Representing Children in Child Custody Cases: Where We Stand and Where We Should be Moving by Linda Rio

In February of 2001, the ABA launched the Child Custody Pro Bono Project. The Project was established to address the critical needs of the millions of children involved in custody proceedings each year. Initial funding for the Project came from a generous $1 million grant from Bill and Melinda Grunow, in honor of the child advocacy work of their niece, Ann Liechty.

Since February, as Director of the Project, I have been meeting with many people who are involved with children in divorce, parentage, adoption and guardianship cases. Among these people have been lawyers, judges, psychologists, social workers, and educators. Among other inquiries, I have been posing the question: what do you believe is the greatest need in child custody representation? The overwhelming response has been twofold: (1) judges should recognize the importance of, and have access to, more representatives for children; and (2) lawyers, judges, and psychologists need better training in the fundamental issues involving children in custody cases.

With this in mind, the Child Custody Pro Bono Project developed a Project Statement governing a minimum of five years. The Project Statement can be seen in full at the Project’s website, www.abachildcustodyproject.org. During 2002, the project will focus on increasing the quantity and quality of representation in child custody cases. We will do this by:

- Establishing a library of child custody materials that can be accessed online
- Producing an online and CD-ROM training curricula
- Distributing mini-grants to support new child custody projects within existing programs
- Serving as an information source and providing technical assistance
- Assisting with the design and adoption of Standards of Representation in Child Custody Cases
- Establishing an annual child custody pro bono award
- Conducting presentations on the need for child representation in custody cases
- Managing a List Service for persons interested in child custody representation
- Compiling and placing online a list of law-related child custody programs
- Producing an ABA Presidential Continuing Legal Education program on child custody representation.

Where We Stand with Child Custody Representation

One of our first tasks was to determine the current state of

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Sharing Strategies on Zero Tolerance With the Juvenile Defender Community  by Angela Coin

Sometimes the key to addressing a problem is just to share your concerns with like minds. That was the theme of a plenary session at the National Juvenile Defender Summit last October in Miami, Florida where several members of the ABA Children's Law Committee Working Group discussed the issues facing children related to zero tolerance, school discipline and school exclusion. The panelists included Anthony DeMarco, Director of the Juvenile Justice Center at Suffolk University Law School, Robert Schwartz, Director of the Juvenile Law Center, James Ferg-Cadima, of Harvard’s Advancement Project, and Thomas Linguanti, a partner at the Chicago office of Baker & McKenzie who is actively involved in the pro bono representation of children in school exclusion matters. The panel, moderated by Bernardine Dohm of Northwestern University Law School’s Children and Family Justice Center, allowed each panelist to discuss their work in the area of zero tolerance and ideas for how to curb the effects of more and more stringent zero tolerance policies on students all over the country.

The audience, a collection of line juvenile defenders, supervisors, children’s law center staff, legal clinic staff and others, engaged in a discussion with the panelists about how these issues interact with the issues of juvenile delinquency and the criminal justice system. Despite the overburdened state of so many juvenile defender offices around the country, many audience members welcomed the information about how they could and should advocate on behalf of their clients in juvenile court, school expulsion hearings and other forums where the trend towards removing students from the classroom will affect their clients.

Panelists shared case summaries and anecdotes about the efforts being made around the nation to try to curb the trend towards school exclusion and discussed successful alternatives in school discipline. Robert Schwartz discussed the February 2001 American Bar Association resolution condemning the policy of zero tolerance and the efforts in a few states, such as South Carolina and Pennsylvania, to replicate the resolution on the state level. Anthony DeMarco shared insight into how advocacy in the school discipline arena can only serve the best interest of the student but can help public defenders gain valuable information for their delinquency case. James Ferg-Cadima shared highlights of the work done by Harvard’s Advancement Project about the racial impact of zero tolerance policies and the prevalence of the racial imbalance around the nation. Finally, Thomas Linguanti, showed defenders how the private bar can be encouraged to use their resources to effect change in individual cases and in reforming public school policies in school discipline.

The panel also marked the release and celebration of a new book released in October edited by Bernardine Dohm, Bill Ayers and Rick Ayers entitled Zero Tolerance. The book is a collection of essays by prominent thinkers on the issue of school exclusion and zero tolerance. Jesse Jackson wrote the forward to the book.

The Children’s Law Committee will be focusing on Zero Tolerance in a program at the Section of Litigation Annual Meeting in Boston, Friday, April 26 from 4:00—5:30 p.m. (See Committee News, page 3). Additionally, the Education Subcommittee may be focusing on Zero Tolerance for its project for the upcoming year. If you are interested in working on the issue of Zero Tolerance, contact our Committee Director to join the education subcommittee at 202/547-3060 or catherinekrebs@prodigy.net.

Angela Coin is an attorney at the Children & Family Justice Center and the director of the Children’s Law Pro Bono Program, both at Northwestern University School of Law Legal Clinic. Angela is also the chair of the education subcommittee.

Resources

♦ America’s Children Still At Risk can be ordered from the website of the Steering Committee on the Unmet Legal Needs of Children, www.abanet.org/unmet or through the ABA Service Center at (800) 285-2221 (PC#5490297).

♦ Program materials and a video of the Immigration Summit for the Training of Pro Bono Attorneys in the Representation of Unaccompanied Children are available from our website: www.abanet.org/litigation/committee/childrens_l/

♦ To learn about legal resources for children around the country check out our on-line ABA Directory of Pro Bono Children’s Law Programs at: www.abanet.org/litigation/committee/childrens_l/directory.pdf. If you know of a children’s law center, clinic or resource center that is not listed in the Directory, please contact our Committee Director at 202/547-3060.

♦ If you are interested in starting a children’s law center or clinic, or a children’s law pro bono program, please contact our Committee Director at 202/547-3060 or catherinekrebs@prodigy.net. The Committee has resources to assist you, including a Working Group of experts who have started their own projects.
Committee News

♦ The Committee has recently formed a Communications Subcommittee which will focus on the Children’s Law Committee newsletter, website and the on-line ABA Directory of Pro Bono Children’s Law Programs. We are presently looking for CLC members who are interested in joining or in taking on a leadership role as the chair/co-chair of this subcommittee. We are looking especially for law students to participate in this subcommittee, as we expect that the subcommittee’s projects may be well-suited to law students’ interests and time schedules. If you are interested in chairing the subcommittee or if you would like to join, please call or e-mail our Committee Director at 202/547-3060 or catherinekrebs@prodigy.net.

♦ The Committee will be presenting the program Zealous Advocacy under Zero Tolerance? at the ABA Section of Litigation Annual Meeting in Boston, MA, Friday, April 26, 2002 from 4:00—5:30 p.m. This provocative and interactive program will attempt to answer some of the following questions: How do we keep our schools safe and preserve an education for all students? What is the role of the legal community in the debate over zero tolerance and school violence? To what procedural protections, if any, are children entitled in zero tolerance expulsion proceedings? Make plans now to attend.

♦ The Committee will host a breakfast meeting Friday, April 26, 2002 from 7:30 a.m.—8:45 a.m. at the Section of Litigation Annual Meeting. This will be an open business meeting with members and non-members encouraged to attend.

♦ The Committee, along with Northwestern University School of Law, Loyola University School of Law and NITA, co-hosted an advisory meeting November 16-17 in Chicago to discuss and plan a national training program. The Advisory Meeting, Starti ng and Sustaining a Children’s Law Program in 2002, a national child advocacy teachers conference and the initiation of the creation of comprehensive materials that will respond to identified curricular and training needs. The Committee, through the Child Welfare subcommittee, will continue to work on the national training for children’s law advocates. If you are interested in learning more about the advisory meeting or in becoming involved in any of the above outlined topics, please contact our Committee Director at 202/547-3060 or catherinekrebs@prodigy.net.

♦ The Committee will present a two part program at the ABA 10th Annual National Conference on Children and the Law, which takes place June 6—8, 2002 in Washington, D.C. Part I will focus on the nuts and bolts of starting and sustaining a children’s law project and Part II will focus on innovative ideas for new children’s law projects.

Representing Children in Child Custody Cases (continued from page 1)

representation. With the assistance of a graduate of Loyola Law School’s Child Law L.L.M. Program, we conducted a 51 jurisdiction research project on several aspects of child custody law. We found that few states have established criteria for when a representative should be appointed for a child in custody cases. In divorce cases, the vast majority—37 states—leave appointment exclusively to the discretion of the judge. Of the remaining states, appointments are required where there are issues of abuse or neglect (ten states); whenever the child is a witness (one state); if it is in the child’s best interest (one state); if the minor requests a representative (one state); or if the custody issue is contested (one state).

Interestingly, in parentage cases (those between unmarried parents), appointment of a representative is required in 24 states—thirteen wherever the child is named as a party, nine in every parentage case, and two where the case is contested. In sixteen states the judge has statutory authority to appoint a representative in his or her discretion, and in the remaining eleven states there is no statute addressing the issue.

In adoption cases, appointment is required in sixteen states—eight in every adoption and eight in every contested adoption. In 28 states appointment is in the discretion of the judge, and in seven states there is no governing statute. Judges have the most discretion on the appointment issue in private guardianship cases. Thirty-nine states leave the decision to the discretion of the judge, and four states have no governing law. In the eight states requiring appointment, three require appointment in contested guardianships and five require it in all guardianships.

We also took a look at who can be appointed as a child representative. The breakdown was as follows:

- Twenty-four states—only private attorneys
- Nineteen states—private attorneys or other professionals
- Six states—private or government attorneys
- One state—private or government attorneys or other professionals
- One state—court-employed professionals only

We were surprised to learn that thirty-four states have no background or training qualifications for those serving as representatives. Of the states with qualification requirements, nine had statewide qualifications, six required individual counties to establish requirements, and two only set forth requirements for non-lawyer representatives. Statutory requirements range from being “educated, trained, and screened,” to thirty hours of specific training on child custody and child-related matters.

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Representing Children in Child Custody Cases (continued from page 3)

We also surveyed the land to get a sense of who was actually providing child custody representation. A great deal of representation is done by private attorneys who are paid by the adult parties in the case, and some is done by government paid staff attorneys. Our focus, however, was more on unpaid representation in cases where the families cannot afford representatives’ fees. Some of this work is being done by individual private attorneys who are on paid appointment panels and accept pro bono appointments as part of that process. Some is being done by attorneys on an individual basis.

Other pro bono representation in this area is being done through formal programs at legal service or pro bono projects. We have identified eleven programs that have well-established pro bono projects representing a significant number of children in divorce, parentage, adoption or guardianship cases:

- Atlanta Volunteer Lawyers Foundation, Atlanta, Georgia
- Children’s Law Center, Charlotte, North Carolina
- Children’s Law Center, Phoenix, Arizona
- Children’s Law Center, Washington, D.C.
- Guardian Ad Litem Program, Legal Aid Society of Orange County Bar, Orlando, Florida
- Guardian Ad Litem Project, Cuyahoga County, Ohio
- Legal Action of Wisconsin, Southeastern Wisconsin
- Na Keiki Law Center, Honolulu, Hawaii
- Public Counsel, Children’s Rights Project, Los Angeles, California
- Rocky Mountain Children’s Law Center, Denver, Colorado
- Support Center for Child Advocates, Philadelphia, Pennsylvania

We have identified another six programs that occasionally represent children on a pro bono basis. We have identified eleven programs that provide staff-only representation. And we have identified ten law schools that do some representation of children in custody cases as part of their clinical programs. We do not believe we have finished identifying projects that represent children in divorce, parentage, adoption and guardianship cases, and would like to hear from any programs we have not yet contacted.

Where we Should be Moving

1. Increased appointments of representatives

   The vast majority of children in custody cases do not have a representative, and most would benefit from such an appointment. This is not to say that all children in custody proceedings should be independently represented, but there are certain circumstances that cry out for a representative. (I use the term “representative” here to refer to persons serving as attorneys, guardian ad litem, or in some other representative capacity. I will leave for another discussion the issue of which of these roles is more appropriate in a given situation, but will note that this is an area of some controversy.) As a result of reviewing every state’s statutes, speaking with lawyers and judges across the country, and working with the Family Law Section on Standards for Representatives, we have identified numerous factors which, if present in a child custody case, warrant appointment of a representative for a child:

   - Allegations of abuse or neglect
   - A history of violence in the family
   - Special physical, emotional or mental health needs of the child
   - Substance abuse by parents or caretakers
   - Mental illness of parents or caretakers
   - The child will testify in court

Making appointments in cases with one or more of these factors will help ensure that the best interests of children are being safeguarded.

2. Increased numbers of pro bono and legal service child custody projects

   To make increased appointments a reality, we of course need more qualified pro bono attorneys to appoint. We believe that the best way to increase the number of these pro bono attorneys is to increase the number of good pro bono programs supporting such attorneys. And we believe the best way to increase the number of such programs is to (1) expand the capacity of existing pro bono child custody programs; (2) add a pro bono component to staff-only child custody programs; or (3) add a child custody component to child-law pro bono programs that do not handle custody cases. In each instance, there is already an established expertise that can be built upon.

   If you are part of a project that falls under one of these categories, consider adding the necessary component that would have you representing children in custody cases. If you are a part of a bar association or court system, support the enhancement or development of such a program in your area.

   Having given this directive, I will offer the resources of our project to help you do it. The first step will be to identify your state laws on who can be appointed, when such appointments are made, and what are the prerequisite qualifications. We have the preliminary information for every state and can help you get started. It may be that you first need to work with local or state entities to revise current rules to allow for more pro bono representation, and we can assist with that process as well.

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particularly violent crime, and how does this perception affect how our society deals with children who come into contact with the criminal justice system?

There is good news to report. First, violent crime by youth continues to decline. Youth homicides declined 68% between 1993 and 1999 and are at their lowest rate since 1966. The youth violent crime rate is at its lowest since 1988 and there has been a corresponding decrease in violent crimes in our schools. School associated deaths have dropped by 72% since 1992 from 55 to 16. Given the size of the school age population (52 million) this means that there is a one in three million chance that a youth would be fatally shot at school. The Center for Disease Control also reports that there has been a 30% decline in youths bringing weapons to school and a 29% decline in overall school crime. Although there remains considerable work to be done, by any standard there has been real progress in reducing violent crimes by adolescents.

Second, we have learned much recently about the development of the adolescent brain. For example, recent studies have looked at the functioning in the brain’s prefrontal cortex (the part of the brain that controls the impulsive and aggressive behavior) of normal adolescent brains and those who have committed violent crimes including murder. The brains of adolescents who have committed violent acts display poorer functioning in the brain’s frontal region. Although the state of our knowledge in this area is still in its early stages, there is hope that we will be able through such research to learn more about the causes of adolescent violence. For those of you who are interested in this topic, I recommend the papers and lectures of Dr. Abigail A. Baird of Dartmouth and Dr. Adrian Raine of the University of Southern California that can be found at the website that I provide at the end of this column.

On a positive note, I can report that for those of you with teenage boys, there is hope – the brains of teenage boys, particularly the prefrontal cortex, do not become fully developed until the mid 20’s. So the next time that your son does something particularly impulsive, remember if you can make it until your son reaches his mid 20’s you should be set.

Despite the significant decrease in juvenile crime, the public simply has not gotten the message. Public opinion polls and studies consistently report that an overwhelming majority of the public believe that violent crimes by juveniles are on the increase and, if the question is asked, “Are our schools less safe than they used to be?” well over 50% of the adults in this country would answer “yes.” Americans are also likely to exaggerate the threat of being the victim of a crime committed by a minority.

Since a very high percentage of the American public form their opinions about crimes and adolescents based on what they see and read in the news, it is probably not surprising that they hold these views. If someone regularly watches local evening news, it would be easy to conclude that serious juvenile crime was on the rise. The problem of course is not the acuity of individual stories, but the misleading impression from the cumulative stories about the crime rate generally, the proportion of crime that is violent, the proportion of crime committed by persons of color, and the proportion of crime committed by youth. In many respects, the public can’t be faulted for having an inaccurate understanding of adolescent crime.

Political discourse regarding juvenile crime has been dominated by a single refrain. “Let’s get tough on crime.” In jurisdiction after jurisdiction, the movement has been to treat as adults many juveniles who are accused of violent crimes. Every state and the District of Columbia have laws that make it possible to charge juveniles as adults and 43 states have changed their laws within the past seven years to make it easier to charge children as adults in criminal court. Clearly, state legislators and presumably the public think that it is a good idea to try an increasing number of adolescents in criminal court and to impose substantially longer sentences on those who are convicted.

This brings me to the work of the Children’s Law Committee and what its members can do. Many of the Committee’s members are experts in these areas or will be perceived as experts by the media which may be almost as good. In the coming months, there will undoubtedly be stories in local media about children who come into contact with the criminal justice system. In my community, we can look forward to numerous stories about the two boys, 16 and 17, who are accused of murdering two Dartmouth College professors. Committee members should consider working with the media to give an accurate picture of youth crime. Besides discussing how the media can accurately report individual crimes and judicial proceedings, the discussion should include how the media can do a better job generally of reporting on this important and complex issue.

At present, the Children’s Law Committee does not have a subcommittee that is dealing directly with the issues addressed in this column. If any of you have an interest in this topic or want to suggest ways that the Committee should be addressing this issue, please contact Marguerite Gualtieri or Geoffrey J. Vitt or the Committee Director, Catherine Krebs.

Information about the Dartmouth conference, including the lectures themselves, may be found at http://www.dartmouth.edu/~humbio/
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It is important to work closely with your local court in developing a program, because child representation almost always results from a court appointment. There are some cases where older children seek out their own representation, or adults seek it out on their behalf, but that is not very common. Some courts are more amenable than others to appointing children’s representatives, and we have some good examples of court systems where appointments are common and encouraged. It seems that the more the court is involved with the training and selection of advocates, the more appointments get made.

Your next step is to set up a protocol for running a pro bono child custody project. There are several good models across the country to use for guidance. Adequate and experienced staff supervision is a must. When planning a recruitment strategy, keep in mind that these cases are difficult and are harder to recruit for than more limited, uncontested cases. Some attorneys may be hesitant to get involved in embattled custody contests, and for good reason. But there are ways to alleviate these fears. First, once you have established a relationship with the relevant judges, they can be powerful recruitment tools. Second, offer extensive staff supervision and experienced attorney mentoring. Not only is this helpful in recruitment, it is an essential part of any well-run child custody program. Third, tap into attorneys who already have either family law experience or experience representing children. And most importantly, offer a comprehensive training program for all volunteer attorneys.

The Child Custody Pro Bono Project has many other resources that can help you fulfill these directives. We have established a Child Custody Resource Library that currently contains over 170 documents to help children’s representatives. You can access the current category listing at www.abachildcustodyproject.org. We have set up a Child Custody List Service for the exchange of information among representatives and others interested in child custody matters. We can provide you with information on programs similar to the one you envision to help you get started, and we will be making grants early in 2002 to help programs enhance or add pro bono child custody projects.

3. A high-quality and convenient training program

The limited resources of courts, legal service and pro bono programs have made it difficult for them to establish comprehensive training programs for child custody advocates. Even those states that mandate training often do not have model trainings available. But the thorough training of lawyers, judges and others who touch the life of a child during a custody proceeding is one of the keys to better outcomes for the children in these cases. For that reason, the ABA Child Custody Project will design, produce, and distribute a comprehensive, easy to access, free training curricula.

The curricula will consist of eleven training/education modules on the following topics: (1) psychological experts and reports; (2) child abuse; (3) domestic violence; (4) child development; (5) interviewing children; (6) hearing from children in court; (7) ethical issues; (8) racial, ethnic, economic, and cultural differences; (9) alternative dispute resolution applications to custody matters; (10) case development; and (11) a sample state law module for easy adaptation locally. The modules will each contain full audio and limited video of a speaker, Power Point slides, mock scenarios, downloadable handouts, and resource links. Each module will be approximately 90 minutes in length. The modules will be part of a consistent curricula, but will stand alone for those only needing to review certain topics. They will have interactive components, including the ability by the user to stop, rewind, and fast forward, and sections testing the user’s responses to certain scenarios.

Rather than entirely recreating the wheel, we will work off of parts of current training programs, such as those in Cook County, Illinois, Atlanta, Georgia, Maine, and Missouri. We also have identified positive segments from other training programs and materials around the country, as well as experts who have proven their skills in conducting such trainings.

The curricula will be available to all pro bono attorneys and programs, legal service providers, judges, law schools, court-appointed psychologists, social workers, parent educators, and anyone else interested in causing better outcomes for children in custody cases. Roll out of the curricula will begin in 2002.

The Ultimate Reward

The ultimate result of more and better trained child representatives is substantial. Children will end up with better decisions being made on their behalf and will be more included in a process that often ignores them. Unnecessary litigation will be avoided as an informed judge and a good child’s advocate often serve to bring the parties to a reasoned settlement. Children will less often be placed in dangerous situations as judges and court-appointed advocates better understand child abuse and domestic violence. Families will have greater confidence in the justice system when decision-makers and representatives display a greater understanding of family issues and children’s needs. And better (and more accepted) decisions in initial custody orders lessen the likelihood of the burdensome post-judgment litigation that is tying up our family courts nationwide and having a devastating impact on the emotional well-being of the very persons the process is supposed to protect—the children.

Linda M. Rio is Director of the ABA Child Custody Pro Bono Project. She has been licensed in Illinois since 1988, has focused on child and family legal issues for seven years in various positions, and provides pro bono representation to children in Cook County, Illinois. For more information on the Child Custody Pro Bono Project, contact Linda at 312-988-5805 or lrio@staff.abanet.org
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ABA Section of Litigation Annual Meeting
April 25—27, The Westin Copley Place, Boston, MA

Children’s Law Committee Breakfast Meeting
Friday, April 26, 2002
7:30—8:45 a.m.

Zealous Advocacy under Zero Tolerance?
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4:00—5:30 p.m.

For more information call Catherine Krebs at 202/547-3060