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Procedural Injustice: How the Practices and Procedures Of The Child Welfare System Disempower Parents And Why It Matters

by Vivek Sankaran and Itzhak Lander Ph.D

Introduction

Many of us appear surprised when families involved in the child protective system do not reunify. A parent's path to reunification seems straightforward. Upon a finding of neglect, the court prescribes a basic regimen, typically consisting of parenting classes, counseling, drug testing, and a psychological evaluation, that a parent must fulfill prior to having the child returned to his/her custody. If a parent successfully completes these seemingly minimal requirements, the law requires reunification unless the return poses a "substantial risk of harm" to the child.¹ With such high stakes involved, a clearly defined path for success, and the prospect of termination of parental rights looming over them, parents have every incentive to complete these requirements quickly and succeed in the overwhelming majority of cases. One would expect parents, fighting zealously for their children, to diligently complete court-mandated requirements and promptly reunify with their children. This is the child protective system we strive to achieve. This goal is embodied in the Michigan Juvenile Code, which states a preference that a child coming within the court's jurisdiction "receives the care, guidance, and control, preferably in his or her own home."²

Yet, today, we find ourselves far removed from this aspiration. Nationally, only 54% of children exiting foster care are returned to their parents' custody.³ Local statistics paint an even darker picture of reality. Over 60 percent of children removed by the Michigan Department of Human Services ("DHS" or "Department") do not return home within a year.⁴ For families under the supervision of a private child welfare agency, that number rises to approximately 70 percent.⁵ Nearly half of all families never reunify.⁶ And, as has been highly publicized, over 6,000

children remain in the Michigan foster care system as permanent court wards whose parents' rights have been terminated but who still await adoptive homes.⁷ These statistics present a system that has failed in facilitating the prompt reunification of children with their parents. Somewhere soon after the child protective case is initiated, many parents become disengaged in the process, fail to complete services, and drop out of their child's life.

Why has this systemic failure occurred? Certainly the complex myriad of problems confronting parents such as drug use, mental illness, and domestic violence often creates insurmountable barriers that may take years to overcome. In a very small number of cases, the seriousness of the abuse or neglect warrant a wise decision by the DHS and the court to immediately terminate the legal relationship between the parent and the child.⁸ In others, the Department fails to provide quality services to parents in a timely manner. In many cases, parents are willing and able to reunify with their children with the provision of services which may be available, yet they ultimately fail. This failure occurs, in part, due to the ways in which the procedures used by the child protective system disconnect and alienate parents from the decision making process involving their children. This process of disempowerment occurs immediately upon the filing of a child protective petition, a time during which allegations of abuse or neglect have not been proven, and continues until parental rights are terminated. At every possible opportunity, the system impresses upon parents, most of whom come from traditionally disenfranchised populations,⁹ that they are no longer capable of raising their children, and does this by silencing their voices both in and out of court and giving them little control over the process. The emascula-

tion is complete when parents completely disengage with the system which permits judges to terminate their rights and consider other “permanency” options for children. To the extent that the child protective system is serious about reunifying children with their parents, many of its practices and procedures undermine that objective. This dissonance, which has significant repercussions for child welfare policy, will be explored.

Procedural Justice

The “straightforward” picture of the system painted at the outset of this article masks the complex relationships in a child protective case between the parent, the Department, and the court. The challenges confronting child welfare professionals are profound. Typically, a parent becomes enmeshed in the court system after the Department either has removed or seeks to remove children from his/her custody.¹⁰ At this juncture, parents are angry, frustrated, and frightened about the prospects of losing their children to a system in which strangers will raise them. They lack any confidence in the Department and the court that has just authorized the removal and are confused about what will happen next. Often, these parents appear hostile and confrontational as they have been stripped of the most important piece of their lives—their children. Few of us would behave any differently.

The challenge facing the child welfare system lies in motivating parents, completely disillusioned with the process, to accept and comply with a series of mandates issued by a department and court that the parent has already deemed to be antagonistic due to the sudden, traumatic removal. Upon removal, the parent often loses confidence in the decision making process, and procedures to re-establish its legitimacy from the parent’s perspective must be implemented to bolster the chances for reunification. The task of establishing a system to achieve these goals is daunting yet attainable. Research in the field of social psychology, described generally as “procedural justice,” instructs us on how exactly we might promote this delicate balance of engendering trust in a seemingly hostile relationship between the parent and governmental authorities.

Repeated studies by social psychologists provide compelling evidence that a key determinant in retaining the support of those receiving unfavorable

outcomes is the utilization of fair procedures to make decisions.¹¹ Surprisingly, although an individual’s willingness to accept authorities’ decisions is shaped by the favorability of outcomes, research shows that outcome favorability is not the only, or even major, factor shaping acceptance and satisfaction.¹² Both trust in the motives of authorities and judgments about the fairness of procedures they use are stronger influences on acceptance and satisfaction than achieving a particular outcome in a case.¹³ These findings provide hope that courts and agencies can achieve voluntary compliance with orders and recommendations even when taking actions in the short term that may run contrary to the parents’ interests.

In assessing what is “fair,” litigants look to a number of factors. Most importantly, procedures that permit individuals to present arguments and to exert control over the process are deemed just, whereas those that silence litigants only exacerbate feelings of mistrust.¹⁴ Central to these findings is a person’s need to have his story told, regardless of whether the telling will ultimately impact the outcome of the case.¹⁵ Fairness is also enhanced by adequate representation and confidence that the decision-maker is neutral and unbiased.¹⁶ Courts that reaffirm one’s self-respect and treat people politely while respecting their rights earn the trust of those before it, regardless of the substance of the orders it issues.¹⁷

Why is the satisfaction of litigants important? Research demonstrates that greater satisfaction with the process significantly increases the likelihood that litigants will comply with the mandates of authorities, even when those authorities are taking actions which may be detrimental to the interests of those individuals.¹⁸ This result is particularly salient in child protective cases in which a finding of neglect only represents the beginning of the case and the ultimate outcome depends largely on the willingness of the parent to obey the dictates of others.¹⁹ Parents must comply with case service plans and court orders to effectuate the child’s return home. Satisfaction with the process helps child welfare authorities achieve voluntary compliance with treatment requirements.

Designing a child protective system based on principles of procedural justice would invest more parents in the process and enhance the legitimacy of the various decision makers ranging from judges to social workers.

What would be the key elements of such a system? Parents would be represented zealously by able, adequately-compensated counsel, who would present their stories to the court. The court, which would treat parents with the utmost of respect, would give them the opportunity to present evidence regarding all aspects of the case, including their story of what happened and what they need to reunify with their children. Judges, mindful of the power imbalance between parents and the Department,²⁰ would carefully and patiently listen to each party's story and meticulously follow court procedures and evidentiary rules prior to making just determinations regarding the family.

Outside of court, caseworkers would meet regularly with parents and consider their input prior to developing and updating case service plans aimed at assessing the family's strengths and needs, and prescribing services to address any deficits. Lawyer-guardians *ad litem* would work to understand the parent's perspective, prior to rendering an opinion on what is best for the child, by regularly meeting with the parent and other members of the extended family. And, of course, parents would have regular access to their attorneys, who would advocate on behalf of the parent and serve as the conduit of the parent's perspective. In all aspects of the child protective case, the parent's voice would be heard, and his/her opinion would be respected. A child protective system based on principles of procedural justice would not require rendering outcomes based solely on the parent's wishes. It would simply empower parents and validate their experiences by giving them a voice and input in the process.

Procedural Injustice

Today's child protective service, however, lacks attributes reflecting procedural justice values for parents. Although laws exist affording parents procedural protections and rights, in practice, these guarantees have been vitiated, leaving parents with few, if any, opportunities to participate meaningfully in the development of their case. Statutory and constitutional rights to parents' counsel have been eviscerated by delayed appointments, low pay, and high caseloads. Relaxed advocacy and procedural shortcuts have been justified by efficiency considerations and by furthering the amorphous "best interests of the child."²¹ Receiving parental input on important decisions has been replaced with decision making based on the opinions of

third-party professionals, many of whom lack meaningful relationships with the family. Each of these factors, among others, contributes to a system that disempowers parents, increases their dissatisfaction with the process, and reduces the likelihood that they will complete services and reunify with their children. Some are highlighted below.

Right To Counsel

Attorneys are their clients' voice in the courtroom. They play a crucial role in conveying their clients' perspective to the court, zealously advocating for that position in all proceedings, and protecting the sacrosanct constitutional rights at stake. As observed in *Reist v. Bay County Circuit Judge*:

Parents most often involved in neglect and termination proceedings are usually the least equipped, in terms of intellectual and emotional resources, to respond to such proceedings. The indigent are frequently the least able to cope with government in its official functions. The case at bar was routine for the welfare workers and other juvenile court staff. For the indigent mother, however, the entire proceedings were incomprehensible.²²

As such, in Michigan, a parent has an unqualified right to counsel, which is recognized in statute, court rules, and case law. Mich. Comp. Laws Ann. § 712A.17c (West 2002) explicitly provides a parent with "the right to an attorney at each stage of the proceeding" and "the right to a court-appointed attorney if the respondent is financially unable to employ an attorney."²³ Not only does such a right exist, but attorneys representing parents must be effective, competent, and diligent.²⁴ The full panoply of responsibilities mandated by the Michigan Rules of Professional Conduct applies to parents' attorneys, who are subject to disciplinary actions if they deviate from the rules.

In practice, however, a parent's right to effective counsel has yet to be fully recognized. Whether a parent receives court-appointed counsel at the outset of the child protective case varies across the state. Custodial parents are only represented by attorneys in approximately 60 percent of removal hearings and 50 percent of non-removal hearings.²⁵ For non-custodial parents, that number drops to 30 and 20 percent respectively.²⁶ "If the parent . . . is not represented at all at the preliminary hearing, decisions to remove

the child can appear arbitrary, and parents may feel that they do not know how to speak to the jurist to explain their situations.²⁷ In certain counties, such as Genesee County, as a matter of practice, no parent receives the assistance of court-appointed counsel at the preliminary hearing. These jurisdictions typically appoint attorneys weeks after the preliminary hearing after critical decisions in the case have already been made, including the child's removal from the home and placement into care.²⁸ In contrast, statistics reveal that children are appointed lawyer-guardians *ad litem* to represent their "best interests" in over 90 percent of cases in which removal is requested.²⁹

Appointment of counsel by itself, however, does not necessarily lead to effective representation because of extremely low rates of compensation. No statewide standards exist establishing a baseline compensation for parent's attorneys, and thus, practice varies among counties.³⁰ While some counties pay attorneys an hourly rate, many, including the counties which have the largest foster care populations in the state, including Wayne County, Oakland County, and Genesee County, compensate parents' attorneys by hearing or stage of the case. For example, in Genesee County, attorneys are paid \$300 if their clients enter a plea, approximately \$450 if the case goes to trial, and \$50 per review hearing. In Oakland County, lawyers receive \$300 for a plea, \$450 for a trial, and \$120 for review hearings. Similar payment structures are utilized in a number of the larger counties.³¹

The disincentives to zealous lawyering created by this structure are transparent. Attorneys are encouraged to practice relaxed advocacy, do little work outside of the courtroom, and push their clients towards entering into pleas. As described above, in Genesee and Oakland Counties, an attorney only receives an extra \$150 to go to trial if his client does not enter into a plea despite the substantial amount of preparation a trial entails including drafting examinations, preparing witnesses, and subpoenaing documents. At the review hearing stage, if an attorney spends one hour a week on a parent's case between hearings, a conservative average, his hourly billing rate, based on the \$50 payment, would come out to under \$4 per hour, well below the minimum wage. And, if a parent's attorney engages in creative lawyering and gets the Department to dismiss a case prior to the court's assumption of jurisdiction, he runs a high risk of not being paid for his efforts. Under this system,

the only way a parent's attorney can make a living is to maintain high caseloads and limit the extent of his advocacy for any one client.

Not surprisingly, this skewed system has affected the quality of legal assistance parents receive. Attorneys maintain caseloads in the hundreds, and in some courthouses, substitution of counsel is routine due to scheduling conflicts.³² As one person observed:

[P]arents' attorneys in Wayne County meet in the cafeteria and 'deal the morning's cases like cards,' trading cases back and forth based on who is going to be in which courtroom that day. Attorneys who work on these cases in Wayne County generally are not able to do other kinds of work and must maintain high caseload numbers to assure themselves adequate income. If a parent's attorney is not available at the time of the hearing, the parent is offered house counsel—an attorney who is on call for that day and who is assigned to come in to the hearing without ever having seen the case file or ever having met the parent.³³

Client contact also appears to be infrequent. One-third of judges responding to a statewide survey report that parents' attorneys rarely speak to their clients before hearings.³⁴ Attorneys themselves report that often they cannot meet their clients in their offices and must talk to them in the lobby or outside of the courthouse just before the hearing.³⁵ Without frequent contact with their clients, it is difficult to comprehend how any meaningful advocacy can occur.

Statistics reveal that relaxed advocacy has become the norm in the system. Decisions to remove a child from the home are rarely challenged, and the overwhelming majority of child protective cases resolve in pleas.³⁶ Michigan is one of three states in the country that provide parents with the right to a jury trial at the jurisdiction stage, yet in 2005, jury verdicts were rendered in fewer than 1 percent of cases.³⁷ In contrast, parents pled to allegations against them in nearly 4,000 cases.³⁸ Similarly, despite clear statutory provisions mandating that the court inquire in each case as to whether the Department made "reasonable efforts" to prevent the removal of children from their home and to finalize the child's permanent placement, these findings are rarely challenged by parents' attorneys.³⁹ Over 90 percent of judges have rarely or never found that the Department failed to make reasonable efforts

despite significant evidence about the availability of appropriate services for parents in the system.⁴⁰ Procedural protections provided to parents under State law are not being exercised because the right to counsel has not been fully enforced.

Not surprisingly, parents themselves provide the most blistering critique of their representation. Parents report that their attorneys do not return phone calls or provide them with contact information.⁴¹ Attorneys fail to explain what is happening in their cases, and do not give parents a chance to tell their story at court hearings and make deals without consulting them.⁴² Parents also confirmed that often, their only contact with their attorneys, if any, occurs for a few minutes before hearings.⁴³ Consequently, they are left confused about what is happening.⁴⁴ As summarized in the 2005 Court Improvement Project Reassessment Report, “What was reported to evaluators in this reassessment and what was observed in court hearings fall disturbingly short of standards of practice.”⁴⁵

The right to counsel plays a crucial role in enforcing standards of procedural justice in any court process. Yet, in child protective proceedings, the system has left this right hollow for parents accused of maltreatment. Although many practitioners who work in this field are passionate and talented, the conditions in which they must practice prevent them from engaging in the level of advocacy that is needed to empower parents and give them a sense of control over the process. The system’s refusal to embrace the importance of legal advocacy on behalf of parents only contributes to the resentment, frustration, and hostility that parents inevitably feel towards those making important decisions.

Other Forms Of Disempowerment

The failure to fully recognize the parent’s right to counsel is only one manifestation of the many ways in which the child protective system denies parents their dignity and silences their voices. Upon the initiation of a case, parents may fail to receive notice of the preliminary hearing. When they arrive at court, they wait for hours in a crowded waiting room prior to their case being called.⁴⁶ Often, seats are a premium, and no space exists for parents to speak privately with their attorneys or case workers.⁴⁷ The following typifies the experience of many:

Evaluators observed that the lobby waiting area became crowded with many people having to

stand up because there were so few seats. In this area, there was chaos, noise, and a lack of privacy. Names were called over a loudspeaker which was heard throughout the waiting area so everyone present learned the names of the other persons before the court. Attorneys generally had to talk to clients in the lobby or outdoors. Because of the lack of meeting rooms, attorneys spoke openly about private family matters in the waiting area in the presence of strangers. Sometimes a person came to the waiting area and said in front of others something like “your drug test came back OK.”⁴⁸

Once the hearing begins, the parent may or may not be represented by counsel,⁴⁹ and the process is short and perfunctory. The Department’s version of the facts is generally accepted,⁵⁰ and more time may be spent during the hearing trying to make the appropriate “reasonable efforts” and “contrary to the welfare” findings necessary to preserve eligibility for federal funding than on pressing issues like placement, visitation, and the immediate provision of services for the family. A lawyer-guardian *ad litem*, who, in all likelihood, has had little opportunity to conduct any investigation of the matter or to meet with the child, is offered a chance to present what is “best” for the child, but few opportunities exist during the hearing for the parent to voice his/her concerns about what is happening. A clear message is sent through this process: The opinions and wishes of the parent are not important or relevant to the decisions being made by the court about the child.

As the case continues, the parent is further stripped of control over the process. State law requires the Department to prepare an initial service plan within 30 days after a child’s removal from the home.⁵¹ Department policy requires the engagement of the parent in the drafting of the plan, which means an open conversation between the parent and social worker to discuss needs and strengths and to reach an understanding of what is entailed in meeting the goals of the service plan.⁵² The Department itself notes that “[p]arental engagement is an invaluable tool for achieving early return home of children from foster care.”⁵³

Unfortunately, the development of the case service plan is another area in which parental involvement has been stifled. A 2005 report issued by the Foster Care Review Board found that in a majority of cases

reviewed, the plan was unsigned by parents and the vast majority of parents felt that they had little input and that the elements of the plan were essentially decided by the case worker.⁵⁴ These conclusions have been corroborated by other sources. The Federal Child and Family Services Review (CFSR) found that in 30 percent of cases reviewed, diligent efforts were not made to involve parents in the case planning process.⁵⁵ Similarly, a statewide assessment discovered that parents were not involved in approximately 40 percent of treatment plans.⁵⁶ The CFSR also concluded that the DHS, in part due to the lack of parental involvement, failed to effectively address the service needs of families in 27 percent of the cases investigated.⁵⁷

The systematic practice of shutting parents out of decision making extends beyond the development of the service plan. Both state and federal law mandate parental involvement, and often consent, before making educational and medical decisions regarding their children, even when the child is in the foster care system. The Individual with Disabilities and Education Act (IDEA) preserves a parent's authority to make educational decisions until the child is a "ward of the State," at which point a surrogate parent may be appointed.⁵⁸ State law requires the parent's consent before any non-routine, elective, or surgical treatment of the child.⁵⁹ DHS policy mandates parental permission before a child can enroll in a private school or be home schooled.⁶⁰

Yet, experience and documented stories tells us that parental involvement of this type is rarely seen in today's foster care system.⁶¹ Instead, once the case is petitioned, child welfare professionals, with the best of intentions, immerse themselves in the family's background and independently determine what is best for the child, excluding family members from the process. Despite having a statutory mandate to "interview family members,"⁶² lawyer-guardians *ad litem* rarely consult with parents prior to making a "determination regarding the child's best interests."⁶³ Meetings are held, decisions are made, and a child's life is altered, yet the opinions of those closest to the child are often not considered. Rather than engaging in a cooperative process in which the parent provides substantial input into identifying and addressing deficits, in practice, parents are simply told what they need to do in a formulaic fashion without consideration of their individual needs.

A final example of a way in which the system erodes the decision making control of parents lies in the court's ability, under Michigan law, to assume jurisdiction of a parent's child without a finding of parental unfitness against that parent. The law currently permits family courts to obtain jurisdiction or temporary custody of a child based solely on a plea or finding of unfitness against one parent.⁶⁴ The Juvenile Code, as interpreted by the case law, even allows a court "to enter an order placing the children outside of the custodial parent's care whose neglect did not factor into the assumption of jurisdiction over the child."⁶⁵ Under this interpretation, a custodial parent who has done nothing to harm her child could be deprived of total decision making authority over her child based solely on findings made against a non-custodial parent who may have had minimal contact with the child. This deprivation, even if contested, could occur without an evidentiary hearing, which is not required under the law after findings are made against one parent.⁶⁶ Afterwards, the extent of the custodial parent's ability to influence any of the educational, medical, and placement decisions of the child would be at the whim of the trial court judge. The case law demonstrates numerous examples of parents being shut out of the decision making process through the application of this statutory regime.⁶⁷ This is yet another example of how the procedures used by our child protection system alienate and disempower those whom the system is trying to help.

Conclusion

The discussion above is not intended to paint a comprehensive picture of the ways in which the procedures employed by the system undermine the goals of family reunification, but is meant to merely highlight the problem. Much more work in the area is needed. Recent initiatives, such as the Family to Family Program funded by the Casey Foundation are attempting to reverse these longstanding practices. Among other goals, the initiative seeks to involve birth parents in all decisions to "ensure a network of support for children and the adults who care for them."⁶⁸ As part of this program, team decision making meetings, consisting of parents, extended family, and community members, along with child welfare professionals, are convened prior to a change in a child's placement. The "Parent Partners" program, implemented in Wayne County,

matches parents with others who have successfully reunified with their children, to help show them that they have control over the process. These programs demonstrate great potential in restoring strength in the family, yet they are early in their limited implementation, and their effectiveness has yet to be evaluated fully. Regardless, the principles underlying the program demonstrate the importance of recognizing the role that parents, even after allegations of abuse are made, should play in the rearing of their children.

Others measures, of which a comprehensive discussion is beyond the scope of this paper, must be taken as well. In short, I recommend creating a statewide task force, with leadership from the judiciary, legislature, and the Department of Human Services, to conduct a comprehensive assessment of how procedures used in child protective cases silence the voices of parents. Membership on the task force must include parents' attorneys and parents themselves. After conducting the assessment and widely disseminating the results, the task force can discuss areas in need of improvement including strengthening a parent's right to counsel, making statutory changes to enhance parental input in judicial and administrative decision making, restructuring court facilities and processes to reinforce a parent's dignity and self-respect, and improving the practice of attorneys and case workers to incorporate the views of parents and other family members. Creating an institutional office to represent parents and to provide support to parents' attorneys similar to the Center for Family Representation in New York City⁶⁹ or Community Legal Services in Philadelphia⁷⁰ would be a logical first step. Specific measures such as establishing a reasonable, uniform rate for compensating parents' attorneys and capping caseloads, creating a statewide office to monitor the quality of representation parents receive, and establishing an administrative case review process in which parents can participate, are some of the other many possibilities for reform. Although these measures themselves will not cure all the problems that ail the child welfare system, they will increase the likelihood that parents will engage with the system and voluntarily accept decisions made against them. Restoring the confidence of parents in the child welfare system will only increase positive outcomes for children in care. ©

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Endnotes

- 1 Mich. Comp. Laws Ann. § 712A.19a (West 2002) ("If parental rights to the child have not been terminated and the court determines at a permanency planning hearing that the return of the child to his or her parent would not cause a substantial risk of harm to the child's life, physical health, or mental well-being, the court shall order the child returned to his or her parent.")
- 2 Mich. Comp. Laws Ann § 712A.1(3) (West 2002).
- 3 See *Children's Bureau, U.S. Dep't Of Health & Human Services, The Afcars Report, Fy 2005 Estimates As Of September 2006* available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.htm (last visited on June 14, 2007).
- 4 See Gongwer News Service Michigan, D.H.S.: *State Statistics Better on Foster Care than Privates* (May 24, 2007) (on file with author).
- 5 See *id.*
- 6 In 2003, only 54 percent of children who exited foster care in Michigan were returned to their parents' home. See Children's Bureau, U.S. Dep't of Health & Human Services, Child Welfare Data Outcomes, Michigan State Data Page available at http://www.acf.hhs.gov/programs/cb/pubs/cwo03/state_data/michigan.htm (last visited on June 14, 2007).
- 7 See Michigan Dep't of Human Services, Foster Care Fact Sheet March 2007, available at http://www.michigan.gov/documents/DHS-FosterCare-FactSheet_131252_7.pdf (last visited on June 14, 2007).
- 8 Statistics reveal that neglect is the most common type of child maltreatment. More than 60 percent of victims of child maltreatment experienced neglect. In contrast, fewer than 10 percent of victims suffered sexual abuse. See Children's Bureau, U.S. Dep't of Health & Human Services, *Child Maltreatment 2005* at xv (2007) available at <http://www.acf.hhs.gov/programs/cb/pubs/cm05/cm05.pdf> (last visited on June 14, 2007).
- 9 Most families involved in the child protective system are poor, and a disproportionate number of African-American children end up in the system. For a comprehensive discussion of this problem, see Michigan

Advisory Committee on the Overrepresentation of Children of Color in Child Welfare, *Equity: Moving Toward Better Outcomes for All of Michigan's Children* (2006) available at http://www.michigan.gov/documents/DHS-Child-Equity-Report_153952_7.pdf (last visited on June 14, 2007).

- 10 Michigan law requires that a court hearing be held no later than 24 hours after a child has been removed from her home. Mich. Ct. R. 3.965(A)(1).
- 11 See Tom R. Tyler & Yuen J. Huo, "Trust in the Law, Encouraging Public Cooperation with Police and Courts" 51, 93 (2002); Tom R. Tyler, "Why People Obey the Law" 115, 129, 137 (1990); E. Allen Lind & Tom R. Tyler, "Social Psychology of Procedural Justice" 71 (1988); Tom. R. Tyler, "What is Procedural Justice? Criteria Used By Citizens To Assess The Fairness Of Legal Procedures," 22 *Law & Society Rev.* 103, 104 (1988).
- 12 See "TRUST IN THE LAW," *supra* note 11, at 26; "Why People Obey The Law," *supra* note 11, at 116, 163.
- 13 See "Trust in the Law," *supra* note 11, at 90.
- 14 See Kees van den Bos et al., "When Do We Need Procedural Fairness? The Role of Trust in Authority," 75 *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 1449 (1998); Gary B. Melton & E. Allen Lind, "Procedural Justice in Family Court: Does the Adversary Model Make Sense?" in *Legal Reforms Affecting Child & Youth Services* (Gary B. Melton ed., 1982).
- 15 See "Why People Obey the Law," *supra* note 11, at 116, 127.
- 16 See "Why People Obey the Law," *supra* note 11, at 137; "What is Procedural Justice?" *supra* note 11, at 105, 107; "When Do We Need Procedural Fairness?," *supra* note 14, at 1452.
- 17 See "What is Procedural Justice?" *supra* note 11, at 129; *Why People Obey the Law*, *supra* note 11, at 138.
- 18 See "Trust in the Law," *supra* note 11, at 51; *Why People Obey the Law*, *supra* note 11, at 163; E. ALLAN LIND & TOM R. TYLER, "Social Psychology of Procedural Justice" 64 (1988); Jose Ashford, "Comparing the Effects of Judicial Versus Child Protective Service Relationships on Parental Attitudes in the Juvenile Dependency Process," 16 *Research on Social Work Practice* 582, 584 (2006) available at <http://rsw.sagepub.com/cgi-reprint/16/6/582.pdf> (last visited on June 15, 2007); "When Do We Need Procedural Fairness?" *supra* note 14, at 1449.
- 19 See Ashford, *supra* note 18, at 583-584.
- 20 In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Supreme Court recognized that "[t]he State's ability to assemble its case almost inevitably dwarfs the parent's ability to mount a defense." *Id.* at 763.
- 21 On more than one occasion, the Supreme Court has adverted to the fact that the "best interest of the child" standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values." See *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 46 n.13 (1981).
- 22 241 N.W.2d 55, 63-64 (Mich. 1976).
- 23 See also Mich. Ct. R. 3.915(B)(1)(b) ("The court shall appoint an attorney to represent the respondent at any hearing conducted pursuant to these rules if (i) the respondent requests appointment of an attorney, and (ii) it appears to the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney."
- 24 See *In re Trowbridge*, 401 N.W.2d 65, 66 (Mich. Ct. App. 1986) ("It is axiomatic that the right to counsel includes the right to competent counsel.")
- 25 American Bar Association, *Michigan Court Improvement Program Assessment of Probate Courts' Handling of Child Abuse and Neglect Cases Final Report* 49 (2001) available at <http://courts.michigan.gov/scao/resources/publications/reports/cipaba.pdf> (last visited on June 15, 2007).
- 26 *Id.*
- 27 See *Muskie School of Public Service and American Bar Association, Michigan Court Improvement Program Reassessment* 134 (2005) available at <http://www.courts.michigan.gov/scao/resources/publications/reports/CIPReassessmentReport090605.pdf> (last visited on June 15, 2007).
- 28 See Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139 (1995) (describing the importance of the early placement decisions made in a child protective case and the effects it has on later decisions).
- 29 See *Final Report*, *supra* note 25, at 49.
- 30 See *Reassessment* *supra* note 27, at 146
- 31 One attorney accurately described the current situation. "Issues in these cases are far more serious, but we are paid only half as much for twice the work as with misdemeanor criminal cases. There is a tremendous disparity of payment in the system. This work is very important, but it's treated as though it's less important." *Reassessment*, *supra* note 27, at 145.
- 32 *Reassessment*, *supra* note 27, at 151, 153 n. 154. Caseloads for parents' attorneys as high as 200-300 cases have been estimated. See *id.* at 153 n. 155.
- 33 *Id.* at 153.
- 34 *Id.* at 154.
- 35 *Id.*
- 36 According to one judge, probable cause hearings are waived 95-99 percent of the time, and pleas are encour-

- aged. *Id.* at 77. One Wayne County judge estimated that between 50 and 75 percent of cases plead out in Wayne. *Id.* A Macomb County judge placed their pleas at 90 percent. *Id.* In Kent County, a jurist said that attorneys recognize the need to obtain pleas quickly, so that cases can move in a timely way through the system. *Id.*
- In one county, at the preliminary hearing, if parents are present, the jurist goes over the petition, advises parents on their rights, makes a contrary to the welfare finding and determines temporary visitation. *Id.* at 108. Neither parent nor child is represented at the hearing in this court, neither may be present, nor is there mention of services that might be required pending trial. *Id.* In another jurisdiction, where parents' attorneys are present at the first hearing, if the attorneys waive proof of probable cause, only placements and visits are discussed, which can take about 15 minutes. *Id.* at 108.
- 37 In 2005, in child protective cases, only 41 jury verdicts were rendered, compared to 1,494 bench verdicts and 3,964 pleas. Michigan State Court Administrative Office, 2005 Child Protective Statistics available at <http://courts.michigan.gov/scao/resources/publications/statistics/2005/2005CPPdatabycounty.pdf> (last visited on June 15, 2007).
- 38 *Id.*
- 39 See Mich. Ct. R. 3.965(D); Mich. Ct. R. 3.976(A).
- 40 See *Reassessment*, *supra* note 27, at 105.
- 41 See *id.* at 154.
- 42 *Id.*
- 43 *Id.*
- 44 *Id.* at 134.
- 45 *Id.* at 155.
- 46 See *id.* at 65-66 (describing court facilities). As noted in the *Reassessment*, "long waiting times try the patience of families who are nervous about their cases." *Id.* at 134.
- 47 *Id.*
- 48 *Id.* at 65.
- 49 See *supra* notes 25 and 26 (describing delays in appointing attorneys for parents).
- 50 See *supra* note 36 (noting that in the overwhelming majority of cases, probable cause hearings are not requested).
- 51 Mich. Comp. Laws Ann. § 712A.13a(8)(a) (West 2002).
- 52 Michigan Department of Human Services, *Children's Foster Care Manual*, CFF 722-6 (2007) available at <http://www.mfia.state.mi.us/olmweb/ex/cff/cff.pdf> (last visited on June 15, 2007).
- 53 *Id.*
- 54 Michigan Foster Care Review Board, *2005 Annual Report* 4 (2006) available at http://courts.michigan.gov/scao/resources/publications/reports/fcrb/fcrb_ar05.pdf (last visited on June 15, 2007).
- 55 *Id.* at 11.
- 56 *Id.*
- 57 See *Reassessment*, *supra* note 27, at 117.
- 58 See 34 C.F.R. 300.515 (2007) (stating that a surrogate parent is needed only when a foster child is made a "ward of the State.")
- 59 Mich. Comp. Laws Ann. § 722.124a(1) (West 2002).
- 60 See *Children's Foster Care Manual*, *supra* note 52, at CFF 722-2.
- 61 See, e.g., "In re A.M.B.," 640 N.W.2d 262, 282-84 (Mich. Ct. App. 2001) (in which parents were denied the opportunity to make medical decisions for their child.)
- 62 Mich. Comp. Laws Ann. § 712A.17d(1)(c) (West 2002).
- 63 See Chris Gottlieb & Erik S. Pitchal, "Family Values: How Children's Lawyers Can Help Their Clients by Advocating for Parents," 58 *Juvenile and Family Court Journal* 17 (2007), for a good discussion on how children's attorneys can engage parents to improve their representation of their child clients.
- 64 See *In re C.R.*, 646 N.W.2d 506, 516 (Mich. Ct. App. 2001). See also *In re Church*, 2006 Mich. App. LEXIS 1098 at *4 -*9 (Mich. Ct. App. 2006). For a more complete discussion of the constitutional concerns this practice raises, see Vivek Sankaran, "But I Didn't Do Anything Wrong: Revisiting The Rights Of Non-Offending Parents In Child Protection Proceedings," 85 *Michigan Bar Journal* 22 (2006).
- 65 See *In re Church*, 2006 Mich. App. LEXIS 1098 at *7.
- 66 See *In re C.R.*, 646 N.W.2d at 516 ("[T]he court rules simply do not place a burden on a petitioner like the FIA to file a petition and sustain a burden of proof at an adjudication with respect to every parent of the children involved in a protective proceeding before the family court can act in a dispositional capacity.")
- 67 See, e.g., *In re Stramaglia*, 2005 Mich. App. LEXIS 1339 at *5 (Mich. Ct. App. 2005) (father denied custody and decision making authority of his child despite finding by jury that he was not neglectful).
- 68 More information about the Casey Foundation's Family to Family Program can be found at <http://www.aecf.org/MajorInitiatives/Family%20to%20Family.aspx> (last visited on June 15, 2007). Information on Michigan's implementation of the program can be found at http://www.michigan.gov/documents/FIA-Fam2Fam_9937_7.pdf (last visited on June 15, 2007).
- 69 For more information about the Center for Family Representation, see <http://www.cfrny.org> (last visited on June 20, 2007).
- 70 For more information about Community Legal Services, see <http://www.clsphila.org/Content.aspx?id=179> (last visited on June 20, 2007).