

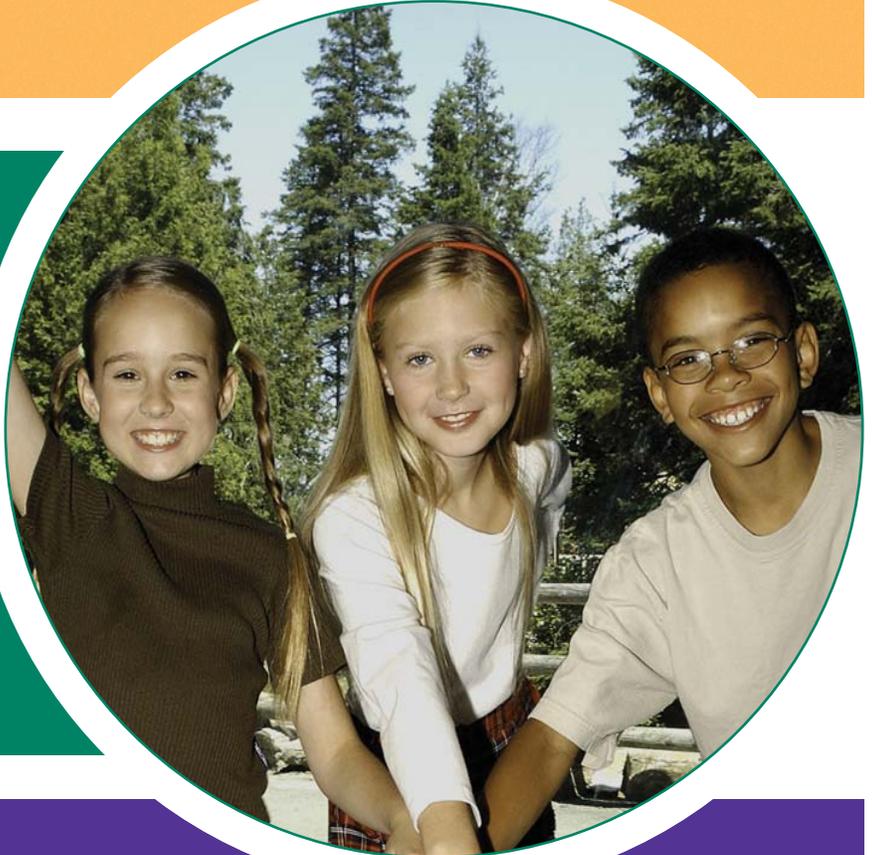
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State Bar of Michigan Children's Law Section

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# The Michigan Child Welfare Law Journal



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# Message from the Chair

I noticed, in *Michigan Family Law*, a paragraph discussing how the Family Law Section was instrumental in bringing the specialized family court into being. Got me wondering; what has the Children's Law Section done lately?

By way of introduction, I am John (been called Jack since the family quit calling me Jackie) McKaig, the recently elected Chair of our Section. I am maybe the one of the oldest, and perhaps one of the geographically northernmost chairs of the section, living and working up here in Antrim County. I received my first appointment from the court in 1976, (losing a termination case on behalf of the mother), and have been representing parents and serving as L/GAL until five years ago, when I was asked to be the permanent L/GAL. I have been a member of the Section Council for six years, serving as treasurer for three of those years and chair of the legislative committee for all six years. I am honored to represent our section's interests for the next year.

It is no secret that our involvement in children's representation issues is not lucrative. If you see a children's law attorney arriving at the court house in any sort of an upscale automobile, they either married it, inherited it or stole it. (If it is stolen, might I suggest a membership in the Criminal Law Section!) I can only conclude from that....we must like what we do and are dedicated. Since our area of interest is evolving rapidly and since interpretations of the same statutes, court rules and cases seem to vary from county to county, perhaps this same dedication can be utilized to bring some relevance to our section and some continuity within the state.

I understand there are approximately 160 members who have elected not to participate on our listserv. Utilizing this free service is one good way to discuss and correct some of the issues that end up at the Court of Appeals for no other reason than someone did not do their job. Participation is restricted to licensed attorneys only, so comments regarding other individuals or groups involved in children's issues will not be privy to commentary, or in some cases rants regarding one case or another. Invitations have been sent to all our members with a follow up in a few weeks. There is NO COST.

In May we will be having our "Spring Training." This year a "practical training" is planned: neglect/abuse in the morning, delinquency in the afternoon. Once again we will be in Frankenmuth. Join us for the social hour or two; the night before.

Did you know?

- The Children's Law Section retains a lobbyist?
- The Legislative Committee reviewed more than 30 proposed bills over the past year?
- Three Amicus Curiae briefs were filed by the section with the Supreme Court?

The Section is working for you. With the dedication of our membership and the hard work of the Section Council, perhaps one day we will also be noted for major changes.

—John Mckaig, Chair

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# Editor's Note

This issue of the *Michigan Child Welfare Law Journal* focuses on issues affecting parents in the child welfare system and those who represent them in our courts. As the state of Michigan focuses on improving the representation of all parties involved in child welfare system, this issue of the *Journal* will help you stay informed on this crucial topic. Special thanks to Professor Vivek Sankaran for taking the lead in this matter.

—Joseph Kozakiewicz

## Introduction

This issue of the *Michigan Child Welfare Law Journal* is dedicated to issues affecting parents in the child welfare system and those who represent them in court proceedings. Despite the fact that the goal in the overwhelming majority of child welfare cases is to reunify the family, parents and their attorneys are often marginalized and are not given the support they need to successfully navigate complicated systems. For many years, this problem has remained in the periphery and has gone unaddressed in public forums.

Recently, the Michigan State Court Administrative Office (SCAO) has increased its focus on these important issues. In 2008, the SCAO convened a Court Improvement Project subcommittee on improving parent representation which resulted in a partnership with the American Bar Association (ABA) Center on Children and the Law to conduct a comprehensive assessment of Michigan's system of parent representation. The final report, which was issued in September 2009, paints a picture of a system, while having some strengths, that needs significant reform to ensure that the interests of families are protected. The report, among other things, recommends that a statewide administrative structure be created to ensure parity and minimum standards for parent representation across different counties. The executive summary of that report is included in this issue.

In October, to discuss the report's findings, the SCAO convened the first symposium on the representation of parents which was attended by over eighty stakeholders, including judges, attorneys, community leaders and policymakers. Three sitting justices of the Michigan Supreme Court were in attendance and attendees all recognized the need for significant reforms. Participants learned more about the ABA report, heard about model parent representation systems in Washington State, Connecticut and California, and spent the afternoon in break-out groups discussing what different constituencies (attorneys, judges, policy makers) can do to strengthen

legal representation for parents. The work at the symposium laid the groundwork and provided direction for the SCAO's future work in this area. A follow-up symposium is planned for next year. Those interested in participating in the SCAO subcommittee on parent representation can email me at [vss@umich.edu](mailto:vss@umich.edu).

In the pages that follow, you will learn about the importance of parent representation from different perspectives. Judge John Hohman and Judge Kenneth Takoma reflect on the role of parents' attorneys and their importance in the courtroom. Tracy Green, the managing attorney at the Detroit Center for Family Advocacy, writes about why she has dedicated a career to serving parents in abuse and neglect cases. Nancy Colon, a parent who experienced the child welfare system, discusses her personal journey through the system and the emotions and confusion she confronted as she fought to regain custody of her children. Josh Kay, a Skadden Fellow at the Michigan Protection and Advocacy representing parents with disabilities, provides guidance to those representing parents with special needs. Also included is a piece written by me providing a national perspective on the parent's right to counsel and areas in which the right needs to be strengthened.

My hope is that this issue will reaffirm the importance of engaging and working with parents as we seek solutions for our families and will remind us that in most cases, the best result is for children to be returned quickly and safely to their families. I look forward to collaborating with you all as we work to make our system more just for families.

Vivek Sankaran  
Clinical Assistant Professor of Law, Michigan Law School  
Director, Detroit Center for Family Advocacy

# Protecting a Parent's Right to Counsel in Child Welfare Cases

by Vivek S. Sankaran

A national consensus is emerging that zealous legal representation for parents is crucial to ensure that the child welfare system produces just outcomes for children. Parents' lawyers protect important constitutional rights, prevent the unnecessary entry of children into foster care and guide parents through a complex system. National groups including the Pew Commission on Children in Foster Care, the American Bar Association Center on Children and the Law, and the National Association of Counsel for Children have recognized the need to strengthen legal advocacy on behalf of parents. A number of states have also begun to reform their systems of appointing lawyers for indigent parents to better serve families. A national movement is afoot to ensure all parents, regardless of income, receive assistance from effective, adequately compensated attorneys in all cases.

Despite these efforts, many barriers remain to providing counsel for parents in child welfare cases:

- Federal laws fail to provide an absolute right to counsel for parents.
- Several jurisdictions deny indigent parents a right to court-appointed counsel in dependency and termination of parental rights proceedings.
- In some jurisdictions, although a technical right exists, parents' attorneys are underpaid and overworked, receive inadequate training, are not appointed in a timely manner, and lack crucial supports to zealously represent parents.
- Legal remedies to address the erroneous deprivation of counsel are inadequate and in some states parents cannot bring ineffective assistance of counsel claims.

This article provides a snapshot of the current state of parent representation across the country and recommends steps to take to strengthen this important right.

## Why Parent Representation Matters

National and state efforts to improve legal representation for parents recognize that this work matters and is essential for a well-functioning child welfare system. Lawyers for parents play many critical roles, including:

### *Safeguarding the liberty interests of all parents*

A parent's right to raise his or her child has been recognized by the United States Supreme Court as one of the oldest, and most sacred of constitutional rights.<sup>1</sup> Not surprisingly, courts have described child protection cases as working a "unique kind of deprivation" on families.<sup>2</sup> Before taking custody of children, the state must prove parental unfitness.<sup>3</sup> Evidence of unfitness must be clear and convincing – the highest standard of proof used in civil cases – before terminating parental rights.<sup>4</sup> State laws also protect these rights. Parents' lawyers prevent government overreaching and protect parents' basic civil liberties.

### *Reducing the unnecessary entry of children into foster care*

Each year, far too many children needlessly enter foster care, costing states millions of dollars and inflicting unnecessary emotional trauma on children. Outcomes for children entering foster care are bleak. Children are often moved many times, are disconnected from their families, and are at-risk of failing academically.<sup>5</sup> Not surprisingly, children raised by the state who age out of the system fare poorly with increased odds of dropping out of school, incarceration, and homelessness.<sup>6</sup> By challenging governmental decisions to place kids in foster care, parents' attorneys play a crucial role in ensuring that only children who truly need the state's protection enter foster care.

### *Guiding parents through complex proceedings*

Child welfare proceedings are governed by many interrelated federal and state laws and involve many professionals -- social workers, guardians *ad litem*, court appointed special advocates, therapists, and judges. Although the goal in most cases is reunification, frequently parents disengage with the process because they are overwhelmed, confused, and frightened. They do not know how to work with their caseworker or understand the purpose of administrative meetings or court hearings. The trusted advice of an advocate reassures the parent that he or she is not alone in navigating the child welfare labyrinth and helps the parent reach decisions consistent with legal and ethical mandates. The advocate also ensures the parent's voice is heard both in and out of court. These and other responsibilities of parents' counsel empower parents in a system that often feels isolating.

### *Improving the quality of decision making*

By challenging unreliable information and producing independent evidence of their clients' strengths and supports, attorneys ensure courts only rely upon the most accurate information available before making life-altering decisions. Without zealous parent representation, courts lack an important perspective -- that of the parent with whom reunification is sought -- which increases the likelihood that a wrong decision will be reached.

### *Expanding options available to courts*

Attorneys propose creative alternatives such as guardianships or other custody arrangements, intensive in-home services to preserve a child's placement in the home, or extensive visitation between parents and children supervised by family members, friends, or neighbors. Parents' attorneys can also help their clients access community-based services such as substance abuse treatment, mental health counseling, or parenting classes. Parents may be able to access these services beyond the duration of the child welfare case.

### *Improving case outcomes*

Limited data suggests the roles parents' lawyers play in child welfare cases dramatically improve outcomes for children. In 2000, the Washington State Office of the Public Defender, funded by the

state legislature, created a parents' representation pilot project that enhanced legal representation to parents by lowering caseloads, increasing compensation, and providing support services, such as experts, to the lawyers. Results after three years found that:

- hearings took place faster;
- reunification rates increased by over 50 percent;
- the rate of terminations of parental rights decreased by nearly 45 percent; and
- the rate of children "aging out" of the foster care system declined by 50 percent.<sup>7</sup>

These results reaffirmed that strong parent representation improves outcomes for children and showed "the enhancement of parents' representation has the potential to save increasing millions in state funding on an annualized basis."<sup>8</sup>

Results from the Center for Family Representation,<sup>9</sup> an interdisciplinary law office in New York City providing high quality representation for parents, reveal similar findings. While the median length of stay for children in foster care in New York was 11.5 months in 2007, the length of stay for children whose parents were represented by the Center was three months. Calculations by the Center showed the city saved over two million dollars due to the reduced time these children spent in foster care. Although more studies are needed to explore how parent representation improves outcomes for children, the initial results support this relationship.

## Current State of the Right to Counsel Parents'

### *Federal right to counsel*

Unlike criminal cases in which the right to counsel is guaranteed by the Sixth Amendment to the Constitution, in child protection cases, there is no absolute federal constitutional right to counsel. In *Lassiter v. Department of Social Services*,<sup>10</sup> the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not mandate the appointment of counsel in every termination of parental rights case. Instead, the decision must be made by the trial court depending on the case circumstances. One legal scholar described the *Lassiter* holding as standing for the proposition that "a drunken driver's night in the cooler is a greater

deprivation of liberty than a parent's permanent loss of rights in a child."<sup>11</sup>

Despite failing to recognize an absolute right to counsel for parents in termination proceedings, the Supreme Court observed that "a wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution."<sup>12</sup> The Court recognized that "[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well."<sup>13</sup> The opinion concludes with an explanation that the decision, "in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise."<sup>14</sup>

#### *Parents' right to counsel under state law*

Although no federal statutory right to parent's counsel exists, fortunately most states have followed the Court's guidance and provide counsel to parents in dependency and termination proceedings. At least 38 states have enacted statutes that provide attorneys for parents in every dependency case, and all but five states provide counsel in every termination of parental rights case. A number of state supreme courts have also interpreted their state constitutions to mandate appointing counsel in these cases.<sup>15</sup> Additionally, across the country, institutional providers, such as the Center for Family Representation in New York City, Community Legal Services in Philadelphia, and the Office of Public Defense in Washington State, among others, have emerged to provide high quality, interdisciplinary representation to parents. A few law schools also have student clinics focusing on such advocacy.<sup>16</sup>

#### Current Challenges

Despite this progress, a number of challenges remain:

**Discretionary appointments.** In about 12 states, the decision to appoint counsel for parents in dependency proceedings is discretionary.<sup>17</sup> In five of these jurisdictions, the appointment of counsel prior to a permanent termination of parental rights hearing is also not absolute.<sup>18</sup> For example:

- In Minnesota, a court only has to appoint

counsel in a case "in which it feels that such an appointment is appropriate."<sup>19</sup>

- In Hawaii, counsel is only required when the interests of parents "are not represented adequately by another party who is represented by counsel."<sup>20</sup>
- Virginia law only mandates counsel at the adjudication and TPR hearings but not for dispositional hearings.<sup>21</sup>
- Mississippi has no statute governing appointment of counsel.

These examples show how fragile the statutory right to counsel remains in many parts of the country. In these states, a parent's ability to receive assistance of counsel may depend on the county where he or she lives or the current fiscal situation. Without a statutory right to legal representation, parents may also lack the legal ability to bring ineffective assistance of counsel claims.<sup>22</sup>

#### **Legal remedies when counsel is not provided.**

Problems exist even in those jurisdictions in which an absolute statutory right to counsel exists. In these states, the legal remedies available to parents when trial courts erroneously deny them their right to counsel are often inadequate. In most states, the erroneous deprivation of counsel at stages other than the final termination of parental rights hearing is governed by a harmless-error standard, which is difficult to meet. Parents must show the specific harm caused by the absence of counsel, even when counsel was deprived for years.<sup>23</sup> Yet, often that harm is difficult to show because the record is undeveloped since the parent lacked a lawyer. Generally, only the erroneous denial of counsel at the final TPR hearing results in reversals of child welfare decisions.<sup>24</sup> Thus, trial courts that fail to appoint counsel to parents for years face few consequences so long as an attorney is appointed at the final hearing. Michigan Supreme Court Justice Maura Corrigan noted this problem. She observed, "[I]n many cases, errors . . . will effectively prevent a respondent from *ever* showing that his lack of participation and representation affected the outcome; because no one will have developed a record in support of his interests, it may be difficult if not impossible for him to provide an offer of proof to support his claim that the proceedings might have ended differently."<sup>25</sup>

**Quality of advocacy.** Even when counsel is

appointed, parents' attorneys are often unable to provide zealous advocacy on behalf of their clients, a conclusion noted by many analyzing the system. A 1996 *New York Times* editorial observed that "these lawyers are often not up to task."<sup>26</sup> In 2003, a state court in New York concluded that the system of parent representation "fails to confirm the confidence and reliability in our system of justice."<sup>27</sup> More recently in 2005, the Muskie School of Public Service and the American Bar Association concluded, with respect to parent representation in Michigan, that "[w]hat was reported to evaluators . . . and what was observed in court hearings fall disturbingly short of standards of practice."<sup>28</sup> These observations are being made across the country.

**Systemic weaknesses.** Systemic inadequacies are a major reason why parents often do not receive quality legal assistance. Attorneys may not be appointed to a case in a timely manner and compensation for attorneys varies across the country. Attorneys are often underpaid, forcing them to carry high caseloads to make a living. Frequently, attorneys are paid a low set fee, as opposed to an hourly wage, which provides a structural disincentive to work hard on cases. Additionally, states may not pay attorneys for work outside court. This work may include administrative meetings at child welfare agencies, or advocacy in collateral proceedings such as custody, guardianship, or adoption cases, which may be crucial in resolving the child welfare case. High caseloads also can cause attorneys to substitute for one another in cases; this denies the parent a dedicated advocate who knows the case.<sup>29</sup>

**Lack of access to supports and resources.** Most attorneys representing parents are court-appointed solo practitioners with limited access to resources and institutional support. They are unable to hire experts, investigators, or social workers, and are at a significant disadvantage when interacting with state agencies with greater resources. They may also lack access to legal research databases, such as Lexis-Nexis or Westlaw, and may not have colleagues readily available to give advice or support. Comprehensive training programs for parents' attorneys are relatively new and few states have rigorous training requirements for attorneys accepting court appointments. Thus, in addition to inadequate pay, few parents' attorneys have the tools to zealously represent their clients.

### Next Steps

Some steps that policymakers and advocates can take to strengthen parents' right to counsel include:

**Advocate for a uniform federal and state statutory right to parent's counsel.**

Federal laws set many requirements that state child welfare systems must meet to receive federal funds. Currently, the federal Child Abuse Prevention and Treatment Act (CAPTA) mandates that children receive the assistance of a guardian *ad litem* in child welfare cases.<sup>30</sup> No similar requirement exists for states to provide parents counsel. By including this provision in federal law, those states currently failing to provide parents with an absolute right to counsel in all child welfare proceedings will be forced to do so or risk losing federal dollars.

**Work with state courts to fully assess parent representation in your state. Identify areas for improvement and collaborate on solutions.**

A number of states – including Colorado,<sup>31</sup> Massachusetts, California and Michigan – have conducted comprehensive self-assessments of their parent representation systems to identify strengths and weaknesses and to develop solutions to problems. These reports, some of which have been funded through Court Improvement Project funds, have provided the information and momentum to implement significant reforms. Based on the results of these and other studies, some states, such as North Dakota, Arkansas, and Connecticut, have moved to a statewide system of representation with uniform compensation rates and training requirements.<sup>32</sup>

**Work with private foundations and donors to fund pilot parent representation projects.**

Many private organizations across the country provide excellent legal advocacy on behalf of parents. Many of these programs were created through private grants from individuals and foundations. These organizations also provide invaluable support and resources to court-appointed attorneys. Advocates across the country should work with the private sector in their states to explore how to create similar organizations in their jurisdictions. An example is the Detroit Center for Family Advocacy, a new public-private partnership aimed at representing parents before a child welfare case is petitioned to divert cases from the formal court system.<sup>33</sup>

**Join a national community of parents' lawyers.**

For years, parents' lawyers remained isolated without a community at the national level to share strategies, seek reforms, and find support. This is changing. The American Bar Association Center for Children and the Law, with the backing of Casey Family Programs, the Annie E. Casey Foundation, and the Child Welfare Fund, has created a National Project to Improve Representation of Parents Involved in the Child Welfare System. The project hosted the first national parents' attorney conference in May 2009 in Washington, DC, and hosts a list serv for parents' attorneys to share information and resources. One objective of the project is to create a national organization to support parents' attorneys and strengthen parents' rights, including their right to counsel. Parent attorneys will benefit through involvement in these and similar projects. To learn more about the project, visit [www.abanet.org/child/parentrepresentation/home.html](http://www.abanet.org/child/parentrepresentation/home.html)

**Conclusion**

Strong advocacy on behalf of parents plays a crucial role in ensuring the child welfare system makes good decisions for children. Zealous legal representation can produce better outcomes, save money, and reduce the number of children who need to enter foster care. Although some progress has been made to strengthen this right, much work still needs to be done. ©

**About the Author**

*Professor Vivek S. Sankaran is a clinical assistant professor of law in the Child Advocacy Law Clinic at the University of Michigan Law School. Professor Sankaran sits on the steering committee of the ABA National Project to Improvement Representation of Parents in the Child Welfare System. He can be reached at [vss@umich.edu](mailto:vss@umich.edu).*

**Endnotes**

1 See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000).  
 2 *M.L.B v. S.L.J.* 519 U.S. 102 (1996).  
 3 *Stanley v. Illinois*, 405 U.S. 645 (1972).  
 4 *Santosky v. Kramer*, 455 U.S. 745 (1982).  
 5 Research by Professor John Doyle documents the negative effects of placing children in foster care. Professor Doyle's papers are available at <http://www.mit.edu/~jjdoyle/research.html>.

6 A recent study by researchers at Wayne State University documents problems faced by children aging out of foster care. The results of the study are available at <http://sun.science.wayne.edu/~ptoro/ageoutfu.html>.  
 7 National Council of Juvenile and Family Court Judges. *Improving Parents' Representation in Dependency Cases: A Washington State Pilot Program Evaluation*, 2003. Available at [www.opd.wa.gov/Reports/DT-Reports.htm](http://www.opd.wa.gov/Reports/DT-Reports.htm).  
 8 Bridge, Justice Bobbe J. and Joanne I. Moore. "Implementing Equal Justice for Parents in Washington: A Dual Approach." *Juvenile and Family Court Journal*, Fall 2002.  
 9 For more information about the Center for Family Representation, visit <http://www.cfrny.org/>.  
 10 452 U.S. 18 (1981).  
 11 Besharov, Douglas. "Terminating Parental Rights: The Indigent Parent's Right to Counsel after *Lassiter v. North Carolina*." *Family Law Quarterly* 15, 1982, 205, 221.  
 12 *Lassiter*, 452 U.S. at 33-34.  
 13 *Ibid.*, 34.  
 14 *Ibid.*  
 15 See, e.g., *In re Shelby R.*, 804 A.2d 435 (N.H. 2002); *In re A.S.A.*, 852 P.2d 127 (Mont. 1993); *V.F. v. State*, 666 P.2d 42 (Alaska 1983).  
 16 Both NYU Law School and the UDC David A. Clarke School of Law have legal clinics dedicated to representing parents in child welfare cases. Students in the University of Michigan Law School's Child Advocacy Law Clinic represent parents, children, and county agencies in these cases.  
 17 Statutes in Hawaii, Indiana, Minnesota, Missouri, Nevada, New Jersey, Oregon, Wisconsin, and Wyoming provide judges with discretion to appoint counsel in dependency cases. In Virginia, the right to counsel is only guaranteed at the adjudication and termination of parental rights hearings. In Mississippi, no statute governs the appointment of counsel in child welfare cases. This author could not locate a statute addressing the issue in Idaho.  
 18 In Hawaii, Mississippi, Minnesota, Nevada, and Wyoming, there is no absolute right to counsel in termination of parental rights hearings.  
 19 Minn. Stat. § 260C.163.  
 20 Hawaii Rev. Stat. § 587.34.  
 21 Va. Code Ann. § 16.1-266.  
 22 See, e.g., *In re N.D.O.*, 115 P.3d 223 (Nev. 2005); *In re Heather R.*, 694 N.W.2d 659 (Neb. 2005).  
 23 See, e.g., *Meza-Cabrera v. Arkansas Dep't of Human Services*, 2008 Ark. App. LEXIS 120 (Ark. Ct. App. 2008); *Arthur v. Div. of Family Services*, 867 A.2d 901 (Del. 2005).

- 24 See, e.g., *In re J.M.B.*, 676 S.E.2d 9 (Ga. Ct. App. 2009); *In re Torrance P.*, 724 N.W.2d 623 (Wis. 2006).
- 25 *In re McBride*, 766 N.W.2d 857, fn 13 (2009) (dissenting opinion).
- 26 “Giving Overmatched Parents a Chance.” *The New York Times*, June 17, 1996, A14.
- 27 *NY County Lawyers’ Association v. State*, 763 N.Y.S.2d 397 (Sup. Ct. 2003).
- 28 Muskie School of Public Service and American Bar Association Center on Children and the Law. *Michigan Court Improvement Project Reassessment*, 2005, 155. Available at [www.courts.michigan.gov/scao/resources/publications/reports/CIPReassessmentReport090605.pdf](http://www.courts.michigan.gov/scao/resources/publications/reports/CIPReassessmentReport090605.pdf).
- 29 For example, the Michigan Court Improvement Project Reassessment observed that parents’ attorneys in Wayne County, Michigan “meet in the cafeteria and ‘deal the morning cases like cards’, trading cases back and forth based on who is going to be in which courtroom that day.” *Ibid.*, 153.
- 30 42 U.S.C. § 5106a(b)(2)(A)(xiii).
- 31 For a detailed summary of the steps taken by the Colorado Supreme Court to improve parent representation, see [www.courts.state.co.us/Courts/Supreme\\_Court/Committees/rptf.cfm](http://www.courts.state.co.us/Courts/Supreme_Court/Committees/rptf.cfm).
- 32 Information about reforms in Connecticut, including the creation of the Commission on Child Protection, can be found at [www.ct.gov/CCPA](http://www.ct.gov/CCPA).
- 33 More information about the Detroit Center for Family Advocacy can be found at <http://www.law.umich.edu/centersandprograms/ccl>.

# Executive Summary of *Legal Representation for Legal Parents in Child Welfare Proceedings: A performance-based analysis of Michigan practice*

by the American Bar Association Center on Children and the Law  
for The Child Welfare Services Division of The Michigan State Court Administrative Office

## Introduction

In 2007-2008, the Michigan Court Improvement Program (CIP) Basic Grant Strategic Plan identified competent representation for parents in child protection proceedings as essential to improving outcomes for Michigan's children and families. In September 2008, the Child Welfare Services Division of the State Court Administrative Office (SCAO) engaged the American Bar Association (ABA) Center on Children and the Law to assess how Michigan provides representation for parents in child protection proceedings and to make recommendations for an improved parent representation model. The CIP Quality Representation Committee selected a subcommittee to assist in the assessment design and serve as a resource on Michigan law, policy, and procedure. The subcommittee consists of representatives from the University of Michigan Law School, the Department of Human Services (DHS), the Office of the Family Advocate, the Office of the Children's Ombudsman, state court administration, and selected judges and attorneys.

Like many other states, Michigan decided to examine the representation of parents in child protection proceedings after having studied the representation of children. Unlike other states, the Michigan CIP elected to commission an independent assessment of parent representation, including quantitative and qualitative measures. The qualitative part of the assessment was designed to be an inclusive process that engaged judges, lawyers, court staff, social workers, community providers, and of course, parents.

The current assessment is the fourth in a series of independent assessments examining core systemic

issues in Michigan's child protection system. This assessment of parents' representation was preceded by three other studies: *A Challenge for Change: Implementation of the Michigan Lawyer-Guardian Ad Litem Statute* (ABA Center for Children and the Law 2002), the *Racial Equality Review: Findings from a Qualitative Analysis of Racial Disproportionality and Disparity for African American Children and Families in Michigan's Child Welfare System* (Center for the Study of Social Policy 2009), and the *Michigan CIP Reassessment: How Michigan Courts Handle Child Protection Cases* (Muskie School of Public Service 2005). These studies represent clear statements of Michigan's special commitment to the safety, permanence, and well-being of its children, and to strengthening its families.

The assessment team, in conjunction with the subcommittee, crafted an evaluation methodology consisting of seven primary components:

- (1) Collection of all Circuit Court Rules, court orders, memoranda regarding the recruitment, screening, training, and continuing education requirements for attorneys appointed to represent parents;
- (2) A compensation survey distributed to each Circuit Court administrator to obtain data about the fee schedule used for court-appointed parents' attorneys;
- (3) Surveys (primarily via Survey Monkey) sent to all attorneys appointed to represent parents and children, and county prosecutors;
- (4) Surveys (primarily via Survey Monkey) sent to each Judicial Officer currently or recently assigned to a child protection calendar;

- (5) Surveys (distributed by various means) to parents involved in child protection cases;
- (6) Interviews and focus groups on site with parents, social workers, providers, attorneys, judges, and court staff in Kalamazoo, Kent, Genesee, and Wayne Counties; and
- (7) Courtroom observation in Kalamazoo, Kent, Genesee, and Wayne Counties. These four counties were chosen because they reflected a variety of practice models and demographics.

The courtroom observations and onsite interviews were conducted from December 1-5, 2008 by three teams consisting of staff attorneys and consultants from the ABA Center on the Law. SCAO staff arranged the onsite visits, and accompanied the teams to their assigned counties.

## Findings

**(1) Michigan places the burden of funding parent representation on its counties, without structural support from the state.** As a consequence, compensation for parent representation in child protection cases varies from county to county. Compensation models include flat fee contracts, hourly rates for specific hearings, hourly rates only for in-court appearances but not out-of-court work, reduced hourly rates for out-of-court advocacy, fixed rates for termination of parental rights (TPR) hearings, and low bid contracts for representing a certain number of parents during a calendar year.

**(2) The majority of parents' attorneys have the skills needed for in-court trial advocacy, are familiar with the key legal principles of the Adoption and Safe Families Act (ASFA) and corresponding Michigan statutes, and are attentive to the requirements of their local courts.** However, recognition of the ethical and practical requirements of representing parents in abuse and neglect proceedings varies considerably. Attorneys' attitudes about their ethical responsibilities to clients in terms of establishing a trusting and confidential attorney-client relationship, maintaining communication, and advocacy for clients' goals are inconsistent. It is not uncommon for attorneys to expect the parent client to initiate communication after being notified by the court of the attorney's appointment or after

the attorney has mailed a letter of introduction. As a consequence, hallway exchanges of information are accepted as a substitute for private office interviews, overlooking the inherent value of office consultation. Face-to-face consultation in the privacy of a law office allows not only for information exchange and an opportunity for direct questions and answers, but most important, for the establishment of a trusting relationship. The impact of the attorney-client relationship on a parent's investment in reunification, cooperation with services, and engagement in the case plan is universally recognized by Judicial Officers in interviews and discussions.

**(3) The fragility of current parent-attorney relationships is exacerbated by the routine use of substitute counsel.** In focus groups and surveys, parents reported coming to court without prior contact from their attorney, being represented by substitute counsel who appear to have little knowledge of their case, and most important, who have no relationship with them. Judicial Officers and many attorneys supported the parents' description of the impact of substitute counsel on their representation. Judicial Officers, although reluctant to be critical of specific attorneys with whom they have had long-standing relationships and with whom they were sympathetic (due to their high caseloads and inadequate compensation), acknowledged the use of substitute counsel is disruptive and often results in less than zealous representation of the parent. Although some Judicial Officers stated that use of substitute counsel from the same appointment panel or contract lessens the negative impact of substitutions, this caveat did not alleviate the concerns of parents.

**(4) For a variety of reasons not unique to Michigan, attorneys representing parents do not always advocate for their clients during the months or weeks between court appearances.** Although exceptions to this norm were noted during the assessment and some attorneys should be credited with exceptional advocacy in this area, the exceptions are few and scattered across the state. Like with trial preparation in most types of civil cases, attorneys must have out-of-court time to conduct their own investigations of allegations and defenses, investigate and prepare witnesses and expert witnesses, and generally conduct discovery. In child

protection, where evidence that directly impacts legal findings is gathered on an ongoing basis outside of the courtroom, out-of-court advocacy is critical. Depending on the facts of the case, zealous advocacy might require counsel or advocacy before, during, or after the following:

- meetings with DHS
- meetings with service providers
- meetings with school personnel/IEP meetings
- assessments
- supervised visitation, or
- mediation

Last minute reading of reports and telephone calls to social workers cannot substitute for participation, timely analysis, and obtaining feedback from the client who has first-hand knowledge of what happened at the meeting with the social worker, mental health assessment, visit with their children, etc.

In addition to the many critical events that happen outside the courtroom in a child protection case, attorneys need to have substantive knowledge in child protection. Parents' attorneys are responsible for insuring that case plans are appropriate, that parents receive the necessary services in a timely manner, and that they are supported in maintaining their relationship with their children. The use of expert witnesses, community providers, and community services as core components of the case against the parent requires that the parent's attorney be familiar with these individuals and ensure that the parent is receiving appropriate services and is actively participating. This out-of-court work is essential to guaranteeing that the client is successful in reunifying with his/her children. Unfortunately, data from this study show that most Michigan attorneys do little out-of-court advocacy.

**(5) Parents need to be treated with more respect, and need additional support in and out of the courtroom.** Parents in child protection cases are often underemployed, lack adequate housing, and need an array of services. They are facing, at the least, a temporary separation from their child[ren]. At the same time, they are involved in a court system that is often confusing and intimidating.

To help parents understand the child welfare system and learn to navigate it successfully to have the best chance of reunification, Wayne County has instituted a Parent Partner program in several

locations. This program pairs a parent new to the family courts with a mentor parent who has previously had a case in the court and been reunified with his or her child[ren]. These parent partners help the parent access services, communicate with others involved in the case, and generally lend moral support to the parent. Parents who have the benefit of a parent partner had a positive experience with the program. In particular they indicated the program helped them get their 'voice heard.' Parent partners work closely with parents' attorneys to improve communication with parents and help parents access services that the parents and attorneys agree are important.

**(6) Compensation is inadequate.** Compensation, by whatever model employed, is below the level paid for counsel who represent criminal defendants. This fact reflects as much on a failure to appreciate the complexity of this type of legal representation as on budgetary constraints. With a few exceptions, attorneys representing parents are not compensated for "out-of-court work," which greatly discourages the performance of the crucial out-of-court advocacy described in number (4) above.

## Recommendations

As addressed in more detail in the full report, Michigan should implement the following recommendations to improve the representation of parents in child protection cases.

### **(1) Statewide Administrative Structure.**

Michigan should adopt a statewide administrative structure to address parent representation. The three models below would address compensation, support systems, training, and oversight in some manner, but vary in their level of centralization.

**(a) Statewide Institutional System.** Like public defender systems in many states and legal aid offices in larger metropolitan areas, this model would primarily use salaried staff attorneys. This model would benefit from having in-house supervision and support staff such as investigators, social workers, and paralegals.

**(b) Office of Parent Representation.** This model relieves the counties of the administrative responsibilities for managing a panel of attorneys, but does not necessarily shift the financial responsibilities to the State. This model would include a limited number

of full-time staff to address systemic representation issues, but would primarily provide client representation with contracted attorneys. One example of this model and its impact on the quality of representation is Connecticut's Office of Chief Child Protection Attorney (CCPA), a statewide office overseeing representation for children and parents in child protection, custody, and support cases. With a small full-time staff (nine at last report), CCPA has achieved remarkable improvements in child welfare representation. Staffing in Michigan would have to be sufficient to accomplish the core responsibilities (for example, Connecticut is smaller than Michigan and has had an effective office with nine full-time staff members). Core responsibilities would include recruitment, screening, contracting, setting performance standards, accessing training, establishing a mentoring system, and regular auditing. Quality control would be an ongoing responsibility of the Office and would be accomplished through surveys, interviews, and court observation. Housing an Office of Parent Representation within an existing agency could reduce overhead costs. The Connecticut CCPA was first implemented as part of the Office of the Chief Public Defender, though it has become increasingly independent.

- (c) **Hybrid Model.** As discussed in the full report, a hybrid of the above two could be used. In Massachusetts, through the Committee for Public Counsel Services, representation is provided by panels of private court-appointed attorneys and by staff attorneys in seven metropolitan areas.

(2) **Survey Local Practices.** Either as part of the administrative structure's responsibilities or independently, for example, through the SCAO, Michigan should regularly survey local practices regarding compensation, screening, appointment, use of standards, and case management. By sharing this information on a regular basis, court administrators and county policy makers could compare local practices with other counties and incorporate features

that might improve their management of the attorney panel and the representation of parents.

(3) **Improve Training.** Michigan should improve its training requirements and delivery through the following:

- (a) **Mandatory Training.** Michigan should establish mandatory training and continuing legal education requirements for parents' attorneys that include specific requirements regarding training directly related to the representation of parents.
- (b) **Training Plan.** Michigan needs a multi-year training plan to increase the frequency of parents' attorney training. SCAO currently provides this training biannually in two locations across the state. Quarterly trainings offered in SCAO's four court administrative regions could attract more attorneys to participate. As with all SCAO trainings, this training should be posted on the SCAO website afterwards to allow other attorneys who could not participate in person to view the training at their convenience. The training could also be delivered via the web and/or in modules that would be available to local Bar Associations to include in their training calendar. Other strategies for promoting training should be created as part of this plan, for example training announcements could be sent via the listserv recommended in number (4).
- (c) **Multidisciplinary Training.** Michigan should regionalize multidisciplinary trainings that are offered to all attorneys, social workers, and service providers on legal and substantive topics, e.g., mental health services, behavioral health assessments, ICPC, bonding and attachment, family engagement, case planning, and substance abuse.

(4) **Parents' Attorney Listserv.** Michigan should assist with the establishment and maintenance of a listserv specifically for parents' attorneys.

(5) **Rules of Court.** Michigan should adopt Rules of Court that recognize the special challenges of representing parents and acknowledge the importance

of this practice area, with requirements comparable to those adopted for Lawyer-Guardians Ad Litem (LGALs), specifically regarding client contact.

**(6) Enhanced Judicial Attention.** Michigan should encourage enhanced judicial attention to the representation of parents.

**(7) Case Processing Protocols.** Michigan should establish case processing protocols or rules, which can be tracked, to assist courts in managing their caseloads in child protection matters.

**(8) Expand Parent Partner Program.** Michigan should expand the existing Wayne County Parent Partner program throughout the State and institutionalize the role the parent partner should play with respect to the parent's attorney.

**(9) Appointment of Counsel.** Michigan should establish a Rule of Court requiring appointment of counsel before the first court hearing for all parents, including nonrespondent parents. Michigan should consider appointing counsel before a protection petition is filed as a long-term goal.

**(10) Evaluation.** Michigan should evaluate the effect of improved representation on case outcomes over time. This evaluation would include first gathering baseline case data such as time frames, case type, outcomes, and information about the legal representation provided and periodic follow-up on new and original cases after planned improvements in parent representation have occurred.

## Conclusion

Michigan has an opportunity to make significant strides in improving the safety, permanency, and well-being of its children by restructuring how parents are represented in child protection proceedings. The appointment of legal counsel to parents who are indigent and cannot afford to retain private counsel is a statutorily guaranteed right under Michigan law. This right comes with the requirement that such representation be "competent." Improving the system by which attorneys are appointed to represent parents, the resources available for such attorneys, and the accountability to the client and the courts will not only improve the quality of parents' representation but the overall performance of the courts.

The significant improvements made in the representation of Michigan's children occurred by recognizing the importance of having comprehensive information about each child presented to the court at each hearing through the adoption of statutory requirements that LGALs conduct an independent investigation and meet with children before court hearings. See Michigan Comp. Laws § 712A.17d (2004). Elevating the representation of parents through a uniform statewide system that combines standards, appropriate compensation, ancillary support, and monitoring would make the promise of competent representation for parents a reality throughout Michigan, while improving courts' ability to make the best decisions for Michigan's children and families. ©

# Afraid to Speak Up: My Journey Through the Child Welfare System

by Nancy Colon

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*From the first day that the child welfare system came into my life, I felt confused, afraid to ask for help and alone, with no one to guide or support me. My case began five years ago. I got a call from Child Protective Services (CPS) in Detroit, asking me to come to a Team Decision Making meeting and to bring my five kids with me.*

At the meeting, the CPS workers told me that my husband had been accused of child abuse and charged with battery for abusing me. This meeting was to determine whether I'd failed to protect my children by allowing them to witness domestic violence. Sitting at the table with the CPS worker, her supervisor and a meeting facilitator, I felt very intimidated. I had no lawyer or advocate to explain what was going on.

## Punished for Telling

I was interviewed for two long hours about my life history, my kids and my marriage. I felt like I was on trial. I believed that the meeting was my only opportunity to get away from my husband's abuse, so I told the workers everything that had been going on in our family for the past two years.

I explained that I didn't leave my husband despite his violence because I had no family support and nowhere to run. Besides, abuse was normal in my life as a child. I witnessed abuse and more abuse. I was always told, "Cover up the bruises and keep walking, and don't tell anyone."

I thought that my husband would end up in jail and my life with my children would return to normal. But I think being honest only made my situation worse. The workers saw my weakness as neglect. In the end, they charged me with "failure to protect" and placed my children in foster care.

## I Lost Everything

After the meeting, my children were separated from me and from one another and placed in four different foster homes. I tried my best to make my children feel comfortable, but I will never forget the moment that I had to tell my oldest, "You have to stay with the nice lady and Mommy has to go somewhere else." It was two weeks before her 6<sup>th</sup> birthday. I was not sure when I would see her again. *My daughter was terrified.* She begged me not to go. But she already knew the reason why. She asked, "Is it because I told the lady that came to my school about Daddy?"

CPS told me I had to move to a shelter immediately. I didn't have a chance to get any of my belongings. I also had to call my boss and tell him that I was quitting so that my husband couldn't find me at work.

The worker drove me to my new home, a shelter in a city an hour away. All of the shelters in Detroit were full and the worker felt that it was best for me to be as far from my abuser as possible. There had recently been a few deaths related to domestic violence. I think the worker feared that my husband would hurt me and didn't want her name on the 5 o'clock news.

## All a Blur

My first night at the shelter I felt like a little kid hiding in the closet again. It was scary for me to see so many ladies with bruises and broken bones. I went to my bunk bed and cried until I had no more tears. In one day I had lost everything that mattered to me—my children, my job as a supervisor, my home and my dignity.

The CPS workers had told me that the shelter would help me find housing and employment and

start a new life. But at the shelter, they just told me I had 30 days. I felt lost.

The first court hearing was a blur. I met my attorney a few minutes before it started. He told me that the best thing to do was to admit to all the allegations. He said this would help me get the kids back sooner. So I did that, but later I came to believe that it only hurt my case.

After three weeks, the CPS worker gave me a copy of my treatment plan and asked me to sign it. It said I had to go to parenting classes, therapy and family therapy and find employment and housing. I didn't have an opportunity to give any input on what I thought might help my family or to go over it with my attorney.

### Determined to Reunite

At the TDM, the workers had told me that I would be able to receive services if I left everything behind and started a new life. But it was difficult finding services in a new place where I couldn't even find the McDonald's.

I started by looking in the yellow pages and calling different shelters and community agencies, but since I was from Detroit, everyone kept saying, "You're not a resident so we can't help." I was too afraid of messing up my case to contact my attorney or worker and ask for help. As time went by, I moved from shelter to shelter, trying to find work and start working on my treatment plan.

After a few months, I decided that it was impossible for me to start from scratch and I moved in with a friend in Detroit. I knew that returning to my community would be the only way that I would have a chance of completing my service plan. I knew what agencies to go to for help, and I knew that my church, school and former employer would support me.

For the first time in months, I felt that I could breathe a little bit more easily. I started working on my service plan right away. I went to my old job and explained what had happened and begged for a job. I also obtained a part-time position as a housekeeper, enrolled in a G.E.D program, and enrolled in therapy at a community mental health program.

I was so afraid of what my CPS worker would say once she found out that I had moved back to Detroit. I thought she would take it as a challenge and I would never see my kids again. But to my

surprise, she was OK with it and even gave me a referral to a parenting class.

### Afraid to Speak Up

Once I found a job and a house and was getting therapy and taking parenting classes, I thought my kids would come home. At every court date, I expected my children to be released to me. Finally I asked my attorney why they were still in foster care and he explained that I had to complete my treatment plan before the court would consider reunification.

My attorney was friendly and nice, and I thought he was a good lawyer because he took the time to answer some of my calls and meet with me before each hearing. But now I see that he did not help me understand my situation. I never knew what to expect from the next court hearing or why we kept returning to court. He also did not challenge the court or the child welfare agency in any way.

At times I wanted to speak up in court. My children told me that they were being abused in foster care, and I wanted the agency to move them to a new foster home. I believed that should have been a priority. But I didn't dare to ask too many questions. I didn't want to make my case more complicated and I was intimidated by the referee. My lawyer seemed intimidated, too. He stayed quiet in court.

### Together Again

After my children had been in care for 16 months, I completed my service plan. At around the same time, I was assigned a new worker who became my advocate. She had my children placed in a new foster home with foster parents that fell in love with my family and wanted to see us together again. They supported us emotionally, became my advocates and spent extra time with us as a family. Finally, my children came home. We were so happy and grateful to be together again.

Now my kids are doing great. One daughter is planning a trip to Nicaragua to help build a school. Another is part of a college preparatory program. My boys are doing well in school and talk all the time about how they want to become police officers. And my little one—well, that child thinks she runs the house.

Even so, I believe my children should not have had to go through a painful year of separation. My

attorney could have been much more aggressive in pushing the court to return my children to me. Or, if I'd had an attorney at the Team Decision-Making meeting, I could have gotten preventive services instead of having my children removed.

### Guiding Others

After I reunified with my children, I was able to become a Parent Partner, providing other parents with what I needed when my children were in the system: emotional support, resources and guidance. Now that I work with other parents, I'm sometimes thankful for my attorney, even though I believe he could have done so much more to communicate with me and teach me my rights.

One mom I worked with had an attorney who talked down to her. In the waiting room at the courthouse, he made comments about how bad she smelled and asked, "Do you even know how to read?" He humiliated her. Amazingly, he didn't think there was anything wrong with his behavior. He seemed surprised when the parent asked for a new attorney.

Another parent had an attorney who never believed anything she said. This mother's children were placed in kinship care and the aunt wanted to adopt the children, so every time we went to court, the aunt had a horror story to tell about the mother. The attorney would not ask if the horror stories were true. She'd just say, "Why would you do that? You're not getting your daughters back." That mom almost had her rights terminated until she asked to have a new attorney assigned to her case.

### The Extra Mile

I've also seen the kind of progress parents can make with a strong attorney. One dad had an attorney who went the extra mile for him. She made sure that the father understood the court process and his rights and that services were provided to him in Spanish.

The attorney always called the father a few days before the court hearing to review his progress and ask if he had questions. She arrived early to court and case conferences so she could sit with the parent and provide support and guidance. After court, she explained what steps to take next and encouraged him to call her if he had questions or concerns. It was a wonderful experience to see how this attorney advocated for her client.

### Proud to Help Parents

Now I am a Parent Advocate at the Detroit Center for Family Advocacy. Our mission is to keep kids out of foster care and reduce the number of children that are in care by providing legal assistance, support and resources to families.

Each family has a team – an attorney a social worker and myself, the parent advocate. Together we work with families to solve legal issues that put their children at risk of entering foster care or staying in the system. We help parents identify their needs, set goals and find support in their communities.

I am proud to sit with the parents and provide emotional support. I share my story and encourage parents to get help and to advocate for themselves so they don't end up in the position I was in. Through my work, I hope that they are no longer afraid to speak up. ☺

# Parent Representation in Child Welfare: A Child Advocate's Journey

by Tracy Green

The current American system of child “welfare” or child “protection” is inherently flawed. Its underlying premise is that children are “protected” and their “welfare” is promoted by governmental removal of these children from their own families and, then, placement of these children with strangers. There is, ostensibly, no acknowledgment that the very action of such removal and placement (not to mention the inevitable psychological and emotional harm associated with a prolonged foster care placement) of a child is, in and of itself, extremely harmful to that child. Indeed, studies have shown that children in foster care suffer disproportionately higher rates of physical, developmental, and mental health problems.<sup>1</sup>

Often the child who is placed in foster care not only loses his parents, extended family members, and friends, but, especially, her siblings, as well, as many children from one family are placed in separate homes. To suddenly uproot a child and separate him from everything he has ever known or loved is severely and profoundly traumatizing. To the child, it is much like suffering the death of multiple loved-ones, simultaneously. These children become the “walking wounded” of our society; they are disproportionately represented in the prison and homeless populations.<sup>2</sup> The damaging effects are irreparable; the child *never* truly recovers from them. This is so even where the placement of a child is in a loving and nurturing home; and this is so even where the home from where she has been removed is a bad one.

Yet, there is seldom a risk-benefit or cost-benefit analysis conducted to determine whether the certain and serious harm to be suffered by foster care placement is outweighed by the oftentimes purely speculative and usually less serious harm resulting from allowing a child to remain in the care of his family. Hence, the uprooting of children and their removal from their families should never occur *except*

in the most severe cases of abuse and neglect.

Said another way, the obligatory inquiry of the government should be whether foster care placement, in any particular case, is actually a “lesser evil” than maintaining the child within the family construct, despite the problems that exist within that family. The usual answer is “no.” Nevertheless, this critical question is seldom raised (let alone answered) because the fact that foster care *is* an evil, at all, lesser or otherwise, is not widely accepted.

The stated aims of the child welfare system are to protect children and preserve families. The system’s laws and policies, however, are fundamentally biased against parents in their application and practice. The bias is deeply rooted in our society’s disdain for the poor or ignorance regarding the affects of poverty.<sup>3</sup> This bias is so extreme, that it obfuscates the glaring harm that foster care imposes upon the very children the system seeks to protect. It is, therefore, through primarily the zealous, diligent, and effective advocacy of the parent’s attorney in child welfare proceedings that the negative consequences imposed on children by foster care can be combated and averted.

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I’ve always wanted to be an attorney --- well, at least since third grade, after abandoning my singing career aspirations. I took one of those oft-administered vocational assessments; the ones that help kids decide what careers they should pursue as adults. I tested squarely in the ‘helping professions’ category. ‘Lawyer’ was there, among other laudable pursuits.

The idea of becoming an attorney quickly appealed to me, having always had, even as a child, a strong sense of social justice and concern for others. So, since that day in third grade, I’ve had difficulty envisioning myself doing anything else. A determination of what *kind* of lawyer I would become, however, was something to which I had never given much

consideration, at first.

What I *did* consider was how I would pay for law school. So, while in undergraduate school, pursuing a degree in, first, psychology, and then, sociology, I ultimately determined that attaining a degree in social work might best facilitate my gainful employment while in law school. Hence, I pursued and attained a Bachelorate of Social Work degree from Wayne State University, with no particular zeal or passion. It was a means to an end.

While in undergrad, as life would have it, I started my family. It was then that I began to cultivate a keen awareness of the importance of family, to the individual and to society as a whole. Becoming a mother changed my whole perspective on life. I derived so much fulfillment and self-worth from my roles of wife and, especially, mother. It was motherhood that challenged my previously held priorities and values. I came to understand that nothing was more important than family.

As planned, after undergraduate studies, I obtained gainful employment, and I went to law school. My first “real” job was as a foster care case manager for a private agency state contractor in Detroit (where I grew up and still live and work). Little more than a year later, I obtained employment with the state, also, as a foster care case manager.

It was during my time working in foster care that my commitment to family preservation began; when I observed first-hand the ravages of poverty and social inequality that often characterize large urban communities. I was an eye-witness to the destruction of so many families involved in an unfair child welfare system, and this was a lesson for me in gratitude. If I had nothing else, I knew that I had my family --- *my* child. I could NOT imagine what it was like for parents to be without their children, and for those children to be without their parents. “What could be more devastating,” I thought, “than losing your family?”

As a foster care case manager, it was my job, among other things, to monitor the well-being of the children on my caseload during their stay in foster care. The evidence of psychological, emotional and social damage suffered by the majority of these children as a consequence of being away from their families<sup>4</sup> was pronounced (even from a lay person’s perspective), and it was irrefutable. I discovered that there were behaviors displayed by these children

that were generally characteristic of foster care children, and proof of the harm caused by foster care placement.

### Johnny’s Story

One of my favorite parts of the late Bernie Mac’s<sup>5</sup> stand-up act was when he would talk about the antics of his two young nieces and a nephew who were living with him as foster care children. Though he was not a stranger to them, he had not had a close relationship with them before they came from out of state to live with him. I was riveted while hearing him rehearse his experiences with those children.

Mac recounted how, among themselves, the children referred to him as simply “him” (as opposed to Uncle Bernie, Mr. Mac, or some other more personal moniker). He recalled one night overhearing the whisper of the youngest girl explaining to her older sister and brother that she was unable to filch some cookies from the kitchen as they had planned because Mac was downstairs. “Him downstairs,” the little one defended.

Though Mr. Mac told the story of the kids’ midnight cookie caper gone awry in his inimitably hilarious style, it was clear to me, based upon my experience working in foster care, that he was describing a real event. And *that* was not funny. I knew this because my involvement with many foster care children taught me that they often maintain a high degree of detachment from others. They are usually withdrawn and cheerless, frequently sullen. They will avoid interaction with their caregivers all together, and they will respond only reluctantly when engaged. Even then, however, they frequently will not refer to their new caregivers by any name that might suggest the existence of development of a bond or a healthy relationship between them and the caregiver, and often by no name at all.

So was the case with Johnny and his brothers.

Once, while visiting sibling clients in their foster care placement, I noticed the oldest child walk over to his foster parent, who was only about ten feet away from him at the time, to ask her a question. Rather than call her by name to get her attention, or by anything at all for that matter, he arose from his seat and walked over to make eye contact with her. After a few subsequent visits where I observed either that

child or one of his brothers similarly avoid a direct reference to the foster parent, I asked her, "What do Johnny<sup>6</sup> and his brothers call you?" After a brief pause, she replied, "Nothing."

The story of Johnny and his brothers is but one example of the damage caused by foster care to a child's sense of security and belonging. My observations of these children suggest that receiving their daily care from strangers provoke intense existing feelings of guilt and conflicting loyalty to their parents. Also, I saw that significant underlying feelings of betrayal and victimization impair the child's ability to trust others. These things contribute to the stagnation of the child's development of an ability to form healthy bonds with others - all resulting from unresolved issues of separation from and loss of their families. No matter how temporary, this separation and loss inevitably results, in varying degree, to an underdeveloped social consciousness in foster care children and, frequently, to juvenile delinquency, social maladjustment, mental illness, and substance abuse.<sup>7</sup>

### Tommy's Story

Another instance of confrontation with the grave reality of foster care for children involved a boy to whom I have since given the name Tommy.

I was waiting for my case to be called in the courtroom. The crowded courtroom had no available seats, so I decided to wait outside in the hallway, just beyond the door. As I waited for my case to be called over the intercom, I noticed Tommy, about twelve years old, standing in the hallway, close to me. He didn't appear to be accompanied by an adult. He appeared haggard, anxious and confused. He seemed to be waiting for something.

Soon after noticing the boy, I saw an older couple accompanied by another boy who looked to be about four or five years old. As the trio quickly approached the courtroom door, Tommy's face lit up with delight. He darted toward the younger boy to greet him, seeming completely unmindful of the older couple. "How are you? Are you eating?" Tommy anxiously asked the boy, as the older couple snatched the younger one and whisked him away, into the courtroom. It was clear to me that the couple did not want the younger boy to have any contact with the older one. And it was painfully obvious to

Tommy, too, who choked back tears as he entered the courtroom. I followed him.

As the next case was called, I quickly shot what I had hoped would be a reassuring smile over to Tommy, who was seated a few seats away from me in the spectator seats. He didn't seem to notice. He was preoccupied with the younger boy who, by then, I had deduced was his little brother. The older couple, I later learned, was the younger brother's paternal grandparents, but not Tommy's.

Soon after, a man walked into the courtroom. I instantly recognized him as Tommy's father, as the resemblance between the two of them was striking. Tommy notice his father approaching and hopefully looked in his direction. Yet, the man walked right past his son, ignoring him, and took a seat a few seats away from the boy. Tommy hung his head.

By now, the hearing had begun and the referee was entertaining appearances and making preliminary findings. This was not my case, but it was Tommy's case. "OK, the mother's not here ... Where's Timmy's father?" asked the referee. "Right here" another man enthusiastically declared who was seated at the hearing table with his lawyer and the other the parties. The older couple nodded their heads in support.

"OK. And Tommy's father - where is *he*?" the referee continued. "Well," replied Tommy's father, "His mother *said* I'm the father ... but she's a big *LIAR* and a *CRACKHEAD*. She's been with a lot of other guys, you know. Can I have a paternity test? ..." Realizing that referee didn't know that poor Tommy was in the courtroom (though the foster care worker and his L-GAL should have known), I raised and waived my hand frantically to get her attention.

But it was too late. The damage was done. Tommy's deep sobs broke the silence that had fallen upon the courtroom. Though his head hung low, concealing his face, his inconsolable anguish was unmistakable. He was totally demoralized. His life was in tatters. He had nothing --- no mother, no father, no little brother. No dignity. No compassion. Nothing.

I often wonder what became of Tommy --- and, even now, I fight back tears at the mere thought of him.

After witnessing the "Tommy debacle," and after seeing far too much of the abject devastation inflicted upon way too many children and their families by the imposition of government-imposed foster care, I resolved that merely being grateful for my own family

wasn't enough. The child "welfare" system, ironically, undermined the very welfare it sought to promote for children.

Thus, the system, *itself*, was unfair to children, and I knew it. The enforcement of its laws was disparately harsh upon poor families, and I knew it. The utter havoc the system wreaked upon families was irreversible, and *I* knew it.

"But what can *I* do about it?" I asked.

After six extremely *long* years of working as a foster care case manager, my indignation grew profound and burdensome. After encountering so many Johnnys and so many Tommys, I grew increasingly exasperated in the knowledge of the appalling disregard and indifference with which the families mired in the system were treated.

Moreover, as my involvement in the system continued, I came to realize that not only were the children in pain, but their parents were suffering, too. Unlike the children, though, who had many professionals and interested parties (parents, jurists, L-GALs, case managers, court appointed special advocates, foster parents, and the like) whose job it was to advocate for them, the parents had only their attorney to speak for them. And unlike the children, the parents were judged so harshly and treated like criminals. They were publically derided and dismissed, often by their own attorneys.

Still, the vast majority of these parents, being poor and undereducated, were *not* bad people at all. They were merely confronted with seemingly insurmountable challenges, the likes of which most of the privileged professionals – those who were making crucial decisions about these parents' families – had never imagined. The parents were people whose reality of everyday life was in stark contrast to that experienced by everyone else in the system who stood in judgment of them – the jurists, lawyers and caseworkers, courtroom staff members – everyone. They lived their lives with constant instability, fear, anxiety and hopelessness, with little or no resources or coping mechanisms. Nevertheless, what they had in common with everyone else was their love for their children. And their children loved, needed, and wanted desperately to be with them, almost without exception.

In spite of all of that, during child welfare proceedings, of everyone in the courtroom, it was the unfortunate parents, and they alone, who found

themselves in the nightmarish posture of not only being without their children, but of being embroiled in a system that they didn't understand and one that was controlled by forces that and people who were obviously hostile to them. All too often, even their own attorneys – the single seemingly reliable source of support and compassion in a courtroom full of detractors – were detached, disinterested and ill-prepared to zealously fight for the restoration of the family.

In that cold courtroom setting, the parents' feelings of confusion, fear and, most of all, utter helplessness were readily perceptible on their faces. Sadly, even their attorneys didn't seem to notice. As a mother, however, I could hear their silent desperate pleas, "*Somebody* please help me! Help my family, my children!" And I could hear their voiceless children crying, "Mommy, Daddy, I want to come home! *Please* take me home!"

"But what can *I* do about it?" I asked, again.

I resolved that I had to do something more than the scope of my role as a foster care case manager would allow. So, after graduating from Wayne State University Law School, (coincidentally, on Mother's Day 1995) I began practicing in the area of child welfare.

At first, I represented both parents and children as L-GAL. I soon discovered, though, that most of the zealous advocacy in child welfare proceedings was done by the L-GALs, ostensibly on behalf of the children. Nonetheless, the fundamental problem was that this "advocacy" was almost invariably adversarial to the parents.

The L-GALs, although usually well-intending, were rarely objective. They hardly ever advocated for the speedy return of their child clients to their families. In fact, oftentimes, more than the assistant attorney general or prosecuting attorney representing the state petitioners and caseworkers or their agents, these L-GALs served to thwart reunification at every turn of the case. They fought fervently on behalf of maintaining the children in foster care or, worse, for termination of parental rights – *even where the parents had addressed the issues that originally brought their children to the attention of the court, and even where no realistic prospect of adoption for the children existed.*

The jurists, more often than not, would defer to the L-GAL's arguments and recommendations. All the while, the parents' attorneys sat seemingly impotently

or indifferently, not even putting forth an effort to fight for the return of the children to their parents.

But, all of that passionate advocacy in opposition to the parents was misdirected, in my view. Keeping children from their parents and families in the name of child “welfare” seemed counterintuitive, contrary to what was in the best interest of the children. It just didn’t make sense. Too often I thought, “If only the parents had more passionate and meaningful advocacy, these children could go home!” After all, it was the parents’ attorneys who were in the best role, based upon their responsibility to advocate for what was truly in the best interests of the children, to impel the return of the children to their parents, siblings and extended families. Those poor voiceless children wanted and *needed* to go home! THAT is what was in their best interest.

If only the parents felt supported, encouraged, and respected, I thought ... if they thought someone believed in them and would stand by and with them ... if only they believed that someone cared, *then* they would find the inner strength to do whatever needs to be done to reunite with their children. If the parents were ardently represented, championed and motivated, the children would go home sooner.

Finally, I arrived at the inescapable conclusion that there is no meaningful child advocacy without parent advocacy. In fact, child advocacy that is in opposition to parents is a myth. I had an epiphany: parent advocacy *IS* child advocacy! Said another way, if one truly desired to help these foster care children, she needed to represent their parents.

At last, it occurred to me. *I* needed to represent the parents. I had to be a parents’ lawyer. I had found my niche: child welfare parents’ representation.

### A Parent’s Story

Currently, I have a client who has been working very hard for over a year toward reunification with her six children (ranging in age from 14 to two years old) who were in foster care. The family was initially brought to the attention of Wayne County Child Protective Services due to inadequate supervision. After investigation, severe environmental and educational neglect was revealed. Additionally, mental health issues pertaining to the eldest child as well as serious medical problems for one of the youngest children existed. The mother, a single parent,

obviously overwhelmed with her responsibilities, suffered from extremely low self-esteem, as she had been domestic violence victim. She was despondent. In my view, it *was* an instance where the appropriate employed cost-benefit analysis would call for temporary removal of the children.

I knew at the outset that prospects for reunification in this case were poor. I also knew, however, that if there was any realistic hope of reunification, it rested primarily upon the quality of representation that this parent would receive in the court’s child protection proceedings. I knew that this parent needed strong advocacy, motivation, encouragement and support that, as her attorney, I was uniquely positioned to give.

About seven months ago, after working tirelessly with the mother for the return of her children, the referee recommended (and it was subsequently ordered), over the adamant objection of the L-GAL, that three of the children be returned. Naturally, the mother was overjoyed, and so was I. I knew that it was only a matter of time before all of the children would be returned.

At the next dispositional review hearing, I came to court anticipating a recommendation for more of the children to be returned because the children who were already there were doing very well. And return of more children was, in fact, the recommendation of the caseworkers on the case. When the L-GAL announced that he needed a sidebar before the hearing, however, my heart sunk. “What in the world would be his objection, now?” I thought.

All of the parties’ attorneys assembled in the inner hallway, where such sidebar discussions usually occur. I held my breath as the L-GAL, in a clearly self-satisfied manner, identified the following issues in the mother’s home as a reason, NOT for the delay of return of additional children, but for the REMOVAL of the ones who had recently been returned home to the mother:

A vacant lot across the street with piles of debris

Chips of mortar missing from the porch of the rental property of the house (to which the mother had recently moved to improve her housing situation)

Reports from neighbors, whom he had interviewed, that gunshots had been heard on the mother’s block two days before.

WHAT???! I could not believe my ears. I was absolutely disgusted – and angry! I chastised the L-GAL for (among other things) his clear ignorance of the conditions in which poor families, not by choice, live in inner-cities. And, after going on the record, he didn't even dare to raise those same objections (though he predictably managed to find others to raise).

The children were not removed. And I am delighted to report that last month, two more were returned. Now, I actually see hope in the mother's eyes and pride on her frequently smiling face. I am certain that her children see it, too. Reportedly, they are thriving and happy to be home with their mother.

Now, almost 15 years after my decision to focus on parent advocacy, I am proud that I have played an important role in the restoration of countless families, all through zealous parent representation. The vast majority of my previous clients were reunited with their children, and their children have remained in their care. Moreover, my cases have rarely ended in permanent custody because I work so assiduously with and on behalf of the parents – encouraging them, motivating them, defending them – to achieve the speedy return of their children.

The work has not been easy, and I have been frustrated and angry (a lot). Still, the work has been indescribably rewarding, as there's nothing like telling a parent, "Your kids are coming home, today!" It is important and noble work. After all, what could be more important than family?

*I am a proud parents' lawyer in child welfare:  
Defender of the Defenseless. Champion of Children.  
Fighting the "good fight" on behalf of families.*

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A few Christmases ago, I received at my home a Christmas card in the mail from an anonymous sender. After the printed customary well-wishes, there was a message in script: "You probably don't remember me, but I remember you. I will never forget what you did for me and my family."

I have no idea who sent that card. And I very well might not have remembered the sender if the card had revealed his or her identity. But I have not forgotten that poignant and gratifying handwritten message. And I will *never* forget how important the work of parent representation in child welfare proceedings is to families – and, especially, to children. ☺

## Endnotes

- 1 American Academy of Pediatrics, Policy Statement, Pediatrics Vol. 106, No. 5, November 2000
- 2 A recent study has found that three of 10 of the nation's homeless are former foster children, and 12-18 months after leaving foster care, 27% of the males and 10% of the females had been incarcerated. Casey Family Programs National Center for Resource Family Support.
- 3 Because it is well-documented that minorities disproportionately represent the poor, this bias is racial in its affect.
- 4 Similar symptoms were sometimes observed in cases where the children were placed with relatives with whom they had an established pre-foster care relationship. In these cases, however, the symptoms differed greatly, in frequency and severity, from the symptoms that manifested in children who were in foster care with strangers.
- 5 Bernie Mac was one of my favorite "stand-up" comics. I was deeply saddened when he died prematurely a couple of years ago.
- 6 The child's name has been changed for the purpose of maintaining his privacy.
- 7 Trends Child Research Brief, Children In Foster Care: How Are They Fairing, Publication #2003-22. P. 2; Brand, A. E., & Brinich, P. M. (1999) Behavior Problems and Mental Health Contacts in Adopted, Foster Care, and Non-Adopted Children. Journal of Child Psychology and Psychiatry, 40(8), 1221-1229

# Reflections of a Juvenile Court Judge

by Hon. John Hohman, Monroe County Probate and Family Court Judge

A child protection court is a problem solving court. In most cases, the goal is to change the parents' behavior in order to solve the problem which caused the case to be filed. Attorneys for parents play a large and important role in that process. The ABA Center on Children and the Law recently assessed the quality of representation of parents in child protection proceedings on Michigan. The ABA report stressed that quality parent representation improves outcomes for children. Effective representation of parents results in the proper provision of services for families, less frequent removals, and increased permanent reunifications. Establishing client trust and facilitating effective communication are essential.

Effective representation of parents is a difficult task. Perhaps the most challenging aspect of that task is gaining the trust of the client. Generally speaking, respondent parents are distrustful of the entire child protection system. In many cases their children have been removed from their homes; they appear to be woefully outnumbered in the court room, and the judge who had ordered the removal of their children has appointed their attorney and will be authorizing payment for services. Hallway conversations between lawyers and caseworkers can lead a parent to believe that the players in the system are just too cozy. In order to be effective, the parent's attorney must convince the client that the attorney is completely loyal to the client's interests. If a parent does not trust his or her attorney, behavior change will be difficult, and highly unlikely.

It is imperative that a parent's attorney have a frank conversation with the parent at the onset of the case to explain the attorney's role, and to explain what to expect. The attorney must follow that conversation up with concrete action. The parent's attorney must establish a convenient and effective communication schedule with the client. An experienced attorney in our jurisdiction instructs his clients to call him each week at a specified time to discuss the client's progress and problems. If the client fails to follow up with that schedule, a letter is automatically generated and sent.

Regular communication helps to provide the attorney with a thorough knowledge of the parent's needs, limitations, strengths, and supports. This knowledge is crucial for the attorney to ensure that the service plan is an individualized plan. The most common failing of proposed service plans is the absence of services tailored to the individual's needs and limitations. There is a tendency to employ the cookie-cutter approach to services. A parent's attorney must make an independent evaluation of the barriers to reunification, and advocate for an individualized service plan that addresses those barriers.

Once the service plan had been adopted and approved by the court, the parent's attorney should fully explain to the client the importance of timely and effective participation in services. The attorney should facilitate a meeting with the parent and caseworker to ensure that the parent can contact the caseworker to ask questions or provide notice of scheduling conflicts.

The attorney must also advise the client that mere participation in services is not enough. MCR 3.975(F) and MCL 712.19 (6)(a) require the court to consider whether the parent has benefited from the services provided. The attorney should advise the client of this requirement, and be prepared to demonstrate to the court how the parent has benefited from the services.

The parent's attorney should encourage the client to engage in frequent and meaningful communications with the caseworker. The attorney should advise the client to report any problems of communication, such as an absence of return phone calls, "full" voicemail mailboxes, or unanswered emails. The parent's attorney should document these efforts and be prepared to present evidence of the same to the Court.

Finally, the parent's attorney should demonstrate to the court during the review hearings that the parent is effectively communicating with caseworker and the service providers. Even in the more difficult cases, judges see effective communication as a ray

of hope for eventual reunifications. A court will be more likely to order additional services if the parent is demonstrating an ability and willingness to effectively communicate.

Child protective proceedings are exercises in problems solving. Meaningful and regular

communications among all participants is absolutely necessary to effectively address the problems that need to be solved. Attorneys for parents should recognize the limitations of their client's skills in communication and construct pathways to overcome those limitations. ©

## *The Michigan Child Welfare Law Journal* Call for Papers

The editorial board of *The Michigan Child Welfare Law Journal* invites manuscripts regarding current issues in the field of child welfare. The *Journal* takes an interdisciplinary approach to child welfare, as broadly defined to encompass those areas of law that directly affect the interests of children. The editorial board's goal is to ensure that the *Journal* is of interest and value to all professionals working in the field of child welfare, including social workers, attorneys, psychologists, and medical professionals. The *Journal's* content focuses on practice issues and the editorial board especially encourages contributions from active practitioners in the field of child welfare. All submissions must include a discussion of practice implications for legal practitioners.

The main text of the manuscripts must not exceed 20 double-spaced pages (approximately 5000 words). The deadline for submission is March 1, 2010. Manuscripts should be submitted electronically to [kozakiew@msu.edu](mailto:kozakiew@msu.edu). Inquiries should be directed to:

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# Thanks, Mike

by Kenneth L. Tacoma

Editor's Note: This article originally appeared in the November 2007 *Michigan Bar Journal*.

Judges are hidebound beasts. I look around the various courts in which I have spent the majority of my professional life, approaching 30 years, and I see some practices with no basis in statute or court rule that sages who have been here even longer than I tell me were instituted in the 60s.<sup>1</sup> And so it was that when I became a judge, I, for the most part, adopted the practices of my predecessor. One of these practices was to hold pretrial conferences in the judge's chambers, off the record, in all kinds of cases, including child abuse and neglect cases. That's just the way it had been done, not only in this county, but in all the counties where I had practiced generally. And it was in this setting, thanks to a perceptive and courageous defense attorney named Mike, that I received a valuable lesson that helped shape and redefine procedures in my court in this narrow area and my view of fundamental fairness, due process of law, and judicial conduct generally.

The story takes place in 1994 in a child protection case in which both parents had been summoned into court. Mike filed his formal appearance on behalf of the father of the children; the children and their mother had court-appointed attorneys. On the day set for a pretrial conference, the attorneys were all invited into the judge's chambers, as had been the practice since before time began. The lawyer for the children;<sup>2</sup> the lawyer for the mother; the assistant prosecuting attorney, Mike; and the Department of Social Services<sup>3</sup> caseworker all entered and took a seat.

Mike looked at the caseworker and said: "What's he doing here?"

Thinking that Mike had failed to recognize him, the caseworker replied: "I'm \_\_\_\_\_, and it's my case."

This brought the following responses from Mike: "I know who you are," and then to the assistant prosecuting attorney, "Unless he goes, I want my client in here."

The assistant prosecuting attorney, caught completely off-guard and not used to having protocol questioned, tried to intercede: "He's here to help me

with the details of the case—he's more familiar with it than I am."

This left him wide open for Mike's next shot: "I know my case without having my client here; you should do your homework."

At this point the caseworker, who was no shrinking violet and also had a bit of a temper, jumped up and said, "I'm not going to be kicked out of a pretrial conference on my own case!"

The rookie judge (me), fearing fisticuffs were about to break out, finally interjected this weak-kneed contribution: "Let's all sit down and calm down."

Remarkably, the antagonists did so, and after a few minutes discussion, I did ask the caseworker to leave—an insult for which he never forgave Mike or me.

After the conference, I reflected on what had happened, and it came as a complete shock to me how entirely right Mike was. I thought of all the cases in which I had participated in my various professional roles up to that point—as a public defender, retained counsel, prosecuting attorney, and now judge—and had an epiphany. Look at this through the eyes of the parent accused of child abuse: Your lawyer gathers with the other lawyers. They go behind closed doors with the judge. Sometimes the social worker who took your child away goes in; sometimes it's the social worker that has given you a list of 15 things to do and meetings to attend. Then a half hour later, your lawyer comes out and tells you that they have decided what is best for you and your child, and now all we have to do is go put it on the record. Especially when your lawyer is a public defender who you know is being paid (poorly) by the state, is it any wonder that you feel the fix is in? Is it any wonder that you think that the judge is just another bureaucrat (the Big Cheese Bureaucrat) who just enforces what the social workers say? Do you have the backbone to say "No" to all these important people? And is the perception improved other than at the margin when the patent impropriety of having the caseworker, clearly a party and witness, is removed?

Is not the taint of the “dirty deal done behind closed doors” still overwhelming?

That marked the last pretrial conference I held in chambers, and, for that matter, the last conference in any other kind of proceeding that was not held on the record, in open court. I have heard all the arguments about the utility of “in-chambers” practice and find none of them persuasive. In fact, when closely examined, they actually reinforce my opinion that nothing in a legal proceeding should take place other than in open court, on the record. Take, for example, the argument I have frequently heard that the lawyers like this practice because they can have an open and frank discussion about the case. Fine, let them do it in one of their offices, not in my chambers where they can try to slip in poisonous and prejudicial comments that would be clearly inadmissible in a formal hearing. And, even worse, I remember some of the derogatory things some lawyers would say about their own clients in those conferences. Or the argument that the lawyers can get some “guidance” on how to proceed from the judge. Why shouldn’t their clients be privy to the “guidance” in open court? Also, from the judge’s point of view, this is very dangerous. How do you know how the lawyer will “spin” your comments to his or her client?

Judges, and the lawyers who are officers of the court, must never forget that the adversary system works only because most litigants accept it as a contest that is presided over by a totally impartial judge. The perception that the judge is somehow outside and above the fray is absolutely essential to the credibility of the system. It is especially necessary in cases in which the litigants are unsophisticated, poor, and vulnerable, because they certainly can’t be expected to stand up to the system and their own lawyers when they feel they are being treated unfairly. This is also why I get very nervous when I see fawning puff pieces written about judges who are there “to help people.” The best help a judge can extend is to try to ensure that the structure is in place for the advocates do their jobs well, that the process is transparent, and that the judge is completely fair and impartial in applying the law, both in perception and in reality. Helping one side or the other should never be part of the judge’s job description.

What is even more important, in my opinion, is that the perception and reality of impartiality is the judiciary’s last fig leaf of legitimacy in our culture. No one seriously accepts the claim that judges are nonpolitical anymore. At both the state and federal level, almost every appointment or election of a judge now drips with political disputes, often every bit as nasty, venomous, and destructive in tone as in the selection of leaders in the legislative and executive branches. Further, since the triumph of legal positivism and the collapse of any claim to a connection between the law and moral philosophy, judges cannot claim any basis for their decisions other than what the positive law provides, augmented from time to time with the ephemeral claims of “social policy” based on the quicksand of prevailing current popular opinion. In the last 20 years, I have heard only a handful of arguments based on some higher claim, and from what I hear, courses in jurisprudence are hardly taught in law schools anymore. Finally, even a cursory reading of a randomly selected current appellate opinion and a comparison of it with a similarly selected opinion written 75 years ago belies the idea that the legal profession is a high intellectual exercise. Opinions are now almost without exception dry, mechanical tomes about the application of sentencing or other guidelines, three-pronged tests, the parsing of the meaning of words using the most recent incarnation of Webster’s, or picayune procedural points. All these reasons lead me to worry that if the perception is lost that the judge is at least impartial in the particular case, the emperor will be left with no clothes.<sup>4</sup> And so, belatedly, I extend this paean to an excellent attorney who probably never intended or realized that he was playing an important part in the education of a young judge. Thanks, Mike. ☺

*Author’s note: In a sad and poignant irony, I wrote this article in July 2007, and I learned in August 2007 that the subject of my story, Michael P. Matthews, Esq., of Big Rapids, Michigan, had died on August 19, 2007. His life was tragically cut short and our profession robbed of a gallant advocate by sudden, aggressive illnesses, which took him in a very short time at the age of 56.*

*of a gallant advocate by sudden, aggressive illnesses, which took him in a very short time at the age of 56. Mike had developed an active and well-regarded practice concentrating in criminal defense work over the years following his admission to the Bar in 1982.*

### About the Author

*Kenneth L. Tacoma is the Wexford County Probate Judge and the presiding judge of the Family Division of the 28th Circuit Court. He graduated cum laude from the Indiana University School of Law. He is admitted to the Michigan, Indiana, and federal bars, and is involved in several professional organizations, including membership on the Standing Committee on Professional and Judicial Ethics of the State Bar of Michigan.*

### Endnotes

1. As in the 1960s, for the ever-growing number of our professional colleagues who are too young to remember the Age of Aquarius.
2. In 1994, MCR 5.965(B)(2) required the appointment of an attorney for the child, unlike the current lawyer/guardian-ad-litem requirement of MCR 3.915(B)(2)(a).
3. The predecessor to the Family Independence Agency, which in turn became the Department of Human Services.
4. As noted in the debates leading to the adoption of the United States Constitution and subsequently from time to time, the judiciary, possessing the power of neither the purse nor the sword, is the least dangerous branch of government. See, e.g., Hamilton, Federalist No. 78. It follows from that, however, that the courts must guard their legitimacy carefully, lest those who do have the power of the purse and the sword no longer accept and enforce the courts' edicts.

# Representing Parents with Disabilities in Child Protection Proceedings

by Joshua B. Kay, JD, PhD

## Introduction

The number of parents with a disability – physical, cognitive, or psychiatric<sup>1</sup> – is substantial. By one national estimate, 8.4 million parents with disabilities have children under 18 living at home.<sup>2</sup> Another estimate is that there are over 10 million families with a disabled parent and children living in the home.<sup>3</sup> Child welfare issues have become a significant concern to the disability community, particularly for people with cognitive or psychiatric disabilities, because they are disproportionately involved in the child welfare system and, once involved, they are far more likely than nondisabled parents to have their parental rights terminated.<sup>4</sup>

The child welfare system is never easy for a parent to navigate, and parents with disabilities face particular and serious challenges at all stages of a child protection proceeding. These challenges may include bias on the part of Child Protective Services (CPS) workers, a lack of appropriate family preservation and reunification services, and inadequate legal representation. Courts may have a limited understanding of disability issues, and large dockets may interfere with the ability of a court to make the kind of inquiry needed to determine what a parent with a disability needs in order to be successful in a case.

This paper first offers an overview of the particular challenges faced by parents with disabilities in child welfare matters. I then discuss some specific legal requirements, including provisions of the Americans with Disabilities Act (ADA),<sup>5</sup> the Michigan Juvenile Code,<sup>6</sup> and case law. Finally, I will describe areas of advocacy that are especially important in child welfare cases involving a parent with a disability. These areas include application of the ADA to family preservation and reunification services and how and when to bring claims under the ADA in these cases. I will also make suggestions about dealing with expert witnesses, as

their testimony is often a critical part of the evidence against a parent with disabilities. Improvements in legal practice are crucial to achieve: not only are parental rights at stake, but the well-being of children hangs in the balance. It is a mistake to assume that children are somehow less attached to parents who have disabilities; just like in other families, these children generally will be best served within their family of origin if at all possible.

## Parents with Disabilities and the Child Welfare System

### *Scope of the Problem*

The percentage of people with disabilities involved in child welfare matters appears to be greater than the percentage of people with disabilities in the population.<sup>7</sup> Disproportional involvement appears especially problematic in parents with cognitive disabilities, although parents with psychiatric disabilities are also overrepresented in child protection cases. One researcher asserts that parents with cognitive disabilities are singled out more than any other group as being at risk of child maltreatment, usually because of actual or potential neglect, as opposed to abuse.<sup>8</sup> State intervention into families headed by cognitively disabled parents is more frequent and severe than in families that are similarly situated demographically but not headed by cognitively disabled parents.<sup>9</sup> The reasons for this include the fact that many parents with cognitive disability are more likely to be receiving state services and thus be under scrutiny.<sup>10</sup> People with cognitive disabilities have frequent contact with professionals who often end up being the source of a child protection referral.<sup>11</sup> These sources have considerable credibility with CPS, so there is likely to be intervention in response to a report.<sup>12</sup> Similar

issues apply to parents with psychiatric disability. For example, among mentally ill women, it is estimated that 40-75% lose custody to one or more of their children, a range of rates that is substantially higher than for women without mental illness.<sup>13</sup>

#### *Poverty and Close Scrutiny by Service Providers*

Poverty plays a significant role in bringing parents with disabilities into contact with service providers who may end up being the source of a CPS referral, and poverty itself is the most consistent characteristic in families in which child neglect is found.<sup>14</sup> One quarter of families with a disabled parent live below the official poverty level, making them twice as likely as other families to be living in poverty.<sup>15</sup> Unlike people with the financial resources to buy services privately, people living in poverty are more likely to come to the attention of the state by accessing public assistance.<sup>16</sup> A reliance on the public system of care carries risks, including that parenting is subjected to close scrutiny by service providers, who usually are mandated reporters of child abuse and neglect and may have close ties to – and a great deal of credibility with – CPS.<sup>17</sup> In cases of cognitive or psychiatric disability, parents must turn to Community Mental Health agencies for their services. For these parents, the combination of close scrutiny and negative assumptions about their parental fitness may be devastating. Not only are these parents over-represented in the child protection system, but their cases are more likely than others to result in termination of parental rights.<sup>18</sup>

#### *Biased Assumptions*

CPS workers may have set beliefs about people with various disabilities or lack expertise in working with them. For example, the widespread belief that people with psychiatric conditions are dangerous may motivate CPS workers to treat them harshly.<sup>19</sup> Based on such negative stereotypes, CPS workers may focus on developing cases for termination rather than providing adequate services.<sup>20</sup> Yet research suggests that most parents with psychiatric disability can provide appropriate parenting for their children with proper treatment and support.<sup>21</sup>

Parents with cognitive disabilities face similar and additional challenges. These parents may be

confronted with assumptions that they are unable to learn how to provide adequate care for their children or that their disability is set in stone and thus change is impossible.<sup>22</sup> Once a child is removed, the stereotype of cognitive disability as immutable and irremediable may be applied so that it is seen as an “irremovable barrier to child care.”<sup>23</sup> Thus, parents with cognitive disability are more likely to face eventual termination of their parental rights.<sup>24</sup>

Thanks to assumptions that cognitively and psychiatrically disabled parents are unfit and will not benefit from services, such a disability serves as a “dual liability,” first prompting intervention and then motivating the social service agency to deny the parent the opportunity to regain custody.<sup>25</sup> While discussed less in this article, the same may be true for parents with physical disabilities, especially if they require substantial assistance to care for their children and lack such resources either financially or within the family: “The discriminatory belief that physically disabled parents can never be normal parents because of their physical limitations underlies the courts’ focus on physical limitations and unwillingness to address the natural, logical solution: better support services.”<sup>26</sup>

#### *The Lack of Appropriate Family Services*

Child welfare agencies generally must make “reasonable” efforts to prevent removal or reunify a family.<sup>27</sup> These efforts take the form of services offered to the family. Case service plans may fail to adequately address and reasonably accommodate a parent’s disability, making it very difficult for a parent to regain custody of the children and demonstrate improved parenting.<sup>28</sup> For example, case plans may be “one size fits all” with little consideration of individual needs or circumstances. One of the requirements in many case plans is that a parent obtain and keep a job, which is difficult in the face of discrimination.<sup>29</sup> If mental health services are needed, which is frequently the case, people who rely on the public care system often face waiting lists, a particularly difficult problem given the short time-frames allowed in child welfare cases.<sup>30</sup> Even once a person receives services, the quality is often low, slowing any improvement.<sup>31</sup> Services often are structured as brief interventions, even if more intensive, longer-term intervention is required.<sup>32</sup> In addition to counseling, many families need concrete services, like financial assistance,

housing, medical care, food, transportation, and help getting a job or public assistance.<sup>33</sup> Concrete services are directly helpful and may also lessen immediate crises so that other services, like counseling and other therapies, have a chance to be effective.<sup>34</sup> To put together an appropriate package of services, rigorous assessment and prioritization are needed at intake, followed by comprehensive case reviews while the case is open.<sup>35</sup> It is incumbent on advocates to press for more appropriate, effective packages of family services.

As an example of effective services, a leading researcher in the field developed successful home-based interventions to address childrearing deficiencies in parents with cognitive disabilities.<sup>36</sup> He found that weekly training visits of 1-2 hours using techniques like simplified instructions, task analysis, pictorial prompts, modeling, feedback, role-playing, and positive reinforcement were effective to enhance child-care skills, and the gains were maintained by the experimental group and subsequently replicated in what had been a control group earlier in the study.<sup>37</sup> The most striking result is that 82% of the parents who had a previous child had lost parental rights to that child, but after the training, only 19% lost their rights to the target child, and those parents had left the program early and against the advice of the researchers.<sup>38</sup> While in-home programming may not be feasible in all cases, several elements of this project could be implemented, including small-group or one-on-one work, simplified instructions, use of modeling and visual cues, etc. Some agency programs, such as Families First,<sup>39</sup> do provide in-home programming and could perhaps be more easily adapted for parents with disabilities, although their short-term nature may be a barrier to success. Often, it is the timeframe of a service, rather than the nature or method of a service, that is a barrier for parents with disabilities. That barrier can be targeted by attorneys to make sure their clients' disabilities are accommodated.

### *Summary*

It is critical that the abilities and needs of parents with disabilities be better understood and respected by the child welfare system. These parents are at relatively high risk for child welfare involvement, and the combination of biased assumptions and inadequate family preservation and reunification services increases the threat of eventual termination of parental rights.

The costs of unnecessary termination of parental rights – financial and otherwise – are tremendous in the form of foster care expenses and a devastating emotional toll on parents and children alike. Where appropriate services can lead to a different result, preserving and even strengthening families, they must be provided. Vigorous advocacy can lead to the provision of more appropriate, targeted, effective services to reunify families. The legal framework for such advocacy is in place, and attorneys for parents must bring it to bear in its entirety to give their clients a full, fair opportunity to be reunified with their children.

### The Applicable Legal Framework

#### *Reasonable Efforts Are Required by Law.*

In most child welfare cases, the agency must make “reasonable efforts” to prevent removal of a child from a parent’s care or to reunify a family.<sup>40</sup> This requirements mirrors federal law so that Michigan is eligible for significant federal financial assistance to support child welfare programs.<sup>41</sup> A “case plan” must be developed that addresses the needs of parents and child to improve the conditions in the home and facilitate return of the child to the home.<sup>42</sup> The Michigan Supreme Court recently discussed these requirements and their importance at length in a termination of parental rights case.<sup>43</sup> The Supreme Court noted that if the state fails to provide to the family the services deemed necessary for reunification, a court is not required to order that the agency seek termination of parental rights, even if the case has exceeded statutory time frames, which would usually mandate that the court make such an order.<sup>44</sup> This case is not just important for its substance but also for putting lower courts and child welfare agencies on notice that the reasonable efforts requirement must be taken seriously, and if it is not, termination of parental rights may be improper. As discussed below, required accommodations under the ADA have been linked by courts to the reasonable efforts requirement.

#### *The Americans with Disabilities Act Applies in Child Welfare Cases.*

Services to prevent removal or reunify a family must comply with the Americans with Disabilities

Act of 1990.<sup>45</sup> Title II of the ADA says “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>46</sup> To prove a claim under the ADA, a parent must show that an agency is a public entity, that the parent is a qualified individual with a disability, and that the parent has been subjected to discrimination on the basis of their disability by the agency.<sup>47</sup>

The Michigan Court of Appeals decided in 2000 that the ADA cannot be raised as a defense in termination of parental rights proceedings.<sup>48</sup> The court agreed with rulings in several other states that “termination proceedings are not ‘services, programs or activities’ under the ADA[.]”<sup>49</sup> However, the court also agreed with numerous other courts that an ADA claim may be brought when family services are so inadequate that they discriminate against parents with disabilities.<sup>50</sup> Such a claim does not attack the termination of parental rights directly, but rather targets the agency’s provision of inadequate services and seeks an injunction to provide appropriate services. The court found the reasonable accommodation requirement under the ADA to be consistent with the reasonable efforts requirement under state law.<sup>51</sup> Specifically, if the agency does not make reasonable accommodations, the court cannot find that reasonable efforts were made to reunite the family.<sup>52</sup>

Just what sort of accommodation is reasonable is unclear, although *Terry* declares that the ADA does not require the provision of full-time, live-in assistance,<sup>53</sup> and a parent must be able to meet the children’s basic needs regardless of disability.<sup>54</sup> The ADA “may require services different from or in addition to those provided to nondisabled . . . parents.”<sup>55</sup> There is an open question of whether the ADA would require completely new services to be created by the agency.<sup>56</sup> Rather, the ADA may only require that reasonable modifications be made to currently available services.<sup>57</sup> ADA claims generally will relate to the specific services themselves or the duration of service provision.<sup>58</sup> Services at issue may include individual assessment and reunification programs for parents when children are removed from their custody.<sup>59</sup>

In *Terry*, the court held that any ADA-based claims that reasonable services were not provided must be made in a timely manner, and it is far too late to raise such claims for the first time at a termination proceeding.<sup>60</sup> Specifically, the court decided that a parent should claim an ADA violation “either when a service plan is adopted or soon afterward.”<sup>61</sup> It is not clear how soon is soon enough. The court does note that a claim should be brought “if a parent believes that the [agency] is unreasonably refusing to accommodate a disability....”<sup>62</sup> Thus, it seems that once the ADA violation is or should reasonably be apparent, the claim should be raised. By implication, it is critical that parents tell the agency about their disability as soon as possible and request accommodations accordingly so that any ADA issues can be raised early in the case. If a parent waits too long, the only remedy is to file a separate action for disability discrimination,<sup>63</sup> which would not be likely to directly affect the child protection matter.

A recent, unpublished Michigan Court of Appeals ruling illustrates the application of the ADA to a case where the disability issue was raised in a timely manner but essentially ignored by the agency and the trial court, and the trial court eventually terminated parental rights.<sup>64</sup> In this case involving a mother with likely cognitive and psychiatric disabilities, the appellate court overturned the termination of parental rights.<sup>65</sup> As required under *Terry*, the parent had requested additional or modified services under the ADA early in the case.<sup>66</sup> The court recognized that a failure to reasonably accommodate a disability is tantamount to a failure to make reasonable efforts.<sup>67</sup> In addition, the trial court judge had not determined whether the parent had a disability under the ADA, and the Court of Appeals required that this determination be made.<sup>68</sup> The court remanded the case so that evidence could be taken about whether the parent was indeed disabled, and if she was found to be disabled, then appropriate services had to be provided.<sup>69</sup> This ruling makes it clear that addressing disability issues up front is crucial for all parties: parent, child, and agency. The parent cannot afford to waive the ADA claim by failing to raise disability issues; the agency cannot afford to ignore the parent’s disability; and the child cannot afford the delay that may ensue if disability issues are not addressed by the agency or trial court.

Finally, the requirement that any disability issues be raised in a timely manner prompts additional questions about what “timely” means. For example, what happens in a case where a parent promptly told the agency about her disability, and the service plan appeared on its face to reasonably accommodate the disability, but after a few months of service provision, the plan as it was enacted actually failed to accommodate the disability? With the emphasis on timing in *Terry*, the court may say that the parent is too late making the ADA claim. Yet if it can be shown that the parent could only have come to the belief that the agency was in violation of the ADA after several months, the claim should still be valid.

## Effective Advocacy for Parents with Disabilities

### *Client Counseling and Professional Knowledge*

Rothstein and Rothstein, in their treatise on disabilities and the law, suggest that counsel for people with disabilities make sure to ask the client what special accommodations may be needed in various settings, including court, ask about the disability itself and what kinds of impact the disability might have on the issue at hand, and maintain contacts in fields like psychology, social work, and rehabilitation counseling.<sup>70</sup> Clients may well have considerable expertise about their disability, how it affects them in different contexts, how it might or might not affect parenting, and how services from counseling to parenting classes might best be provided to them. They also can often provide detailed information about the child, the parent-child relationship, family and other supports that are or can be put in place, any services that they are already receiving, and whether any allegations against them that reference disability are accurately tied into their actual parenting skills or home situation. For clients with cognitive disabilities, counsel may need to take longer to explain the legal situation and may need to check in with the client more to make sure that the client understands the situation.

Rothstein and Rothstein stress that it is helpful for the attorney to have clinical knowledge, such as a working understanding of mental health issues and services, medical services, or social services and rehabilitation.<sup>71</sup> This is not to suggest that all attorneys for parents with disabilities should have

advanced degrees in other, relevant disciplines. Rather, it is critical for the attorney to take the time to learn basic information about mental health treatment, social work practice with parents with disabilities, and issues like Social Security, other public benefits, and common barriers in areas such as housing or employment. Attorneys should also work closely with other professionals, such as social service providers, and understand their perspective.<sup>72</sup>

With such background knowledge, attorneys can better identify clients with disabilities. Based on statistics cited in this article, it is clear that parents with disabilities make up a disproportionate share of caseloads, yet it is likely that the presence of disability is under-identified. Armed with knowledge, attorneys also can more effectively examine case plans put forward by the agency so as to ensure that they are sufficiently individualized, concrete, behavior-centered, and include appropriate measures for evaluating the outcome.<sup>73</sup> Attorneys can also evaluate the materials given to parents by the agency and their ability to understand them.<sup>74</sup> Finally, a good knowledge base will make it easier for counsel to know when and how to raise ADA claims in child welfare cases.

### *How to Raise an ADA Claim*

Parents’ attorneys need to understand how to raise an ADA claim. The threshold for ADA applicability is whether the claimant has a disability. This question was a central and protracted focus of litigation in many ADA cases, but the ADA Amendments Act of 2008<sup>75</sup> has clarified the definition of disability and intent of the ADA, which should make this question easier for courts to answer. Disability is defined as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”<sup>76</sup> The definition of disability is to “be construed in favor of broad coverage.”<sup>77</sup> The ADA Amendments Act of 2008 addresses the term “substantially limits,” declaring that the U.S. Supreme Court previously interpreted that term under the ADA in a manner that overly restricted the scope of protection and that the focus should be on whether covered entities have complied with their obligations, not on whether a person has a disability.<sup>78</sup> The ADA

includes a definition of “major life activities” that covers many physical and cognitive tasks and is not exclusive.<sup>79</sup> These activities include but are not limited to learning, reading, concentrating, thinking, communicating, and working.<sup>80</sup> Therefore, tasks that may well be impaired for parents with disabilities are included under the ADA. Difficulty with these tasks may impede a parent’s ability to benefit from standard services provided by the agency, such as parenting classes.

For many parents, there may be little diagnostic information documenting their disability. While the ADA Amendments Act of 2008 makes it easier to qualify as disabled, evidence of disability is nevertheless desirable. Evidence might include medical and mental health records, Social Security determinations, and educational records. Even where parents lack hard evidence of their disability, agency workers may make verbal or written statements that indicate that they regard the parent as having a disability. For example, a petition may indicate that the CPS worker believes that the parent has a mental illness that interferes with parenting, is intellectually impaired in a manner that affects parenting, or lacks capacity to parent effectively or to learn new parenting skills. Oral or written statements by workers – including court reports – may also indicate doubts about capacity or concerns about mental illness. Therefore, the third meaning of disability in the ADA – “being regarded as having such an impairment”<sup>81</sup> – may apply. People are regarded as disabled and thus protected by the ADA if (1) they have an impairment that does not actually substantially limit a major life activity but are treated by a public entity as being substantially limited in a major life activity; (2) they have an impairment that substantially limits a major life activity because of the attitudes of others toward the impairment; (3) or they are simply treated by a public entity as having an impairment that substantially limits a major life activity.<sup>82</sup>

Protection under the ADA applies to a “qualified individual with a disability,” which means a person who, “with or without reasonable modifications,” “meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”<sup>83</sup> Parents in most child welfare matters must be given services to preserve or reunify the family, so a parent with a disability is a qualified

individual under the law, since the parent is eligible for the services regardless of any modifications. Their eligibility for the service hinges on the fact of their parenthood, not their disability or associated accommodations. It is worth noting, however, that in cases where the allegations are such that a parent would not be entitled to family preservation or reunification services, and the agency is indeed denying services on those grounds, having a disability does not entitle the parent to services.

Finally, the agency in a child welfare action is clearly a “public entity” under the ADA, which includes in its definition of “public entity” any department of a state or local government.<sup>84</sup> Therefore, this is not a portion of an ADA claim that is likely to be litigated in the child welfare context.

In sum, a parent may make an ADA claim regarding services provided by the agency by demonstrating that he or she is a qualified person with a disability who requires a reasonable accommodation of that disability by a public entity. This claim must be raised as early in the case as possible, cannot first be raised on appeal, and cannot be used directly as a defense to termination of parental rights. Nevertheless, an ADA claim can result in reversal of a termination of parental rights when the parent shows that despite a timely request for accommodations, the trial court failed to address the disability issue or required accommodations were not given, and thus reasonable efforts were not made.<sup>85</sup> When raising an ADA claim, parent’s counsel must be prepared to argue that the parent is disabled, articulate why the services offered do not reasonably accommodate the disability, and suggest to the court and agency how the disability may be reasonably accommodated through more appropriately tailored services. Often, neither the agency nor the court will have expertise in such matters, so it is incumbent on counsel to lay out options for accommodations. A combination of knowledge, connections with knowledgeable professionals, and, most importantly, close consultation with the client about the disability and the parent-child relationship is essential to successful advocacy.

#### *The Problem of Expert Testimony*

Finally, it is worth touching on another problematic area in child welfare cases, especially

those involving parents with cognitive or psychiatric disabilities. Agency workers often seek – or courts order – assessments of parents by mental health professionals. These assessments carry enormous weight in child welfare cases, and that is arguably most true in cases where a parent is disabled. Judges typically have little exposure to the families they are judging, so they rely on expert testimony.<sup>86</sup> These experts often go unchallenged, and they often speak to the ultimate question: whether to terminate the rights of a parent.<sup>87</sup> Experts frequently render opinions on the parent's present level of psychological and cognitive functioning, capacity for change, and prognosis. Unfortunately, expert witnesses may harbor their own stereotypes about people with disabilities.<sup>88</sup> These stereotypes may reinforce those that judges and agency workers bring to the table, thereby replacing meaningful individualized inquiry with class-based declarations.<sup>89</sup> In addition, mental health experts in the child welfare setting often use psychometric testing, relying especially on IQ and assumptions about what people with various IQ scores can and cannot do, and tend not to evaluate *parenting* in any valid manner.<sup>90</sup> In the case of parents with psychiatric disability, experts may make judgments of dangerousness without adequate evidence.<sup>91</sup>

Psychologists often testify about parents and children based on an evaluation that occurred in a single session, using test results and clinical impressions to explain and predict behavior and what action will be in the best interests of the children.<sup>92</sup> The predictive abilities of mental health professionals have been proven highly suspect, so predictions regarding best interests – and most parenting behaviors – should be met with skepticism.<sup>93</sup> Instead, courts and even parents' counsel often fail to take a skeptical approach and often ask simply about the qualifications of the expert and not the scientific basis for opinions.<sup>94</sup> Qualifications are not sufficient to establish expertise.<sup>95</sup> "By virtue of their qualifications alone, experts do not provide any assurance that their opinions rest on reliable methods and procedures."<sup>96</sup> If not based on sound research, experts' opinions may be based on flawed heuristics, personal values, and subjective beliefs, in which case no court deference is warranted.<sup>97</sup> Nevertheless, courts often simply ratify agency determinations – via experts – of parental inadequacy.<sup>98</sup>

In the face of a strong presumption that expert testimony is valid and relevant, parent's counsel must obtain and present contrary evidence or, at the very least, use vigorous cross-examination to call into question the expert testimony against their client.<sup>99</sup> Given tight funding for defense experts in child welfare cases, the only tool available to refute expert testimony may well be cross-examination. When faced with expert testimony, the attorney should insist that the expert show that any assessments are actually relevant.<sup>100</sup> As a corollary, the attorney should keep experts from testifying about behavior unrelated to parenting.<sup>101</sup> Success in countering expert testimony requires a well-trained, knowledgeable lawyer who has adequate time and resources to devote to the case. I strongly recommend taking the time to read expert reports very carefully, learn about the procedures used, determine whether the tests used are up-to-date and considered valid for the purpose of this assessment, and look up the expert's licensing status on the Michigan Department of Community Health website.<sup>102</sup> Parents' counsel would do well to be familiar with the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct<sup>103</sup> in order to be in a position to discredit an expert who did not complete an assessment in an ethical and professional manner. Finally, basic familiarity with psychology licensing rules is recommended.<sup>104</sup>

## Conclusion

Parents with disabilities are disproportionately represented in the child protection system, and once involved in the system, they are more likely than other parents to suffer termination of their parental rights. Parents deserve to have a full and fair opportunity under the law to maintain or regain custody of their children. In court, a parent's attorney should direct the court's focus to how much the parent can do, the actual relationship and interaction between the parent and child, and the love and guidance provided by the parent.<sup>105</sup> Parents' counsel must be prepared to bring claims under the ADA, suggest reasonable accommodations in family preservation and reunification services, and deal with expert testimony.

Attorneys for parents with disabilities also can advocate for changes in the system, such as calling

for knowledgeable case managers and for models of integrated and intensive service provision that will meet the needs of parents in the context of their families.<sup>106</sup> They can also develop trainings for agency personnel, other attorneys, and the courts about parents with disabilities.<sup>107</sup> ©

## Endnotes

- 1 “Cognitive disability” typically would apply where a person has been diagnosed with mental retardation involving IQ two standard deviations below the mean or lower as well as impairments in adaptive functioning, including areas like communication, socialization, and self-care. In other cases, the term would apply where a developmental disability is present. It is worth noting that some parents are not diagnosed but are regarded as having such a disability by child welfare agencies. “Psychiatric disability” would apply where a person has moderate to severe mental illness.
- 2 Rhoda Olkin et al., *Comparison of Parents With and Without Disabilities Raising Teens: Information From the NHIS and Two National Surveys*, 51 *Rehabilitation Psychol.* 43, 44 (2006).
- 3 Megan Kirshbaum & Rhoda Olkin, *Parents with Physical, Systemic, or Visual Disabilities*, 20 *Sexuality & Disability* 65 (2002).
- 4 See, e.g., Maurice A. Feldman, *Parents with Intellectual Disabilities: Implications and Interventions*, in *HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT* 401 (John R. Lutzker ed., 1998).
- 5 42 U.S.C. § 12101 *et seq.* (West 2009).
- 6 M.C.L. 712A.1 *et seq.* (West 2009).
- 7 Alexander J. Tymchuk, *The Importance of Matching Educational Interventions to Parent Needs in Child Maltreatment: Issues, Methods, and Recommendations*, in *HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT* 425 (John R. Lutzker ed., 1998). See also Alexis C. Collentine, Note, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 *Hofstra L. Rev.* 535, 542 (2005).
- 8 Feldman, *supra* note 4, at 401.
- 9 Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 *Harv. L. Rev.* 1202, 1211 (1990).
- 10 MARTHA A. FIELD & VALERIE A. SANCHEZ, *EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN* 20 (1999).
- 11 Susan Kerr, *The Application of the American with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 *J. Contemp. Health L. & Pol’y* 387, 402 (2000).
- 12 *Id.* See also, Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 *Cal. L. Rev.* 1415, 1436 (1995).
- 13 Colby Brunt & Leigh Goodmark, *Parenting in the Face of Prejudice: The Need for Representation for Parents with Mental Illness*, 36 *Clearinghouse Rev.* 295, 297-98 (2002).
- 14 FIELD & SANCHEZ, *supra* note 10, at 244.
- 15 Olkin, *supra* note 2, at 44.
- 16 Rosemary Shaw Sackett, *Terminating Parental Rights of the Handicapped*, 25 *Fam. L.Q.* 253, 290 (1991).
- 17 Theresa Glennon, Symposium, *Walking with Them: Advocating for Parents with Mental Illness in the Child Welfare System*, 12 *Temp. Pol. & Civ. Rts. L. Rev.* 273, 292 (2003).
- 18 Sandra J. Bishop, Comment, *Parents with Disabilities Involved in Dependency Cases*, 27 *Child Abuse & Neglect* 233 (2003) (reviewing findings about parents with intellectual and psychiatric disabilities).
- 19 Glennon, *supra* note 17, at 278.
- 20 *Id.* at 279.
- 21 *Id.* at 291.
- 22 Hayman, *supra* note 9, at 1230.
- 23 *Id.*
- 24 *Id.* at 1231.
- 25 *Id.*
- 26 Julie Odegard, *The Americans with Disabilities Act: Creating “Family Values for Physically Disabled Parents*, 11 *Law & Ineq.* 533, 549 (1993) (footnotes omitted). Parents with physical disabilities are discussed less in this article because there is some indication that they are targeted less by the child welfare system than parents with cognitive or psychiatric disabilities.
- 27 See M.C.L. §§ 712A.18f(4), 712A.19a(2).
- 28 Glennon, *supra* note 17, at 282.
- 29 *Id.* at 283. In my practice, I have noted an increasing tendency to require a “legal source of income” rather than employment, which may ameliorate this problem.
- 30 *Id.*
- 31 *Id.*
- 32 *Id.* at 296. Note that a court could order an agency to extend the length of an intervention as a “reasonable accommodation” under the ADA. See discussions under II.B. and III.B., *infra*.
- 33 Robert F. Kelly, *Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 *Fam. L.Q.* 359,

- 380 (2000-2001).
- 34 *Id.* at 389.
- 35 *Id.* at 380.
- 36 Feldman, *supra* note 4, at 406.
- 37 *Id.* at 410, 412.
- 38 *Id.* at 412-13.
- 39 Families First of Michigan is a program of Casey Family Programs. See [http://www.michigan.gov/dhs/0,1607,7-124-5452\\_7124\\_7210-15373--,00.html](http://www.michigan.gov/dhs/0,1607,7-124-5452_7124_7210-15373--,00.html) (last visited July 29, 2009).
- 40 See M.C.L. §§ 712A.18f(4), 712A.19a(2).
- 41 See 42 U.S.C. § 671(a)(15) (West 2009).
- 42 42 U.S.C. § 675(1)(B) (West 2009). See also M.C.L. § 712A.18f(2) & (3).
- 43 In re Rood, 483 Mich. 73, 105, 763 N.W.2d 587 (2009).
- 44 *Id.* (citing M.C.L. 712A.19a(6)(c) as reflective of 42 U.S.C. 675(5)(E)(iii) and 45 C.F.R. 1356.21(i)(2)(iii)).
- 45 In re Terry, 240 Mich. App. 14, 25, 610 N.W.2d 563 (2000).
- 46 42 U.S.C. § 12132.
- 47 Glennon, *supra* note 17, at 301.
- 48 Terry, 240 Mich. App. at 25.
- 49 *Id.* at 24.
- 50 *Id.* at 25.
- 51 *Id.* at 26 (citing M.C.L. § 712A.18f(4)).
- 52 *Id.*
- 53 *Id.* at 27-28.
- 54 *Id.* at 28.
- 55 Dave Shade, *Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act*, 16 Law & Ineq. 153, 202 (1998). But see In re Welfare of Angelo H., 124 Wn. App. 578, 587, 102 P.3d 822 (2004).
- 56 See, e.g., Angelo H., 124 Wn. App. at 587 (finding ADA does not require provision of services to disabled parents that are not available to nondisabled parents). But see Odegard, *supra* note 26, at 551.
- 57 Angelo H., 124 Wn. App. At 587.
- 58 Shade, *supra* note 55, at 204.
- 59 Kerr, *supra* note 11, at 388.
- 60 Terry, 240 Mich. App. at 26.
- 61 *Id.*
- 62 *Id.*
- 63 *Id.*
- 64 In re Greene, 2009 WL 763936 (Mich. App.).
- 65 *Id.* at \*1.
- 66 *Id.*
- 67 *Id.*
- 68 *Id.* at \*2.
- 69 *Id.*
- 70 LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* § 9:12, at 667 (3d ed. 2006).
- 71 *Id.*
- 72 THEODORE J. STEIN, *THE ROLE OF LAW IN SOCIAL WORK PRACTICE AND ADMINISTRATION* 7 (2004). Stein also notes that it is important to have clinically knowledgeable lawyers. *Id.* at 15.
- 73 Hayman, *supra* note 9, at 1271.
- 74 Teri L. Mosier, Note, "Trying to Cure a Seven-Year Itch": *The ADA Defense in Termination of Parental Rights Actions*, 37 Brandeis L.J. 785, 804 (1998-1999).
- 75 P.L. 110-325.
- 76 42 U.S.C. § 12102(1).
- 77 42 U.S.C. § 12102(4)(A).
- 78 P.L. 110-325 § 2(a)(7) & (b)(5).
- 79 42 U.S.C. § 12102(2)(A).
- 80 *Id.*
- 81 42 U.S.C. § 12102(1)(C).
- 82 28 C.F.R. § 35.104. See also 42 U.S.C. § 12102(3)(A).
- 83 42 U.S.C. § 12131(2). Emphasis added.
- 84 42 U.S.C. § 12131(1)(B).
- 85 See discussions of Terry, *supra* notes 54-60 and 66-69, and Greene, *supra* notes 70-75.
- 86 FIELD & SANCHEZ, *supra* note 10, at 244
- 87 Hayman, *supra* note 9, at 1237, 1238.
- 88 Duffy Dillon, Comment, *Child Custody and the Developmentally Disabled Parent*, 2000 Wis. L. Rev. 127, 149 (2000).
- 89 *Id.* at 146.
- 90 Sackett, *supra* note 16, at 296.
- 91 Glennon, *supra* note 17, at 276.
- 92 Watkins, *supra* note 12, at 1442.
- 93 Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say about "The Best Interests of the Child"?: An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 Fam. L.Q. 551, 567 (1997) [hereinafter Shuman, *Experts and Best Interests*].
- 94 *Id.* at 564-65.
- 95 *Id.* at 554.

- 96 Daniel W. Shuman, Symposium, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment*, 36 Fam. L.Q. 135, 160 (2002).
- 97 Shuman, *Experts and Best Interests*, *supra* note 93, at 566.
- 98 Sackett, *supra* note 16, at 296.
- 99 See Shuman, *Experts and Best Interests*, *supra* note 93, 559. Shuman's critiques of the use of expert testimony by the family court in custody actions and best interest determinations provide a particularly cogent and thorough overview of this serious and pervasive problem.
- 100 Hayman, *supra* note 9, at 1270.
- 101 Dillon, *supra* note 88, at 149.
- 102 The online form for looking up a professional license can be found at [www.dleg.state.mi.us/free/default.asp](http://www.dleg.state.mi.us/free/default.asp). (Last visited August 24, 2009).
- 103 Available at [www.apa.org/ethics/code2002.html](http://www.apa.org/ethics/code2002.html). (Last visited August 24, 2009).
- 104 R 338.2501 *et seq.* See [www.state.mi.us/orr/emi/admincode.?AdminCode=Department&Dpt=CH&Level\\_1=Bureau+of+Health+Professions](http://www.state.mi.us/orr/emi/admincode.?AdminCode=Department&Dpt=CH&Level_1=Bureau+of+Health+Professions) under "Board of Psychology" for the complete rules, which regulate training and supervision requirements among other things. (Last visited August 24, 2009).
- 105 1 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 8.14, at 470 (1993).
- 106 Glennon, *supra* note 17, at 297.
- 107 *Id.* at 298.

# National Association of Counsel for Children



## Protecting Children and Promoting Their Well-being Through Excellence in Legal Advocacy

The NACC is a nonprofit child advocacy and professional membership association dedicated to representation and protection of children in the legal system. Founded in 1977, the NACC is the only national association of its kind. The NACC provides training and technical assistance to child advocates and works to improve the child welfare and juvenile justice systems. If you work with children as an attorney, judge, administrator, care provider, physician, therapist, social worker, teacher, law enforcement officer, or are simply a concerned citizen and want to improve your effectiveness while improving the system, the NACC is your organization. *Join us today!*

### Member Benefits

- Toll-free and internet access to NACC Child Advocacy Resource Center
- Subscription to the NACC's quarterly publication, *The Guardian*
- Discounts on publications include *The Children's Legal Rights Journal*, NACC annual *Children's Law Manuals* and *Child Welfare Law and Practice*
- Access to the NACC Listserv information exchange
- Public policy and legislation updates
- Discounts on conferences and trainings

### Your Dues Also Support

- Amicus Curiae
- Speakers/Training Bureau
- Public Policy Advocacy
- Standards of Practice
- Youth Empowerment
- Outstanding Legal Advocacy Award
- Student Essay Competition
- Children's Attorney Certification
- National Children's Law Office Project

## NACC – Membership Application

### I wish to become a member.

#### INDIVIDUAL MEMBERSHIPS:

- Regular \$80   
  Supporting \$100\*   
  Patron \$250\*  
 Student \$40   
  Sustaining \$150\*   
  Lifetime \$2500\*

\*Includes special thank you listing in *The Guardian*.

- I would like \$10 of my membership dues to support my local NACC affiliate.

#### GROUP MEMBERSHIPS:

Group memberships are available at a significant discount. Please contact the NACC for more information.

- Please send information on establishing an affiliate.

Make Check Payable to: NACC

Mail to: National Association of Counsel for Children  
1825 Marion Street, Suite 242  
Denver, CO 80218

Telephone: Office: 303-864-5320 • Fax: 303-864-5351

Federal Tax ID#: 84-0743810

All but \$80 of your membership fee is tax-deductible.

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