

ABA National Conference on Children and the Law

**The Unfulfilled Promise:
The Right to Counsel for Parents and Children in Child Welfare Proceedings**

LaShanda Taylor
ABA Center on Children and the Law

**May 14 – 16, 2009
Washington, DC**

This document summarizes a full paper that will appear in the Family Court Review in October 2009.

EXECUTIVE SUMMARY



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

BY THE BAR-YOUTH EMPOWERMENT PROJECT

© 2009 American Bar Association.

The preparation of this document was supported by Casey Family Programs and the Eckerd Family Foundation.

The views expressed herein are those of the ABA Bar-Youth Empowerment Project and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Nor should this article be construed as representing the policy of Casey Family Programs or the Eckerd Family Foundation.


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

ABA
BAR-YOUTH
EMPOWERMENT
PROJECT

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

EXECUTIVE SUMMARY

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

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

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

I. CHILDREN HAVE A CONSTITUTIONAL RIGHT TO LEGAL COUNSEL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. FUNDAMENTAL FAIRNESS REQUIRES LEGAL COUNSEL FOR CHILDREN

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

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

In *In re Gault*, the Supreme Court held that children in delinquency cases must be afforded counsel.⁵ Although it has not yet afforded children in the dependency system the same right, the rationale underlying *Gault* is not limited to delinquency cases. In *Gault*, the Court found that procedural safeguards, including the appointment of counsel for the child, were integral to accurate fact-finding and to preventing governmental oppression. Children in dependency proceedings are similarly disadvantaged by the lack of formality and due process. Also like delinquency cases, dependency proceedings are complex and children cannot act as their own counsel. The median age at which children enter foster care is 7.5 years old⁶; a child that

Legal Profession Supports Attorneys for Children

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

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

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

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

⁵ *In re Gault*, 387 U.S. 1 (1967).

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

age cannot fully and independently understand the legal process or the rights he possesses. Without legal assistance, he cannot: (1) express his opinions within the context of the law; (2) cross examine witnesses; (3) conduct discovery; or (4) draft and file legal motions.

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

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

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

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

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

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

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

Lawyers that represent children must honor the same ethical rules and duties that apply to attorneys generally. The Model Rules of Professional Conduct require attorneys to maintain confidential communications with the client (MR 1.6); abide by the client’s determinations as to the objectives of the litigation (MR 1.2); maintain client loyalty (MR 1.2); and refrain from intentionally or knowingly engaging in any activity which creates a conflict of interest (MR 1.7).⁹ When serving as a GAL (“best

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

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

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

interests” attorney), the attorney is often required to choose between violating the child’s confidences and representing the child’s best interests. “Consequently, a GAL generally must bend the restrictions of the Model Rules to permit disclosing to the court relevant and necessary information provided by the child.”¹⁰

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

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

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

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

Client-Directed Representation Promotes a Sense of Fairness to the Child. In many states the child is not given the opportunity to express his opinion in dependency court. This gives the child the sense that both he and his views are unimportant.

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

V. CHILDREN HAVE A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

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

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

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

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

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

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

VI. CONCLUSION

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

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

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

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

American Bar Association
Center on Children and the Law
Bar-Youth Empowerment Project
740 15th Street, N.W.
Washington, DC 20005

www.abanet.org/child/empowerment

The Unfulfilled Promise: The Right to Counsel for Parents and Children in Child Welfare Proceedings

Vivek Sankaran
Clinical Assistant Professor of Law
University of Michigan Law School
Child Advocacy Law Clinic
vss@umich.edu

LaShanda Taylor
Staff Attorney
ABA Center on Children & the Law
taylorl@staff.abanet.org

A Parent's Opinion

“When I arrived at court that morning, I was told this is my lawyer. My lawyer sat down with me five minutes, asked me a couple of things, and told me to admit my drug addiction. I didn't know anything about a fact finding hearing. I wasn't told what my rights were. I wasn't told the procedure of the court. I didn't have any idea what was happening, and I was very much afraid, because the important thing in my life had just been lost.”

Parents' Attorneys

- Protect Civil Liberties
 - Empower Parents
 - Produce Better Outcomes for Children
 - Guide Parents through the System
-

Improved Outcomes for Children

- 2003 Washington State OPD Evaluation
 - Hearings took place more quickly (# of days from petition filing to case dismissal decreased by 23.6%)
 - Increase rate of family reunification (53.3% increase in the rate of reunification)
 - Decrease rate of TPR (44.4% decrease)
 - Rate of juveniles aging out of the system decreased by 50%.
 - Need for adoption decreased by 47.6%.
 - Los Angeles Dependency Attorneys
 - Increased rate of reunification by 8%
-

What is the current state of the right to counsel for parents?

Lassiter v Dep't of Social Services

- ❑ The 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 proceedings.
 - ❑ Determination should be made on a case by case basis depending on the facts of the case.
 - ❑ "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."
-

Lassiter v Dep't of Social Services

“A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of counsel not only in termination proceedings, but in dependency and neglect proceedings as well.”

Good News

- Most states provide counsel to parents in dependency and/or TPR proceedings.
 - Astra Outley, 2004 Article for the Pew Commission citing study by the NCJFCJ: 39 states provide that counsel be appointed for indigent parents.
 - My research suggests the number is higher.
 - A number of state courts have also found that their state constitutions mandate the appointment of counsel in dependency and/or termination proceedings. 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)
-

Good news

- Increased attention on the importance of counsel for parents
 - ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases
 - ABA National Project To Improve Representation For Parents. More information at <http://www.abanet.org/child/parentrepresentation/home.html>
-

Good news

- Emergence of institutional providers of parent representation
 - Center for Family Representation, NYC
 - Bronx Defenders
 - Community Legal Services, Philadelphia
 - Family Defense Center, Chicago
 - Office of Public Defense, Washington State
 - Los Angeles Dependency Lawyers
 - Law school clinics representing parents: NYU, UDC, Michigan
-

So what's the problem?

Not all states provide a statutory right to counsel in dependency or TPR proceedings

- Examples: Hawaii, Indiana, Minnesota, Wisconsin, Mississippi, Nevada
 - Appointments are discretionary
 - Example of statutory language
 - Minn. Stat 260C.163: “if the child, parent, guardian, or custodian desires counsel but is unable to employ it, the court shall appoint counsel to represent the . . . parents or guardian in any case in which it feels that such an appointment is appropriate.”
 - Ind. Code 31-32-4-3(b): “The court may appoint counsel to represent any parent in any other proceeding.”
 - Hawaii Rev. Stat. 587-34: “The court shall appoint a guardian ad litem for the child to serve throughout the dependency of the child protective proceedings under this chapter. The court may appoint additional counsel for the child pursuant to subsection (c) or independent counsel for any other party if the party is an indigent, counsel is necessary to protect the party's interests adequately, and the interests are not represented adequately by another party who is represented by counsel.”
-

Some states do not provide representation to non-offending parents whose custodial rights may nevertheless be infringed upon

- ❑ Michigan: “The court shall appoint an attorney to represent the respondent at any hearing ...” MCR 3.915. “Respondent” is defined as parent “who is alleged to have committed an offense against a child.” MCR 3.903(C)(10).
 - ❑ But, the court still has the power to order the non-offending parent to comply with services and can remove the child from the non-offending parent based solely on a finding that it is in the child’s best interests to do so.
-

Quality of lawyering is often inadequate

- “Parents who are about to lose their children because of abuse or neglect are often at a legal disadvantage. . . The court appoints lawyers for the parents, drawing from panels of lawyers who are screened and certified annually. But these lawyers are often not up to the task. Many meet their clients for the first time just before rushing into court. They know nothing of the family’s background and often cannot speak the parents’ language.” N.Y. Times Editorial (1996)
 - New York County Lawyers’ Association v. State of New York, 763 N.Y.S.2d 397 (February 5, 2003) (observing “grim reality that . . . indigent adults in the New York City Family Court . . . are at unreasonable risk of being subjected to a process that is neither swift nor deliberate, and fails to confirm the confidence and reliability in our system of justice.”)
 - 2005 Michigan CIP Reassessment: “What was reported to evaluators in this reassessment and what was observed in court hearings fall disturbingly short of standards of practice”
 - Very little advocacy done between court hearings.
-

Common complaints

- Timing of appointments
 - Timing often varies by county.
 - Lack of adequate compensation
 - Compensation rates often vary by county.
 - Lack of training requirements
 - Lack of institutional support
 - Most attorneys representing parents are court-appointed solo practitioners.
-

Low pay leads to

- High Caseloads
 - High Turnover
 - Limited Supply of Parents' Attorneys
 - Limited Scope of Representation
 - Holistic representation is rarely seen
 - Administrative advocacy is rare
-

Legal Remedies to Address Problems are Inadequate

- High standard to prove ineffective assistance of counsel
 - Must show that counsel's performance fell below an objective standard of reasonableness
 - Must overcome the presumption that the challenged action was trial strategy.
 - Must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.
 - Rarely achieved
-

Inadequate legal remedies to address erroneous deprivation of counsel

- ❑ In most states, the erroneous deprivation of counsel at stages other than TPR is governed by harmless error analysis.
 - ❑ Generally, automatic reversal only occurs when the parent is deprived of counsel at the final TPR hearing
-

Examples

- ❑ Meza-Cabrera v Arkansas Dep't of Human Services, 2008 Ark. LEXIS 120 (Ark. Ct. App. 2008) (TPR affirmed even though incarcerated father erroneously deprived of lawyer for two years)
- ❑ Arthur v Div of Family Services, 867 A.2d (Del. 2005) (TPR affirmed even though incarcerated father erroneously deprived of lawyer for 15 months)

In these and other cases, TPRs affirmed because errors were deemed to be harmless since the parents were represented at the final TPR hearing.

Deprivation of counsel at TPR hearing

- Some courts have deemed that the deprivation of counsel at the TPR hearing requires automatic reversal because it is a structural defect
 - *In re JMB*, ___ Ga App ___; ___ SE2d ___; 2009 Ga App LEXIS 339 (Ct App Ga, 2009) (“We therefore overrule [prior decisions] to the extent that they require a showing of harmful error after an indigent parent’s request for appointed counsel during a termination hearing had been erroneously denied.”).
 - *In re Torrance P*, 298 Wis 2d 1, 29; 724 NW2d 623 (2006) (finding that the denial of the statutory right to counsel constitutes structural error because without counsel, “a termination of a parental rights proceeding cannot reliably serve its function.”)
 - Pending case in Michigan: *In re McBride*
-

Problems with jurisprudence

- ❑ Child protective hearings are continuous proceedings
 - ❑ Counsel helps shape subsequent facts
 - ❑ When counsel is erroneously deprived, then ex post harmless error analysis is inappropriate because the record is not fully developed
 - ❑ Analogy to criminal jurisprudence is inappropriate. Most important lawyering tasks in a TPR hearing take place in the years before the hearing.
-

Next steps

- ❑ Work with state courts to identify need for improvement and collaborate on solutions
 - E.g. Michigan State Court Administrative Office collaboration with the ABA. Recent study in Colorado. Use CIP Funds.
 - ❑ Amend CAPTA to mandate appointment of parents' attorneys.
 - ❑ CAPTA only requires appointment of GAL as a condition of receiving federal funding.
 - ❑ States care about receiving federal funding
 - ❑ Comprehensive federally-funded project to improve legal representation of parents.
 - ❑ Recent RFP to "improve the quality and quantity of competent representation for children and youth in child welfare cases so that States and Tribes achieve the best safety, permanency and well-being outcomes for these children and youth." Allocates several million dollars for the project.
 - ❑ Work with private foundations to fund pilot projects
 - ❑ Detroit Center for Family Advocacy
 - ❑ Create national community of parents' attorneys
-

Attorneys for Children

- ❑ Protect Civil Liberties and Child's Distinct Interests
 - ❑ Empower Children and Promote a Sense of Fairness
 - ❑ Guide Children through the System
 - ❑ Produce Better Outcomes for Children
-

Improved Outcomes for Children

- Palm Beach County Study (Chapin Hall, 2008)
 - Decreased likelihood that the child will exit the foster care system without achieving legal permanency
 - Exit to permanent homes about 1.5 times more frequently than children who were not afforded counsel
 - Children moved from case plan approval to permanency at approximately twice the rate (2.01) of comparison children
-

What is the current state of the right to counsel for children?

In re Gault (1967)

- ❑ The Supreme Court held that children accused of crimes in a delinquency proceeding must be afforded the right to counsel
 - ❑ The Supreme Court has not yet afforded children in the dependency system the same right to counsel
-

Child Abuse Prevention and Treatment Act (CAPTA)

- Requires that states provide guardians *ad litem* (GAL) for all children in child abuse and neglect proceedings
 - Reauthorized and amended in 1996 to provide that a lawyer may be appointed as GAL
 - GAL may “be an attorney or a CASA (or both)” whose role is “to obtain first-hand, a clear understanding of the situation and needs of the child; and to make recommendations to the court concerning the best interests of the child
-

ADOPTION 2002: The President's Initiative on Adoption and Foster Care

- Guidelines for Public Policy and State Legislation Governing Permanence for Children
 - “the states may appoint an [client-directed] attorney for the child . . . in fulfillment of the CAPTA requirement,” and that “states are free to appoint a guardian *ad litem*, perhaps a volunteer CASA, in addition to an [client-directed] attorney for the child This is the preferred approach.”
-

Good News

- Children in nearly 40 states have a statutory right to an attorney
 - Several court decisions have held that children have a constitutional right to counsel
 - Roe v. Conn
 - In the Matter of Jamie TT
 - Kenny A. v. Perdue
-

Roe v. Conn, 417 F. Supp. 769, 781 (D.C.Ala. 1976)

- A Federal district court held that a challenged Alabama procedure “violates the due process clause of the Constitution because that procedure does not provide for the appointment of independent counsel to represent a child in a neglect proceeding...”
-

In the Matter of Jamie TT, 191 A.D.2d 132, 136 (NY 1993)

- A New York Appellate Court held that it “would be callously ignoring the realities of [the child’s] plight during the pendency of this abuse proceeding if we failed to accord her a liberty interest in the outcome of that proceeding, entitling her to the protection of procedural due process.”
-

Kenny A. v. Perdue, 356 F.Supp.2d 1353, 1357, 1361 (N.D.Ga., 2005)

- A Federal court in Georgia concluded “foster children have both a statutory and a constitutional right to counsel in all [major child welfare] proceedings...”
 - The court went on to state that “only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and [termination of parental rights] proceedings.”
-

Increased attention on the importance of counsel for children

- American Bar Association
 - ABA Resolutions on Foster Care and Adoption: Foster Care Reform (August 2005)
 - Resolved that all dependent youth should “have the right to quality legal representation, not simply an appointed lay guardian *ad litem* or lay volunteer advocate with no legal training, acting on their behalf...”
 - ABA Resolution 112a (August 2006)
 - Urged federal, state, and territorial governments to provide legal counsel at public expense to low income persons “in those categories of adversarial proceedings where basic human needs are at stake,” such as those involving child custody
 - ABA Resolution 104a (August 2007)
 - Resolved to provide “all youth with the ability and right to attend and fully participate in all hearings related to their cases
-

Standards of Practice

- Recommendations of the Fordham Conference on Ethical Issues in the Legal Representation of Children (1995)
 - ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Proceedings (1996)
 - ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Proceedings (NACC) (1999)
 - NACC Recommendations for Representation of Children in Abuse and Neglect Cases (2001)
 - ABA Standards of Practice for Lawyers Representing Children in Custody Cases (2003)
 - Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham (2006)
-

Examples of institutional providers of child representation

- Children's Law Centers
 - Washington, DC
 - Los Angeles, CA
 - Chicago, IL
 - Pro Bono Model
 - Lawyers for Children
 - Children's Attorney Panel
 - Washington, DC
 - Private/For Profit Attorneys
 - Orange County, CA
 - Legal Aid
 - Maryland
 - Public Defenders
 - Alameda County, CA
-

So what's the problem?

Statutory right to counsel

- Not all states provide a statutory right to counsel
 - In the states that provide statutory right to counsel:
 - In majority, the person is called an “attorney-GAL” or an “attorney *ad litem*” and represents the “best interests”
 - In some states, the person represents both the expressed wishes **and** “best interests”
-

Training- The Problem

- Only 28 jurisdictions require attorneys to have training prior to appointment and/or continuing legal education (CLE) to enhance the attorney's knowledge of issues related to his representation
-

Training- Good News

- CAPTA was amended in 2003 to require states receiving federal funds to certify that each court-appointed children's lawyer or GAL was a person "who has received training appropriate to the role."
 - Fostering Connections to Success and Increasing Adoptions Act expands the availability of federal funds to train attorneys representing children in child protection proceedings
 - National certification programs help states ensure high quality representation
 - In 2006, the NACC developed a certification program to become a Child Welfare Law Specialist
 - It is anticipated that all 51 jurisdictions will be open to NACC certification by the end of 2009
 - One goal of National Quality Improvement Center on the Representation of Children is to support lawyers in obtaining National Association of Counsel for Children (NACC) certification in child welfare law and practice
-

Training- ABA Recommendation

- ABA Resolutions on Foster Care and Adoption: Foster Care Reform, August 2005
 - Development, implementation of, and funding for, qualification and training standards for dependency counsel
-

Caseloads- The Problem

- Many attorneys representing children report having high caseloads
 - A survey found that 17.6% of all respondents had caseloads of 200 and over and 24.9% had caseloads between 100 and 199
 - In April 2008, it was reported that assistant public defenders in Oklahoma County had caseloads between 1,000 and 1,250 children
-

A quote from a children's attorney:

“By keeping my caseload low... I am able to get to know my clients well, meet with them where they are living, and build the trust required to hear their desires, investigate cases fully, and better advocate for them. I also have time to more thoroughly research legal issues in my cases, so the level of practice in Family Court may be improved.”

Caseloads- Good News

- ❑ NACC recommends caseloads of no more than 100 children per attorney per year
 - ❑ In 2006, Dekalb County, Georgia, through its consent decree in *Kenny A.*, established a caseload cap of 130
 - ❑ A recently enacted New York court rule states that “the number of children represented at any given time by an attorney... shall not exceed 150”
 - ❑ California adopted caseload standards of a maximum of 188 cases per attorney for attorneys who have appropriate support staff
 - Statewide average is 273, with some counties experiencing attorney caseloads of between 500 and 600
-

Caseloads- ABA Recommendation

- ABA Resolutions on Foster Care and Adoption: Foster Care Reform, August 2005
 - Development and implementation of national protocols and standards for reasonable attorney caseloads
-

Next Steps

- Amend CAPTA
 - The National Child Abuse Coalition: require every child in a dependency proceeding to have both an attorney and a guardian *ad litem*
- Litigation
 - Constitutional right to counsel (federal and state)
 - In re Gault
 - Procedural Due Process
 - Client-directed vs. Best interest attorney
- Additional studies
 - Effect that attorneys have on permanency
 - Overall financial benefits to providing attorneys for children
- National Quality Improvement Center on the Representation of Children
- Right to Counsel Summit- October 2009
- ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings