

EXECUTIVE SUMMARY



A LAWYER FOR *EVERY* CHILD: CLIENT-DIRECTED REPRESENTATION IN DEPENDENCY CASES

BY THE BAR-YOUTH EMPOWERMENT PROJECT



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The logo consists of two vertical rectangular blocks. The left block is light green and contains the text 'ABA BAR-YOUTH EMPOWERMENT PROJECT' in a dark grey, serif font, stacked in four lines. The right block is light orange and is empty.

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The Bar-Youth Empowerment Project of the American Bar Association's Center on Children and the Law aims to improve outcomes for youth currently in foster care by promoting youth participation in court cases that affect them and ensuring that all youth have legal representation in their dependency case. For more information, visit: www.abanet.org/child/empowerment

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A LAWYER FOR *EVERY* CHILD: CLIENT-DIRECTED REPRESENTATION IN DEPENDENCY CASES

When a child enters the dependency court system, he is alleged to have experienced abuse, neglect, or abandonment. He is often removed from all that is familiar to him. The dependency court system was designed to protect him from future losses and abuse, reunite him with family or find him another permanent place to call home. Yet, when the child's case is heard he is often without a voice. His views are not considered equal to the views of his parents, caregivers, or the state. Because he often lacks a strong, effective voice in court, the information available to the judge is limited and the child is denied a meaningful opportunity to participate in decisions that profoundly affect his life. The dependency system should no longer dismiss the voices of those it is charged with protecting.

This paper argues that children have a constitutional right to counsel in dependency cases and reviews federal and state legislation, court decisions, and public policy arguments that support this right. It also advocates for a traditional, client-directed model of representation and discusses the impact of high caseloads and lack of training on attorney performance. This summary is for policymakers, advocates, legislators, lawyers and judges to evaluate whether their communities are adequately and effectively representing children in dependency cases.

I. CHILDREN HAVE A CONSTITUTIONAL RIGHT TO LEGAL COUNSEL

The failure to routinely provide children with attorneys in dependency cases violates their due process rights to life, liberty and property. The enormity of children's interests in these cases and the high risk of erroneous deprivation require the appointment of legal representation.¹

Both Children and the State Have Important Interests in Dependency Cases.

During each case, the court makes decisions regarding the child's placement, permanency, and visits with family. These decisions impact the child's fundamental constitutional interests in safety, health, and well-being and his ability to maintain relationships with relatives. The state has several interests at stake too, including its interest in obtaining a just and fair case resolution. Because judges cannot conduct their own investigations, they are entirely dependent on others to provide them with information about the child's circumstances. Attorneys not only advocate for their client's position but also present additional facts to the court by filing motions, requesting hearings, and introducing evidence. Such advocacy enables *each party* to have its views, facts, and arguments presented; thereby enabling the court to reach a more informed and accurate decision.

¹ Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 663 (Summer 2006).

There is a High Risk of Harm if Erroneous Decisions are Made in Dependency Cases. The lack of legal advocacy on the child’s behalf may result in decisions that keep him in an unsafe environment. Any erroneous decision could have a traumatic, irreversible, and life-long effect on the child. Without an attorney to advocate for the child’s expressed interests and present information that would not otherwise be offered, the child could be placed in foster care unnecessarily or remain in the system longer than required to ensure his safety. It is critical that judges are presented with all available information; the presence of a child’s attorney decreases the likelihood of error and is integral to the guarantee of due process.

“Attorneys largely control the flow of information to the judge. Attorneys decide what witnesses, evidence, and arguments to present. ... Without complete, relevant information, judges’ decisions may well be ill informed or even tragically mistaken.”

Mark Hardin, American Bar Association, Center on Children and the Law. Testimony before the House Committee on Ways and Means Subcommittee on Human Resources, March 23, 2000.

With Attorneys, More Children Find Permanent Homes: In a recent study conducted in Palm Beach County, Florida the 832 children represented by attorneys from the Foster Children’s Project experienced exits to permanent homes about 1.5 times more frequently than children who were not afforded counsel.² Children with their own lawyers also moved from case plan approval to Permanency at approximately twice the rate of those not represented by counsel.

Zinn, A. E. & Slowriver, J. *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*. Chicago, IL: Chapin Hall Center for Children (2008).

II. STATUTORY AND LOWER COURT SUPPORT FOR CHILDREN’S RIGHT TO LEGAL COUNSEL

Federal and State Laws Support Children’s Need for Counsel. The Child Abuse Prevention and Treatment Act (CAPTA) requires states to provide guardians *ad litem* (GALs) to all children in dependency cases. In its 2002 guidelines, the U.S. Department of Health and Human Services suggested that “the states may appoint an [client-directed] attorney for the child . . . in fulfillment of the CAPTA requirement,” and that “states are free to appoint a guardian *ad litem*, perhaps a volunteer CASA, in addition to an [client-directed] attorney for the child . . . [T]his is the preferred approach.” This guideline aims to help states review their own laws and develop statutes and policies that reflect best practices in child welfare.³ These best practices are evident in state law trends, with nearly forty states going beyond the minimum requirements of CAPTA by statutorily mandating some form of *legal* representation.⁴

² Zinn, A. E. & Slowriver, J. *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*. Chicago, IL: Chapin Hall Center for Children, 13-14 (2008).
http://www.chapinhall.org/article_abstract.aspx?ar=1467.

³ Donald N. Duquette & Mark Hardin, *Adoption 2002: Guidelines for Public Policy and State Legislation Governing Permanence for Children*. Washington, DC: Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau (1999).

⁴ Cf. *National Report Card on Legal Representation for Children*, First Star (2007).
<http://www.firststar.org/research/documents/FIRSTSTARReportCard07.pdf>.

Several Court Decisions have Held that Children have a Constitutional Right to Counsel:

- In *Roe v. Conn*, a federal district court held that a challenged Alabama procedure “violates the due process clause of the Constitution because that procedure does not provide for the appointment of independent counsel to represent a child in a neglect proceeding...” 417 F. Supp. 769, 781 (D.C.Ala. 1976).
- A New York Appellate Court, in *Matter of Jamie TT*, held that it “would be callously ignoring the realities of [the child’s] plight during the pendency of this abuse proceeding if we failed to accord her a liberty interest in the outcome of that proceeding, entitling her to the protection of procedural due process.” 191 A.D.2d 132, 136 (NY 1993).
- In *Kenny A. v. Perdue*, a federal court in Georgia concluded “foster children have both a statutory and a constitutional right to counsel in all [major child welfare] proceedings...” The court went on to state that “only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and [termination of parental rights] proceedings.” 356 F.Supp.2d 1353, 1357, 1361 (N.D.Ga., 2005).

III. FUNDAMENTAL FAIRNESS REQUIRES LEGAL COUNSEL FOR CHILDREN

Principles of fundamental fairness support a governmental obligation to ensure children can effectively access and advocate for themselves in the court system.

Legal Profession Supports Attorneys for Children

In 2005, the American Bar Association resolved that all dependent youth should “have the right to quality legal representation, not simply an appointed lay guardian *ad litem* or lay volunteer advocate with no legal training, acting on their behalf... .”

ABA Resolutions on Foster Care and Adoption: Foster Care Reform, August 2005.
<http://www.abanet.org/child/foster-adopt.shtml>.

Children in Dependency Cases Should Receive the Same Rights as those in Delinquency Cases.

In *In re Gault*, the Supreme Court held that children in delinquency cases must be afforded counsel.⁵ Although it has not yet afforded children in the dependency system the same right, the rationale underlying *Gault* is not limited to delinquency cases. In *Gault*, the Court found that procedural safeguards, including the appointment of counsel for the child, were integral to accurate fact-finding and to preventing governmental oppression. Children in dependency proceedings are similarly disadvantaged by the lack of formality and due process. Also like delinquency cases, dependency proceedings are complex and children cannot act as their own counsel. The median age at which children enter foster care is 7.5 years old⁶; a child that age cannot fully and independently understand the legal process or the rights he possesses. Without legal assistance, he cannot: (1) express his opinions within the context of the law; (2) cross examine witnesses; (3) conduct discovery; or (4) draft and file legal motions.

“The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot.”

In re Gault 387 U.S. 1, 39, n. 65 (1967).

⁵ *In re Gault*, 387 U.S. 1 (1967).

⁶ U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *The AFCARS Report, Preliminary FY 2006 Estimates as of January 2008* (14). http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.htm.

Children Have Distinct Interests that Cannot Be Represented by Other Parties.

Lawyers for children are “critically important because they promote a child’s interests . . . where the child’s parents, and even the state, may have vastly different ideas about what is best for that child.”⁷ Parents involved in the dependency system may have difficulty seeing their child’s needs and interests as different if not conflicting from their own. The parent will also have interests separate from the child stemming from allegations of abuse or neglect made by the state. In addition, the state “must consider the needs of the system, such as administrative requirements and costs, and the needs of the class of children as a whole.”⁸ These factors interfere with the state’s ability to represent any individual child’s needs or interests.

Appointing Attorneys for Children Saves the Government Money. The cost of providing attorneys can be offset by the positive impact of effective court advocacy for children. Recent research shows that when children have counsel they exit the system more often to permanent homes. For example, if adoption is the permanency goal, finalization of that adoption saves the federal and state government approximately \$143,000 in child welfare costs. Each adoption can also net the state an additional \$190,000 to \$235,000 in savings from reductions in special education spending and the costs of future justice system involvement.

Zinn, A. E. & Slowriver, J. *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*. Chicago, IL: Chapin Hall Center for Children (2008); Mary Eschelbach Hansen, “The Value of Adoption,” 10 *Adoption Quarterly* 2, 65-87 (2007). See also Richard Barth, et al., *A Comparison of the Governmental Costs of Long-Term Foster Care and Adoption*, Social Services Review at 127-158 (March 2006).

IV. COUNSEL FOR CHILDREN SHOULD REPRESENT THE CHILD’S EXPRESSED INTERESTS

The role a child’s lawyer assumes can significantly impact the child’s ability to participate fully in proceedings. In order to be active participants in their cases, children need advocates who advance their independent and individual interests.

Guardian ad Litem (GAL) Attorneys May Violate Legal Ethical Standards.

Lawyers that represent children must honor the same ethical rules and duties that apply to attorneys generally. The Model Rules of Professional Conduct require attorneys to maintain confidential communications with the client (MR 1.6); abide by the client’s determinations as to the objectives of the litigation (MR 1.2); maintain client loyalty (MR 1.2); and refrain from intentionally or knowingly engaging in any activity which creates a conflict of interest (MR 1.7).⁹ When serving as a GAL (“best interests” attorney), the attorney is may be forced to choose between violating the child’s confidences and representing the child’s best interests. “Consequently, a GAL generally must bend the restrictions

⁷ Susan A. Snyder, *Promises Kept, Promises Broken: An Analysis of Children’s Right to Counsel in Dependency Proceedings in Pennsylvania*, Juvenile Law Center (December 2000). <http://www.jlc.org/publications/9/promises-kept-promises-broken/>.

⁸ Robyn-Marie Lyons, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 Cal. L. Rev. 681, 686-687 (March 1987).

⁹ Model Rules of Professional Conduct, <http://www.abanet.org/cpr/mrpc>.

of the Model Rules to permit disclosing to the court relevant and necessary information provided by the child.”¹⁰

Judges, not Attorneys, Should Determine what is in the Child’s Best Interest.

Attorneys who advocate for the child’s “best interests” substitute their personal judgment when the child’s stated goal is deemed contrary to that interest. “Best interests” is an amorphous standard, however, that is virtually impossible to quantify or define. In many instances, the attorney lacks the knowledge or expertise to render this opinion. Instead, the attorney should provide the court information that will enable *the judge*, the ultimate arbiter of fact and law, to make the “best interests” determination.

“But judge, childhood is also letting your voice be heard... But how can I do that if you don’t even want to hear what I, one *insignificant* twelve-year-old, has to say?”

“Thoughts to the Judge” Krystin, age 12. “My Voice, My Life, My Future,” Home at Last (2006).

Client-Directed Representation Promotes a Sense of Fairness to the Child.

In many states the child is not given the opportunity to express his opinion in dependency court. This gives the child the sense that both he and his views are unimportant.

Professional Standards and Policies Recommend Attorneys Use a Client-Directed Approach.

The American Bar Association (ABA) and National Association of Counsel for Children acknowledge the fundamental principle of client-directed representation for child clients in their standards and policies. The ABA Standards of Practice, for example, explicitly recognizes the child as a separate individual with potentially discrete and independent views.¹¹

V. CHILDREN HAVE A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Attorneys Must have Proper Training. Attorneys need proper training to become effective advocates and to comply with ethical rules regarding competent representation. Attorneys handling child welfare cases must have training in: trial skills, child welfare law, child development, child psychology, and child interviewing. In fact, CAPTA requires states receiving federal funds to certify that each court-appointed children’s lawyer or GAL is a person “who has received training appropriate to the role.”¹² Yet, only about half of the states require attorneys to have training prior to appointment and/or continuing legal education.¹³ Recognizing this gap, Congress passed the Fostering Connections to Success and Increasing Adoptions Act (P.L. 110-351), which expands the availability of federal funds to train attorneys representing children in dependency cases.

¹⁰ Jennifer L. Renne, *Legal Ethics in Child Welfare Cases*, “Special Issues for Guardians ad Litem.” See also Emily Buss, *You’re My What? The Problem of Children’s Misperceptions of Their Lawyer’s Roles*, 64 *Fordham L. Rev.* 1699, 1744 (1996).

¹¹ American Bar Association, *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases*, Definitions [A-1] The Child’s Attorney, comment (1996), <http://www.abanet.org/child/repstandwhole.pdf>; National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001); National Association of Counsel for Children, *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version)* (1999).

¹² 42 U.S.C. §5106a (b)(2)(A)(xiii) (West 2009).

¹³ *National Report Card on Legal Representation for Children*, First Star (2007), <http://www.firststar.org/research/documents/FIRSTSTARReportCard07.pdf>.

Attorney Must Have Manageable Caseloads. The size of an attorney’s caseload significantly affects his capacity to adequately represent his clients by limiting his ability to investigate each case, build a rapport with each child and assess each child’s needs. Many attorneys representing children have high caseloads. Due to the prevalence of this problem, the National Association of Counsel for Children recommends caseloads of no more than 100 children per attorney per year. This standard is also been acknowledged by the U.S. Department of Health and Human Services, Administration for Children and Families Children’s Bureau.¹⁴

A recent survey found that 17.6 percent of all respondents’ attorneys had caseloads of 200 children or more and 24.9 percent had caseloads between 100 and 199.

Howard Davidson, Erik S. Pitchal, “Caseloads Must be Controlled so All Child Clients Can Receive Competent Lawyering.” *The Specialized Practice of Juvenile Law: Model Practice in Model Offices*, National Association of Counsel for Children. 2006.

VI. CONCLUSION

The United States Constitution, federal and state law, and public policy support a child’s right to counsel. Despite this, many states do not provide abused and neglected children client-directed counsel to advocate for their expressed wishes—stripping them of the opportunity to participate in decisions that profoundly affect their lives. Lawyers are the key to ensuring fairness, accuracy, and appropriateness of court decisions. In addition to protecting client’s rights, children’s attorneys improve children’s lives by expediting permanency and helping ensure their well-being and assuring that their voices are heard as an integral part of the court process.

¹⁴ Donald N. Duquette & Mark Hardin, *Adoption 2002: Guidelines for Public Policy and State Legislation Governing Permanence for Children*. Washington, DC: Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau (1999).

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