall, except upon good cause stated in the record, appoint that attorney as the guardian ad litem.

(b) Guardian ad litem.

1. The guardian ad litem shall be appointed by a circuit court of the county where the action is to be commenced or is pending, except that the guardian ad litem shall be appointed by a circuit court commissioner of the county in actions to establish paternity that are before the circuit court commissioner.

2. When the plaintiff is a minor 14 years of age or over, upon the plaintiff's application or upon the state's application under section 767.407(1)(c); or if the plaintiff is under that age or is adjudicated incompetent or alleged to be incompetent, upon application of the plaintiff's guardian or of a relative or friend or upon application of the state under section 767.407(1)(c). If the application is made by a relative, a friend, or the state, notice thereof must first be given to the guardian if the plaintiff has one in this state; if the plaintiff has none, then to the person with whom the minor or individual adjudicated incompetent resides or who has the minor or individual adjudicated incompetent in custody.

3. When the defendant is a minor 14 years of age or over, upon the defendant's application made within 20 days after the service of the summons or other original process; if the defendant is under that age or neglects to so apply or is adjudicated incompetent or alleged to be incompetent, then upon the court's own motion or upon the application of any other party or any relative or friend or the defendant's guardian upon such notice of the application as the court directs or approves.
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<td>(c) Minors or Incompetent Persons. Whenever a minor or an incompetent person has a representative, such as a guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or an incompetent person does not have a duly appointed representative, or such representative fails to act, the minor or the incompetent person may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for a minor or an incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or the incompetent person.</td>
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