This chapter sets the stage for the entire book. We begin by focusing on the various similarities and differences between representing children in family and dependency courts and then outlining the important information you likely never learned in law school about representing children. As you will see, we believe representing children requires an understanding of various psychological and legal principles that will prepare you for each of your cases.

**Family and Dependency Law Overlap**

A common belief among most family and dependency law lawyers and judicial officers is that there is an impassable chasm between dependency and family law. More recently, there have been endeavors to create unified family courts that include child welfare cases, but those efforts remain isolated, and in practice, professionals still talk about them as though they exist separately from one another and the issues at stake
are entirely different. This book aims to dispel that myth and focus on the similar issues that affect children's representation. Therefore, this section discusses the similarities but also the differences so when we do speak of the differences, it is from a place of understanding, not of disrespect of a different kind of law.\(^8\)

**Differences between Family and Dependency Law**

The fundamental difference between family and dependency law is the involvement, or lack of involvement, by the State. In private family law cases, there is an underlying presumption by society and the court system the child’s two parents are “good enough.” Dependency law, by contrast, presupposes that either one or both parents is somehow inadequate, potentially unable to parent because of abuse, neglect, or another form of inability such as medical incapacitation. This raises two main differences for lawyers representing children. First, children generally are not allowed to be present in family law courtrooms. By contrast, many dependency courts have begun to allow children over the age of 12—and in some jurisdictions, all children—to be present at all court hearings. Having a client sitting at counsel table with the lawyer changes the dynamics of the case and the argument.

The second major difference is the child’s presumptive position in each court system. In family court, it may be presumed the child loves both of his parents and wants to spend as much time as possible with each even when those two parents are in significant conflict. In dependency court, however, children generally are not conflicted between the parents and the State. This is not true in all situations, of course. In many situations, children are removed from their parents and placed with relatives or even foster parents, and the child prefers that to living with her parents. But the underlying assumption is that the child will not feel pulled in multiple directions. This is generally the explanation as to why children more often have the right to be present in dependency court proceedings than they do in family court proceedings.\(^9\)

Perhaps the most important legal difference between family and dependency law is the vague concept of best interests of the children. In family law, because the issue is generally between two parents, the question of best interests of the

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8. Of course, this will not cover all similarities and differences between the two types of courts. This is simply an overview of why there are similar and different roles for the lawyers to better outline the variety of reasons this book is written as it is.

9. Another difference between the two courts is potentially in how they deal with children who are refusing contact with a parent. That issue will be addressed in Chapter 8.
The Role of Children’s Representatives as They Stand Today

children is the core tenet in the case. By contrast, in dependency law, reunification and a parent’s right to parent is the core interest, so there are times when the best interests of the children is not the central question. While child safety is often the central concern, best interests is not. For example, one could argue that after eighteen months of being in a foster home and visiting a parent only twice a week for the first year of her life, it is in the child’s best interests to remain in the foster home. Parents’ rights and federal law in the United States, however, trump that analysis and require children to be returned to parents when those parents have taken the necessary steps to minimize the risk to the children when returned.

Although these legal differences can have serious repercussions for the outcome of the case, they do not, in fact, change the way children’s representatives should generally act, particularly at the beginning of a case. The underlying similarities between family and dependency law far outweigh the differences when we look at them from a psychological, and not a legal, standpoint.

Similarities between Family and Dependency Law

From a legal perspective, the most common similarity between the two courts is that parents have constitutionally protected rights to parent their children in the United States but children’s rights are not constitutionally, or even generally statutorily, protected in the same manner. The underlying legal assumption is, therefore, that legal parents should parent their children with as little interference from the State as possible and each parent should have as much contact as possible when the parents are separated. Legally, parents’ rights are fundamental to every aspect of the law, including how to interpret the effects of all the psychological issues addressed.

From a psychological perspective, family and dependency law both revolve around psychological issues such as trauma, domestic violence, abuse (physical, sexual, and emotional), neglect, mental health issues, child development, attachment, resistant children, and substance abuse. Although family law requires an understanding of child development in order to create the most appropriate parenting plans, when children’s representatives are appointed in family law cases, it is generally because of some variety of high conflict involving one of the above issues. Thus, from the perspective of representing children, family and dependency law are even more similar than in cases where a child’s representative is deemed legally unnecessary in family court.

Perhaps the most obvious similarity, and the one that exists regardless of the intensity of the conflict between the parents, is that all family and dependency law cases begin with some form of trauma. Understanding how to work with
children in shock from recent trauma, and a more in-depth analysis of the ACE study and other trauma studies, will be a focus of Chapter 4. We address it here simply to recognize the similarities for the children’s experiences between family and dependency courts. In practice, dependency court professionals often balk at cases with undertones of family law, expressing a desire they be handled elsewhere. When cases end and a residential schedule for the children is needed, dependency court professionals use as few judicial and attorney resources as possible to just get the cases out of the courthouse.\textsuperscript{10}

Most importantly, family and dependency law are similar in how they differ from other areas of law.

\textbf{Family Law and Dependency Law Are Different from Other Areas of Law}

Family and dependency law, as areas of practice, are fundamentally different from other areas of the law. Children’s representatives must understand these underlying differences because they affect the very nature of how the parties and professionals interact when engaged in the court process. Moreover, they also underlie how representation of a child, a nonparty to family law proceedings, in these areas is unique in the legal profession and does not always fit within the confines of what it means to be a lawyer as most children’s representatives were trained to be.

\textbf{Family and Dependency Law Fundamental Differences}

Perhaps the most fundamental difference between family law and other areas of the law is that “[j]udgments in child custody cases are, literally, human interest stories.”\textsuperscript{11} The same is true of dependency law. Thus, instead of fact finders determining whether the facts of the case fulfill the elements of a statute or those outlined in a precedential case, the judge in family and dependency courts must gather the story of a family and determine how that story influences the nebulous concepts of the child’s best interests, safety, and welfare, which are influenced by

\textsuperscript{10} This is not true in all jurisdictions, but in jurisdictions where the chasm continues to exist between family and dependency courts, it remains the normal practice.

\textsuperscript{11} Graeme Austin, CHILDREN: STORIES THE LAW TELLS 8 (Victoria University Press 1994).
societal and personal biases. There was a time when family law tried to apply presumptions and rules, like other areas of law. The two most notable of these rules have been the father’s rights presumption and the tender years’ doctrine.\textsuperscript{12}

These rules and presumptions were easy to apply, but they prohibited judges from deciding cases differently regardless of the evidence to support a different outcome.\textsuperscript{13} What is most interesting is these rules and presumptions created opposite results, more proof that such rules are merely indications of their time and not what works for each family. These rules even appeared in popular culture in the film \textit{Kramer vs. Kramer}, likely a precursor to the changing law—as society saw how inappropriate these rules were, the legal system began to change. As a result, family law evolved beyond these presumptions toward a focus on the child’s best interests and welfare. The best interests standard has sparked debate for years:\textsuperscript{14}

The best interests of the child doctrine is at once the most heralded, derided and relied upon standard in family law today. It is heralded because it espouses the best and highest standard; it is derided because it is necessarily subjective; and it is relied upon because there is nothing better.

The concerns raised about its subjectivity are valid, and there are examples of outrageous decisions,\textsuperscript{15} but the best interests standard allows judges to see each family and child as an individual story to be written and ultimately allows them to consider each child individually.\textsuperscript{16} The standard removed family law from specific rules to human-interest stories. It has, therefore, fundamentally changed everyone’s role. It also created a very difficult job for the children’s representative, an issue we will discuss in Chapter 10.

\begin{flushleft}
\textsuperscript{12} Id. at 13–15.
\textsuperscript{13} Id.
\textsuperscript{15} Id. at 370–76.
\textsuperscript{16} Austin, \textit{supra} note 11, at 12.
\end{flushleft}
Dependency law is also a nebulous mix of stories masquerading as legal concepts. When children are removed from their parents, there is generally a period of time before they are returned, and in that period of time, parents usually must complete a case plan designed by child welfare professionals and ordered by the judge. While it is generally easy to determine whether someone has attended classes, it is far more difficult to determine whether parents have made the necessary changes such that their children will now be safe in their home. These determinations require more of the crystal ball approach than the past determination of inappropriate conduct. Some jurisdictions might attempt to alleviate some of this confusion with strict rules and timelines, but those approaches tend to miss the mark and result in either draconian removal of children or placement of children back with parents who are fundamentally unable to care for their children because they participated in some classes but failed to show they benefited from them. As you will read further and as some of the critical psychological issues are addressed, this nuanced approach will make more sense.

The traditional Anglo adversarial model of jurisprudence outside of family and dependency law is fundamentally unable to address the full needs of the family. The adversarial model is a zero-sum approach, which requires a winner and a loser. Families, however, are not zero-sum. Children are not property to be won or lost by their parents either between parents or between safety and the love of a family. In other areas of law, litigants may leave the courtroom and never interact again, but families are living entities that continue to exist, albeit in a new form, after the final judgment. This is true even in cases where children are adopted or reunify with their parents; their time away from their new families, even if only the first few hours of life, inherently changes how they interact with their new families in the future.

In addition, the adversarial model focuses almost exclusively on past events. Family and dependency law, by contrast, focus on the future. It is more like informed fortune-telling than a win-lose legal battle. The current family law system, however, asks parents and families to predict and enter an unknown future without giving them the proper tools to do so. It pits them against each other and then expects them to get along once the court orders have been signed. It severs relationships at one moment in time, usually the moment with the most unresolved animosity within the family, and instead of resolving the problems from the past, the past becomes irrelevant and is never addressed.\(^\text{17}\) Thus, these

unresolved issues permeate the process, and they often continue to permeate the newly structured family going forward.\textsuperscript{18}

Here exists another difference between family and dependency law. While certainly broken, the goal of dependency courts is to reunify and repair a broken family. Services are offered throughout the case in the hope the family can repair the pain caused by the trauma prior to the State’s intervention as well as the trauma caused by the State’s intervention. Of course, it is impossible to undo the previous damage entirely, but the underlying intention to heal—as opposed to break apart—makes exiting a successful dependency court case sometimes less damaging than exiting a family law case. Of course, many dependency court cases begin while parents are together and end with them separated, so the outcome of cases is often similar.

These emotional issues, which the law prides itself on finding irrelevant, are far from irrelevant to the families. Instead, every decision parents make originates from an emotional response. This is only natural, and the effects of the trauma on child clients will be more fully addressed in a later chapter, but here it is important to recognize that in a separation, the only basis parents have to stand on is emotion. The decision about how to raise children and where they should live has not, until very recently in human evolution, been made in a courtroom. Instead, the rearing of children has been an instinct passed down through generations, one we feel before we think. The legal system, however, does not work on that level. Instead, it prides itself on logic and rules, the opposite of how families operate.

Children in family law cases are removed from the legal system by an additional layer; they are not parties to the case. This is not necessarily true in dependency court cases. In family law cases, children’s best interests are central, but children have no legal standing in the case. Thus, the most legally significant person is not a party and traditionally has had no model for integrating into the system. When representing children in family law cases, therefore, the child’s representative must consider how a nonparty to a case must navigate a legal system that makes little sense to the parties and almost no sense to the children involved. That would be difficult enough, but there are additional procedural differences between lawyers for adults and lawyers for children appointed in family and dependency court cases that make this navigation significantly more nontraditional.

\textsuperscript{18} Id. at 1250.
The Procedural Differences of a Lawyer for the Child\footnote{19}{Although much of this book will address all manner of children’s representatives, including GALs, this section specifically looks at these roles from the perspective of lawyers and legal ethics.}

The procedural aspects of lawyering consider how lawyers are appointed and how they interact with their clients. These procedural differences significantly influence the lawyer-client relationship and the lawyer’s role vis-à-vis the court.

The major procedural differences between lawyers for children and lawyers for adults immediately flip the lawyer-client model upside down. Generally, adults are in court either by their choosing or through their own alleged or real actions.\footnote{20}{For example, a business client brings a suit against another business or the government charges a person with a crime.}

The parents in family law cases choose to have children, and when they are unable to agree on the best parenting model, they must go to court.\footnote{21}{Parents involved in the court process may argue they do not specifically choose to disagree about their children, but their entry into the court process is a choice on some level.}

Parents in dependency court cases have generally made a parenting mistake that renders the child unsafe.\footnote{22}{In jurisdictions where a child welfare case can go forward with a non-offending parent, this is not entirely true.}

Thus, the children in both family and child welfare cases are involved because of their parents’ actions. They do not choose to enter the system that will eventually determine their fate. A lawyer appointed to represent these children must first explain to the client why the court is part of his life before reaching the substantive issues regarding the actual lawyer-client relationship. It is not uncommon for children to become bewildered as to why they are in a courthouse or why so many strange adults have spoken to them about things society generally teaches children not to discuss with strangers.\footnote{23}{This is especially true in cases of sexual abuse of one sibling when there are no allegations of sexual abuse of the other siblings. The representative for the non-abused siblings has a very difficult road to navigate—how to explain to a child the court is involved in his life for safety reasons when the child has never experienced a feeling of not being safe, and the representative does not want to inform the child that his sibling has been sexually abused. From a procedural aspect, these are some of the most difficult cases for children’s representatives to navigate.}

Adults usually choose their own lawyers, except in cases of indigence where they might have a lawyer appointed for them. When choosing a lawyer, adults...
presumably take the time to find the most qualified person to represent them and with whom they will personally interact well. In contrast, the first time a child client meets his lawyer occurs after the lawyer’s appointment. Rather than a client walking into the lawyer’s office seeking services, the lawyer appears to the child and announces, “Hello, I am your lawyer.” The child may not even know what a lawyer is. Thus, before any explanation of the role has occurred and before the relationship has started, the presumptive balance between lawyer and client has been inverted. The potential confusion to your child client is enormous, and recognition of this inherent disconnect before you enter the child client’s life is critical. Adults who choose their lawyers choose them because they trust them. Children have no reason to trust their representatives, and often they have every reason not to trust adults outside their familial circle.

In addition, children’s representatives first learn about their clients from outside sources, including the child’s parents and court documents written by other professionals. Sometimes children’s representatives speak with teachers, grandparents, and counselors before meeting the child. They seek out and obtain records and information regarding the child. Thus, at the first meeting with a child client, the representative has already learned about the child, but never from the child’s perspective—always from the point of view of someone else involved in the system, and as we will discuss later in the book, all people bring biases to their work. Thus, the first information children’s representatives receive about their child clients begins from a biased perspective provided by others. As we will discuss throughout this book, learning about your child client from his perspective is critical to your representation.

In contrast, lawyers who represent adults usually obtain case information directly from their client when their client enters their office for the first time and explains his version of the facts. A lawyer for an adult first understands his client influenced only by his client’s views. This dynamic undermines one of the cornerstones of the lawyer-client relationship by asking the lawyer to learn about

24. Bias is not used here as a judgment about the person’s views of the child. Everyone’s views are tainted by his own perceptions about the world. It is used simply to point out that the lawyer learns about the child from the ways other people see the child rather than learning about the child from his own interaction with the child. A more complete description of different types of bias and its potential influence in our work will be discussed in Chapter 11.

25. This oddity of representation also appears frequently for parents’ attorneys in child welfare cases.
the client from people other than the client, including some people who have their own agenda in the case that may not correlate with that of the child client.

Similarly, adult clients generally determine the goals and scope of representation. The lawyer advises and counsels the client, but the client generally makes the final determination about the goals to be achieved, though not necessarily about the best path for achieving those goals. The academic literature on lawyers for children suggests that at least with respect to children who are old enough to direct counsel, they should be able to determine the goals of the representation. In addition, the American Bar Association’s Rules of Professional Conduct state that lawyers should attempt to have as normal a relationship as possible with child clients. This argument, however, ignores how substantive law controls the lawyer’s role, even a child client old enough to direct counsel.

For example, in the United States, many states have statutes providing for the appointment of a “best interests attorney,” so even if the lawyer and the child client prefer the lawyer to fill a different role, the lawyer’s duty is to provide evidence to the court and advocate for the child’s best interests. This is also true in dependency law where federal law requires the appointment of a GAL for the child. Many states interpret that to mean only best interests representation or some form of “dual” role. Therefore, the two people engaged in the relationship generally cannot determine the lawyer-client relationship.

Lawyers for adults usually represent only one client in any particular case, and before they can represent multiple clients, they must reasonably believe they can navigate the potential conflicts and have consent from all of the involved clients. By contrast, lawyers presumptively represent all siblings in a case regardless of client consent. This issue will be examined more fully in Chapter 10, but we mention it here as a procedural difference of representing child clients.

The courtroom provides another venue where the roles between lawyers for children and lawyers for adults differ procedurally. Adult clients usually come to court for hearings. Children, by contrast, rarely come to court in family law cases, and often their presence is prohibited. In dependency court cases, they are more likely allowed to be present, but each jurisdiction handles children’s presence in court differently. The child’s lack of physical presence in the courtroom

26. Of course, if the goals are illegal, the lawyer is not bound to follow them.
27. Barbara A. Atwood, Representing Children Who Can’t or Won’t Direct Counsel: Best Interests Lawyering or No Lawyering at All?, 53 ARIZ. L.R. 381, 382–83 (2011).
29. Id., R. 1.7.
changes the lawyer’s role in two significant ways. First, lawyers cannot consult with the client as the case progresses in the courtroom, so if new evidence arises or new ideas are proposed, the lawyer cannot consult with his client. Lawyers for children, therefore, must understand their child clients’ complete perspectives better than they understand their adult clients with whom they can consult continuously. Second, the lawyer must ensure the child’s lack of presence does not result in a situation where the child is “out of sight, out of mind.” It is easy to generalize about someone who is not physically present, so the lawyer must continually remind the Court (and perhaps the parties) about the specific child involved. When a child is in the courtroom and emotionally reacting to what is happening, judges and parties respond differently.

Finally, the process of becoming a lawyer for children is more involved than becoming a lawyer generally. In many jurisdictions, to be appointed as a lawyer for children, you need to go through a process that places you on a list to represent children. It is never a mistake that someone is appointed to represent a child; instead, it is the culmination of not only completing law school, becoming a member of the Bar, and completing required training but also of consciously choosing to work with children and represent them. This appointment process helps ensure that lawyers who represent children want to be there. It also helps ensure they expect the difficulties such appointment entails.

These procedural differences between lawyers for children appointed by the Court and lawyers for adults chosen by the adults impact every aspect of the role, and children’s lawyers must always be conscientious of them. Thus, when discussing the role of lawyers for children, one must start by recognizing these differences while also recognizing that lawyers must act as lawyers within the legal parameters of these cases.

These procedural differences influence substantive law and vice versa. The following section examines an overview of the substantive law that lawyers and courts must follow and its impact on the role of the child’s lawyer.

**The Tired Debates**

The role of children and their lawyers in family and dependency law cases has been debated for decades. As legislation has moved away from rules and presumptions, the question must be answered, “How does a court effectively determine a child’s best interests?” Thus, the debates regarding lawyers for children do not always start and end with the actual role. They also focus on the child’s participation in the system and whether the child should have a lawyer at all.
These tangential discussions have pigeon-holed the discussion about the actual role of the lawyer for the child into one focused almost exclusively on the child’s views and wishes rather than a holistic lawyer for the child. The next chapter provides background on these basic assumptions before looking at how they have influenced the legislation and guidelines.