

2009

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

Vivek Sankaran

University of Michigan Law School, vss@umich.edu

Available at: <https://repository.law.umich.edu/articles/1460>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Family Law Commons](#), [Fourteenth Amendment Commons](#), [Juvenile Law Commons](#), [Legal Profession Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Sankaran, Vivek. "Protecting a Parent's Right to Counsel in Child Welfare Cases." *ABA Child L. Prac.* 28, no. 7 (2009): 97, 102-5.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.



Child Law Practice

Vol. 28 No. 7

September 2009

Helping Lawyers Help Kids

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

(Continued on page 102)

What's Inside:

98 CASE LAW UPDATE

106 VIEWPOINT

Protecting Newborns from Parents Who Abuse Drugs or Alcohol

110 HEALTH MATTERS

Advocacy for Young or Expectant Parents in Foster Care

(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.

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

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/~jdozle/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.