

General Overview of Child Protection Laws in the United States

Martin Guggenheim

1.01 The Statutory Framework

Every state has laws that protect children from harm. Criminal assault laws protect persons of any age against physical assaults. Child abuse and neglect laws are special in protecting only children. States give their juvenile courts jurisdiction over children who have been denied proper parental care. Particular statutes may be phrased in terms of neglect, abuse, abandonment, dependency, or something else, but all contain provisions vesting broad discretion in the court to find appropriate substitute care.

Although there is considerable similarity from state to state in the definitions of child maltreatment, very few statutes use identical language. Counsel representing parents in child protection proceedings must familiarize themselves with the statutory scheme in their particular state. The general overview of the law provided by this chapter is no substitute for study of the language of the governing statute of the jurisdiction in which any given case arises.

“Neglect” ordinarily refers to a temporary lapse of care on the part of the parent, often involving some degree of willfulness. Statutes may be quite detailed, enumerating specifics such as moral unfitness of a parent, mental or physical incapacity of a parent, and failure to send the child to school; or they may be couched entirely in broad phrases, such as lack of proper parental care, control, or guardianship. Even statutes that set out numerous specific grounds of neglect usually include a catch-all phrase to cover other situations.

Although most acts of child abuse would come within the standard neglect provisions, many states have separate child abuse statutes. The allegedly abusive parent may be charged with a criminal violation as well as with neglect or possibly subjected to proceedings for termination of parental rights.

In addition to child abuse, abandonment and dependency are two common categories of neglect that may be the subject of separate legislation. Abandonment is shown by parental absence, usually required to be willful and, when separated from neglect findings, is ordinarily included in adoption codes as a ground for permitting the child to be adopted by another concerned adult. Dependency denotes a failure to provide adequate care without fault on the part of the parent; in some states, a finding of dependency must be made as a precondition to the provision of social services to the family.

States also treat unwed fathers very differently. In some jurisdictions, unwed fathers may not even be counted as parents with rights unless they take particular steps to secure such rights. Counsel is well advised to study carefully the laws regulating how men get to become parents with substantive rights.

Finally, states vary widely on the time frame within which agencies are encouraged or required to file a petition to terminate parental rights once children have entered foster care. Counsel should know the law on terminating parental rights before beginning the representation of a parent because the mere passage of time—which may be as short as three to six months—may result in parents permanently losing their rights.

I.02 Common Problems in the Operation of Child Protection Laws

Whatever their precise terms, child protection laws are almost universally administered in a fashion that gives rise to a common constellation of problems. Counsel representing parents can expect to confront the following problems in child protection cases:

- children are removed from the families' custody and placed in foster care despite laws that should forbid such placements;
- the families prosecuted in these proceedings are overwhelmingly poor and, in communities with high rates of minorities, very disproportionately of color;
- these families are brought to court to address concerns regarding parental decisions involving children's health or education that are not made the subject of court proceedings for middle and upper income parents;
- courts do not rigorously oversee the decisions of agencies;
- as a condition of regaining custody of their children, parents are required to secure services that are either unavailable to them or are not needed;
- many localities do not have adequate interpreters available to communicate meaningfully with parents;

- parents are often mislabeled in psychological evaluations as having conditions they do not have;
- services that would eliminate the need for foster care placements are not used;
- intervention exacerbates the challenges of parents with special needs;
- parents and children in foster care are not allowed sufficient time each week for visiting and the few visits made available often take place in inappropriate sterile environments;
- children remain in foster care long after they could be safely returned to their families;
- agencies and courts focus more on a parent's deficits than strengths in making placement decisions;
- parents do not regard caseworkers as allies, devoted to helping them and concerned for their, and their children's, well-being;
- parents do not understand what happened in their case when they were in court;
- parents do not get to speak with their lawyers between court appearances and do not regard them as fighting for their rights or interests;
- cases are increasingly fast-tracked for termination of parental rights when children remain in foster care for one year;
- thousands of family relationships each year are permanently extinguished despite the children wanting to remain part of their families and even when they gain nothing by becoming legal orphans; and
- counsel for parents are not appointed before significant decisions have already been made and, when appointed, are required to handle unacceptably high caseloads.

1.03 The Impact of Congressional Legislation on Child Protection Laws

For most of American history, protecting and caring for children was considered a matter of state rather than federal concern. That changed beginning in 1980 when Congress enacted the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500. It was enacted in the face of widespread evidence in the late 1970s that children were being needlessly separated from their families by child-care agencies. After conducting extensive hearings on the subject, Congress concluded that there was a need for federal action to effect change in local practices. The 1980 law mandates that states receiving federal money comply with specifications designed to prevent unnecessary separation of children from their parents, to assure a careful monitoring of children who are separated, and to provide an infusion of services into the family to speed the ultimate return of children to their parents.

The Act gives parents' lawyers an important weapon for attacking deficiencies in state processes. It constitutes a statement of national policy that they can invoke to curb