Child Law Practice

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IN PRACTICE

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 show that this work matters and is essential for a well-functioning child welfare system. Lawyers for parents play many critical roles:

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.[1] Not surprisingly, courts have described child protection cases as working a "unique kind of deprivation" on families.[2] Before taking custody of children, the state must prove parental unfitness.[3] Evidence of unfitness must be clear and convincing—the highest standard of proof used in civil cases—before terminating parental rights.[4] 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

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CASE LAW UPDATE

Children's Best Interests Required Return to Guatemalan Mother

In re Angelica L., 767 N.W.2d 74 (Neb. 2009).

An undocumented immigrant mother was arrested and deported to Guatemala after she failed to take her newborn child to the doctor for a follow-up appointment for a health condition. The mother's two children were placed in temporary emergency custody with the child welfare agency. At the initial removal hearing, the trial court continued the children's temporary custody with the agency. The children were later adjudicated dependent and placed in foster homes with a permanency goal of reunification.

The agency prepared a case plan for the mother, which the court approved. The plan required that the mother show she could provide for the children's basic needs, provide a safe and nurturing environment, achieve timely permanency, and address any individual mental health needs. It also required her to maintain a job, avoid associating with criminals, and complete a psychological evaluation and parenting classes. She was also to maintain regular contact with her caseworker and keep her informed of her progress. Since she was in Guatemala, phone contact with the children was established in lieu of visits.

The caseworker communicated the case plan requirements to the mother through an interpreter, but did not provide her with a physical translated copy. The caseworker also spoke with two missionaries whom the mother had contacted for help regaining custody of her children. The missionaries agreed to help the mother meet the case plan requirements and to keep the caseworker informed of her progress.

The mother assumed the missionaries were providing the required information to the caseworker. However, the caseworker found it difficult to monitor the mother's progress because of her location and there were periods of no contact. She also reported not receiving confirmation that the mother had completed some of the case plan requirements, such as completing parenting classes or getting a psychological evaluation, although the mother disputed this.

Based on the mother's failure to comply with the case plan and the passage of more than 15 of the most recent 22 months, the state moved to terminate the mother's parental rights. At the termination hearing, the court heard testimony from several witnesses for the state and for the mother. It also received medical records for the two children, and the results of two home studies of the mother's ability to care for her children in Guatemala. Two letters were also provided from the Guatemalan consulate general, which stated that it had never received notice of the mother's case and that services were available in Guatemala to monitor and protect the well-being of children.

The trial court concluded the state met its burden and terminating the mother's rights was in the children's best interests. It found the mother was unfit based on her actions of crossing the border either pregnant or with a newborn infant and her failure to provide her child appropriate medical care. It also cited her failure to comply with her case plan, and noted that the children had never lived in Guatemala and were thriving in their foster placements. It therefore terminated the mother's rights. The mother appealed.

The Supreme Court of Nebraska reversed, finding the state failed to prove by clear and convincing evidence that the mother was unfit and that terminating her rights was in the children's best interests.

Although the state presented

several witnesses at the termination hearing, none were asked about the mother's fitness and nothing in the record established that she was unfit. The state and guardian *ad litem* argued that the mother's failure to provide her child medical care was sufficient to terminate her parental rights. The supreme court disagreed, noting "the law does not require the perfection of a parent" and the mother's error in medical judgment was not enough to terminate her rights.

The details of the mother's entry into the U.S. with her newborn child were unclear; she either crossed the border while pregnant or with her newborn child. The court found neither circumstance represented a lack of judgment or concern and likely contributed to her hesitancy to seek medical care for her newborn at first because of her fear of deportation. Despite this fear, the children's medical records showed the mother did seek regular medical care for her children. The incident that prompted the children's removal in this case—the mother's failure to take her newborn for a follow-up medical appointment—happened because the mother lacked transportation and she thought the child was getting better. The court found this mistake in judgment did not make her an unfit parent.

Evidence from the two home studies showed the mother had established a stable home in Guatemala, could provide for the children's needs, and that it was in the children's best interests to return to the mother in Guatemala. Instead of rebutting the findings of the home studies, the supreme court found the state introduced evidence to show it would be in the children's best interests to stay with their foster parents because living in Guatemala would put them at a disadvantage. The court emphasized that the best interest standard does not require determining that one environment is superior to another.

Both children had always lived in the U.S. and were doing well in their foster homes. However, unless the mother could be found unfit, the state's determination that one environment or set of circumstances is better does not overcome the presumption that reuniting with their mother is in their best interests.

The court also explained that the children's extended placement with foster parents in the U.S. would not have occurred if the state had allowed the mother to take the children to Guatemala. The evidence showed that both children could have been safely returned to the mother before she was deported, and that Guatemala had the resources to monitor children's well-being and parents' rehabilitation. However, the state made no efforts to reunify the mother with the children, mainly because it believed they would be better off in the U.S.

Regarding the mother's failure to comply with her case plan, the court found the state was less than helpful in giving her a plan she could meet. The caseworker never gave her a translated copy of her plan and instead read it to her over the phone and asked her to take the initiative to follow it. Despite the lack of guidance from the agency or the caseworker, the mother progressed and made a genuine effort to meet the plan's requirements.

While the court acknowledged that its decision would uproot the children, it stressed the mother's constitutional right to raise her children in her own culture was paramount.

Juveniles May Not Waive Right to Counsel in Delinquency Proceedings without Consulting Counsel

State ex rel. P.M.P., 975 A.2d 441(N.J. 2009).

A juvenile delinquency petition was filed against a 20-year-old man based on allegations that he sexually assaulted a six-year-old child when he was 13. Police arrested the young man and transported him to the prosecutor's office, where he was read his *Miranda* rights. He waived his rights and then gave a statement admitting to the sexual assault of the child.

The young man moved to suppress his statement. The trial court granted his motion, finding the filing of the delinquency petition was the functional equivalent of an indictment and therefore he had a right to counsel and could not waive that right without his counsel's approval. The state appealed.

The appellate court reversed, holding the basic differences in procedures and goals of the juvenile justice and criminal justice systems prohibited equating a juvenile complaint with an indictment. The defendant appealed.

The Supreme Court of New Jersey upheld the trial court's ruling. The defendant claimed his right to counsel attached when the prosecutor submitted his delinquency petition to the trial judge, therefore his uncounseled statement should have been suppressed.

The state countered that a juvenile delinquency petition is not the same as an indictment since a juvenile petition is governed by statute and lacks a constitutional dimension. It argued that a juvenile petition differs from an indictment issued by a grand jury since it can be signed by anyone who has knowledge of the facts and allegations and believes they are true. The state also stressed the rehabilitative goals of the juvenile justice system differ from the punitive goals of the criminal justice system, and that the safeguards and procedural protections of the juvenile system are sufficient to protect juveniles' rights.

The supreme court explained that New Jersey's juvenile justice code, adopted after the U.S. Supreme Court's decision in *In re Gault*, gives juveniles the right to be represented by counsel at every

(Continued on page 101)

California

In re G.W., 94 Cal. Rptr. 3d 53 (Ct. App. 2009). DEPENDENCY, GUARDIANSHIP
Order establishing grandmother as guardian was inappropriate under statute that allowed appointment when parent makes the request and waives reunification services, and child welfare agency approves the home; a selection and implementation hearing, rather than a dispositional hearing, should have been held because mother did not consent to guardianship and agency had declined to waive grandmother's prior criminal conviction.

In re Jason J., 96 Cal.Rptr.3d 625 (Cal. Ct. App. 2009). TERMINATION OF PARENTAL RIGHTS, EXCEPTIONS
Parent-child beneficial relationship exception to adoption did not preclude termination of father's parental rights where evidence established that strength and quality of child's relationship with father did not outweigh sense of security and belonging in placement; child separated easily from father at end of visits, father appeared more like a friendly visitor to child rather than a parent, father refused reunification services and had not progressed beyond supervised visits, and father did not recognize need to protect child from mother.

Delaware

Showell v. Div. of Family Servs., 971 A.2d 98 (Del. 2009). TERMINATION OF PARENTAL RIGHTS, NOTICE
Trial court improperly terminated parental rights where notice statute required publication in locality where parents reside and notice via mail if parents cannot be personally served; publication in Charlotte, North Carolina newspaper was not reasonable attempt to provide notice when parents were known to live near Raleigh.

Clark v. Div. of Family Servs., 975 A.2d 813 (Del. 2009). TERMINATION OF PARENTAL RIGHTS, CRIMINAL CONVICTION
Trial court properly terminated parental rights on ground that mother committed a serious crime against a child; only one ground need be proved by clear and convincing evidence and it was undisputed that mother pled guilty to felony vehicular assault involving intoxication and one of the injured was her son.

Florida

M.V.-B. v. Dep't of Children & Family Servs., 2009 WL 1606545 (Fla. Dist. Ct. App.). DEPENDENCY, GRANDPARENTS
Court lacked jurisdiction to hear father's appeal of order denying placement with grandparents because it was not a final order; statute and court rules do not permit appeals in dependency cases except from adjudication orders or orders terminating jurisdiction or supervision, and father alleged no fact that would justify a common law writ of certiorari.

Georgia

In re B.M., 679 S.E.2d 113 (Ga. Ct. App. 2009). TERMINATION OF PARENTAL RIGHTS, SUBSTANCE ABUSE
Termination of parental rights petition was supported by evidence showing likelihood that drug-addicted mother would continue to deprive children; mother admitted to long-term drug addiction and to thoughts of committing suicide and killing son, she failed to obtain court-ordered mental health evaluation or complete drug treatment program, and she failed to stay free from drugs or alcohol.

In re J.J., 2009 WL 2096299 (Ga. Ct. App.). TERMINATION OF PARENTAL RIGHTS, PLACEMENT
Trial court acted within its discretion in placing children in permanent custody of public agency for adoption rather than with paternal grandmother after terminating parental rights; fact that grandmother was a long haul trucker, had previously returned the children after the agency placed them with her, and that children had been in same nonrelative foster home for extended period was sufficient to overcome relative preference.

Hawaii

In re N.C., 209 P.3d 195 (Hawaii Ct. App. 2009). DEPENDENCY, SEXUAL ABUSE
Minor who had sexual contact with a seven year old could be adjudicated as a person in need of supervision under sexual assault statute that prohibits sexual contact with a person under the age of 14, despite fact that he was eight and nine at the time of the incidents.

In re TC, 2009 WL 1783769 (Hawaii Ct. App.). ABUSE, MINORS
Juvenile who was adjudicated for violating sexual assault laws after sexually assaulting a minor lacked personal privacy right under the Hawaii Constitution and the due process clause of the Fourteenth Amendment to the U.S. Constitution as a minor under age 14 to engage in sexual activities with other minors under age 14; state had significant interest in regulating the sexual activities of children under age 14 to protect their health and safety.

Indiana

In re J.M., 908 N.E.2d 191 (Ind. 2009). TERMINATION OF PARENTAL RIGHTS, FINDINGS
Evidence supported trial court's denial of petition to terminate parental rights because parents had availed themselves of services and the child's need for permanency was not severely prejudiced; despite being incarcerated, parents had completed services which would benefit their chances of reunification and lessen their period of incarceration, had attempted to provide for child by arranging a placement with relatives, and had worked to ensure housing and job placements upon release.

Mississippi

A.B. v. Lauderdale County Dep't of Human Servs., 2009 WL 1798822 (Miss.). TERMINATION OF PARENTAL RIGHTS, PRIOR NEGLECT
Trial court erred in refusing to consider all evidence in termination of parental rights hearing; earlier adjudication of neglect did not amount to a determination that reunification was not in the best interests of the children such that the court was justified in refusing to hear evidence of progress parent had made in period between adjudication and termination hearing.

New York

In re Jesse J., 882 N.Y.S.2d 487 (N.Y. App. Div. 2009). DEPENDENCY, REMOVAL
In six related child protective proceedings, reversal of orders for children's removal was warranted since evidence did not show that children would be at risk of imminent harm if they remained in the home during proceedings and family court failed to determine if risk to children would be reduced through reasonable efforts to avoid removal.

In re Patricia C., 881 N.Y.S.2d 260 (N.Y. App. Div. 1990). TERMINATION OF PARENTAL RIGHTS, DUE PROCESS
Trial court violated father's procedural due process rights when it closed fact-finding portion of trial and refused to let father testify after he was mistaken about the time the hearing started even though his attorney was present; father informed court of his mistake and that his first witness was present and available to testify while he traveled to the court, and father had timely attended three prior days of the trial and expressed interest in testifying.

North Carolina

In re D.L.H., 679 S.E.2d 449 (N.C. Ct. App. 2009). DELINQUENCY, SENTENCING
Trial court acted within its discretion under statute in extending probation and secure confinement periods where juvenile violated probation by fighting at school; court had authority to extend confinement period from 14 to 28 days for probation violation for juvenile's intermediate-severity-level offense.

Ohio

In re M.M., 2009 WL 2004387 (Ohio Ct. App.). TERMINATION OF PARENTAL RIGHTS, REPRESENTATION
Incarcerated mother was not denied effective assistance of counsel when her lawyer failed to secure her testimony by deposition or affidavit; while an incarcerated parent may give testimony by deposition or affidavit, no legal authority requires it and discretion to decide whether to offer testimony rested with mother's lawyer when formulating trial strategy.

*In re M.S.K.H.,*2009 WL 2386096 (Ohio Ct. App.). DEPENDENCY, PERMANENCY PLAN
Trial court's grant of permanent custody of daughter to child welfare agency and placement of son in planned permanent living arrangement was supported by evidence; mother failed repeatedly to address conditions causing daughter's placement and would be unable to resume care of daughter in reasonable time period, and mother's significant psychological issues and poor parenting skills influenced son's behavior problems while in her care that required much more structured environment than she could provide.

Oregon

In re F.D.J., 211 P.3d 289 (Or. Ct. App. 2009). DEPENDENCY, PERMANENCY PLAN
Change in permanency plan from reunification to adoption was inappropriate in case where father made sufficient progress to allow safe return of child; agency had only requested father establish paternity, which he did after several months.

Pennsylvania

In re D.P., 972 A.2d 1221 (Pa. Super. Ct. 2009). DEPENDENCY, PERMANENCY PLAN
Permanency goal change from reunification to adoption was supported by evidence showing mother's failure to improve and children's need for permanence; mother failed to work consistently towards reunification, provided inadequate supervision of children, invited unsafe people to the home, took drugs in son's presence, and withheld information from agency needed to keep children safe.

Utah

O'Dea v. Olea, 2009 WL 2225213 (Utah). PATERNITY, QUALIFYING CIRCUMSTANCE
Trial court properly dismissed father's paternity claim where he was required by statute to bring proceeding within 20 days from when he knew of a qualifying circumstance and his failure to do so effectively waived all rights to the child; although father did not believe mother's statement in phone call that she was living in Utah, this was a qualifying circumstance that should have prompted him to act to protect his rights.

Washington

In re KB, 210 P.3d 330 (Wash. Ct. App. 2009). DEPENDENCY, RECORDS
Trial court properly denied mother's request to impose fees or sanctions on child welfare agency for its delay in providing child's records in response to her statutory request in connection with dependency guardianship proceedings; mother failed to make required discovery request under civil rules and instead only submitted a letter to the agency.

In re Tyler L., 208 P.3d 1287 (Wash. Ct. App. 2009). VISITATION, THERAPEUTIC
Trial court erred in denying mother's request for therapeutic visitation with two children where record showed that agency had not offered necessary services, including therapeutic visitation, child mental health specialist recommended therapeutic visits to ensure children's needs were being met, and therapeutic visits were viewed as essential to help with one child's attachment disorder.

Wyoming

In re A.E., 208 P.3d 1323 (Wyo. 2009). TERMINATION OF PARENTAL RIGHTS, INCARCERATION
Trial court properly ordered termination of parental rights based on ground of crime against a child where parents were convicted of manufacturing methamphetamines in presence of children; although state was required to prove parents were unfit at the time of the termination trial, evidence showing parents did not fully appreciate serious harm they had caused their children was sufficient to show current unfitness even considering that they had participated in services in prison.

(**State ex rel. P.M.P,** *cont'd from page 99)*
"critical stage" of the proceeding. Further, a juvenile may not waive any rights without first consulting counsel. The court found the filing of a juvenile petition by the prosecutor's office, followed by a court-approved arrest warrant, was a "critical stage" that gave rise to a statutory right to counsel.

Regarding the juvenile's right to waive counsel, the court explained that New Jersey's juvenile code provides the same safeguards to juveniles at all critical stages of the proceeding that are provided to adults following criminal indictments. These safeguards include restricting defendants from waiving their *Miranda* rights without first consulting their counsel.

Therefore, the defendant had a statutory right to counsel during the filing of the dependency petition and his arrest, and he could not waive his right to counsel without his lawyer's consent. Thus, the trial court properly granted his motion to suppress his uncounseled statement.

(Continued from front page)
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.[5] 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.[6] 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.[7]

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."[8]

Results from the Center for Family Representation,[9] 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*,[10] 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."[11]

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."[12] 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."[13] 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."[14]

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.[15] 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.[16]

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.[17] In five of these jurisdictions, the appointment of counsel prior to a permanent termination of parental rights hearing is also not absolute.[18] For example:

- In Minnesota, a court only has to appoint counsel in a case "in which it feels that such an appointment is appropriate."[19]
- In Hawaii, counsel is only required when the interests of parents "are not represented adequately by another party who is represented by counsel."[20]
- Virginia law only mandates counsel at the adjudication and TPR hearings but not for dispositional hearings.[21]
- 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.[22]

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.[23] 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.[24] 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."[25]

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."[26] 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."[27] 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."[28] 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. Often 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, denying the parent a dedicated advocate who knows the case.[29]

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.[30] 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,[31] 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.[32]

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 court system.[33]

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

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.

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This article is one in a series based on a presentation at the First National Parents' Attorneys Conference, held May 2009 by the ABA National Project to Improve Representation of Parents Involved in the Child Welfare System. Learn more at: **www.abanet.org/child/parentrepresentation/home.html**

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 www.mit.edu/~jjdozle/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.

[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 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 WL 376290 (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.

[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).

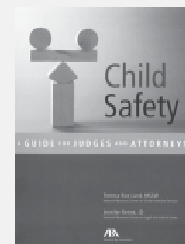
[31] For a detailed summary of the steps taken by the Colorado Supreme Court to improve parent representation, *see* www.courts.state.co.us/Courts/Supreme_Court/Committees/rptf.cfm.

[32] Information about reforms in Connecticut, including the creation of the Commission on Child Protection, can be found at www.ct.gov/CCPA.

[33] More information about the Detroit Center for Family Advocacy can be found at www.law.umich.edu/centersandprograms/ccl.

New in Print

Child Safety: A Guide for Judges and Attorneys
by Therese Roe Lund, MSSW, and Jennifer Renne, JD



As a child welfare practitioner, you may struggle with these questions:

- How do you know whether a child's severe injury represents a pattern of dangerous family conditions or is a one-time incident?
- What criteria do you use to determine whether a child is safe?
- How do you decide whether to return a child home?
- What information do you need from the agency to make these decisions?

This *Guide*, published by the National Resource Center for Child Protective Services and the National Child Welfare Resource Center on Legal and Judicial Issues, helps judges and lawyers address these and other issues by providing a framework for understanding how safety decisions are made. Safety planning in the child welfare system is a shared responsibility, but ultimately the court must make critical safety decisions such as whether to remove a child and when to return a child home.

Judges rule on these choices every day, but often lack a decision-making structure, which can lead to following agency recommendations without a thorough inquiry. Often after the initial removal, it is unclear *what needs to change* for the child to be returned. Unclear standards leads to frustration for families and their attorneys, and causes children to linger in foster care.

This *Guide* lays out clear standards that must be met before a child can be removed or returned. It provides checklists to assist judges make reunification decisions and considerations before terminating jurisdiction.

$21.99 (bulk pricing available). Order from the ABA Service Center: 800/285-2221 (PC 549-0446).

Protecting Newborns from Parents Who Abuse Drugs or Alcohol

by Jennifer Anderson

Divergent Minds

The image made quite an impression: a woman in labor and with burns and scars all over her face, her baby born addicted to methamphetamine.

"The fact is, it is a crime when you put the life of a child in jeopardy," says Shane Salter, founder and executive director of Court Appointed Special Advocates for the District of Columbia, recalling the televised Nebraska birth.

Many Americans share Salter's outrage at a system that permits women to inflict damage on their babies in utero with little or no consequences. As a 2003 report by researchers at the University of New Hampshire put it: "Hearing about the abuse of a child provokes a visceral wish to punish the offender."

Yet even Salter acknowledged that the child ultimately may fare better if the mother can overcome her addiction and raise her child in a healthy environment.

Salter's evolving thought process regarding the birth underscores the complexity of an issue that is emotionally charged given the particular vulnerability of the victims. Everyone wants newborns protected, but there is wide disagreement over how to accomplish that.

A May 2000 review in *Child Maltreatment* explains:

- From one perspective, drug use during pregnancy is seen as a public health problem…a strong response is considered unconstitutional, ineffective…and akin to punishing persons suffering from depression
- From another [it] is a voluntary and illegal act…making public health approaches a dangerous assault on public moral standards.

Overshadowed in the debate is a more basic and critical issue: identifying those parents who may be too dependent on drugs or alcohol to nurture their offspring.

The National Center on Substance Abuse and Child Welfare (NCSACW) estimates that as many as 95 percent of newborns prenatally exposed to alcohol and illegal drugs are not recognized as exposed and sent home without any intervention.

Another group, the National Center on Addiction and Substance Abuse (CASA), has described alcohol and illegal drugs as "fueling" a child abuse and neglect death rate that more than doubled from the mid-1980s, when crack hit the streets, to 1999. CASA has estimated that substance addictions account for 80 to 90 percent of all child welfare spending.

In *Nobody's Children*, Elizabeth Bartholet describes substance abuse as "one of the key factors responsible for the increase in severe forms of abuse and neglect." She cites several studies indicating illegal drug and alcohol abuse accounted for 79 to 99 percent of families with child protective services involvement.

Making problems worse for these children are the physical or mental disabilities that may result from the prenatal exposure. In a 2007 report, *Substance-Exposed Infants: State Responses to the Problem*, NCSACW states disabilities from substance exposure render children three-to-four times more likely to be abused or neglected than children without disabilities.

To protect these newborns, several authorities recommend universal testing for prenatal exposure to illegal drugs and alcohol, ideally throughout the pregnancy and at least at the moment of birth.

No states mandate universal testing, however, and testing of newborns is controversial in all states. This is in part because of the concern of false positives, in which a child that was not exposed is wrongly identified.

Other concerns outlined in the NCSACW report include false negatives, in which exposure is not detected, as well as the cost of the testing and the possibility of violating parents' civil liberties and privacy.

Another approach that might mitigate these concerns would have women self-report their drug or alcohol use. Ira J. Chasnoff, MD, president and medical director of the Children's Research Triangle, is among researchers developing a questionnaire to encourage women to be truthful about their tobacco, alcohol, or illegal drug use. Women with positive screens would then be offered a brief intervention, and there would be no punitive consequences.

"We'd like to think we're on the road to a solution," Chasnoff said.

In concept he may be right; however, the solution "isn't just over the horizon," said Steven J. Ondersma, editor, *Child Maltreatment* and assistant professor, Wayne State University School of Medicine.

"There are tremendous challenges in getting the questionnaires and interventions universally adopted," he said. "And you're still not going to change minds of the huge group of folks who believe illicit drug exposure is uniquely devastating and requires [child protective services] intervention and court involvement."

Common Drugs and their Impact

The short- and long-term effects of various drugs and alcohol on the developing fetus are complex, controversial and somewhat unclear. Unless otherwise indicated, the following summary is based on information by The Future of Children, a collaboration of The Woodrow Wilson School of Public and International Affairs at Princeton University and The Brookings Institution.

- **Smoking**: Women who smoke during pregnancy are about twice as likely to deliver a baby weighing less than 5½ pounds as are women who do not smoke. The risk of infant mortality also is increased, and respiratory illness and ear infections are more common among infants and children exposed to second-hand smoke.
- **Marijuana**: Increased risk of low birth weight, preterm labor, miscarriage and stillbirth may be associated with marijuana use during pregnancy, although some studies have found no difference in the pregnancy outcomes between users and nonusers.
- **Alcohol**: Heavy consumption during pregnancy has been cited as the leading preventable cause of mental retardation worldwide. Fetal alcohol syndrome is characterized by a pattern of severe birth defects including low birth weight, growth and mental retardation, and deformities around the head and ears. Even moderate consumption can result in a growth-retarded infant.
- **Methamphetamines**: Use of this drug during pregnancy has been linked to a three-fold increase in underweight babies, according to a study by Barry Lester, professor of psychiatry at Brown University Medical School. Published in *Pediatrics,* the study found methamphetamine appears to restrict blood flow to the placenta, affecting fetal growth.
- **Cocaine**: Initial fears that exposure to any amount of cocaine in utero would result in long-term, devastating effects have not been borne out in the scientific literature. Still, serious impacts are documented, including: low birth weight, preterm labor, separation of the placenta, severe brain damage, malformations of the reproductive organs and urinary system, thyroid abnormalities, and acute cardiac events.

"Some of these babies have been born literally without a brain," reports the late Vincent J. Fontana, MD, former medical director of the New York Foundling Hospital, in *Save the Family, Save the Child.* "At the very least, cocaine babies come into the world undersized and addicted, suffering the terrible agony of cocaine withdrawal."

"They cannot be held or even fed properly because they are so fragile and extremely sensitive to the touch; some just keep flailing their limbs around to find a little relief."

Trends in Criminal Prosecution

Several states, including Florida, Kentucky, Ohio, California, Georgia, Michigan and Pennsylvania, have attempted to prosecute women for maternal conduct during pregnancy, primarily the use of crack cocaine. So far South Carolina is the only state where a conviction has withstood several appeals.

In that case, *Whitner v. South Carolina,* 492 S.E.2d 777 (S.C. 1997), the Supreme Court of South Carolina denied postconviction relief for Cornelia Whitner, who pleaded guilty to criminal child neglect for causing her baby to be born with cocaine in its system.

Among her arguments, Whitner claimed that charging her with ingesting cocaine during pregnancy violated her right to privacy. "It strains belief for Whitner to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right of privacy," the court said. "Use of crack cocaine is illegal, period."

The United States Supreme Court declined to hear *Whitner,* but it reversed a lower court ruling that a hospital in Charleston, South Carolina was within its constitutional rights to test pregnant women for cocaine use and turn positive results over to prosecutors without the patients' knowledge.

"When [state hospital employees] undertake to obtain…evidence from their patients for the specific purpose of incriminating those patients, they have a special obligation to make sure that the patients are fully informed about their constitutional rights," the Court decided in *Ferguson v. City of Charleston,* 532 U.S. 67 (2001).

Public Health and Systemic Bias

The *Ferguson* decision—making drug screening for purposes of criminal prosecution illegal—is among factors cited by those who believe maternal drug use should be treated solely as a public health problem. Others include: the fact that cigarettes and alcohol can be as devastating on the developing fetus as some illegal drugs, and the health care system's tendency to single out poor, minority women.

Chasnoff and colleagues were the first to show systemic bias in a 1990 study on black and white women attending both private and public clinics in Florida. They learned that although both groups of women were using drugs and alcohol at about the same rate, "black women were reported at approximately 10 times the rate for white women and poor women were more likely than others to be reported."

A 2008 study by Chasnoff and colleagues, *Perinatal Substance Use Screening in California,* published by NTI Upstream, Chicago, IL, found: "Caucasian women demonstrated the highest rates of alcohol and tobacco use… [and] continued after knowledge of pregnancy to drink at significantly higher rates than women in the other racial or ethnic groups." The study also found "significantly fewer women with private insurance coverage had stopped drinking relative to women with Medi-Cal or no coverage."

Put another way, said Robert Sokol, MD, professor of obstetrics and gynecology at Wayne State, "There are plenty of rich women who use cocaine, and nobody wants to take their kids away."

The answer to bias in the system, said Victor Veith, director of the National Child Protection Training Center and a former prosecutor, is not to stop trying to protect African-American children.

"We need to figure out how to get to the rich kids, too," he said. "If you just send the child home, the situation is not going to improve. There needs to be intervention."

The Problem with Not Knowing

Nancy Young, director of Children and Family Futures and lead author of the NCSACW report, estimated 8.1 million children in the United States are living with a parent who is either dependent on alcohol or needs treatment for illegal drug use. Many of these children were exposed in utero and released without health care providers having any knowledge of the parents' addiction problems, she said.

Selena McDonald likely fell into this category considering she was just three months old when her mother handed her off to her crack dealer, who was living in a rented apartment in the District of Columbia.

In court papers, the dealer, Caroline de Forest, explained that the mother, Theresa Hogan, visited often but rarely interacted with her baby. "Theresa would go and come back with a couple hundred dollars. I would go and buy crack for her," de Forest stated. "Theresa was often there getting high."

Hogan refused to feed or change her daughter's diaper "but would smoke a crack pipe while holding Selena," de Forest stated.

Hogan's visits became less frequent, and it's unclear when she stopped showing up altogether. By the fall of 2003 other acquaintances of de Forest noticed bruises and scratch marks on Selena's face and arms.

> . . . 8.1 million children in the United States are living with a parent who is either dependent on alcohol or needs treatment for illegal drug use.

At about this time, de Forest's drug use accelerated, with members of the U.S. Attorney's Office reporting that she was selling about $2,000 worth of cocaine daily. Caring for Selena became intolerable, de Forest stated.

About a week before D.C. authorities recovered Selena's bruised and battered body in January 2004, de Forest spotted Hogan on a sidewalk. "I told her to come get her baby out of my house. I couldn't take it anymore," she stated in court papers. Hogan never came.

Challenges of Drug Screening

Within the past five-to-eight years, the development and use of biological tests to determine intrauterine exposure has accelerated, according to Marilyn A. Huestis, chief, Chemistry and Drug Metabolism, National Institute on Drug Abuse.

A biomarker is a physiological indicator, or marker, of exposure to drugs or alcohol. Enzymes such as AST or ALT in elevated levels might indicate alcohol exposure. Benzoylecgonine (BE), a metabolite of cocaine metabolism, is often used as a biomarker for cocaine exposure—although researchers recently learned that exposure can be missed approximately 10 percent of the time unless the lab also looks for metahydroxy benzoylecgonine (M-OH-BE).

Biomarkers can be obtained from hair, urine and meconium; each method has its drawbacks.

Urine indicates drug or alcohol use only within the past few days. Mothers may be reluctant to provide a urine sample, and it is difficult to collect urine from newborns as the bags frequently come off and the adhesive can irritate newborn skin.

Mothers may object to having their own or their newborn's hair cut. Often the mother's hair isn't long enough, or the baby doesn't have enough hair, and hair treatments such as bleach can strip the biomarkers out of the hair.

Meconium, the baby's first stool, can be collected noninvasively in diapers and can indicate that there was at least one episode of illegal drug use or binge drinking, in which four or more drinks are consumed in a setting.

"It's the best we have by far," Huestis said. Meconium, however, doesn't start forming until 13 weeks' gestation, so the entire first trimester is missed. Exposure during the second trimester is "poorly recorded," she said, based on studies in which pregnant women provided three weekly urine samples, weekly sweat patches, and monthly hair specimens. "We know exactly when they used by all these tests," she said.

The umbilical cord and placenta, both waste products available at the time of birth, are other possibilities for biomarkers, although so far neither appears to be as sensitive as

meconium, Huestis said.

Although some researchers have suggested the cost of meconium screening—$80 to $130 depending on the panel of drugs tested—would prohibit universal use, Huestis noted: "It's nothing compared with the cost of foster care."

Much less expensive is to have women self-report their drug or alcohol use, although the accuracy of such questionnaires is debatable. Ondersma referenced one study in which half of the women who denied drug use the month before they became pregnant ended up with positive hair or urine screens at birth.

Chasnoff has reported a 97 percent accuracy rate in the screening test he developed, the *4P's Plus®*—although Ondersma noted verification was based not on toxicology testing but on in-depth, clinical interviews.

The *4P's Plus®* involves asking women six questions concerning usage patterns by the patient as well as her parents or partner. Positive screens are then followed by a 5- to 15-minute conversation with a health care provider on the dangers of tobacco, drug, and alcohol use during pregnancy.

A computer-based model Ondersma is developing may elicit more truthful answers in part because patients are responding to a monitor. He noted additional advantages in terms of time and cost savings as well as consistency and the elimination of human error.

Still, given the potential for inaccuracy both in variants of the self-report method and in the toxicology testing, a combination may yield the most accurate result. This option is endorsed by several researchers including Huestis and Larry Burd, director of the North Dakota Fetal Alcohol Syndrome Center.

Disagreement intensifies among researchers, child and fertility rights advocates, and the general public, concerning the proper response when substance abuse is particularly egregious and implicated in multiple pregnancies.

"One would think that no woman could fail to be moved and even somewhat remorseful at the sight of… their third, fourth, and even fifth drug-afflicted baby," Fontana stated in *Save the Family, Save the Child.* "I have myself seen many such women and their suffering infants."

Sokol and Ondersma are among researchers who say more damage ultimately can result from legal system involvement and that substance abuse by pregnant women should be handled exclusively from a public health perspective.

"We've had women deny drug use, thus greatly reducing our ability to help them, cross state lines to give birth in what they see as a less aggressive state, or even deliver at home because they didn't want to face losing custody of their children," Ondersma said.

Burd, however, described the body of research indicating pregnant women fearing prosecution would avoid medical treatment as "phenomenally sparse"—and not enough on which to base policy.

"Women who are drinking heavily during their pregnancies have severe alcoholism and need high quality help from many directions," he said. "Some will benefit from contact with the legal system."

Coordinated Systems

While Veith agreed prosecution should be used as a last resort in cases of maternal conduct, he also noted that it can be effective in influencing community expectations borne of ancient cultural biases that government should not interfere in parenting.

Indeed, in Selena McDonald's case, de Forest was sent to prison, but prosecutors declined to press charges against Hogan. "A lot of moms, unfortunately, use cocaine," explained Deborah Connor, a prosecutor in the case.

It's either impossible, and undesirable, to prosecute all of them or possible to use prosecution to change social mores, depending on one's perspective.

Another option, mitigating the social conditions that give rise to behaviors that are harmful and might provoke legal intervention, requires a broader commitment: a coordinated system of care for every newborn and young family.

Neal Horen, a research instructor with Georgetown University's Center for Child and Human Development, travels the country helping communities build these systems. The task is not easy, particularly in areas with high concentrations of drug abuse, poverty, HIV, or other social problems. But once in place, he said, the payoffs can be tremendous.

Universal drug and alcohol screening for all new families can be part of a community's response, Horen said, as can coordinated, universal home visitation services. In Vermont, a nurse or social worker is required to visit every home where there is a newborn regardless of any evidence of risk. Likewise, several states and tribes are taking advantage of funding available through a federal initiative known as Project LAUNCH. In New Mexico, this includes a collaboration with Santa Fe to streamline all home visiting services and then connect those efforts with the state early childhood leadership to inform policy decisions.

"They're not waiting for families to float downstream," he said.

Jennifer Anderson is a freelance writer specializing in children's issues, health, and the environment. She lives in Virginia with her husband and three children, and she is a licensed foster parent and member of Childhelp's Washington Area Chapter. She can be reached at jennifer_anderson@verizon.net.

Advocacy for Young or Expectant Parents in Foster Care

by Lisa Pilnik and Laura Austen

A recent study by Chapin Hall of over 4,500 young or expectant parents in foster care in Illinois found that:

- Although most females received some prenatal care, more than one in five pregnancies involved either no prenatal care, or care that began during the third trimester.
- Twenty-two percent of mothers were investigated for child maltreatment and 11% had one or more of their children placed in foster care.
- Only 44% of females and 27% of males had received a high school diploma or GED.
- 86% of the youth were African American.
- Almost 25% of teen mothers in the study had two or more children.[1]

Strengthening legal advocacy is one way to help address these challenges. Through its work on adolescent health issues,[2] the ABA is involved in trainings across the country on representing young or expectant parents in care. Some common questions practitioners face when advocating for these youth appear below. The answers can be helpful in your advocacy.

Q&A A teen mother or father is in foster care. Can the state automatically take custody of the teen's child simply because the parent is a ward of the state?[3]

No. A state can only take custody of a child if the statutory definition of abuse or neglect is met.[4]

United States Supreme Court cases dating to 1923 have held parents have a fundamental right to custody of their children and to make important decisions regarding their upbringing.[5] In *Lassiter v. Department of Social Services*, the Court stated:

> This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'[6]

If the state wishes to permanently sever a parent's rights to their child, it must afford that parent due process, and meet a standard of clear and convincing evidence.[7]

Although the Supreme Court has limited the constitutional rights of minors in some circumstances,[8] it has never addressed the rights of teen parents, in part because no state has passed a law restricting the parental rights of minors based solely on age.[9]

Q&A Can the care provider of a youth in foster or residential care receive funding for the youth's child even if the child is not in state custody?

Yes. Title IV-E of the Social Security Act allows maintenance payments to be made for the child of a youth in foster care: "*Foster care maintenance payments made on behalf of a child placed in a foster family home or child care institution, who is the parent of a son or daughter in the same home or institution,* ***must include amounts which are necessary to cover costs incurred on behalf of the child's son or daughter***."[10] (Emphasis added.)

Q&A What expenses should maintenance payments made on behalf of the youth's child cover?

These payments should be limited to funds for items listed in the definition of foster care maintenance payments.[11]

"Foster care maintenance payments" are defined as "payments made on behalf of a child eligible for Title IV-E foster care to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel for a child's visitation with family, or other caretakers."[12]

The law also allows for reimbursement of local travel needed to provide the items above, and some administrative or operating costs for child care institutions.[13]

Q&A How can lawyers better serve teens in care who are parents or expectant parents?

Ensure the child welfare agency provides services the teen needs to parent successfully. These include:

- a supportive placement where the parent and child can live together (or visit frequently in the case of a noncustodial parent);
- prenatal and postnatal care for mother and child;
- health and nutrition education;
- mental health services, if necessary;
- gender and age-appropriate parenting classes and support groups;

- child care;
- transportation;
- education (Title IX of the Education Amendments of 1972 gives pregnant and parenting students the right to stay in their same schools);
- independent living services (i.e., planning for housing, school or job opportunities, and health care access).

Revisit the current placement and permanency goals often with the youth. Explore what other supports are needed to reach the placement and permanency goals. Some jurisdictions have found that a "shared responsibility plan" between the teen parent and her or his foster parents can help. (For an example, visit calswec.berkeley.edu/.../SB500_handout3_SharedRespon_blj_11_07_06.doc.)

Advise the youth that the child welfare agency may seek custody of the youth's child. Counsel the youth on steps to take to ensure he or she keeps custody of his or her child (or retains unsupervised visitation for a noncustodial parent). Such steps include obtaining prenatal care, attending parenting classes, and establishing proper child care while the youth attends school or work. Keep records of all steps the youth has taken to be an appropriate parent, including certificates for completing service programs. Also consider asking service providers to write letters sharing their positive observations of the client's parenting skills or to testify if the agency tries to obtain custody of the child.

Help your client handle related legal issues, such as paternity or child support, either directly or by helping the client obtain other low-cost or free legal services. For an unmarried teen father client, it is important that he establish his paternal rights as soon as possible to ensure he can continue his relationship with his child while the father is in foster care and after he transitions out of care.

One Lawyer's Story

After Karen's client, Diane, became a mother at age 16, she and the baby continued to live together in Diane's foster home. Diane primarily took care of her baby, but often asked her foster parents to care for the baby when she went out with friends. Her foster parents complained to the child welfare agency that Diane sometimes came home late or didn't tell them where she was going when she was out. They also said that Diane had thrown a blanket on top of her child, which they thought showed carelessness, although the baby was not harmed.

The agency filed a petition for custody of the baby, claiming that Diane was not able to parent her child adequately. Karen represented Diane in a trial on the merits and argued that the allegations made by the agency were untrue or did not constitute harm to the baby. The judicial officer agreed that the allegations could not be sustained and the agency did not get custody of Diane's child. After the trial, Karen worked with the agency to ensure that as part of Diane's case plan in her own dependency case she was receiving all services she needed to be a better parent, including weekly visits from a parenting aide.

Looking back, Karen believes the foster parents were frustrated because they felt they had too much caretaking responsibility for Diane's baby, and the agency's involvement might have been avoided if Diane and her foster parents had agreed in advance how much they each would care for the baby. She also thinks Diane would have benefited from more services in her case plan aimed at supporting her as a parent. (See discussion, at left, of "shared responsibility plans" and services that can help teen parents.)

Q&A Can a lawyer represent a teen parent in her own dependency proceedings as well as representing the teen as a parent's attorney in proceedings about his or her child?

If the lawyer represents the teen under an expressed wishes representation model and is competent to represent parents in child welfare proceedings, then this dual representation is proper, and will likely benefit the client. However, if the lawyer acts as a guardian ad litem (GAL) under a substituted judgment model then the lawyer should not also represent the client as a parent's attorney. Since it is foreseeable that the client's position as a parent may diverge from what the GAL believes is in his or her best interests as a youth in foster care, dual representation is inappropriate.

Q&A What basic principles should lawyers keep in mind when representing a teen parent in a child welfare proceeding?

The attorney should represent the child according to the American Bar Association's Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases.[14]

Lawyers must keep in mind the age of their client and use terms they can understand. The lawyer should ensure teen parents understand that even though they are in foster care,

they still have a right to be a parent and participate in all aspects of raising their children (or many aspects for a noncustodial parent). The lawyer should hold others working with the youth (social workers, foster parents) accountable in allowing the teen to participate in parenting his or her child. Documentation and testimony should be presented to the agency and the court on the teen's efforts to appropriately parent his or her child.

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Endnotes

[1] Dworsky, A. & J. DeCoursey. *Pregnant and Parenting Foster Youth: Their Needs, Their Experiences.* Chicago: Chapin Hall at the University of Chicago, 2009.

[2] The ABA Center on Children and the Law's adolescent health work, including this article, is supported through its Partners in Program Planning for Adolescent Health (PIPPAH) grant from the U.S. Department of Health and Human Services, Health Resources and Services Administration, Maternal and Child Health Bureau.

[3] In most instances, this article discusses federal statutes or Supreme Court case law regarding parents and the child welfare system. Consult your state law to determine if additional protections are given to parents generally or teen parents in foster care specifically. *See, e.g.,* California's recently enacted Protecting the Rights of Teen Parents in Foster Care legislation, AB 2483.

[4] *See, e.g.,* In re Hall, 703 A.2d 717 (Pa. Super. Ct. 1997).

[5] Meyer v Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944).

[6] Lassiter v. Dep't of Social Servs. of Durham County, N.C.; 452 U.S. 18 (1981) (citing Stanley v. Illinois, 405 U.S. 645 (1972)).

[7] Santosky v. Kramer, 455 U.S. 745 (1982).

[8] In re Gault, 387 U.S. 1 (1967); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); Bellotti v. Baird, 443 U.S. 622 (1979); Wisconsin v. Yoder, 406 U.S. 205 (1972); Parham v. J.R., 442 U.S. 584 (1979).

[9] Buss, Emily. "The Parental Rights of Minors." *Buffalo Law Review* 48, 2000, 785.

[10] 45 C.F.R. §1356.21(j).

[11] 45 C.F.R. §1356.21.

[12] 45 C.F.R. §1355.20.

[13] Ibid.

[14] Available at www.abanet.org/child/clp/ParentStds.pdf.

Interactive Web Site Details Lives of Immigrant Children

The Urban Institute has created an interactive resource exploring the lives of the nation's 16.4 million immigrant children, available at www.urban.org.

The Children of Immigrants Data Tool lets users generate detailed charts of the characteristics of children age 0 to 17 nationwide and for individual states and the District of Columbia. Statistics on 21 features include citizenship and the immigrant status (foreign vs. native-born) of children and their parents; children's race, ethnicity, and school enrollment; parents' education and English proficiency; and family composition, income, and work effort. The child and parents' citizenship and immigrant status (foreign vs. native-born) can be used as reference points for comparisons.

"More than one in five children in the United States has at least one immigrant parent. The tool is an essential resource for improving social policies that affect immigrant families and children," says Urban Institute researcher Karina Fortuny.

The data tool debuts at the same time as a companion report, *Children of Immigrants: National and State Characteristics,* which highlights key national data and variations across states.

The Urban Institute's Low-Income Working Families Project produced the data tool and report. The database will be updated as future data become available.

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