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WHEN CHILDREN OBJECT: AMPLIFYING AN OLDER CHILD'S OBJECTION TO TERMINATION OF PARENTAL RIGHTS

Brent Pattison*

"I know who my family is. What's the point of getting another?"¹

"I tried to go [to court] when my parents got their rights taken away. They didn't let me go. I think that's not right. I think you should be there. It's your parents."²

INTRODUCTION

Each year, thousands of children become wards of the state when a court terminates the legal rights of their parents. Between 2010 and 2014, more than 307,000 children lost their legal relationships to their parents in Termination of Parental Rights (TPR) proceedings.³ A growing percentage of child welfare cases involve older children.⁴ At the same time, too many young people lose their legal relationships with their parents without a family waiting to adopt them.⁵ The stakes are high for children in TPR cases; nonetheless, many children—even older children—cannot meaningfully participate in proceedings. Moreover, TPR cases threaten parents' and children's rights to familial association.⁶

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1. DEBORAH GIBBS ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., TERMINATION OF PARENTAL RIGHTS FOR OLDER FOSTER CHILDREN: EXPLORING PRACTICE AND POLICY ISSUES 6-12 (2004).

2. *Id.* at 6-19 (alteration in original).

3. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2013 ESTIMATES AS OF JULY 2014 NO. 21 at 1 (2014), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport21.pdf>.

4. See Erik S. Pitchal, *Where Are All the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. DAVIS J. JUV. L. & POL'Y 233, 243 (2008). Throughout this Article, the term "older children" is used to refer to children ten and over. Although this is, to some extent, arbitrary, it seems simpler than using multiple terms like adolescent, teen, child (or even "tween"). It is also consistent with the ages implicated by the "child objection" provisions discussed in the Article.

5. See *infra* Part II.B (discussing frequency of TPR for older children).

6. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981). While a parent's rights in this regard are without question, there is less clear guidance on the child's reciprocal rights with regard to familial association. See John Thomas Halloran, *Families First: Reframing Parental Rights as Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. &

Nonetheless, courts have struggled with how to incorporate the perspectives of older children in TPR cases. Children infrequently attend court proceedings,⁷ and the court may receive competing narratives regarding the child's position. Children are not always represented by lawyers in TPR proceedings, and when they do have legal representation, it may only be by a guardian ad litem (GAL) who presents her position on what is in the child's best interests, rather than advocating for what the child actually wants.⁸

This Article explores how courts should address an older child's objection to TPR and ensure meaningful consideration of the child's perspective. A small minority of states give courts the discretion to decline to terminate parental rights when an older child objects to termination. In states with such an exception, how should courts handle older children's perspectives? What is the proper weight to give an objection? How should courts decide whether to terminate parental rights when an older child objects? This Article addresses these questions in three parts. First, the Article describes the state statutes that create exceptions to TPR when an older child objects and analyzes the case law relating to those exceptions. Second, the Article outlines why consideration of a child's objection makes sense from legal and social work perspectives, especially in light of our current understanding of child development and legal decision-making in other contexts. Finally, the Article argues that states should adopt a hybrid version of the objections to termination currently in place in Virginia and Iowa. It also considers concerns of practical implementation.

I. A CHILD'S OBJECTION TO TPR

There is less uniformity than one might expect in the way states handle TPR hearings.⁹ Generally, however, TPR hearings include two separate proceedings: one in which children are removed from parental custody and placed in the care of relatives or foster parents, and another that provides the family with family reunification services.¹⁰ In order to terminate the parents' rights through the second proceeding, the State must prove there are legal grounds for

POL'Y 51, 63–64 (2014). Nonetheless, “until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.” *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

7. See Pitchal, *supra* note 4, at 244.

8. See *infra* Part III.B (discussing child representation in TPR proceedings).

9. Although states are bound by federal guidelines for TPR, the grounds for TPR and the way hearings are handled vary. See Halloran, *supra* note 6, at 56.

10. See Pitchal, *supra* note 4, at 237–38.

termination (e.g. the child has been out of the home for a lengthy period of time, the problems that led to the removal have not been addressed, and there are continued reasons it would be contrary to the child's welfare to return the child home).¹¹ The State must also prove that termination of the parents' rights is in the child's best interests.¹² Finally, the court may decline to terminate parental rights if any discretionary exceptions apply. For example, when the child is placed with a relative, termination would be detrimental to the child in light of the closeness of the parent-child relationship.¹³

A. Exceptions for a Child's Objection

One less common exception to TPR involves an older child's objection. A handful of states have statutory exceptions for a child's objection, and the age at which the objection has legal meaning varies. In Iowa, a court "need not terminate the relationship between the parent and child if the court finds . . . [t]he child is over ten years of age and objects to the termination."¹⁴ In California, the court may decline to terminate if it "finds a compelling reason for determining that termination would be detrimental to the child," including when "a child 12 years of age or older objects to termination of parental rights."¹⁵ In Virginia, parental rights "shall not be terminated if it is established that the child, if he is 14 years of age or older or otherwise of an age of discretion as determined by the court, objects to such termination."¹⁶

Virginia courts have referred to this provision as a "veto right" for older children.¹⁷ Virginia, however, also gives the court the discretion to override the child's veto if the child suffers from a disability that reduces the child's developmental age and that the child is not otherwise of an age of discretion.¹⁸ The Virgin Islands allow for an exception very similar in nature to Virginia's, but applies the exception to children "age 15 or older."¹⁹ Maine used to have a provision preventing termination if a child was at least fourteen years old and

11. *See, e.g.*, IOWA CODE § 232.116 (2014).

12. *See, e.g., id.*

13. *See, e.g., id.* § 232.116(3).

14. *Id.* § 232.116(3)(b).

15. CAL. WELF. & INST. CODE § 366.26(c)(1)(B)(ii) (West 2015).

16. VA. CODE ANN. § 16.1-283(G) (West 2015).

17. *Akers v. Fauquier County Dep't of Soc. Servs.*, 44 Va. App. 247, 264 (Va. Ct. App. 2004).

18. VA. CODE ANN. § 16.1-283(G).

19. V.I. CODE ANN. tit. 5, §201-2550(f) (2015).

objected, but the provision was amended to merely require consideration of the child's wishes "in a manner appropriate to the age of the child" when deciding whether to terminate parental rights.²⁰

There are two obvious rationales for this kind of exception. First, in nearly all states, children may object to adoption if they are a certain age.²¹ If a child is going to object to an adoption, it may make little sense to terminate his or her parents' rights. Even some states that do not have specific statutory exceptions for the child's objection have developed case law disfavoring termination when a child is likely to object to any adoption.²² A survey of judges who hear TPR cases in different jurisdictions found that sixty percent reported "requiring or desiring" a child's consent to adoption prior to TPR.²³ Second, the provisions advance the goal of involving older children in child welfare cases by giving the child's position legal meaning.²⁴

Although it is more common for younger children to be the focus of TPR proceedings, older children still find themselves subjects of proceedings.²⁵ Almost ten percent of children in out-of-home care after TPR in 2000 were between the ages of thirteen and seventeen.²⁶ Twenty-two percent of children waiting to be adopted in 2012 were thirteen or over.²⁷ In addition, state practices regarding TPR of older children vary significantly.²⁸ For example, in Texas, almost one third of children in foster care who experienced TPR

20. See ME. REV. STAT. ANN. tit. 22, § 4055(3) (2014).

21. See, e.g., COLO. REV. STAT. § 19-5-203(2) (2015) ("Written consent to any proposed adoption shall be obtained from the person to be adopted if such person is twelve years of age or older.")

22. See, e.g., *In re Gena S.*, 101 A.D.3d 1593, 1595 (N.Y. App. Div. 2012).

23. See RAQUEL ELLIS ET AL., CHILD TRENDS, PUB. NO. 2009-40, THE TIMING OF TERMINATION OF PARENTAL RIGHTS: A BALANCING ACT FOR CHILDREN'S BEST INTERESTS (2009), http://www.childtrends.org/wp-content/uploads/2009/09/Child_Trends-2009_09_09_RB_LegalOrphans.pdf. Even if the child wishes to be adopted, TPR may not be pursued if adoption is unlikely under the circumstances. See GIBBS ET AL., *supra* note 1, at 6-5.

24. Even when there is no specific discretionary exception to TPR, some states require the court to determine and consider the child's perspective. See ME. REV. STAT. ANN. tit. 22, § 4055(3). In Iowa, there is both a discretionary exception for the child's objection to TPR, as well as a provision allowing the court to consider "the reasonable preference of the child" when determining the child's integration into a foster family as part of the "best interests" analysis. IOWA CODE § 232.116(2)(b)(2), 232.116(3) (2014).

25. In 2000, children in the eight- to nine-year-old age group had twice the rate of TPR compared to those aged thirteen to seventeen in 2000. See GIBBS ET AL., *supra* note 1, at 3-6. In North Carolina and Colorado, youth aged thirteen to seventeen comprised forty-nine percent of the children between eight and thirteen in the states, but only twenty percent of the TPRs. See *id.* at 4-1.

26. See *id.* at 37.

27. See CHILDREN'S BUREAU, *supra* note 3, at 4.

28. See GIBBS ET AL., *supra* note 1, at ES-2.

were between the ages of thirteen and seventeen.²⁹ In other states, the numbers were much lower. Notably, states with child objection exceptions have a lower rate of TPR for older children.³⁰

The Adoption and Safe Families Act (ASFA) of 1997 may have increased the pressure on states to consider TPR for older children. ASFA accelerated the timelines for family reunification in response to concerns that too many children were languishing in foster care.³¹ ASFA also mandated that child welfare agencies file for TPR when a child, regardless of age, has been in out-of-home care for fifteen of the last twenty-two months.³² There are three exceptions to this requirement: (1) if the child is living with a relative; (2) if the state agency documents a compelling reason why filing for TPR is not in the child's best interests; and (3) if the state has failed to provide the family with the services necessary for reunification.³³ Interestingly, a handful of states have explicitly included the objection of an older child as a compelling reason not to file for termination when it would otherwise be required.³⁴

B. Courts' Approach to a Child's Objection to TPR

There is little case law on the exception for a child's objection, and much of the case law that exists relates to ways courts avoid applying the objection. This Section will discuss the case law that has developed around the exceptions in California, Virginia, and Iowa.³⁵

29. See *id.* at 3-21.

30. *Id.* at 3-21 to 3-22 (Iowa (7.5%), California (2.5%) and Virginia (1.9%) had low percentages of older children who had experienced TPR, but there were other states that were similarly low without the same statutory exception to TPR).

31. Rachel Venier, *Parental Rights and the Best Interests of the Child: Implications of the Adoption and Safe Families Act of 1997 on Domestic Violence Victims' Rights*, 8 AM. U. J. GENDER SOC. POL'Y & L. 517, 519 (2000).

32. 42 U.S.C. § 675(4)(E) (2014).

33. See *id.* Some commentators have criticized these exceptions because they create "an extremely large escape hatch" that undermines ASFA's permanency goals. David Herring, *New Perspectives on Child Protection, the Adoption and Safe Families Act—Hope and its Subversion*, 34 FAM. L.Q. 329, 343-44 (2000).

34. See, e.g., OKLA. ADMIN. CODE § 340:75-6-40.9(d)(2)(b) (2015) (explaining that a state may be excused from filing a TPR petition if the child is twelve years of age or older and objects to termination). In New York, if a child is fourteen or older and will not consent to adoption, the state considers it a compelling reason to not file TPR. N.Y. SOC. SERV. § 384(b)(1)(k)(1)(ii)(C) (McKinney 2013). See also COLO. REV. STAT. § 19-3-702(5)(a)(II) (2015).

35. There do not appear to be any cases from the Virgin Islands relating to their objection exception. The exception is very similar to the Virginia exception, and so it would likely be analyzed similarly.

1. California's Exception

In California, the court may decline to terminate parental rights if it finds a compelling reason termination would be detrimental, including when “a child 12 years of age or older objects to termination of parental rights.”³⁶ The leading case relating to this provision is *In re Christopher L.*,³⁷ in which a parent appealed a trial court’s decision terminating her parental rights, arguing that the fifteen-year-old child unequivocally objected to termination.³⁸ The court of appeals disagreed and affirmed the termination. The appellate court reviewed the child’s preferences holistically, examining his testimony and records of his statements in agency reports.³⁹ The court noted that even though the child testified that he would not want to be adopted if it meant he could not see his mother, he had previously expressed a preference to be adopted.⁴⁰ The court explained that his statements “do not constitute unequivocal objections. Rather, the statements appear to reveal an internal conflict between his hope to be adopted and . . . his hope to see [his mother] again.”⁴¹ The court drew a formal distinction between “preference” and “objection” and determined the statements were of “preference.”⁴² Because it did not find an “unequivocal” objection, the court declined to rule on the question of whether an unequivocal objection by a child over twelve prevented termination as a matter of law.⁴³

The appellate court’s ruling laid out guidelines for identifying whether the court should exercise the child-objection exception. The court noted that it has an obligation, independent of the child-objection provision, to “consider the child’s wishes to the extent they are ascertainable.”⁴⁴ The court of appeals explained that trial courts should “explore the child’s feelings” about their parents, foster parents, and prospective adoptive parents, and that evidence of

36. CAL. WELF. & INST. CODE § 366.26(c)(3)(B)(ii) (West 2015).

37. 50 Cal. Rptr. 3d 57 (Cal. Ct. App. 2006).

38. *Id.* at 61.

39. *Id.* at 63.

40. *Id.* After initially telling the Court he did not want to be adopted if he could not see his mother again, he later explained he would be “happy” to be adopted by his aunt and uncle, and that he was “okay” with living with them because they made him feel safe. *Id.*

41. *Id.*

42. *Id.* at 64.

43. *Id.*

44. *Id.* at 63 (citing CAL. WELF. INST. CODE § 366.26(h); *In re Leo M.*, 24 Cal. Rptr. 2d 253 (Cal. Ct. App. 1993)).

the child's wishes does not have to be in the form of direct testimony.⁴⁵ The evidence could also appear in agency reports. The court also rejected the mother's attempt to import the adoption consent rules into the termination matter.⁴⁶ The fact alone that a child over twelve must consent to adoption was not enough to prevent termination under the facts in this case.

2. Virginia's Exception

There are only a handful of published cases in Virginia that cite to its "veto" or "child preference" provision. The published cases largely deal with situations where the child was under the age of fourteen, but the parent argued they had reached the "age of discretion" and so the veto should apply. For example, in *Deahl v. Winchester Department of Social Services*,⁴⁷ the Supreme Court of Virginia reversed a TPR when the trial court did not find whether the thirteen-year-old child was of the age of discretion, and whether he objected to the termination.⁴⁸ The trial judge had shielded the child from the ultimate question of whether he objected to termination, but had allowed questions that addressed the issue indirectly.⁴⁹ The child's testimony indicated that he missed and loved his parents, and that he would like to return permanently to their care.⁵⁰ The record also indicated, however, that the child had previously not wanted to return to his parents' care, and that there was evidence that the parents had threatened to abandon him if he did not tell the county Department of Social Services that he wanted to be returned to their care.⁵¹ The termination order indicated that the child, in chambers, had requested termination and that the GAL agreed.⁵² The state supreme court explained that it appreciated the judge's "commendable" efforts to protect the child from a hard choice, but noted that the statute requires giving the child a "meaningful opportunity to object" when the child is either

45. *Id.* (citing *In re Amanda D.*, 64 Cal. Rptr. 2d 108 (Cal. Ct. App. 1997)).

46. *Id.* at 62 n.3. The court explained that dependency proceedings are special proceedings governed by their own rules and code.

47. 299 S.E.2d 863 (Va. 1983).

48. *See id.* at 869.

49. The judge explained to counsel for the parent: "I don't think it is advisable for this boy to force you to say to this boy, 'Jack, do you want to be taken out of the custody of your parents and put with the Welfare?'" *Id.* at 865. He further explained that was a "very damaging thing to ask anyone" and "he may want that but he is not going to want to say it or he may say it and then just live with a lifetime on that thing." *Id.*

50. *See id.* at 866.

51. *See id.* at 864.

52. *See id.* at 865.

fourteen or has attained the age of discretion.⁵³ Given the uncertainty regarding whether there was an objection, or whether the child had reached the age of discretion, the Virginia Supreme Court reversed and remanded.

In *Tackett v. Arlington County Department of Human Services*, the parent argued that the court erred when it ruled that a twelve-year-old child did not have the maturity necessary to exercise the termination veto.⁵⁴ The court of appeals explained that the age of discretion analysis should focus on “whether the child, regardless of how old he or she may be, is mature enough to intelligently consider the circumstances and ramifications of the termination proceeding.”⁵⁵ The trial court concluded that the child’s views were a result of manipulation by the mother, and that the child had made inconsistent statements about whether she wanted to live with her mother or her foster parents.⁵⁶ The court also discounted the child’s testimony because it was made in front of her mother and grandmother.⁵⁷

It is not unusual for the court to sidestep the exception by pointing to an unclear record regarding the child’s position. In an unpublished case involving a fourteen-year-old child, there was a poorly executed colloquy between the judge and the child about whether he objected and, ultimately, it was determined that he did not object.⁵⁸ The court of appeals affirmed the trial court’s decision that the veto did not apply.

3. Iowa’s Exception

Iowa’s exception permits children as young as ten-years-old to object—the youngest age of any of the exceptions related to a child’s

53. The Court noted that it “may not always be necessary that the bald question be propounded to the child provided the record otherwise clearly indicates the child’s wishes.” *Id.* at 869.

54. 746 S.E.2d 509, 519 (Va. Ct. App. 2013).

55. *Id.* (quoting *Hawks v. Dinwiddie Dep’t of Soc. Servs.*, 487 S.E.2d 285, 289 (Va. Ct. App. 1997)).

56. *See id.* at 519–20.

57. *See id.*

58. *See Scott v. Roanoke City Dep’t of Soc. Servs.*, 2012 Va. App. LEXIS 103 at *22 (Va. Ct. App. Apr. 3, 2012). The appellate court noted that F.S. appeared confused and did not understand what termination meant. *See id.* The court, and counsel for the parties, tried to explain the issue multiple ways during the hearing, and ultimately the trial judge asked the parties to leave the room because F.S. indicated he felt pressured. *See id.* at *22–23. When the judge asked him if he objected, F.S. asked what that meant, and the judge explained “[t]hat is saying if you do not object then if her rights are terminated you could be placed for adoption.” *Id.* at *24. F.S. responded “Okay.” *Id.*

objection. But Iowa also has the least developed case law regarding the application of the exception. There is only one Iowa Supreme Court decision related to the exception: *In re K.M.*⁵⁹ In *K.M.*, the state supreme court affirmed the TPR, and discussed the child's objection in the context of analyzing whether TPR was in the child's best interests.⁶⁰ Without noting the child's age, the court explained that it heard conflicting testimony about whether K.M. wished to be reunited with her parents.⁶¹ The court also explained that the child had never been explicitly asked about her preference, and praised the trial court's opinion that the child should not "be required to make a decision to choose between her biological parents and potential adoptive parents."⁶²

The only published guidance from the Iowa Court of Appeals on the question of how courts should weigh a child's objection is that the exception is discretionary, not mandatory.⁶³ There are no cases that reverse a trial court's decision that the exception does not apply. But a few unpublished cases avoid applying the exception by noting either that the child is low functioning or that there is lack of a clear record regarding the child's wishes.⁶⁴ Other exceptions, such as when the child is in the custody of relatives, or when termination would be detrimental to the child given the closeness of the parent-child relationship, have received much more attention from the appellate courts in Iowa.⁶⁵

C. Common Themes When Applying the Exceptions

Although the three states' exceptions employ different approaches, common themes arise in applying all of them. First, courts commonly avoid applying the objection because the issue is not raised clearly, or no one makes a clear record regarding the

59. 653 N.W.2d 602 (Iowa 2002).

60. *See id.* at 606. It is not clear from the opinion whether the parents actually raised the exception.

61. *See id.*

62. *Id.*

63. *See In re A.J.*, 553 N.W.2d 909, 916 (Iowa Ct. App. 1996).

64. *See, e.g., In re J.B.*, No. 2-191, 2012 Iowa App. Lexis 256 at *6 (Mar. 28, 2012) (no clear record of objection); *In re B.B.*, No. 1-250, 2011 Iowa App. Lexis 1134 at *8-9 (Apr. 27, 2011) (child lacks maturity to make decision).

65. A Lexis search for each of the exceptions (e.g., § 232.116(3)(b), § 232.116(3)(a), etc.) on February 22, 2015 generated only thirty-five references to the child objection exception, but over 300 to each of the other above-referenced exceptions. *Lexis Advance*, LEXISNEXIS, <http://advance.lexis.com/>.

child's objection.⁶⁶ The question is not just whether the child objects, but whether that objection is "unequivocal."⁶⁷ The court will consider statements in court, statements to other professionals, and even evidence of the child's conduct.⁶⁸ Because the court will evaluate so many sources of evidence regarding the child's wishes, there are many opportunities for conflicting accounts. This makes it more difficult for a judge to find that an objection is ever "unequivocal." In addition, courts will not apply the objection if they believe the parent manipulated the child's view.⁶⁹ Finally, when the parent is the party arguing for applicability of the objection on appeal, the court may consider the parent's basis for believing the child objected to be speculative.⁷⁰

Whether the child actually objects to the termination of her parents' rights can be difficult to determine if there have not been significant efforts by the agency, counsel, or court to understand the child's wishes. Furthermore, there is substantial disagreement about the appropriate way to make a record of the child's objection. Some courts are unwilling to allow children to be asked their preference directly.⁷¹ On the other hand, at least one reviewing court has reversed a termination precisely because the issue was addressed too indirectly.⁷² The biggest challenge to implementing an objection may be simply how to make a record of it.

Second, when the court cannot sidestep the issue, the child's maturity level is usually the critical question when the exception is

66. *L.C. v. L.C.*, B227495, 2011 Cal. App. Unpub. LEXIS 2151, at *8 (Mar. 23, 2011) (explaining that the record did not reflect that the child objected; rather, it indicated the child was interested in adoption by his aunt and continuing to visit his parents); *In re J.B.*, 2012 Iowa App. Lexis 256 (no record of objection).

67. *In re Christopher L.*, 50 Cal. Rptr. 3d 57, 63 (Cal. Ct. App. 2006); *In re K.M.*, 635 N.W.2d at 606 (noting some testimony that the child wanted to be reunited with her parents, but other testimony that she was conflicted on the question). One gets the impression that the "equivocal" nature of the objection is less a reflection of equivocation, and more a function of the child's confusion about what TPR and adoption mean.

68. *In re Christopher L.*, 50 Cal. Rptr. 3d at 1335 (considering not only the child's testimony, but statements made to agency officials months before the hearing); *Tackett v. Arlington Co. Dep't of Human Servs.*, 746 S.E.2d 509, 519–20 (Va. Ct. App. 2013) (considering the child's out-of-court statements to her therapist about her foster family and biological family); *In re Leo M.*, 24 Cal. Rptr. 2d 253, 259 (Cal. Ct. App. 1993) (considering the child's conduct to infer his feelings on termination and adoption).

69. *Tackett*, 746 S.E.2d at 519–20.

70. *See, e.g., L.C.*, 2011 Cal. App. Unpub. LEXIS 2151 at *19 ("Despite mother and father's arguments to the contrary, the record of Jr.'s testimony does not show any objection.").

71. *See Deahl v. Winchester Dep't of Social Servs.*, 299 S.E.2d 863, 868–69 (Va. 1983) (explaining the trial court's unwillingness to address the question directly); *In re K.M.*, 635 N.W.2d at 602 (praising the trial court for not addressing the question directly).

72. *See Deahl*, 299 S.E.2d at 868–69.

discretionary.⁷³ In Virginia, when the objecting child is under the age of fourteen, courts investigate whether the child is mature enough to have intelligent views on the subject of termination, and consider the “capacity, information, intelligence, and judgment of the child.”⁷⁴ The child’s maturity level does not have to be “extraordinary,” but the child must be able to “intelligently consider the circumstances and ramifications of a termination proceeding.”⁷⁵ While there are no cases related to the “disability override” provision in Virginia’s exception, one can imagine that a similar “maturity” analysis would be applied in that context.

Ultimately, applying the objections in Iowa, Virginia, and California hinges on whether there is a clear record of the child’s objection and, if so, whether the child is sufficiently mature for the court to take the objection seriously. Both of these questions can be very challenging for a court to answer, and the case law relating to the objections does not give a great deal of guidance to trial courts about how to answer them.

III. AMPLIFYING A CHILD’S VOICE: THE IMPORTANCE OF CHILD OBJECTION EXCEPTIONS

Despite the challenges in defining and implementing a child objection exception in California, Virginia, and Iowa, more states should join them in recognizing this objection. A child objection provision appropriately empowers older children to protect their legal relationships with their families, and encourages them to participate in their cases. It is also consistent with our current understanding of child development and legal decision-making by older children in other contexts. Finally, child objection exceptions are consistent with realistic permanency planning for older children.

73. See, e.g., *In re B.B.*, No. 1-250, 2011 Iowa App. Lexis 1134 at *8–9 (Apr. 27, 2011) (rejecting objection due to lack of maturity).

74. *Hawks v. Dinwiddie Dep’t of Social Servs.*, 487 S.E.2d 285, 288 (Va. Ct. App. 1997) (citing *Coffee v. Black*, 82 Va. 567, 569–70 (1886)).

75. *Id.* at 289.

A. *Contextualizing Child Objection Exceptions within
Child Welfare Law*

Although child objection exceptions are uncommon in the TPR context, the law already involves older children in important decision-making related to the ultimate outcome in child welfare cases. The most relevant example is that the child's consent may be required for an adoption after TPR. An older child's consent is required for adoption in "nearly all" states.⁷⁶ Allowing a child to object to termination is a logical extension of this consent requirement, and helps prevent children from becoming legal orphans.⁷⁷ If the child will object to adoption, it does not further the child's sense of permanency to allow TPR over his or her objection. At least two states, Oklahoma and New York, allow agencies to decline to file TPR petitions when an older child objects, even when the state would normally be required to file a TPR petition due to the length of time the child has been out of the home.⁷⁸

In addition, federal law already requires that courts consider the position of older children regarding permanency planning. Courts must "consult[], in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child."⁷⁹ Even though the court is not required to accept the child's position, its obligation to consult gives legal weight to the child's objection and promotes investigation of the child's hopes and fears regarding permanency, and empowers him or her in the decision-making process.

76. CHILD WELFARE INFO. GATEWAY, CONSENT TO ADOPTION 3 (2013), <https://www.childwelfare.gov/pubPDFs/consent.pdf>. See, e.g., IOWA CODE § 600.7(1)(d) (2014) (adoption requires the consent "of the person to be adopted if that person is 14 years of age or older."). The consent must be made in the presence of the court.

77. See *infra* Part III.C (discussing the way child objection provisions promote realistic permanency planning and the problems associated with legal orphan status). But see *In re Christopher L.*, 50 Cal. Rptr. 3d 57, 62 n.3 (Cal. Ct. App. 2006) (explaining that Court was unwilling to import the consent-to-adoption requirement into TPR proceedings). The term "legal orphan" appears to have been coined by Martin Guggenheim to describe a child whose parents' rights had been terminated, but who has not yet been adopted. TPR does not guarantee that a child will be adopted. See LaShanda Taylor, *Resurrecting Parents of Legal Orphans*, 17 VA. J. SOC. POL'Y & L. 318, 325–26 (2010). Children can be left in limbo and subject to post-termination changes in placement. See *id.* For every year that a child spends in foster care post-TPR, the likelihood of adoption is reduced by eighty percent. See *id.* at 321 n.9 (citing Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995)).

78. Oklahoma and New York consider the objection of an older child to be a compelling reason not to file TPR when it would otherwise be required. See OKLA. ADMIN. CODE § 340:75-6-40.9(d)(2)(b) (2015); N.Y. SOC. SERV. § 384(b)(1)(k)(1)(ii)(C) (McKinney 2013).

79. 42 U.S.C. 675(5)(c)(ii) (2012).

Finally, the objection exception also appropriately reframes the TPR narrative from a parent's rights to a family rights model.⁸⁰ Although there is some debate about the nature and extent of a child's associational rights with his family, there is no question that when a parent's rights are terminated, it is not only the parent who loses something. The child loses his legal relationship with his parents, extended family members, and potentially his siblings.⁸¹ By giving legal meaning to the child's objection, states recognize that termination of parental rights is a matter of children's rights as well.

Critics of a child objection exception might argue that a child's perspective is already incorporated into TPR proceedings. Some states have specific laws requiring the court to consider the child's perspective.⁸² The child's perspective, especially for older youth, might also be considered as part of the court's mandate to determine whether TPR is in the child's best interests, or under one of the other discretionary exceptions like the closeness of the parent-child relationship.⁸³

Mere consideration of the child's perspective, however, may not mean as much to older children if their views are strong enough that they want to raise an objection. The availability of a legal objection empowers the child by giving their position real legal meaning, especially in a place like Virginia where it can be determinative. The fact that one state, California, has both provisions highlights the insufficiency of a "perspective provision."⁸⁴ Moreover, folding the child's perspective into the best-interests analysis might make sense for very young children, but it marginalizes the perspective of older children who may have stronger views and more at stake in a TPR case.⁸⁵

80. See Halloran, *supra* note 6.

81. See Taylor, *supra* note 77, at 327–28 (explaining that the child loses the right to continued financial support and inheritance rights); Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain their Relationships Post-Adoption*, 41 N.M. L. REV. 1, 4 (2011).

82. See, e.g., W. VA. CODE R. § 49-6-5(a)(6)(C) (2015) (“[The court] shall give consideration to the wishes of a child fourteen years of age or older or otherwise at an age of discretion.”).

83. See, e.g., IOWA CODE § 232.116(3)(c) (2014) (explaining that the court need not terminate parental rights if there is “clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.”).

84. See CAL. WELF. & INST. CODE § 366.26(c)(1)(B)(ii) (West 2015) (child objection); *Id.* § 366.26(h) (consideration of the child's wishes regarding TPR).

85. See *infra* Part III.C (discussing the lower likelihood of adoption of older children and the problems associated with “legal orphan” status).

Another critique of the child's objection is that it puts children "in the middle" of a tense, and potentially traumatic, child welfare proceeding. Allowing an objection could result in parents or others manipulating the child's position, and could cause older children to feel pressured to express loyalty to their parents.⁸⁶ This could be especially true if the objection provision is like Virginia's, and the court may not be able to terminate over the child's objection. This concern led the Iowa Supreme Court in *K.M.* to praise the trial court for refusing to allow the child to be directly asked about his position.⁸⁷

The main problem with this critique is that older children are already "in the middle" in these cases. As one agency worker explained, "[j]udges and guardians ad litem think they are shielding kids from harsh realities, but this is their reality."⁸⁸ Anyone who has represented older children in TPR cases realizes that both parents and agency officials will try to claim that they speak for the child.⁸⁹ Agency officials are quick to inform the court that a child wants termination and adoption, but the same officials will discount the child's perspective when the child does not favor termination.⁹⁰ Parents will assert that their children oppose termination, and argue that when the child supports termination, it is due to misinformation and misunderstanding.⁹¹

These problems are not likely to be worsened merely because the child has a right to object to TPR. Rather, allowing a formal objection may make it more likely that judges, social workers, and attorneys will explore the child's views about TPR and adoption and help alleviate the child's fears or misconceptions about TPR.⁹²

86. This is exactly what was alleged in *Deahl v. Winchester Department of Social Services*, 299 S.E.2d 863, 865 (Va. 1983). Allegedly, the parents told the child they would leave and never see him again if he did not tell the Department he wanted to come home. *Id.* at 864.

87. 635 N.W.2d 602, 606 (Iowa 2002).

88. See GIBBS ET AL., *supra* note 1, at 6-19.

89. See Catherine Ross, *The Tyranny of Time: Vulnerable Children, Bad Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 181 (2004).

90. See Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805, 823 (2006) ("When children want to go home, that wish is often received by adults the same way editors treat a story about a dog biting a man—they aren't going to run with it. On the other hand, when children say they do not want to go home, adults frequently will invoke the child's preference as a crucial factor to take into account.").

91. In *Deahl*, the parents challenged the trial court's unwillingness to allow the child to testify specifically about his position on termination. 299 S.E.2d at 868-89. The "indirect" approach to questioning him led inevitably to confusion regarding his position. The Virginia Supreme Court agreed. *Id.* at 869.

92. A 2009 survey of Judges who hear TPR cases found that exploring the older child's feelings about TPR was critical because often the child has fears and misconceptions about TPR and adoption that can be resolved by courts, social workers, or lawyers. See ELLIS ET AL., *supra* note 23, at 10-11.

Moreover, the fact that the child has the right to object does not mean she must exercise it, or that she must take any other position in the case. The objection simply gives strong, legal weight to the child's position in situations where the child truly opposes the state's attempt to sever his legal relationship with his family.

B. Encouraging Participation

Child objection exceptions also address another problem in child welfare law: lack of meaningful participation by children in their cases.⁹³ The median age of children in foster care has risen to almost eleven, but even older children infrequently attend hearings.⁹⁴ Child welfare cases are the only kind of case where the "person at the center of the case is rarely present and, in most states, has no established right to be present."⁹⁵ The Pew Commission on Children in Foster Care issued a report in 2004 indicating grave concerns about the state of child welfare and recommending that courts "enable children and parents to participate in a meaningful way in their own court proceedings."⁹⁶ The UN Convention on the Rights of the Child also encourages child participation in any proceedings affecting the child.⁹⁷ Importantly, the Convention's discussion of participation focuses on the child's voice being heard, not just the child's best interests.⁹⁸ Very few states have provisions requiring child participation in child welfare cases, but perhaps it should not be surprising that of those that do, two states, Iowa and California, also have child objection provisions.⁹⁹

Young people complain that the TPR process is frequently subject to confusion and misunderstanding. In a youth focus group on the topic, young people explained that they were not told about

93. Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 NEV. L.J. 1302 (2006). Krinsky and Rodriguez explain that courts play a "life-changing role" in the lives of children, "[y]et the voices of far too many foster children and former foster youth are ignored in this process." *Id.* at 1302. One young person in a focus group explained "I didn't even know that *my* rights were terminated until years after it had been done." GIBBS ET AL., *supra* note 1, at 6-21.

94. See Pitchal, *supra* note 4, at 243.

95. *Id.*

96. *Id.* at 244.

97. See Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 973 (2006). The Convention allows for the child's direct participation, or participation through a representative.

98. See *id.*

99. See IOWA CODE § 232.91(4) (2014); CAL. WELF. & INST. CODE § 349 (2014).

TPR until after it happened.¹⁰⁰ Even more disturbingly, one young person recalled learning of the TPR, explaining, “I saw my picture on the [agency] computer to be adopted.”¹⁰¹ In order to object to TPR, the child will have to be informed in an age appropriate way of what is happening in the proceeding, what his rights are, and what his objection would mean. Although children would not necessarily have to testify about their positions, or even take a position at all, they would have to be advised that their perspective matters and be given the opportunity to present it to the court.

Finally, similar arguments to those being made against child objection exceptions have been made against children being present in court, or participating in the proceeding in other ways.¹⁰² But young people report that the opportunity to be more involved in child welfare proceedings “is exactly what they need to enable them to heal and move on—hearing difficult information in an appropriate setting, with support available and the opportunity to express their own views about their life’s course, enables them to come to terms with and work through the abuse and neglect they have suffered.”¹⁰³

C. Promoting Realistic Permanency Planning

Child objection exceptions also promote realistic permanency planning. From a social work point of view, the critical issue is not only whether TPR should occur, but whether the young person has a sense of family and permanency.¹⁰⁴ If TPR does not advance those goals because there is no family waiting to adopt the child, or the child is not emotionally prepared for termination, then it may do more harm than good.¹⁰⁵ The child may simply become a legal orphan.¹⁰⁶ Children who do not have an adoptive parent waiting in the wings are “left in legal limbo and are likely to experience post-

100. GIBBS ET AL., *supra* note 1, at 6-20.

101. *Id.*

102. See Krinsky & Rodriguez, *supra* note 93, at 1307.

103. *See id.*

104. See NINA WILLIAMS-MBENGUE, NAT’L CONFERENCE OF STATE LEGISLATURES, MOVING CHILDREN OUT OF FOSTER CARE: THE LEGISLATIVE ROLE IN FINDING PERMANENT HOMES FOR CHILDREN 1 (2008).

105. “TPR may force an adolescent to separate from their family before they are developmentally ready to do so.” GIBBS ET AL., *supra* note 1, at 6-18.

106. Adolescents are eight times more likely to be in long-term foster care, as opposed to adoption, than elementary school-aged children. *Id.* at 1-5. See generally Taylor, *supra* note 77 (discussing the negative legal, financial, and social effects of having no legal parent).

termination changes in placement.”¹⁰⁷ Children in these circumstances generally experience higher rates of homelessness, involvement in the criminal justice system, and public assistance utilization, as well as lower educational attainment.¹⁰⁸

In addition, social workers are well aware that adolescents frequently have contact with their parents post termination, and understand that TPR may not change the older child’s perspective on permanency.¹⁰⁹ If older children are just going to reunify with their biological parents when they turn eighteen and the court loses jurisdiction, then it makes sense to proactively plan for this rather than terminate parental rights.¹¹⁰

For all of these reasons, many judges, even in states with no child objection provision, are hesitant to terminate parents’ rights when it is unclear whether the termination will lead to meaningful permanency for the child.¹¹¹ Social workers often share these concerns.¹¹² Problems with establishing permanency post TPR have even caused states to create legal frameworks to restore a parent’s rights.¹¹³ Child objection exceptions encourage the kind of planning necessary to avoid these permanency traps and encourage the use of other legal permanency outcomes, such as guardianship¹¹⁴ or another planned permanent living arrangement,¹¹⁵ which can protect adolescents without requiring unwanted termination of their

107. Taylor, *supra* note 77, at 325. One study indicated that for every year a child spends in foster care without being adopted, their likelihood of adoption decreases by eighty percent. *See id.* at 326.

108. *See id.* at 328–29.

109. *See* GIBBS ET AL., *supra* note 1, at 6-15. Although in many states there is no guarantee of contact with the birth family after termination and adoption, other states have a legal framework for such contact. Lucy McGough & Annette Peltier-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoptions*, 60 LA. L. REV. 13, 15 (1999). *See also* Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoptive Law and Practice*, 75 B.U. L. R. 997, 1012 (1995) (discussing importance of post-adoption contact for older children adopted from foster care).

110. GIBBS ET AL., *supra* note 1, at 6-15. “Older kids always find a way to see their birth parents. It’s where they go when they turn 18.” *Id.* (quoting a child welfare worker).

111. In a recent study, sixty percent of judges reported desiring or requiring an older child’s agreement before terminating parental rights. *See* Ellis et al., *supra* note 23, at 4. However, in some jurisdictions, age and adoption likelihood are not factors at all. *See* GIBBS ET AL., *supra* note 1, at 6-6.

112. *See* GIBBS ET AL., *supra* note 1, at 6-8.

113. *See, e.g.,* Randi O’Donnell, *A Second Chance for Children and Families: A Model Statute to Reinstate Parental Rights after Termination*, 48 FAM. CT. REV. 362 (2010); Taylor, *supra* note 77.

114. *See* Joshua Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. OF JUV. L. & POL’Y 1, 13–22 (2015) (discussing guardianship as an important, but underutilized, approach to establishing permanency for children without unnecessarily ending a child’s ties to parents and siblings).

115. A new federal law, the Preventing Sex Trafficking and Strengthening Families Act, eliminates the use of “another planned permanent living arrangement” as an option for children under 16. Pub. L. No. 113-83, § 475A, 128 Stat. 1919 (2014). States are just beginning to

parental rights.¹¹⁶ These exceptions also promote meaningful engagement between the social worker and the child about TPR and the child's wishes. This could help address the child's fears about TPR and make children more willing to consider adoption as the ultimate permanency goal.¹¹⁷

*D. Considering Child Development and Decision-Making
in Other Contexts*

Giving stronger legal meaning to an older child's objection is consistent with our current understanding of child development and adolescent decision-making in other contexts. Developmental Psychologist Jean Piaget posited that between ages eleven and fifteen, children are in a stage of development where they can "hypothesize and draw deductions, understand theories, and combine them to solve problems."¹¹⁸ According to Piaget, by age fifteen, a child has the capacity for mature thinking and approaches problems more like an adult would.¹¹⁹ Other research indicates there is little difference in the cognitive abilities of later adolescents and adults.¹²⁰ Another study found that by middle adolescence, children can "reason about multiple alternatives and consequences . . . and use information systematically."¹²¹ Research also shows that decision-making by fourteen-year-olds with regard to their medical needs is quite similar to that of adults.¹²²

implement this statute, but eliminating APPLA as an option for children in early to mid-adolescence (ages ten to fifteen) could result in more TPR petitions for this age group.

116. See GIBBS ET AL., *supra* note 1, at 6-15; see also Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 ALA. L. REV. 715, 738-39 (2015) (discussing non-exclusive adoption as a way to provide a sense of permanency to a child while maintaining relationships with biological parents and siblings).

117. GIBBS ET AL., *supra* note 1, at 6-8.

118. Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1879 (1996).

119. *Id.*

120. See *id.* at 1881. For example, sixteen-year-olds and seventeen-year-olds scored similarly to eighteen-year-olds to twenty-four-year olds in competency related assessments. KIMBERLY LARSON & THOMAS GRISSO, DEVELOPING STATUTES FOR COMPETENCE TO STAND TRIAL IN JUVENILE DELINQUENCY PROCEEDINGS: A GUIDE FOR LAWMAKERS 17 (Apr. 2, 2012), <http://modelsforchange.net/publications/330>.

121. See Mlyniec, *supra* note 118, at 1882 (quoting Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescent Psychological and Legal Competence to Consent to Abortion*, 16 L. & HUM. BEHAV. 129, 147-48 (1992)).

122. See *id.* at 1881 (citing Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1590-91 (1982)). The study considered evidence of "choice, reasonable outcome, rational reasons, and understanding as measures of competency." *Id.* The adolescents studied were aged fourteen to seventeen.

Of course, not all of the evidence supports the proposition that older children are mature decision-makers. Critics of Piaget have noted that his formulations are based on “average children” and do not take into account the way others may influence decision-making by children.¹²³ In addition, Piaget’s focus on cognitive abilities does not account for adolescent behavior, which is more susceptible to peer influence, riskier, and more focused on immediate consequences than that of adults.¹²⁴ Furthermore, recent research regarding adolescent brain development confirms that the adolescent brain is far from fully developed.¹²⁵ This research has been used to justify changes in how courts address juvenile competency to stand trial¹²⁶ and juvenile sentencing in adult court.¹²⁷

But valid concerns about developmental immaturity, impulsive behavior, and a juvenile’s criminal culpability should not be used to prevent older children from having a legal right to object in the context of a civil TPR hearing. Older children have the cognitive ability, and often the maturity, to make reasoned decisions in this context. Furthermore, even when an older child objects to TPR, the court still has options to protect the child from adverse consequences stemming from that decision. A court’s decision to not terminate a parent’s rights does not mean the child will return to the parent’s custody. The child may remain in the care of relatives or foster parents. The child’s objection simply prevents the state from severing her legal relationship with her parents.

Child objection exceptions are also consistent with important decisions children are allowed to make in other contexts. Older children, for example, are allowed to make numerous medical decisions with significant consequences. When a minor seeks an abortion, she may not need a parent’s consent or a court order.¹²⁸ An adolescent may be required to consent to inpatient mental

123. *See id.* at 1881.

124. *See id.* at 1883.

125. *See* LARSON & GRISSE, *supra* note 120, at 13.

126. *See id.* at 27 (discussing the relevance of developmental immaturity to juvenile competency and proposing that states consider an age-based presumption of incompetence).

127. *See, e.g.,* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (explaining that a child’s developmental immaturity is one reason that life without parole sentences may not be automatically imposed on juveniles waived to adult court).

128. Bellotti v. Baird, 443 U.S. 622, 651 (1971); Jennifer Rosato, *Foreword*, 8 Hous. J. Health L. & Pol’y 195, (2008). In twelve states, parental notification is required, but not parental consent. *See State Policies in Brief: Parental Involvement in Minors’ Abortions*, GUTTMACHER INST. (Nov. 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf. In the other thirty-eight states that require parental consent, there are “bypass” statutes that allow minors to obtain an abortion without parental consent if they are sufficiently mature and demonstrate an understanding of the consequences. *See id.*

health treatment, and may be able to refuse life-extending treatment over a parent's objection.¹²⁹ Minors may also obtain contraception without a parent's consent.¹³⁰ While legal standards governing adolescent autonomy in this area are admittedly varied and fraught with contradiction,¹³¹ there is no doubt that the law provides some autonomy to older adolescents to control their medical fate.¹³²

Adolescents have a measure of autonomy in this area because these decisions are deeply personal and relate to fundamental constitutional concerns such as privacy and bodily autonomy.¹³³ TPR cases also implicate deeply personal decisions and constitutional concerns: familial integrity and due process.¹³⁴ And, in the TPR context, judges may have more power to protect older children from the consequences of their decisions than in the medical context. As discussed above, sustaining a child's objection to TPR does not mean the child will return home. The child could remain in the custody of relatives or foster parents, and the court can control any contact the child has with her parents.

Older children are also allowed to make important legal decisions in juvenile delinquency cases. Children are allowed to waive their right to remain silent and their right to counsel in the context of custodial interrogation.¹³⁵ Once charged, they must decide

129. Amanda C. Pustilnik & Leslie Meltzer Henry, *Adolescent Medical Decision Making and the Law of the Horse*, 15 J. OF HEALTH CARE L. & POL'Y 1, 3 (2012).

130. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 681–82 (1977). Twenty-one states allow minors to access contraceptives without parent consent. See *State Policies in Brief: Minors' Access to Contraceptive Services*, GUTTMACHER INST. (Nov. 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_MACS.pdf. Twenty-five other states allow it under certain circumstances, like when the minor has been pregnant previously, is of a minimum age, or faces health risks without contraception. See *id.*

131. See Pustilnik & Henry, *supra* note 129 (noting that a child may be able to admit herself into inpatient treatment for mental health issues, but be prohibited from getting an aspirin at school without parent consent.). See also Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1267 (2000) (explaining that a sixteen-year-old may be able to decide treatment for an STD, but not for a complication related to the STD).

132. At common law, some courts utilized the "mature minor rule," which analyzed the type of procedure at issue, the benefit of the procedure, and the child's ability to comprehend the procedure and its implications. See Mlyniec, *supra* note 118, at 1893. Mlyniec notes that courts gave little guidance as to who to determine a child was "mature." See *id.*

133. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 72–75 (1976). The Court explained that "[c]onstitutional rights do not mature and come into being magically only when one attains that state-defined age of majority." *Id.* at 75.

134. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26–27 (1981).

135. There are special protections for children in this context, such as the consideration of their age in determining whether the waiver was knowing, intelligent, and voluntary. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2408 (2011). In *J.D.B.* the court noted that children "often lack the experience, perspective, and judgment to recognize choices that could be detrimental to them." *Id.* at 2397 (citing *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

whether to waive their right to a trial and accept a plea agreement offered by the state. In order for a plea to be accepted, the court must find that the plea is knowing, intelligent and voluntary.¹³⁶ Children are allowed to make these decisions in spite of the fact that “juvenile proceedings can be more complex and perplexing than many adult proceedings[.]”¹³⁷ In addition, a guilty plea in a juvenile case may have long lasting collateral consequences.¹³⁸

While there are important protections in place to help children make these decisions, and, hopefully, prevent exploitation of the child’s immaturity,¹³⁹ there is no question that delinquent children have significantly more autonomy in decision-making than a similarly-aged child in the child welfare system.¹⁴⁰ There is also no question that the state is more willing to see children as capable decision makers when it serves the state’s interest, like when the state obtains a plea of guilt from a child and avoids a delinquency trial. Similarly, an attorney prosecuting a delinquency case is likely to assert that a child has the maturity to knowingly, intelligently, and voluntarily consent to custodial interrogation, but the same attorney prosecuting a TPR is unlikely to care much about whether a child of the same age consents to TPR.

Traditionally, the child’s perspective has been given little attention in family law custody disputes. “The resolution of custody disputes historically was made by reference to either a presumption favoring one parent, or to a concept of fault.”¹⁴¹ This is changing, however, as more states are requiring courts to consider the child’s perspective when determining the “best interests” of the child.¹⁴²

136. In *Boykin v. Alabama*, the U.S. Supreme Court held that pleas must be knowing, intelligent, and voluntary. 395 U.S. 238, 242–43 (1969). This rule has been applied to juvenile court pleas as well through case law and state statutes. See, e.g., *In re E.F.*, 862 A.2d 239 (Vt. 2004).

137. Timonth Wynkoop, *Neuropsychology of Juvenile Adjudicative Competence*, 3 J. FORENSIC NEUROPSYCHOLOGY 45, 48 (2003).

138. See Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1113 (2006).

139. See, e.g., *J.D.B.*, 131 S. Ct. at 2406 (explaining that a child’s age is a factor to consider in deciding whether there was a valid waiver of Miranda rights).

140. This is one reason courts and scholars have been pushing back against this idea in light of new research on juvenile brain development. See e.g. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (holding that mandatory sentencing schemes requiring life-without-parole sentences for juveniles violates the prohibition on cruel and unusual punishment); Kellie Johnson, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067, 1094 (2006) (urging states to require courts to presume a child is incompetent if the child is under the age of thirteen at the time competency is raised in a delinquency matter).

141. Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1534 (1994).

142. Mlyniec, *supra* note 118, at 1886. State statutes, however, often qualify this responsibility and allow the child’s counsel to disregard the child’s wishes. See Brent Avery, *Custody*

Lawyers are appointed for children in custody cases more frequently as well.¹⁴³ As in the TPR context, there is little guidance for courts on how evaluate a child's expressed preferences in child custody cases.¹⁴⁴ Even if a court is not required to follow a child's wishes, judges appear to give much greater weight to a child's position when the child is fourteen or over.¹⁴⁵

Although older children may have a limited voice in custody disputes, there are important reasons to treat TPR hearings differently. TPR cases are initiated by the state, and as a result have constitutional implications, like due process and the right to familial association,¹⁴⁶ that are not present in private family law disputes. TPR cases also end the legal relationship between a child and her parents. Custody decrees, on the other hand, presumptively result in joint custody or some visitation with the noncustodial parent.¹⁴⁷ They can also be modified later, unlike most TPR decisions.¹⁴⁸

Ultimately, child objection exceptions make sense for a host of reasons. They are consistent with other rights children have in the child welfare context, and advance the goal of participation by older children in their cases. They also promote realistic permanency planning by ensuring that older children are either prepared for TPR, or can object to becoming "legal orphans." Finally, child objection exceptions are also consistent with what is understood about child development and decision-making in other contexts, including medical decision-making and juvenile delinquency. In addition, courts have the power to protect a child from the consequences of her objection. A child's objection to TPR does not mean she will return to a parent's custody. There are other options, such as legal guardianship with relatives or another caregiver, which can preserve the family relationship while maintaining the child's safety.

and Visitation: Court Appointed Counsel and the Wrong Side of Soundproof Glass, 16 J. CONTEMP. LEGAL ISSUES 219, 222 (2007).

143. Although some states only appoint counsel in particular circumstances, like when child abuse is alleged. See Avery, *supra* note 142, at 223.

144. See Mlyniec, *supra* 118, at 1887.

145. See *id.* at 1887–88. A study in Virginia found that judges focused primarily on age when deciding how much weight to give a child's wishes, noting that a child's preferences were dispositive or "extremely important" when the child was over the age of 14. *Id.*

146. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26–27 (1981).

147. See J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 215 (2014).

148. *But see* O'Donnell, *supra* note 113 and accompanying text; Taylor, *supra* note 77 (discussing statutes that allow reinstatement of parental rights post TPR).

IV. IMPLEMENTING A CHILD OBJECTION EXCEPTION: SELECTING A MODEL AND THE CRITICAL ROLE OF COUNSEL

States looking for a way to include an older child's objection in the TPR process should institute a combination of the approaches discussed above. The best answer is to combine both approaches. Combining the Iowa discretionary exception for children over the age of ten with the Virginia veto provision for children fourteen and over would allow courts to strongly consider the objection of children between ten and thirteen, and prevent termination when older children object.

A. Blending the Exceptions: Including Both a Veto and Discretionary Objection

For children fourteen and over, a veto provision makes sense. Nearly all states require a child's consent for adoption, so giving the child similar veto power over the termination helps avoid creating legal orphans. As discussed *supra*, it is also consistent with what is known about child development and the other kinds of legal and medical decisions the law allows older adolescents to make. The rationales for a veto provision for older children do not necessarily extend to children with significant disabilities. In those cases, the child's consent is probably not necessary under most state adoption statutes, and the child's decision-making capacity is likely more suspect.¹⁴⁹

The ideal model also includes a discretionary exception for children between the ages of ten and thirteen, and a similar approach could be taken with children over the age of fourteen with disabilities.¹⁵⁰ The exception means that the child's position, not just what other parties and professionals think is best, has legal importance.¹⁵¹ Although the child's objection may not change the

149. See Mlyniec, *supra* note 118, at 1882 (noting that nine-year olds are ill-equipped to understand their rights in the legal process). *But see* Federle, *supra* note 141 (explaining that, too often, children's rights are improperly limited by adult determinations about the child's capacity).

150. While a child's disabilities could impair their decision making and reflect developmental immaturity, there is also the concern that minor disability issues could be overemphasized by agency attorneys in order to undermine the child's position. In addition, children with disabilities are overrepresented in the child welfare system. See Rebekah Gleason Hope, *Foster Children and the IDEA: The Fox No Longer Guarding the Henhouse?*, 69 LA. L. REV. 349, 357-58 (2009).

151. This focus is consistent with developing views about the role of attorneys for children in child welfare cases. Barbara Kaban et al., *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. 682, 683 (2006). Ultimately, consensus is

outcome of the TPR hearing, giving it legal meaning may positively influence the child's experience of the process.¹⁵² It may also force state agencies to consider whether they ought to file a TPR petition in the first place when a child objects.¹⁵³ Finally, making the objection discretionary for children over the age of ten comports with the variability of children's decision-making abilities between the ages of ten and thirteen.¹⁵⁴

B. *The Critical Role of Counsel.*

Judges, social workers, and therapists play an important role in ensuring children understand what TPR means and assessing the child's readiness for adoption.¹⁵⁵ However, significant assistance from the lawyer is required to help a child decide whether to formally object to termination and to facilitate appropriate participation in the case generally. The attorney must advise the child in an age appropriate manner about the proceedings and her rights within it.¹⁵⁶ The attorney must help the child participate appropriately in hearings, as well in the case in general. The attorney has to help the older child understand the entire universe of options available to the child, and the legal meaning of those options. Doing all of this in a developmentally appropriate way can be a daunting task for a lawyer.¹⁵⁷

moving appropriately toward ensuring that attorneys provide client-directed representation to children. *See id.*

152. Krinsky & Rodriguez, *supra* note 93 (“[I]t is often the process and integrity of the path followed, and not the ultimate result, that determine our perception of the legal system.”). “Children who can express their views through counsel may take solace in the rationality of the system that determines their fate—even if the decision is not one they sought.” Catherine Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 *FORDHAM L.J.* 1571, 1619 (1996).

153. *See supra* note 34, 78 and accompanying text (explaining that a small number of states allow agency officials to consider the child's objection a compelling reason to not file a TPR petition when the child has been out of the home for more than fifteen out of twenty-two months).

154. *See* Mlyniec, *supra* note 118, at 1882 (noting that a child's ability to focus selectively on relevant information and “systematically compare information about alternatives improves between the ages of 10 and 13.”).

155. *See* Ellis et al., *supra* note 23, at 10 (explaining that it is generally the role of child welfare agency staff “to educate children about adoption and assess their adoption readiness.”).

156. *See* Kaban et al., *supra* note 151, at 684.

157. *See* Marty Beyer, *Developmentally Sound Practice in Family and Juvenile Court*, 6 *NEV. L.J.* 1215, 1215 (2006). Dr. Beyer notes that the lawyer may not have clinical or special education training, but must understand the impact of trauma, disabilities, and immaturity in order to effectively represent his client.

If the child decides to object, the lawyer faces another large challenge: making a record of the objection. Agency lawyers may muddy the waters by referencing the child's prior, conflicting statements.¹⁵⁸ If the child has any disabilities, agency lawyers may argue that the child's objection should be given less weight, or that the court should override the veto due to disability.¹⁵⁹ The attorney must also answer the critical question of how the child's position should be presented. Should it be in the form of a written objection or pleading? Testimony? An in camera meeting with the judge? An effective attorney should also consider whether a better strategy might be to focus less on the child's right to object, and more on other factors that might convince the court not to terminate.¹⁶⁰ Deciding which approach to take requires strategic thinking by the lawyer and informed input from the child client.

The child objection exception also has implications for the debate about the role of counsel for children in child welfare proceedings. Representation relating to the objection necessarily demands a client-directed approach. But whether children should have a client-directed attorney or an advocate who makes recommendations in the child's best interests (or both) is a far from settled question.¹⁶¹ Arguably, the national trend is toward client-directed representation, especially for older children.¹⁶² Professor Donald Duquette has recommended a "Two Distinct Lawyer Roles" model, allowing for a best-interests lawyer until age seven, and a client-directed lawyer after that.¹⁶³ Even in states that appoint a "best interests" GAL or a GAL-Attorney hybrid, there is usually a framework for that attorney to ask for a separate GAL to be appointed for older children so that the original attorney can

158. *In re Christopher L.*, 50 Cal. Rptr. 3d 57, 63 (Cal. Ct. App. 2006) (explaining that the child's objection was "equivocal," and that he had made prior statements indicating he would like to stay with his aunt and uncle.).

159. See VA. CODE ANN. § 16.1-283(G) (2015).

160. See Martin Guggenheim, *Matters of Ethics: Counseling Counsel for the Child Client*, 97 MICH. L. REV. 1488, 1504 (1999). "Good lawyers will mask reliance on their client's preferences when arguing before courts known not to give much weight to a child's preferences." *Id.*

161. See *id.*; Donald Duquette, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 46 FAM. L.Q. 87, 94-99 (2012).

162. See Duquette, *supra* note 161, at 100; LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605 (2009); ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases at B-4; NACC Recommendations for Representation of Children in Abuse and Neglect Cases at 13-14.

163. See Donald Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240, 1246-48 (2006).

advocate for the child's wishes.¹⁶⁴ If a child did not have a client-directed lawyer who can advise the child about her options and help her make a record regarding her objection to TPR if she objects, then allowing the objection would certainly be less meaningful.¹⁶⁵ It is not difficult to imagine the weakness of an objection that is reported to the court by a best-interests GAL, and then actively undermined by the same GAL.¹⁶⁶ The child objection exception is an excellent example of why older children need client-directed representation in TPR cases. It is also an important answer to critics who argue that court-appointed counsel for children in child welfare cases usually ally with the state.¹⁶⁷

Although the role of a lawyer is critical, there are still significant practical hurdles to effective representation for children in TPR cases. First, not all children will have lawyers in TPR cases. The Child Abuse Prevention and Treatment Act (CAPTA) requires states to provide a guardian ad litem for children in child protection cases, but CAPTA does not specifically require that the GAL be a lawyer.¹⁶⁸ Under CAPTA, the GAL could be a lay advocate like a Court Appointed Special Advocate.¹⁶⁹ Academics and practitioners have argued that children have a constitutional right to counsel in child welfare cases, and a handful of courts have determined that procedural due process requires such a right.¹⁷⁰ Nonetheless, a minority of states still do not provide lawyers for children in TPR

164. See e.g., IOWA CODE § 232.89(4) (2015) (explaining that a separate guardian ad litem may be appointed "if the same person cannot properly represent the legal interests of the child as legal counsel and also represent the best interests of the child as guardian ad litem."). Unfortunately, even in states where the law provides a separate lawyer for the child, this often does not happen either because of the prohibitive cost of appointing a lawyer and a guardian ad litem for one child, or the guardian ad litem simply does not ask the court to appoint a lawyer for the child. See JENNIFER L. RENNE, LEGAL ETHICS IN CHILD WELFARE CASES 80 (2004).

165. One of the most common practical problems with determining applicability of the child objection exception is making a record of the child's objection. See, e.g., *In re Christopher L.*, 50 Cal. Rptr. 3d 57 (Cal. Ct. App. 2006).

166. See, e.g., *In re A.T.*, 744 N.W.2d 657 (Iowa Ct. App. 2007) (reversing a TPR order because the GAL noted the child's disagreement with TPR, but litigated in support of TPR).

167. See Guggenheim, *supra* note 90. Professor Guggenheim explains that while lawyers for allegedly delinquent youth generally understand that their role is to fight against unwanted intervention in the client's life, attorneys in child welfare cases rarely oppose similar intervention, even when their clients oppose it. See *id.* at 809. Given this problem, Professor Guggenheim notes that it is not surprising that states have not only been willing to fund programs for representation of children, but have created child representation programs that are superior to the frameworks for parent representation. See *id.* at 818.

168. 42 U.S.C. 5106a(b)(2)(B)(xiii) (2012).

169. See *id.*

170. See Duquette, *supra* note 161, at 90–91.

cases.¹⁷¹ Finally, as discussed above, even if the GAL is an attorney, he may not advance or even take seriously the child's position if he does not believe it is in the child's best interests.

Second, even when lawyers are provided for children, crushing caseloads and poor training interfere with effective representation. The American Bar Association and National Association of Counsel for Children have proposed caseload standards for attorneys,¹⁷² but those caseloads are routinely exceeded. It is not unheard of for attorneys representing children to have caseloads as high as 450 children.¹⁷³ In addition, in spite of training requirements under CAPTA, the state of training for child advocates is far from adequate.¹⁷⁴ Limitations on access to counsel, high caseloads, and poor training undermine effective representation for children in child welfare cases generally, and addressing these problems is critical to effective implementation of a child objection exception.

CONCLUSION

States should allow an exception to TPR when older children object. For the oldest children, aged fourteen and above, the exception should be a "veto" in line with Virginia's exception. For younger children, as well as older children with significant developmental delays, the exception should be discretionary. Iowa's exception for children ages ten and over is a good model for the discretionary exception. Allowing this graduated approach would appropriately empower children to protect their legal relationships with their parents and advance meaningful participation in their cases. It is also consistent with our growing understanding of child development and a child's capacity for decision-making. There will

171. See A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN 10 (3d ed. 2012). First Star reports that thirty-nine percent of jurisdictions in the United States do not require legal representation for children in child welfare cases. See *id.*

172. NACC Recommendations for Representation of Children in Abuse and Neglect Cases 7 (2001) (no more than 100 individual clients at a time); ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases 22 (1996) (caseloads must be low enough to ensure compliance with the ABA standards).

173. Caseloads in Fulton County, Georgia were that high prior to a class action lawsuit which successfully argued that there is a constitutional right to counsel for children in dependency cases, and that the right to counsel included the right to effective counsel. See *Kenny A. v. Perdue*, 356 F.Supp.2d 1353, 1362 (N.D. Ga. 2005).

174. See *Duquette*, *supra* note 161, at 89. The National Quality Improvement Center on Representation of Children in the Child Welfare System is promising project that is gathering data and developing a best practice model to help improve representation for children. See *id.* at 87-88.

be cases where the availability of the objection places a heavy burden on the child. It also requires a well-trained lawyer with the resources to address a challenging issue in developmentally appropriate ways. But an older child has too much at stake in a TPR proceeding to not give legal meaning to a child's objection.