

Child-Victims' Independent Participation in the Criminal Justice System

The choice of how, when, and the extent to which one participates in the justice system is important to victims; it is a means by which victims can enhance or regain control over their lives, and it can improve victims' psychological and emotional well-being.¹ Nearly every state has a statute that establishes who may assert child-victims' rights in criminal proceedings.² These provisions can be categorized as either codifying procedures that enhance a child-victim's ability to independently participate, or including language that may pose problems for child-victims who want to independently assert their rights. This *Bulletin* examines the structure of these statutes and provides tips to assist practitioners representing child-victims who wish to independently exercise their rights.

INDEX

- I. Statutory Provisions that Enhance Child-Victim Participation in Criminal Proceedings
 - II. Statutory Elements that Potentially Limit a Child-Victim's Independent Assertion of Rights
 - III. Conclusion
- Practice Pointers

I. Statutory Provisions that Enhance Child-Victim Participation in Criminal Proceedings

Statutory language that arguably or explicitly allows a child-victim to designate a representative to act on his or her behalf (or to choose not to designate a representative), revoke the designation or appointment of a representative, or which allows the child-victim's maturity to be taken into consideration when determining who will exercise the child-victim's rights enhance the ability of child-victims to independently participate in criminal proceedings. A number of jurisdictions have enacted statutory provisions that incorporate one or more of these elements.

Some of the laws in these jurisdictions provide that victims have the ability to designate or revoke designation of a representative. These laws arguably place control over the assertion of rights firmly in the hands of the child-victim. Ohio's statute is illustrative: a member of a child-victim's family or other person may exercise the child-victims' rights as the child-victim's representative; if a victim does not want anyone to act as the representative, "the court shall order that only the victim may exercise [the victim's rights]."³ Note that laws may be drafted ambiguously, with one statutory provision providing that victims may designate and/or revoke the designation of a representative and another provision addressing the selection of a representative.⁴ In these jurisdictions, practitioners should be prepared to argue that the provisions must be read together to ensure that child-victims are afforded their right to choose whether to assert their rights personally or to have their rights asserted by a representative.

Specific language that directs the court to consider the maturity of a child-victim also

affords the child-victim control over the exercise of his or her rights. For example, providing for the non-voluntary appointment of a representative to exercise victims' rights on behalf of the child-victim only when the child-victim cannot meaningfully participate in the process or understand the rights allows for the consideration of the child-victim's maturity and ability to assert his or her rights, among other factors.⁵ For example, under Delaware law, the term "victim" "includes a parent, guardian or custodian of a victim who is unable to meaningfully understand or participate in the legal process due to physical, psychological, or mental impairment."⁶ This articulation allows child-victims who can meaningfully understand and participate in the legal process to personally assert their rights.

II. Statutory Elements that Potentially Limit a Child Victim's Independent Assertion of Rights

Potentially limiting statutory language includes the nondiscretionary identification of a family member or other representative to assert victims' rights concurrently with the child-victim, and the discretionary appointment of representatives to act in place of a child-victim, in the absence of a mandate to consider a child-victim's independent ability to act.

Although concurrent exercise of rights is generally positive because it means that more victims' voices are heard, concurrent exercise of rights may dilute (or be seen to dilute) the impact of a child-victim's asserted rights. The use of "and" or "includes" when defining "victim" indicates that both child-victims and other identified individuals can independently exercise victims' rights in criminal proceedings.⁷ For example, in Massachusetts, "victim" means "any natural person who suffers direct or threatened physical, emotional, or financial harm as the result ... of a crime ... and the family members of such person if the person is a minor, incompetent, or deceased."⁸ This type of provision is not inherently problematic, as a child-victim may prefer that a parent also exercise victims' rights, or have no objection to concurrent exercise. However, when the interests of the child-victim and the child-victim's parent diverge, the child-victim may fear that his or her voice will be diluted in the process.

Statutory language that explicitly prohibits the concurrent exercise of rights by more than one

person or that fails to direct courts to consider the maturity and ability of child-victims to exercise their rights is also potentially disempowering to child-victims. Arkansas law, for example, provides that a child-victim's rights may be exercised by a court-designated or victim-appointed family member, but specifies that if more than one person attempts to assert the child-victim's rights, it is within the court's discretion to choose who will exercise the rights.⁹ If a mature child-victim wants to assert his or her rights and the child-victim's parent also wants to assert the rights, the court could theoretically elect to empower either the child-victim or the parent. Similarly, Utah's statutory scheme vests the court with the discretion to determine whether a child-victim may independently exercise his or her victims' rights or whether another will be allowed to do so in his or her stead.¹⁰ The absence of explicit legislative guidance to courts regarding the factors to consider when divesting child-victims of the ability to independently assert their rights is troubling, particularly in light of the traditional deference afforded to trial court determinations by appellate courts.¹¹

III. Conclusion

Child-victims who want to independently assert their rights in a criminal proceeding may either be explicitly empowered to do so or face potential hurdles in the law. Practitioners should carefully read the laws in the relevant jurisdiction to identify the provisions that empower their child-client and those to which they must be prepared to respond.

Practice Pointers

Before employing these practice pointers, attorneys representing child-victims should carefully consider the needs and maturity of the child-victim client, in addition to all relevant laws and jurisdictional precedent.

- The discretionary appointment of a representative to act on behalf of a child-victim may be appropriate under some circumstances; attorneys should nevertheless assert the mature

child-victim's right to be heard on the issue of appointment and/or whenever a court is determining who will exercise victims' rights in criminal proceedings.

- When a parent/guardian and a child-victim have concurrent standing to assert victims' rights, be alert for potential conflicts of interest.
- Where courts are empowered to select either a child-victim or another representative to exercise the child-victim's rights, be prepared to litigate to ensure that a capable child-victim is not divested of the ability to independently assert victims' rights.
- Be clear about the scope of representation and the identity of the client. When an attorney represents a child-victim but not the child-victim's parent or guardian, clarity in drafting the representation agreement is critical.

NCVLI thanks Jacqueline Swanson (Lewis & Clark Law School, degree anticipated 2013) for her research and assistance in the preparation of this Bulletin.

¹ See, e.g., Margaret E. Bell, *Battered Women's Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcomes and Processes*, 17 *Violence Against Women* 17, 72 (2011); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 *N.Y.U. L. Rev.* 911, 953-55 (2006); Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 *Wayne L. Rev.* 7, 26 (1987).

² See, e.g., Ala. Code § 15-23-61(c); Alaska Stat. § 12.55.185(19); Ariz. Rev. Stat. Ann. § 13-4403(C); Cal. Const. art. I, § 28(17)(e); Colo. Rev. Stat. Ann. § 24-4.1-302(5); D.C. Code § 23-1905(2); Fla. Stat. Ann. § 960.001(7); Ga. Code Ann. § 17-17-3(11); 725 Ill. Comp.

Stat. 120/3(a); Iowa Code Ann. § 915.10(3); Ky. Rev. Stat. Ann. § 421.500(1); La. Rev. Stat. Ann. § 46:1842(3); Md. Code Ann., Crim. Proc. § 11-104; Mich. Comp. Laws Ann. § 780.752(m); Miss. Code Ann. § 99-43-5; Mo. Ann. Stat. § 595.200(6); Mont. Code Ann. § 46-24-106; Neb. Rev. Stat. § 29-119(2); N.H. Rev. Stat. Ann. § 21-M:8-k(I)(a); N.Y. Crim. Proc. Law § 440.50(2); N.C. Gen. Stat. Ann. § 15A-841; Or. Const. art. I, § 42(6)(c); 18 Pa. Cons. Stat. Ann. § 11.103; R.I. Gen. Laws § 12-28-4.2; Tenn. Code Ann. § 40-38-203; Tex. Code Crim. Proc. Ann. art. 56.01(2); Vt. Stat. Ann. tit. 13, § 5301 (4); Va. Code Ann. § 19.2-11.01(B); Wash. Const. art. I, § 35; Wis. Stat. Ann. § 950.02(4)(a); Wyo. Stat. Ann. § 1-40-202(a)(ii).

³ Ohio Rev. Code Ann. § 2930.02(A) (emphasis added). See also Del. Code Ann. tit. 11, § 9401(6) (“‘Representative of the victim’ means a member of the victim’s family or an individual designated by the victim or by a court in which the crime is being or could be prosecuted.”) (emphasis added); Ohio Rev. Code Ann. § 2930.02(A) (providing in the case of child-victims that the child-victim may choose to designate another to act as the victim’s representative, and that “a member of a [child-victim’s] family may exercise the rights of the victim under this chapter as the victim’s representative” and further providing that if “a victim does not want to have anyone act as the victim’s representative, the court shall order that only the victim may exercise the rights of a victim under this chapter”) (emphasis added).

⁴ See, e.g., Ind. Code Ann. § 35-40-13-1 (“(a) If a victim is physically or emotionally unable to exercise any right but is able to designate a lawful representative . . . the designated person may exercise the same rights that the victim is entitled to exercise. (b) A victim may revoke the designation of a representative at any time and exercise the victim’s rights.”); Ind. Code Ann. § 35-40-13-2 (providing for the appointment of a representative for an individual who is incapable of designating a representative); Ind. Code Ann. § 35-40-13-3 (“If the victim is a minor, the victim’s parents or legal guardian may exercise all of the victim’s rights on behalf of the victim.”) (emphasis added); N.M. Stat. Ann. § 31-26-7(A) (“A victim may designate a victim’s representative to exercise all rights provided to the victim pursuant to the provisions of the victims of Crime Act. A victim may revoke his designation of a victim’s representative at any time.”); N.M. Stat. Ann. § 31-26-7(C) (“When the victim is a minor, the victim’s parent or grandparent may exercise the victim’s right . . .”) (emphasis added).

⁵ See, e.g., Del. Code Ann. tit. 11, § 9401(7) (“‘Victim’ means the person . . . identified as the victim of a crime in a police report, a criminal complaint or warrant, an

indictment or information or other charging instrument. ‘Victim’ includes a parent, guardian or custodian of a victim *who is unable to meaningfully understand or participate in the legal process* due to physical, psychological, or mental impairment.”) (emphasis added); Idaho Code Ann. § 19-5306(3) (“The provisions of this section [victims’ rights] shall apply equally to the . . . immediate families of victims of such youthful age or incapacity *as precludes them from exercising these rights personally*. The court *may* designate a representative from the immediate family to exercise these rights on behalf of a . . . minor victim.”) (emphasis added); Me. Rev. Stat. Ann. tit. 17-A, § 1171(2) (including in the definition of “victim” the “immediate family of a crime victim if . . . [d]ue to . . . age, physical or mental disease, disorder or defect, *the victim is unable to participate as allowed under this chapter.*”) (emphasis added).

⁶ Del. Code. Ann. tit. 11, §9401(7) (emphasis added).

⁷ See, e.g., Conn. Gen. Stat. Ann. § 1-1k (“‘victim of crime’ or ‘crime victim’ means an individual who suffers direct or threatened physical, emotional or financial harm as a result of crime and includes immediate family members of a minor”); Mass. Gen. Laws. Ann. ch. 258B, § 1 (defining “victim” as including “the family members of such person if the person is a minor”); Minn. Stat. Ann. § 611A.01(b) (providing that the “term ‘victim’ includes the family members, guardian, or custodian of a minor”); Mo. Ann. Stat. § 595.200(6) (defining “victim” to include “the family members of a minor”); N.D. Cent. Code § 12.1-34-01(10) (specifying that “[t]he term ‘victim’ includes the family members of a minor”); S.C. Const. art. I, § 24(C)(2) (providing that “the term ‘victim’ also includes the person’s spouse, parent, child, or lawful representative of a crime victim who is . . . a minor”). Cf. Utah Code Ann. § 77-37-2 (defining “victim” generally, and specifying that the rights to information “also apply to the parents, custodian, or legal guardians of children”).

⁸ Mass. Gen. Laws. Ann. ch. 258B, § 1 (emphasis added).

⁹ See Ark. Code Ann. § 16-90-1101(5) (defining “Representative of the victim” to mean “a member of the victim’s family or an individual designated by the victim or by a court in which the crime is being or could be prosecuted”); Ark. Code Ann. § 16-90-1114 (providing in the case of child-victims that “a member of the victim’s family may exercise the rights of the victim” and specifying that if more than one member of the victim’s family “attempts to exercise those rights, the court may designate which of them may exercise [the victim’s] rights”).

¹⁰ See Utah Code Ann. § 77-38-2(7) (defining the victim’s representative as being “designated by the victim or designated by the court . . . who represents the victim in the

best interests of the victim”); Utah Code Ann. § 77-38-9(3) (providing that when “the victim is a minor, the court in its discretion may allow the minor to exercise the rights of a victim under this chapter or may allow [another] to act as a representative of the victim”) (emphasis added).

¹¹ Notably, victims in every jurisdiction have statutory victims’ rights and in more than thirty states they have constitutional rights. See *Fundamentals of Victims’ Rights: A Brief History of Crime Victims’ Rights in the United States*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), November 2011, at 2. In many jurisdictions, these rights include the rights to be present, to be heard, to restitution, and to protection. See *Fundamentals of Victims’ Rights: A Summary of 12 Common Victims’ Rights*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), November 2011. Further, many state constitutions explicitly provide due process to victims of crime, see, e.g., Ariz. Const. art. 2, § 2.1(A); Cal. Const. art. I, § 28(b); S.C. Const. art. I, § 24(A); Tenn. Const. art. I, § 35, and where state constitutions do not explicitly provide for it, guarantees of dignity, respect, fairness, and the right to be heard, encompass critical aspects of due process, see, e.g., Douglas Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah L. Rev. 289, 294 (1999). Before a child-victim can be deemed to not be the proper person to exercise the rights, notions of due process and deprivation of these rights must be taken into consideration. A full discussion of this argument is beyond the scope of this Bulletin.

Publication of this bulletin was originally supported by Grant. No. 2010-VF-GX-K004, awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this bulletin are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

NCVLI's Tools: Legal Advocacy, Training & Education, and Public Policy



Legal Advocacy. We fight for victims' rights by filing amicus curiae (friend of the court) briefs in victims' rights cases nationwide. Through our National Alliance of Victims' Rights Attorneys (NAVRA), we also work to pair crime victims with free attorneys and work to ensure that those attorneys can make the best arguments possible. We do this by providing the attorneys with legal technical assistance in the form of legal research, writing, and strategic consultation.

Training & Education. We train nationwide on the meaning, scope, and enforceability of victims' rights through practical skills courses, online webinars, and teleconferences. We also host the only conference in the country focused on victim law.

Public Policy. We work with partners nationwide to secure the next wave of victims' rights legislation — legislation that guarantees victims substantive rights and the procedural mechanisms to secure those rights.

Get Involved

Donate to NCVLI. You can make a difference in the life of a victim today by supporting our work. Your gift will support programs that protect and advance crime victims' rights and the pursuit of a more fair and balanced justice system. Visit the "Get Involved" page of our website, www.ncvli.org, to learn more.

Join NAVRA! The National Alliance of Victims' Rights Attorneys (NAVRA) is our membership alliance of attorneys, advocates, and other persons committed to the protection, enforcement, and advancement of crime victims' rights nationwide. Basic membership includes access to a wealth of victims' rights educational information and enhanced membership includes access to NAVRA's searchable database of hundreds of amicus briefs, case summaries, and sample pleadings, as well as past trainings on victims' rights law. Visit www.navra.org to learn more.

Volunteer. Volunteers are a crucial component of NCVLI's work on behalf of crime victims. NCVLI has a variety of volunteer opportunities available ranging from serving as local co-counsel on amicus briefs, to law student internships, to event planning assistance. Visit the "Get Involved" page of our website, www.ncvli.org, to learn more.

Get Informed. NCVLI offers a number of legal publications covering a wide range of victims' rights issues as well as communications to stay up to date on happenings in the victims' rights community. Please visit our website, www.ncvli.org, and contact us to sign up to receive any of our publications and communications designed to keep you informed of important developments in victim law.