

U.S. Children’s Bureau Challenge: Improve Child Representation in America

Abstract

This chapter reviews the legal representation of the child in the United States child welfare system, including:

- The central importance of an effective legal advocate for the child
- Lack of effective national standards to guide child representation
- Insufficient number of attorneys trained in child welfare law
- Inadequate compensation for attorneys in dependency cases

To address these weaknesses, the U.S. Children’s Bureau launched QIC-ChildRep: “to gather, develop and communicate knowledge on child representation, promote consensus on the role of the child’s legal representative, and provide empirically-based analysis of how legal representation for the child might best be delivered.”

1.1 The Problem to Be Addressed

In America’s child welfare system, when a child alleged to be abused or neglected is brought before a court for protective proceedings, State and Federal law generally provide that the child is entitled to an independent representative to safeguard their interests. The child’s representative may be a lawyer or a lay volunteer or both. A large number of American children are affected by these child protection proceedings. The U.S. Children’s Bureau estimates that there are more than 400,000 children in foster

care at any given time¹. There are approximately 50,000 lawyers involved in these cases, serving as judges and as counsel for the children, parents and state agencies.

The modern era of legal representation of children in child welfare cases began in 1974 with the Federal Child Abuse Prevention and Treatment Act (CAPTA).² In CAPTA, Congress attempted the first comprehensive legislation on child abuse and neglect. It is the touchstone and source point for the evolution of representation of children by lawyers and nonlawyer guardians ad litem alike. It required states to provide a guardian ad litem for children in child protection court proceedings, but did not describe qualifications, training, or responsibilities of the representative. Congress has regularly reauthorized CAPTA with various amendments. The 2003 amendments included as a purpose: “to ensure higher quality representation and to bar appointment of untrained or poorly trained court-appointed representatives for children.”³ CAPTA now requires appointment of “a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), “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.”⁴ Congress reauthorized CAPTA again in 2010.⁵

CAPTA began the modern development of legal representation of children, but left many questions unresolved. Evaluations of America's child welfare system consistently register disappointment in the quality of representation of children.⁶ The U.S. Children's Bureau highlights the importance of the child's legal advocate:

A key component of court processes for handling child abuse and neglect cases is the appointment of quality legal representation. The American legal system is based on the premise that parties have a due process right to be heard and that

1. U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH, AND FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT (No. 22), (2014).

2. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247 (1974) (codified as amended in scattered sections of 42 U.S.C.). The complete text of U.S. Code title 42, chapter 67 is available at www4.law.cornell.edu/uscode/42/ch67.html. See also CHILD WELFARE INFORMATION GATEWAY, ABOUT CAPTA: A LEGISLATIVE HISTORY (2011), <http://www.childwelfare.gov/pubs/factsheets/about.cfm>; JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS § 2-A (3d ed. 2007) M. Carmela Welte, *Gal Training Mandated in CAPTA: HHS Issue Guidelines, National CASA Volunteer Curriculum Cited as Model for Volunteer Training*, July 2004.

3. *Id.*

4. 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2015).

5. For additional information on the history of federal child-welfare statutes, see Howard Davidson, *Federal Law and State Intervention When Parents Fail: Has National Guidance of Our Child Welfare System Been Successful?* 42 FAM. L.Q. 481, 485-90 (2008).

6. SHIRLEY A. DOBBIN ET.AL, NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILD ABUSE AND NEGLECT CASES: REPRESENTATION AS A CRITICAL COMPONENT OF EFFECTIVE PRACTICE (1998); PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE (2004).

competing independent advocacy produces just results in each case. Competent representation is important for the agency and the parents in child welfare cases, but *it is crucial for the child*, as a court reviews agency decisions about the family and the need for removal, the suitability of the child's temporary placement, and the permanency decision that will result in either reunification or adoption. Numerous studies and reports have pointed out the importance of competent representation of children so that judges can make informed decisions about their future.⁷ (Emphasis added.)

Children's Bureau goes on to say that although CAPTA mandates a trained guardian ad litem for a child ". . . it is clear that practice and policy in the States have not kept pace."⁸ The American Bar Association adopted Standards of Practice for Lawyers Representing Children⁹ but the ABA Standards are merely advisory and have no legal authority in individual states.

In spite of the enactment of State laws mandating representation for children and dissemination of these national standards, funding for GALs has been inconsistent and inadequate, and the quality of representation of children in dependency court remains poor in many cases.¹⁰

There is an extraordinary range in the quality of counsel for children, from a high degree of dedication and professionalism to inactivity and incompetence. The PEW Commission on Children in Foster Care found that "the availability and competence of legal representation for children and their parents in dependency proceedings is wildly inconsistent across the country, for many reasons."¹¹ The Commission called for an informed and effective voice for children of all ages and capabilities in court through representation by better-trained attorneys and volunteer advocates.¹²

The Federal Court Improvement Program (CIP) requires State courts to conduct assessments of the state's effectiveness in carrying out the Federal laws related to dependency court proceedings, including legal representation.¹³ But despite some improvements in child representation, many barriers remain. For example:

7. Department of Health and Human Services, ACYF Funding Opportunity #HHS-2009-ACF-ACYF-CO-0077 4, National Quality Improvement Center on the Representation of Children in the Child Welfare System, 2 (April 2009), may be found in the internet archives at <http://www.acf.hhs.gov/grants/open/HHS-2009-ACF-ACYF-CO-0077.html>. [Hereinafter *ACYF Funding Announcement*]

8. *Id.* at 3.

9. A.B.A, STANDARDS FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996). [Hereinafter *1996 ABA Standards*]

10. *ACYF Funding Announcement*, *supra* note 7, at 3.

11. *Id.*

12. PEW COMMISSION ON CHILDREN IN FOSTER CARE, *supra* note 6.

13. Social Security Act, 42 U.S.C. 629h (2015).

- Very commonly the States that report on training, experience, and standards for attorneys are reporting a lack of or inconsistent training, lack of experience, and confusion regarding standards.
- Several reassessments expressly note that attorneys who represent parents and children are often quite inexperienced.
- States report that even enacting standards of practice for the representation of parents or children is not a guarantee of adequate representation.

- When the reassessments deal with the amount and timing of attorney-client contact, the resulting conclusions nearly always emphasize the need for more and earlier contact.
- Most reassessments do not address caseloads for attorneys but those that do typically report higher than desirable caseloads for GALs.
- Attorney compensation is addressed by less than a third of the reassessments, but those that address the issue were uniform in their conclusion that compensation levels, especially for defense and children's attorneys, are too low. These reassessments note that poor compensation complicates the recruitment and retention of skilled, committed attorneys.¹⁴

The Child and Family Service Reviews (CFSR)¹⁵ support the conclusions about the poor quality of child representation in dependency courts. In some States and localities there are an insufficient number of attorneys trained in child welfare, which results in delays in adoption and other forms of permanency. CSFR stakeholders report that attorney representation of children is not guaranteed in all courts, particularly in some rural areas, leading to inconsistent child representation across these states.¹⁶

Among the positive developments in the field, the Children's Bureau identified the recent movement toward consensus on a national model of best practices for child welfare attorneys based on Federal law and national standards.¹⁷ An important step in

14. Evaluation of the CIPs conducted by Planning and Learning Technologies analyzing state assessments of child representation, *ACYF Funding Announcement*, *supra* note 7, at 4.

15. The Children's Bureau conducts the Child and Family Service Reviews (CFSRs), which are periodic reviews of state child welfare systems, to achieve three goals: 1) Ensure conformity with federal child welfare requirements; 2) Determine what is actually happening to children and families as they are engaged in child welfare services; and 3) Assist states in helping children and families achieve positive outcomes. After a CFSR is completed, states develop a Program Improvement Plan (PIP) to address areas in their child welfare services that need improvement. *Child & Family Services Reviews (CFSR)*, CHILD'S BUREAU, <http://www.acf.hhs.gov/programs/cb/monitoring/child-family-services-reviews> (last visited Apr. 4, 2016).

16. *ACYF Funding Announcement*, *supra* note 7, at 4.

17. For a framing of the national model of best practice, see generally CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS AND STATE AGENCIES IN ABUSE, NEGLECT AND

improving child welfare lawyer practice was the definition and creation of a new legal specialty in child welfare law, recognized by the American Bar Association, which accredited the National Association of Counsel for Children to certify lawyers as “child welfare law specialists” once they met rigorous experience and qualification standards, including passing a national certifying examination.¹⁸

Children’s Bureau addressed the weaknesses in child representation by establishing a National Quality Improvement Center on Child Representation in the Child Welfare System at the University of Michigan Law School. (QIC-ChildRep) The project is completed and this is our report.

1.2 Child Representation—A Unique Legal Role

The legal representative of the child in the child welfare field is unique in American jurisprudence. The close interface between social services agencies and the court has few parallels among American institutions or systems. Fundamental constitutional rights of both parents and children are implicated so that any non-voluntary interference with the parent-child relationship requires court review. If the court enters an order suspending the parental rights and interfering with the constitutionally protected parent-child relationship, the court itself becomes the ultimate monitor of the government action and thus the *de-facto* supervisor of the agencies providing services to the family. There is a strong governmental interest in protecting children and enhancing the welfare of the parents and the family.¹⁹

When the court enters orders to protect a child in the home or remove a child from the custody of a parent, the interference with parental rights is justified in part because of the rehabilitative benefit received by the parent and child.²⁰ State and federal law put the family court in a position of reviewing and authorizing the interference with personal liberty imposed by the child’s removal and the rehabilitative services required of the child and family. The court is the gatekeeper for the American foster care system. Except in the most serious emergencies, no child enters foster care or remains in foster care without an authorization by a court.

From the perspective of delivering social services, having a court be the ultimate supervisor and authority in delivering executive branch child welfare services is a most unique arrangement. The working parts of the system, including the public agencies,

DEPENDENCY CASES (Donald N. Duquette, Ann M. Haralambie, & Vivek Sankaran eds., Bradford 3d ed. 2016).

18. NACC Certification is available to attorneys serving in the role of Child’s Attorney, Parent’s Attorney, or Agency Attorney. There are about 600 NACC Certified Child Welfare Law Specialists located in 43 jurisdictions. NACC *Child Welfare Law Certification*, Nat’l Ass’n of Counsel for Children, <http://www.naccchildlaw.org/?page=Certification> (last visited June 27, 2016).

19. Prince v. Massachusetts, 321 U.S. 158 (1944).

20. Youngberg v. Romeo, 457 U.S. 307 (1982).

private child caring agencies and contract service providers—all supervised or monitored by the court—create an extremely complex social service delivery system. Moreover, this “system” is charged with addressing and resolving the extremely complicated intersecting problems of family dynamics and dysfunction, poverty, and social agency bureaucracy.

From the legal perspective, child welfare is similarly unusual. With the exception of private child custody cases and certain equitable remedies, a legal dispute is generally presented to a court, a resolution is reached, and the matter is dismissed. Generally a court does not retain ongoing authority and detailed supervision of a matter. Even in a mental health civil commitment case the court tends to grant an order of hospitalization or guardianship, but delegates the administrative details to the hospital or guardian. In child welfare, however, there is very close scrutiny of the case plan and its implementation. In child welfare the court not only adjudicates as to whether there is a legal basis to suspend parental rights, but also closely monitors the specific details surrounding delivery of rehabilitative services to the family.

The unusual nature of child welfare in the panoply of American institutions has significant implications for the child's legal advocate. Typically, a child who is the subject of a large but well-meaning bureaucracy has a parent to look out for his or her interests. Any person who has ever had a child in the hospital or with special needs in a school system knows that the bureaucracies and the individuals involved may be well meaning, but they can also be clumsy and, despite the best intentions, occasionally fail to provide the needed services. Without an advocate the child can easily get lost in the shuffle. The child welfare system is no different, except that, by definition, the child's parent is compromised in their ability to look out for his or her needs and interests. The parent is accused of failing to meet the child's needs. Under these circumstances an additional advocate for the child's rights and interests is required.

The legal representative of the child ideally would be expert in the law and the workings of the court system—but would also be knowledgeable in the assessment of parental capacities, risks faced by the child, and the social and emotional needs of a child. The child advocate must understand the importance of identifying the appropriate services and the delicacy of proper pacing in the delivery of those services. The child advocate carries an enormous responsibility, unique in American law. It is no surprise that the evolution of this singular role is taking some time.

1.3 QIC-ChildRep Is Launched

In this context, the Children's Bureau launched the QIC-ChildRep: “to gather, develop and communicate knowledge on child representation, promote consensus on the role of the child's legal representative, and provide empirically-based analysis of how legal representation for the child might best be delivered. Our first task was to determine the current state of knowledge and practice regarding child representation in dependency cases? Where is the state of play today? How did we get here? What is a way forward?