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Legal Representation for Parents and Children in Child Protection Proceedings: Two Empirical Models of Acquisitorial Processes and a Proposal for Reform*

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I. Introduction

Ten years ago the Child Abuse Prevention and Treatment Act¹ was passed, requiring states to appoint guardians ad litem for children who were the subject of protection proceedings. This was one of a number of requirements in the Act designed to achieve the goal of improving the states' response to the problem of abuse and neglect. Unfortunately, the only two state-wide empirical studies (New York and North Carolina) on the use of attorneys as representatives for abused and neglected children found that such representation did not have a significant beneficial impact and was, for the most part, inadequate.² While certainly some children within each of these states received excellent representation, the overall failure of the programs

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1. 42 U.S.C. §§ 5101-5107 (1982).

2. See J. KNITZER & M. SOBIE, *LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN* (1984) [hereinafter cited as J. KNITZER & M. SOBIE]; Kelly & Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference? A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 J. FAM. L. 405 (1983) [hereinafter cited as Kelly & Ramsey, *Attorneys for Children*] (North Carolina); see also Kelly & Ramsey, *The Legal Representation of Children in Protection Proceedings: Some Empirical Findings and a Reflection on Public Policy*, 34 FAM. REL.: J. APPLIED FAM. & CHILD STUDIES (forthcoming, 1985) [hereinafter cited as Kelly & Ramsey, *Children in Protection Proceedings*] (North Carolina); Kelly & Ramsey, *Legal and Other Determinants of Effective Court Intervention In Child Protection Proceedings: A Policy Analysis*, 8 J. OF SOCIAL SERV. RESEARCH (forthcoming 1985) [hereinafter cited as Kelly & Ramsey, *Determinants of Effective Court Intervention*] (North Carolina).

should not be ignored. At present, the legal representation for children in protection proceedings results in an expensive, but illusory, benefit for children.³

This article proposes a method of improving the quality of representation for children. The means for doing so is based on an analysis of the differences between representation provided to parents and representation provided to children. The article addresses two questions. *First*, how can the processes by which parents and children acquire legal representation in protection proceedings be characterized? *Second*, do the methods by which representation is acquired influence the quality of the legal representation that parents and children receive? It is argued that understanding the link between the processes by which legal representation is acquired and the subsequent impact of that representation can result in improvements in the systems currently used to provide legal representation in child protection cases.

The questions of the acquisition and subsequent quality of legal services can be reframed in broader policy terms as issues of program implementation and benefit. When a program provides a new service it is naturally assumed that the result will be a significant and measurable beneficial impact. Public policy makers are especially interested in empirically testing this assumption because they are required to choose among programs that compete for limited public resources and because they are responsible for making improvements in current programs. In response to policy needs, evaluation researchers generally assess two aspects of a program's impact, namely implementation and benefit.⁴

Evaluation of *implementation* is concerned with whether a program reaches the targeted population, the form in which it is provided and the cost of delivering the program's services. Evaluation of *benefit* is quite different, and is concerned with whether providing a service such as legal representation creates a significant and measurable benefit attributable solely to the service delivered by the program. Unfortunately, evaluating legal services in cases as complex and multifaceted as child protection proceedings is very difficult, in large part because of the difficulty involved in developing standards for assessing benefits.⁵ Despite problems inherent in evaluating legal services, it is nonetheless critical, as a matter of public policy, that

3. New York spent about ten million dollars in 1982 for attorneys for children in cases of abuse and neglect, persons in need of supervision, and delinquency. J. KNITZER & M. SOBIE, *supra* note 2, at 169.

4. P. ROSSI & H. FREEMAN, *EVALUATION: A SYSTEMATIC APPROACH* 2d ed. 1982).

5. See Kelly & Ramsey, *Attorneys for Children*, *supra* note 2; Kelly & Ramsey, *Children in Protection Proceedings*, *supra* note 2; Kelly & Ramsey, *Determinants of Effective Court Intervention*, *supra* note 2.

such services be evaluated. Program resources are provided by the state, and the public interest is best served when it is known whether these resources produce the intended benefits. If programs are ineffective, knowledge about their flaws can be used to improve the design of subsequent programs. Providing these services to children also results in an intrusion into the lives of children and parents, which can only be justified in terms of the benefits obtained.

In this paper implementation and benefit questions are addressed using information gathered from a representative sample of child protection proceedings in North Carolina. The implementation question considered is a narrow one: namely, how to characterize the ways parents and children in North Carolina received legal services. To answer this question, the two models of legal service acquisition that are most relevant to the cases of parents and children in protection proceedings—a *market* model for parents and a *therapeutic* model for children—are presented in section II.⁶

Section III of the Article describes the methods used to collect the North Carolina sample data and the statistical methods used to ascertain how well the two models represent the actual processes by which parents and children acquired legal representation.⁷ In sections IV and V the results of these statistical analyses of legal services acquisition are presented and discussed.⁸ The processes by which parents obtained legal services were found to conform to the market model, while the processes by which children acquired attorneys conformed to the therapeutic model.

In section VI the issue of program benefits is addressed in the form of the following question: Do attorneys for parents and attorneys for children provide significant benefits for their respective clients? A review of the results of several previous impact analyses of the North Carolina data indicates that while the attorneys who represented children produced no measurable benefits for the children, and in some instances even produced negative impacts, attorneys who represented parents did produce benefits for their clients.⁹ These contradictory impacts result in large part from the methods through which parents and children acquired representation and how their representation was subsequently treated by their attorneys and the courts.¹⁰

In section VII the policy implications of the relationship be-

6. See *infra* notes 12-26 and accompanying text.

7. See *infra* notes 27-35 and accompanying text.

8. See *infra* notes 36-62 and accompanying text.

9. See Kelly & Ramsey, *Attorneys for Children*, *supra* note 2, at 443, 447; Kelly & Ramsey, *Children in Protection Proceedings*, *supra* notes 2; Kelly & Ramsey, *Determinants of Effective Court Intervention* *supra* note 2.

10. See *infra* notes 63-90 and accompanying text.

tween the implementation findings and benefit analyses are discussed.¹¹ The question of what, if any, modification can be made to improve representation in systems by which children acquire attorneys is addressed by considering the characteristics of the market model that made the services obtained by parents beneficial. To the extent that these characteristics are transferable to the way legal representation is delivered to children, they would provide guidelines for improving programs which allocate attorneys to children in protection proceedings.

II. Methods For Providing Legal Services: Courts and Markets

There are a variety of ways in which the providers of legal services and the consumers of these services may fulfill each other's needs. The bar, the federal government, labor unions and consumer groups have attempted to both expand the availability and to limit the costs of legal services particularly to middle and low income groups.¹² These efforts are undertaken with the recognition that a market for legal services exists, albeit a market with numerous distortions and discriminatory tendencies, and that the operation of supply and demand can be used to describe the operation of the market.

In addition to a market system there is another means of providing legal services. In this system, the courts are allowed discretion as to when and how legal services are provided. For example, this system is used in juvenile delinquency proceedings, child protection proceedings, and mental competency proceedings,¹³ and is based on a *therapeutic* model of the acquisition of legal services. The next two sections of this article describe the *therapeutic model* and the *market model* and suggest that these models of legal services acquisition accurately describe how parents and children acquire legal services in protection proceedings.

A. The Therapeutic Model

A therapeutic model for the provision of legal services is based on the belief that under certain conditions, courts should be used to achieve therapeutic goals. Judges have accepted this role and when

11. See *infra* notes 91-106 and accompanying text.

12. Hollingsworth, *Ten Years of Legal Services for the Poor*, in *A DECADE OF FEDERAL ANTIPOVERTY PROGRAMS* (R. Haveman ed. 1977).

13. Although provision of counsel may be technically required under certain circumstances in all of these examples, (under *In re Gault*, 387 U.S. 1 (1967), for example, a juvenile who may be placed in secure detention has a constitutional right to counsel) there are many ways of manipulating the system to avoid this requirement. Hence judges typically exercise control over not only the method of representation but also whether counsel is even appointed in a particular hearing.

handling minors or other persons under legal disabilities they typically characterize their role as therapeutic in nature.¹⁴ Although the therapeutic model is inherently paternalistic, this paternalism need not be understood, a priori, in solely perjorative terms.

When a child is the subject of a proceeding, the therapeutic judicial ideology directs that all parties act in the best interests of the child. A therapeutic model also suggests that a broad range of factors such as family structure, processes and resources, and the availability of social services are considered by judges in arriving at their decisions. The therapeutic model suggests that the court should have a great deal of discretion in child protection proceedings.¹⁵

However, in some instances the substantive therapeutic goals of the court in the proceeding may be at odds with the procedural protections that are provided by law.¹⁶ Under such circumstances the negative aspects of the therapeutic model are most likely to appear. For example, one goal of providing representation for children is to give the child an independent voice and advocate in the proceedings. However, this means that the representative of the child may challenge the department of social services and/or the court concerning custodial or therapeutic arrangements for the child. But since it is the court that typically appoints, monitors and pays the representatives of children, the court may view the child's attorney as merely an adjunct to the therapeutic strategy rather than an independent voice. There is a structural asymmetry in the locus of control of this situation in that, while the attorney represents the child, the attorney is also closely tied to, if not a surrogate of, the court.

Recognition of the negative aspects of a paternalistic court system gave rise to reforms, introduced to provide procedural protections for juveniles. The Supreme Court, in the case of *In re Gault*¹⁷ required that attorneys be appointed to represent juveniles in delinquency proceedings when there was a likelihood that the court might commit the juvenile to a prison-like correctional or rehabilitation facility.¹⁸ The results of *Gault* are perhaps the best example of the existence and persistence of the use of a discretionary therapeutic model in providing legal representation to children. In a comprehensive review of the effect of the *Gault* decision, Donald Horowitz has

14. E. RYERSON, *THE BEST-LAID PLANS; AMERICA'S JUVENILE COURT EXPERIMENT* (1978).

15. For discussions of the therapeutic model, see Clarke & Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference*, 14 *LAW & SOC'Y REV.* 265, 263-66 (1980) [hereinafter cited as Clarke & Koch]; D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977) [hereinafter cited as D. HOROWITZ].

16. D. HOROWITZ, *supra* note 15, at 190. Cox & Cox, *Foster Care and Public Policy*, *J. OF FAM. ISSUES* 182 (1984) [hereinafter cited as Cox & Cox].

17. 387 U.S. 1 (1967).

18. *See id.* at 41.

shown that the processes for implementing the mandate of *Gault* have tended to subvert its goals of procedural protections for juveniles in delinquency proceedings.¹⁹ Additionally, the rates at which attorneys were appointed for juveniles have remained uniformly low and relatively unaffected by the *Gault* decision.²⁰

Gault's implementation and goals were further weakened by the tendency of courts to subsume the role of lawyers who represented juveniles into the *parens patriae* therapeutic ideology and practice of the courts.²¹ Horowitz notes that in juvenile cases a lawyer is:

expected to act as an interpreter between the court and the family. On the one hand he is to explain the juvenile court's "philosophy" and its decisions to the child's parents. On the other, he is to provide information to the court that will aid in its decision process.²²

This observation about the role of lawyers in these proceedings is also supported by a study of the juvenile court systems in two North Carolina counties, which found that attorneys representing juveniles in delinquency proceedings had no positive impact, and in some instances, even had a negative impact on the court's decision to commit juveniles to training school.²³ The authors of the study attribute these findings to the largely procedural role taken by attorneys and to the low expectations of the courts concerning the attorneys' role and value in the proceedings.

Based on the post-*Gault* research and on the premise that the appointment and impact of the children's attorneys in protection proceedings resemble the "discretionary/therapeutic appointment model," several predictions are made here concerning the appointment and impact of attorneys for children in protection proceedings: (1) Statutory requirements for appointments are unlikely to be fully implemented; (2) Appointment of attorneys in protection proceedings is likely to be influenced by factors that are indicative of the court's therapeutic/paternalistic approach to children, namely extra-

19. D. HOROWITZ, *supra* note 15, at 185-204.

20. See Ferster, Courtless & Smethen, *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375 (1971); E. LEMERT, SOCIAL ACTION AND LEGAL CHANGE: REVOLUTION WITHIN THE JUVENILE COURT (1970) [hereinafter cited as E. LEMERT]; R. Maiman, Private Attorneys in Juvenile Court: The Impact of *In re Gault* (1974) (Paper presented at the annual meeting of the American Political Science Assoc., copy on file with authors).

21. The empirical study in New York found that many lawyers still believe that they should represent a juvenile's best interests in a delinquency proceeding, see J. KNITZER & M. SOBIE, *supra* note 2, at 7, even though the standards approved by the American Bar Association would have the lawyer serve as the juvenile's advocate, see INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES ____ (1979).

22. D. HOROWITZ, *supra* note 15, at 201.

23. Clarke & Koch, *supra* note 15, at 297.

legal factors such as family structure; (3) appointed, attorneys are unlikely to have a significant beneficial impact. In sections V and VI these hypotheses are evaluated using the North Carolina data.

B. *The Market Model*

A market model of legal services acquisition suggests that supply and demand functions will best describe the underlying dynamics of interaction between lawyers and potential consumers of legal services. Demand is determined largely by the quality and intensity of the consumer's need, the consumer's ability and willingness to purchase, and the information possessed by the consumer regarding the nature of the available services. Supply is determined by the institutions that produce, regulate and market legal services, and by the price offered to lawyers for their services in the market. A market approach to the acquisition of legal services emphasizes questions such as: how intense is the potential consumer's desire for a lawyer; what is the consumer's expected cost of legal services; does the consumer have access to or knowledge about either traditional or alternative forms of legal services; and what is the availability of traditional and alternative forms of legal services in the geographically relevant market?²⁴

Unfortunately, little if any empirical research is available which comprehensively analyzes the production, distribution and consumption of legal services as a market phenomenon. Rather, available research generally has addressed isolated questions that, while implicitly related to a market model of legal services acquisition, are not integrated in a comprehensive market theory. For example, research on the provision of legal services for the poor has compared the cost-effectiveness of a voucher system to a neighborhood/direct service office system, without incorporating other market factors.²⁵

By far the best developed market-related research of this type is that which analyzes the use of legal services by focusing on two questions; how does the utilization of legal services vary with social class status; and which specific types of problems lead people to use legal services as a remedy?²⁶ The most consistent conclusion to be

24. For a readily accessible discussion of supply and demand, see P. SAMUELSON, *ECONOMICS* 58-78 (10th Ed. 1976).

25. See Carlin & Howard, *Legal Representation and Class Justice*, 12 *UCLA L. REV.* 381 (1965); Mayhew & Reiss, *The Social Organization of Legal Contacts*, 34 *AM. SOC. REV.* 309 (1969); Marks, *Some Research Perspectives for Looking at Legal Need and Legal Services Delivery Systems: Old Forms or New?*, 11 *LAW AND SOCIETY REV.* 191 (1976) [hereinafter cited as Marks].

26. Marks places these questions within what he calls the "demand model" of legal services, or the "paradigm of legal need." While Marks does not explicitly recognize that each of these concepts is but one step removed from a market theory of legal service, such a conclusion follows logically. See Marks, *supra* note 25, at 197-201.

drawn from this research is that high levels of economic resources are indeed positively related to the use of legal services. Due largely to problems encountered in collecting information for these studies, it is less clear how the various types of legal problems confronted by potential consumers are related to the actual use of legal services. The empirical analysis of the North Carolina data, described in section IV of this article, strongly suggests that both the severity of the problem and the economic resources of the potential user correspond with a high use of legal services. The question of the impact of economic resources and the question of the severity of the problem experienced by the potential legal services consumer should be considered as issues related to the market model of legal sources.

As compared to the consumer in the therapeutic model, the potential user of legal services in the market model exercises greater control over the processes by which the services are acquired. As compared to the therapeutic model, the *locus of control* in the market model is with the consumer, rather than with a third party such as the court. Because parents in protection proceedings possess greater control over their attorneys than do children with court appointed attorneys, it is hypothesized that: (1) Attorneys for parents, unlike attorneys for children, are more likely to produce a measurable beneficial outcome for their clients. (2) Acquisition of legal representation by parents will be determined by factors that represent supply and demand functions.

III. Data and Method of Analysis

Data with which to assess the models outlined in the previous section come from a probability sample of child abuse and neglect cases.²⁷ The sample was drawn from cases in which petitions had been filed in North Carolina district courts during the first sixteen months of operation of the state's statute providing for appointment of attorneys for children in abuse and neglect cases (September 28, 1977 to December 31, 1978). Sampling was conducted in two stages. In the first state a random sample of twenty of North Carolina's one hundred counties was drawn.²⁸ District court judges granted access to court records in each of the twenty counties. In the second stage

27. There was some overlap in the North Carolina statutory definitions of "neglected" and "dependent" children. Since some judges interpreted the category of neglect more broadly than others, children who were classified as "neglected" in one county might be classified as "dependent" in another. These classifications were accepted as they were found. Since the statute providing for appointment of attorneys applied only to "neglected" children, "dependent" children were not included in the sample.

28. Because the size of the county sample is relatively small, basic socioeconomic and demographic characteristics of the sample were compared to statewide figures. All of these comparisons support the proposition that the sample fairly represents the state as a whole.

of sampling, information was gathered from randomly selected court case records in each of the twenty counties for a total of 210 cases involving 375 children.²⁹ Case data were supplemented by two additional sets of information. Attorneys in the sample who represented children were interviewed by telephone.³⁰ The attorneys were asked about their approach to their role and to the children that they served, as well as a variety of standard background questions. In addition to case and attorney level data, extensive county-level demographic, socio-economic, social services and judicial-administrative information was collected for each of the twenty counties in the sample.³¹ Case, attorney, and county-level data were integrated in all analyses.

In the next two sections of this article statistical analyses and models of the factors and processes associated with the acquisition of legal representation by parents and children are presented. The first goal of the analyses was to develop comprehensive models of legal service acquisition, thereby furthering the social scientific understanding of these processes. For this reason, large numbers of factors or variables (for example race, age, whether an immediate custody order was issued) were examined with the goal of identifying the most complete set of variables associated with the acquisition of legal services.

A technique known as multiple regression analysis was used to construct the statistical models.³² This technique made it possible to estimate and evaluate the direction, strength and significance of each

29. Because of financial constraints the fraction of each county's caseload that was sampled varied. In all of the following statistical analyses cases are weighted to reflect each county's accurate contribution to the state's abuse/neglect caseload. Thus, the sample remains representative of the state as a whole. The final unweighted number of 210 cases was approximately 8.2% of the statewide 1977 abuse/neglect caseload.

30. Socio-demographic background data (age, sex, race, and law school attended) were collected for 103 of the 108 attorneys for children who had served in the case sample. Ninety-one of the 108 attorneys responded to a phone survey conducted by Samuel Streit, Esq., of the Bush Institute for Child Development at the University of North Carolina at Chapel Hill. Hence, completed questionnaires were available for 84% of the attorneys and background data were available for 95% of the attorneys in the sample.

31. For a discussion of the need to include contextual/structural variables in analyses of the causes of and responses to child abuse/neglect, see Gabarino & Crouter, *Defining the Community Context for Parent-Child Relations: The Correlates of Child Maltreatment*, 49 CHILD DEV. 604 (1978).

32. On the technical issue of selecting the proper multivariate statistical method for estimating the models from among the many available methods, it should be noted that because the dependent variables are categorical in nature, (i.e., they have no inherent scale) the log-linear approach to estimation would normally be the method of choice. Because the sample is relatively small, however, and because the log-linear approach requires comparatively large ratios of cases to independent variables, and finally because the complexity of judicial processes demands a large number of independent variables to assure a properly specified model, the ordinary-least-squares method was chosen. For further discussion of these issues see L. GOODMAN, *ANALYZING QUALITATIVE/CATEGORICAL DATA* (1978); Cleary & Angel, *The Analysis of Relationships Involving Dichotomous Dependent Variables*, 25 J. HEALTH & SOC. BEHAV. 334 (1984).

of a large number of independent variables (such as the type of neglect) in the prediction or explanation of an outcome or a dependent variable (such as the appointment of an attorney to represent the child). For example, multiple regression analysis permits estimation of the impact of the availability legal services in a county on the likelihood that parents involved in protection proceedings would acquire an attorney to represent them, independent of whether the court had previously removed the child with an immediate custody order. The multivariate analysis allowed the examination of all or most of the variables that might influence a given dependent variable. It was therefore possible to reduce the likelihood that the impact of one independent variable was mistakenly attributed to that of another independent variable because either was excluded from the analysis.

At various stages in the analysis several categories of independent variables were examined with respect to their ability to explain the variance in each of the dependent variables.³³ The categories of independent variables analyzed include: characteristics of the court's treatment of the case; characteristics of the problems that brought the case to court; characteristics of the children named in the petition (for example race, age and sex); characteristics of the parents and family of the child;³⁴ characteristics of the attorney who served as the child's representative; and characteristics of the county where the abuse/neglect petition was filed. A list of the most salient variables that were examined in this fashion appears in Appendix 1.

Once variables helpful in describing the acquisition of representation by parents and children were identified, the second stage of the analysis was reached. The multivariate models of the determinants of attorney acquisition for parents and children that relied on the categories of variables described above were then scrutinized with respect to the degree to which they conformed to or deviated from the theoretical market and therapeutic models of legal service acquisition.³⁵

33. The term explained variance is represented algebraically by the symbol R². It refers to the proportion of all variation in the dependent variables which has been accounted for by the model's independent variables.

34. Unfortunately, we were unable to find consistent and reliable information on the age of mothers and fathers.

35. Because models that attempt to predict the appointment or acquisition of legal representation are rare, an inductive/model fitting approach was taken to specify the model. While such an approach may be criticized because it lacks the dynamism of a deductive hypothesis testing approach, it does allow us to test whether the general market and therapeutic model aptly describe the processes of acquisition as they appear in our data. As each model progressed to its final form, all theoretically relevant variables that had previously been eliminated from the model were repeatedly entered to determine whether spurious relationships existed, and whether previous variable exclusions might be a source of mis-specifications. In the final model we can be confident that the inclusion of an additional variable from those

IV. Determinants of Legal Representation for Parents

Table 1 (upper left quadrant) presents the results of a regression analysis of the factors associated with the use of attorneys by parents.³⁶ The table also provides statistics describing each of the independent variables used in the analysis. Parents were represented by attorneys in slightly under one out of every four cases (24%).³⁷ The model explains 22% of the variation in the dependent variable, (R^2) a modest but acceptable level of explanatory power given the complex nature of the processes under analysis. The results of this analysis support the hypothesis that the processes by which parents acquired representation were functions of the demand for and supply of legal services (the market model).³⁸ First, consider those factors that are related to demand.

listed in Appendix I would neither alter the structure of significant relationships in the model, nor increase the amount of variance explained.

36. To be included in a regression model variables had to meet the following criteria: (1) a statistical significance level of .05, or in the range of .10 in cases in which the variable was of particular substantive interest, and (2) a causal priority over the dependent variables.

37. A study of legal representation of parents found that 76% of parents appearing as respondents in abuse/neglect petitions in Kings County Family Court, New York, were not represented, the same percentage found in this study. *Representation in Child-Neglect Cases: Are Parents Neglected?* 4 COLUM. J.L. & SOC. PROBS. 230, 238 (1968).

38. At the time of our study indigent parents were not entitled to counsel. Therefore parents had to either employ counsel or be in a locality served by a legal aid office.

**Regression Models of the Determinants of Legal
Representation for Parents and Children in Child
Protection Proceedings (N=210)**

Independent Variables (Means or Percentages)	Parents (Guardians)		Children	
	Standardized B (Unstandardized b)	Statistical Significance	Standardized B (Unstandardized b)	Statistical Significance
Appointment of Attorney For Child (Appointed=74%)	.045 (.044)	.478		
Immediate Custody Order (Yes=58%)	.094 (.082)	.139		
Abandonment/Neglect Petition Problems (Yes=66%)	-.182 (-.164)	.005		
Child's Attorney Independence/Activism (Interaction Mean=2.6)*	.233 (.210)	.000		
Legal Services Available (Yes=77%)	.105 (.131)	.101		
Father is Child's Custodian (Yes=4%)	.199 (.485)	.002		
1978 Neglect Hearings Percapita (x=.08)	-.323 (-1.68)	.000		
<hr/>				
Year in Which Petition Was Filed (Sept.-Dec. 1977 versus Jan.-Dec. 1978) (1978 Cases=82%)			.279 (.319)	.000
Removal Risk: Number of Reasons Cited (x=1.8)			-.101 (-.060)	.122
Relative or Family Friend is Petitioner (Yes=14%)			-.186 (-.231)	.005
Custodian is Other Than One or Both Parents (Yes=6%)			-.138 (-.246)	.04
Two Parent Family, Mother is Source of Alleged Problem (Yes=13%)			-.108 (-.139)	.114
Percent of County Abuse/Neglect Case- load Black (x=45%)			.13 (.295)	.05
		Variance Explained (R*)=.22	Variance Explained (R*)=.19	

*Interaction mean is not directly interpretable.

The most powerful method of intervention that was available to courts in their response to an allegation of abuse or neglect was the issuance of an immediate custody order. Once a petition had been filed the court could use the immediate custody order to remove the child from its parents prior to a hearing on the merits of the petition. Thus, an immediate custody order was an early message to parents that the allegations against them were considered by the court to be extremely serious. Parents who lost custody of their children through immediate custody orders would likely be in great need of the services of an attorney in order to prepare for their impending confrontation with the judicial and social services systems.³⁹ Not surprisingly, the analysis indicates that parents were more likely to obtain legal representation when their children had been removed by immediate custody orders. This relationship should be treated with some caution, however, because it is relatively weak and marginally significant in a statistical sense.

When an abandonment/neglect type of problem was the major abuse allegation, rather than violence/sexual abuse, poverty conditions or substance abuse, parents were much less likely to have counsel.⁴⁰ There are two possible reasons why parents faced with an allegation of abandonment/neglect would be less in need of legal services. First, a separate analysis of the North Carolina data⁴¹ revealed that the courts regarded abandonment/neglect as a less serious problem and were significantly less likely to remove custody from the parents.⁴² Second, parents whose actions fell into the abandonment/neglect category simply may have lacked the motivation or ability to undertake the effort and expense needed to acquire legal representation. In fact, parents whose action was classified as "aban-

39. Note that the immediate custody order effect is significant at a level slightly below the .10 level. The effect is included in our discussion because of its theoretical importance.

40. The following categories of abuse and neglect were utilized for the study:

1. Substance Abuse: drug or alcohol abuse by parents, boyfriends or guardians.
2. Violence/Physical Abuse/Sexual Abuse: father beating wife or child; threat of violence with firearms; father-daughter sexual relation; child is bruised, burned, has broken bones.
3. Poverty/Status: parents unemployed or unable to support child; home lacks utilities, is unclean or overcrowded; mother takes children to school late and doesn't pick them up on time; mother sells moonshine; mother lives with boyfriend.
4. Abandonment/Neglect: (not clearly related to poverty): mother in jail; parents' whereabouts unknown; child left with unfit custodian; mother does not want child; children get no care.

Each type of petition problem, the number of each type of petition problem as a proportion of all problems alleged in the petition, and all higher order interactions of types of petition problems were evaluated for possible inclusion in the models.

41. Kelly & Ramsey, *Attorneys for Children*, *supra* note 2.

42. Obviously parents who had disappeared would have had custody removed by default, but many of these "abandonment" cases involved parents who were temporarily away from home.

donment" often did not appear at protection hearings. Each of these interpretations supports the inference that abandonment/neglect situations created only a low level of perceived need for legal services.

The market model of legal services hypothesizes that parents would be more likely to acquire the services of an attorney when an attorney had been appointed to represent their child in protection proceedings. The rationale behind this hypothesis was that parents, in their desire to protect their interests in their children, would seek to have at least the same legal resources available to themselves as their child had available. Contrary to this expectation, the appointment of an attorney to represent children in protection proceedings did not alter the likelihood that parents would acquire the services of an attorney. This finding is consistent with results from other analyses of the North Carolina data showing that attorneys for children played only a minor role in the proceedings.⁴³ We can only speculate as to the precise reasons that the expected relationship did not manifest itself. Possibly parents learned by informal methods that attorneys for children were unlikely to influence court proceedings. The presence of an attorney for the child would not therefore influence the parents' perception of their own need for legal representation.

While the presence of an attorney for the child by itself had no impact on the likelihood that parents would obtain their own attorney, the type of attorney representing the child did have an effect.⁴⁴ Attorneys for children were questioned on issues such as their attachment to the role of independent advocate and their beliefs about the efficacy of attorneys for children. A composite measure was created from these responses to gauge an attitudinal dimension of the attorney's independence, activism and skepticism with respect to the role of attorneys for children.⁴⁵ When the attorneys representing children scored high on this dimension, parents were much more

43. Kelly & Ramsey, *Attorneys for Children*, *supra* note 2; Kelly & Ramsey, *Child Protection Proceedings*, *supra* note 2; Kelly & Ramsey, *Determinants of Effective Court Intervention*, *supra* note 2; L. Herskovitz, Court Disposition in Child Abuse and Neglect: An Analysis of Kin Involvement (1984) (Masters Essay, Department of Sociology, Wayne State University, Detroit, Mich.) [hereinafter cited as Litterskovitz].

44. Because attorneys for children were not appointed in 26% of the cases, there are missing scores for these cases on attorney-level variables. In order to minimize the loss of cases in the statistical models, the mean (\bar{x}) value from appointed attorney cases on these variables was assigned to the non-appointment cases. This procedure should minimize serious bias in the models.

45. The specific questions used to construct this measure concerned (A) whether the attorney had served on cases in which he/she felt that an attorney was unnecessary or useless, and (B) whether the attorney felt that it was expected that he/she take an adversarial role in the proceedings. An interaction term was created in which low scorers felt that they were always necessary but that they should not take an adversarial stance, while high scorers felt that they should take an adversarial stance but that there were times when their presence was without purpose. We characterize the high scorers as attorneys who recognize that their participation in neglect proceedings may often be useless, but nonetheless see their role as an active one.

likely to be represented. This strong and statistically significant relationship may be interpreted as the effect of the intensity of the need for legal services, a component of demand. Parents who knew that their child's attorney was likely to take an independent and aggressive posture in the protection proceeding would presumably feel a greater need to have legal counsel themselves. Possibly, more activist attorneys would have told the parents that they should get counsel. From the available data it is not possible to specify the manner in which parents gained this information about the child's attorney. Previous contact with the attorney or the attorney's reputation could be a plausible source of the information.

In addition to the demand factors, there is also a clear indication that a supply factor influenced the odds that parents would obtain legal representation. Although the relationship is not powerful, parents were more likely to have counsel in counties where free legal services were available on an income-tested basis through offices of the Legal Services Corporation. Since the sample is composed predominantly of low income persons, the interpretation of this relationship is relatively unambiguous: Legal Service Offices have the effect of increasing the supply of attorneys available to low income persons.⁴⁶

Two other variables were found to influence the acquisition of legal services by parents. Both of these relationships provide general support for the market model, but they also present ambiguities. Compared to either two parent or female-headed families, families in which fathers were the sole custodian of children named in abuse/neglect petitions were more likely to have counsel. Why this relatively strong relationship? Perhaps men who are single parents are so sensitive about their parenting skills that when their ability to perform this role is challenged, they respond in a highly protective manner and are more likely to acquire counsel. Single male custodial parents may also have greater financial resources with which to hire a lawyer. Available research clearly indicates that single male parents have greater financial resources than single female parents.⁴⁷

Finally, parents in counties that had heavy per capita abuse/neglect caseloads were much less likely to be represented by counsel. This is the most powerful relationship in the model. Several factors

46. A limitation of this analysis is that, with the exception of the variable which indicates the presence or absence of Legal Services Corporation offices in a county, few other "supply" variables were available for use in the analysis. It would have been useful, for example, to incorporate measures of the numbers of attorneys per capita in various types of practices or average legal fees for various types of services in the models of legal service acquisition.

47. J. CASSETTY, *CHILD SUPPORT AND PUBLIC POLICY: SECURING SUPPORT FROM ABSENT FATHERS* (1978).

may contribute to an explanation of this relationship. Because heavy abuse/neglect caseloads were found in rural North Carolina counties, an inequality may have existed in which a heavy demand for legal services, indicated by the heavy abuse/neglect caseload, exceeded the supply of legal services, indicated by the small number of lawyers available per capita in rural counties. Parents in these counties may have been squeezed out of the legal services market. Courts with heavy caseloads possibly found ways to restrict the use of attorneys by parents in order to minimize the additional court time and resources necessary to accommodate the presence and activities of lawyers for parents. Analyses of the data indicate that when children were represented their cases remained within the court system nearly a month longer than cases in which there was no representation. Although the available information on the parents' attorneys does not allow us to determine with certainty whether such a process occurred in their cases as well. Perhaps a similar process characterized cases in which parents were represented. Courts are formal organizations and as such typically respond to exigencies, such as heavy caseloads and backlogs, with informal strategies that often follow an organizational rather than a legal/procedural logic. Perhaps in this manner parents were indirectly pressured not to retain counsel. A similar explanation has been given for low rates of post-*Gault* attorney appointment in counties with a high juvenile caseload.⁴⁸

In sum, although there are certain ambiguities in the interpretation of the empirical model of the acquisition of legal representation by parents, the model does provide broad support for the hypotheses that market factors strongly influenced acquisition.

V. Determinants of Legal Representation for Children

In many ways the model of the factors determining representation for children (Table 1, lower right quadrant) stands directly in contrast to the model of the factors associated with the acquisition of legal services by parents. Factors totally unrelated to the supply and demand functions of the market model of legal services acquisition characterize the processes by which children acquired representation.⁴⁹

At the time of the study the courts in North Carolina were required to appoint an attorney for an allegedly neglected or abused child unless the court had determined that the child "is not in need

48. Canon & Kolson, *Rural Compliance with Gault: Kentucky, A Case Study*, 10 J. FAM. L. 300, 320-26 (1971).

49. Table 1 is drafted to highlight the fact that the two models of legal services acquisition do not share a single common variable. It should be noted that the model explains somewhat less variation ($R^2=.19$) than the parents' model.

of and cannot benefit from such representation."⁵⁰ Despite this stringent requirement, attorneys were not appointed in 26% of all cases during the first sixteen months of the law's existence. Further, in cases of nonappointment judges almost never made the required finding that a child could not benefit from representation.

Such judicial noncompliance with a law may be initially surprising. However, a substantial body of empirical research suggests that the judiciary often resists change, especially change that implicitly challenges the concepts held by the courts as to their proper or traditional role.⁵¹ This is especially true in the area of juvenile law where the courts have traditionally exercised a great deal of discretion. Thus, to reiterate, *Gault* was implemented slowly and in an incomplete fashion, and the lawyers appointed as a result of *Gault* were pressured to become dependent participants in the court's therapeutic/discretionary strategies rather than the independent advocates envisioned in the *Gault* decision.⁵²

Table 1 demonstrates that the most powerful predictor of appointment is the variable measuring how long the appointment statute had been in effect at the time that the petition for each case had been filed. When a case was heard after the first three months following the effective date of the statute, the odds that attorneys would be appointed dramatically increased. The courts were slow to implement the legislation and this slowness probably reflects the initial resistance to the presence of attorneys representing children. The slowness of implementation can be viewed as providing a period of time during which lawyers and judges could work at establishing the informal rules and accommodations under which attorneys, as new actors, would operate in the court. The research based on the early days of *Gault* supports the contention that, upon the entry of a new actor to court proceedings, courts go through an initial period of adaptation and integration. The slowness of implementation can be seen as characteristic of the general tendency of bureaucracies to both resist and respond slowly to innovations.⁵³

It was anticipated that the courts would be more likely to appoint attorneys for children in cases in which the alleged abusive or

50. N.C. GEN. STAT. § 7A-283 (1977) (replaced by N.C. GEN. STAT. § 7A-586 (1981)).

51. One commentator explains judicial resistance to the implementation of *Gault* in this fashion:

Although juvenile court judges and lawyers place a premium on compliance with the law and the procedural basis of justice, they also entertain a number of beliefs about the best way to handle juveniles in trouble, beliefs seriously qualifying their commitment to the adversary process for juveniles.

D. HOROWITZ, *supra* note 15, at 217-18.

52. See Canon & Kolson, *supra* note 48; D. HOROWITZ, *supra* note 15; W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH (1972).

53. E. BARDACH, THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW (1979).

neglectful behavior was extremely serious, such as cases of violence, physical abuse, or sexual abuse. Research on the provision of counsel for juveniles generally supports the existence of a relationship of this type.⁵⁴ To examine the nature of such relationships in child protection proceedings an index referred to as *removal risk* was constructed. The index measures the seriousness of the allegations involved in the case.⁵⁵ The expectation that removal risk would be positively and significantly related to the appointment of an attorney was not fulfilled. Indeed, for high risk cases the odds that counsel would be appointed were somewhat lower than the odds in low risk cases. Perhaps the court felt that high risk cases were so clear-cut that an attorney could provide no special benefit to a child. In high risk cases the court might also feel the need to act most strongly in its traditional and highly discretionary role of *parens patriae*. Under such circumstances, in the court's view, an attorney would probably represent at best a redundancy and at worst an impediment to the court's perceived obligation to act expeditiously.

The court's decision to appoint was also significantly influenced by the identity of the party who filed the abuse/neglect petition and by characteristics of the child's family or caretakers. When a relative or friend of the child's family filed the abuse/neglect petition it was much less likely that an attorney would be appointed. One reason for this negative relationship may stem from the fact that the Department of Social Services was the sole petitioner in nearly 70 percent of all cases. Very likely, the courts handled non-DSS cases in a manner distinct from the way in which most other cases were handled. The courts may have questioned the claims of abuse or neglect, the motives, or the evaluative skills of non-professional petitioners and, as a consequence, been less inclined to expend resources for an attorney in these cases. A separate analysis of the North Carolina data revealed that when the Department of Social Services was the petitioner and other factors were controlled, the courts were more likely to issue immediate custody orders, an indication of the seriousness with which the court viewed Department of Social Services' petitions.⁵⁶ These findings are similar to those reported by Clarke and Koch in their study of the juvenile justice system in two North Carolina counties. Clarke and Koch found that when probation officers were the complainants in delinquency proceedings, it was more likely that the juvenile would be adjudicated delinquent.⁵⁷

54. See E. LEMERT, *supra* note 20; D. HOROWITZ, *supra* note 15 at 192, 201.

55. The removal risk variable is a count of the problems cited in the petition to the court that would indicate a clear and serious harm to the child, such as violence and sexual abuse.

56. Kelly & Ramsey, *Attorneys for Children*, *supra* note 2.

57. Clarke & Koch, *supra* note 15, at 287.

The reduced likelihood that an attorney would be appointed when the petitioner was a relative or friend of the child's family may also be attributable to the fact that the court viewed the petitioner as a surrogate representative for the child's interests. Thus, if the child already had a *de facto* advocate, albeit not a lawyer, in the court's view the need for a lawyer might be significantly reduced.

The court was less likely to appoint an attorney for the child when neither the mother or the father alone, nor both parents together, had physical custody of the child at the time of the petition. The strength of this relationship is moderate as compared to others in the models. Custody, *de facto*, had already been removed from the child's biological parents. In such cases the court probably thought that these children were already in a form of therapeutic care with a relative or friend of the family. In fact, when children were in the custody of relatives or friends, it was found that the non-parental custodians were likely to be the persons filing the abuse/neglect petition with the court ($r=.16, p<.05$). Such a petition would presumably be directed at the behavior of the child's natural parents. It appears that the courts viewed children with nonparental custodians as already possessing some type of therapeutic, if not legal, representation in the form of surrogate parents. This interpretation is strengthened by the results of an analysis that indicated that immediate custody orders were less likely to be issued when the child's current custodian was a relative or friend of the family. Apparently the court took the position that a child who was already in the custody of surrogate parents did not need to be removed from that environment, just as he or she did not need an attorney to provide representation when that of the surrogate parents was already available.⁵⁸

In order to test the impact of family structure variables and familial causes of the abuse/neglect on the appointment of attorneys, a series of interaction variables were developed to represent various combinations of family structure and source of the problem.⁵⁹ Examples of combinations include: two parent families, mother is the source of problem; and female headed family, mother is not the source of the problem. When the mother was identified as the source

58. For a more extensive discussion of the role of kin in protection proceedings see L. Herskovitz, *supra* note 43.

59. Interaction variables are used to assess the impact of joint events or characteristics. For example, it is known that blacks and women are discriminated against in the labor market in terms of wages. A regression model would represent these relationships with two independent variables, Blacks and Female, each with a significant negative relationship to Income. It is possible that black females have an additional burden in the labor market over that of either blacks or women as a group. This possibility can be tested by constructing the interaction variable "Black/Women" and assessing its impact on Income over and above that of its constituent parts, namely Blacks and Female.

of the problem in a two-parent family (13% of all cases),⁶⁰ an attorney was less likely to be appointed. To phrase this relationship in slightly different terms, whenever the child's family was headed by the mother, regardless of the source of the problem (37%), or when the child's family was headed by both parents with the father or both parents named as a source of the problem (50%), attorneys were more likely to be appointed. While this relationship is not powerful, it is intriguing. Thinking solely in socio-cultural terms, possibly the courts felt that two parent families in which the father could offer support and guidance to his child (that is, the mother was the alleged source of the problem) did not need the assistance of an attorney, whereas *all* female headed families and two parent families in which the father could not offer support and guidance (the father was identified as at least one of the alleged sources of the problem) did need the attorney to assist in the representation of the child's interests. A selectivity seems to have been exercised by the court, apparently based on a confluence of criteria derived from ideals about the *normal family* and *paternal* versus *maternal* capacity to act in the best interests of children.

Clarke and Koch found a similar pattern in their study of the North Carolina juvenile court system. The more conventional the juvenile's home structure was, regardless of the alleged offense, the less likely it was that the juvenile would be adjudged delinquent or committed to a training school.⁶¹ Apparently the courts used similar factors in their decisions to appoint attorneys in protection proceedings.

The variable that measured the proportion of the county's abuse/neglect caseload consisting of black families was found to influence the likelihood that an attorney would be appointed by the court. The larger the share that was black, the higher the probability that appointments would be made. This moderately strong relationship may also result from the court's use of family characteristics in appointment decisions. The courts in these counties, influenced by a caseload in which blacks were heavily represented (on the average blacks represented 45% of the total child protection caseload, although blacks represented only 22.4% of the 1980 statewide population), used their discretion to appoint attorneys more frequently than the courts in counties with lower black representations in the court's abuse/neglect caseload. The courts may have chosen to more frequently appoint attorneys in these counties by assuming that black families were more disrupted and therefore in need of the additional

60. Each of the constituent variables for the interaction variables were tested and found not to influence the dependent variable.

61. Clarke & Koch, *supra* note 15, at 288-90.

guidance that an attorney might provide. In fact, support is found for this interpretation in a related multivariate analysis. This analysis found that black families were more likely than white families to have immediate custody orders imposed upon them without regard to the severity or nature of the problems alleged in one petition.⁶²

These relationships as a whole demonstrate that courts were influenced by a broad array of factors in determining whether to appoint an attorney to represent a child. The court was less likely to appoint attorneys in high risk cases and thus protected its ability to exercise control over these cases. But the courts were also less likely to appoint an attorney when the child already appeared to have an advocate — cases in which a relative or friend was the petitioner and cases in which the child was already living with someone other than his parents. Additionally, the courts were more likely to appoint an attorney for those children whose families exhibited characteristics that a white middle class male judge might view with alarm — female-headed families, two-parent families where the father was the source of the problem, and black families.

As hypothesized, the factors favoring the appointment of attorneys generally fit the therapeutic model of legal service acquisition. The judge controls the appointment of attorneys as he does the rest of the proceeding — in accordance with his view of the child's best interests. Extra-legal factors such as family structure and the source of the petition play important roles in determining whether a child is to be represented. While this exercise of discretion may be appropriate and necessary to the general task of producing a therapeutic disposition, it is at variance with the broader policy goal of uniformly providing independent representation for children. The amount of discretion authorized by the appointment statute was clearly minimal, but the judges used it to avoid appointing attorneys in 26% of their cases. This finding supports the previously stated hypothesis that courts, using a therapeutic model, would exhibit a low degree of implementation of the statute. Although the statutory provision encouraging appointment of a representative for children was meant to make a change in the way these cases were handled, the judges' retention of control over the attorneys made them mere extensions of the existing system.

VI. Discussion of the Models: A Comparison and Evaluation of the Impact of Attorneys for Parents and Children

The most striking feature of the two models discussed above is that they have little or nothing in common. The processes that are

62. Kelly & Ramsey, *Attorneys for Children*, *supra* note 2.

associated with the acquisition of legal representation by parents and children are totally distinct. Notwithstanding certain ambiguities of interpretation and the statistical weakness of certain relationships, the empirical model of parents' legal services acquisition conforms well to a market model while the empirical model representing the processes by which children secured legal services conforms to the therapeutic model.

The theoretical development and statistical estimation of models that illustrate the complex social processes that influence the acquisition of legal representation in child protection proceedings is an end in itself. It advances the understanding of the manner in which law and the family interact under conditions of stress. This process also provides a rather clear picture of how family courts implemented and adapted to the statutory requirement that a new actor, the attorney for the child, be integrated into protection proceedings.

A question of substantial importance to public policy remains: What is the evidence that either of these systems of legal service acquisition influences the outcome of protection proceedings? This question may be divided into two parts: (1) Do the processes that characterize the acquisition of legal representation by parents (the market model) create results that a reasonable person in the parent's position would consider beneficial? and (2) Do the processes that characterize the acquisition of representation by children (the therapeutic model) contribute to beneficial outcomes for children? If these questions can be resolved with some degree of confidence, policy makers concerned with the problems involved in providing legal representation for parents and children will have an improved basis upon which to design, propose and implement representation programs.

Extensive analyses of the North Carolina data that measure the impact of legal representation on the actual outcome of the cases have been carried out.⁶³ These analyses have addressed two benefit questions; namely, the impact of parents' attorneys on the outcome of a case and the impact of children's attorneys on the outcome of a case. The results of these analyses are examined next as a way of answering the two impact benefit questions posed immediately above.

A. *The Impact of Parent's Attorneys*

Analyses of the impact of parents' attorneys focused mainly on the issue of custodial disposition. Custody was removed in 87% of all

63. Kelly & Ramsey, *Attorneys for Children*, *supra* note 2; Kelly & Ramsey, *Children in Protection Proceedings*, *supra* note 2; Kelly & Ramsey, *Determinants of Effective Court Intervention*, *supra* note 2; L. Herskovitz, *supra* note 43.

child protection cases handled by the North Carolina courts during the period studied. This is a figure that is nearly double the national average.⁶⁴ The return of custody to parents was not encouraged and statistical analyses indicate that unnecessary and apparently unjustified removals occurred on a systematic basis.⁶⁵ These circumstances suggest a useful method for evaluating the impact of attorneys representing parents, if it is assumed *first* that nearly all parents who have had their children removed by the state would want them returned, and *second* that in a highly interventionistic state such as North Carolina, the propensity to seek the return of one's children will be greater than in other states because of the disproportionately liberal use of custodial removals. These assumptions, and the empirical observations that support them, suggest the following hypothesis: Parents who are represented in child protection proceedings by attorneys will be better able to resist the court's tendency to intervene in their custodial relationship with their children than will nonrepresented parents.

Implicit in this hypothesis is a standard by which to measure how legal representation for parents affected the outcome of a case. The standard suggests that from the parents' perspective "winning" in a protection proceeding in a court system such as North Carolina's may be measured by the degree to which parents are able to counteract the courts' desire to remove custody and, if custody has been removed, to hasten the reunion of parents and children.

Using this standard parents who had obtained representation were found to have fared better in protection proceedings. This conclusion is based on the results of several different tests of the previously stated hypothesis. In the first test a general scale of *Custodial Judicial Intervention* was created. Each case was ranked on a three point system in which: a score of *one* was given if custody was never removed (13% of the sample), a score of *two* was given if custody had been removed, but later returned (32%), and a score of *three* was given if custody was removed but not returned during the period under study (55%). A multivariate model of judicial intervention was estimated and it was found that when all other confounding variables such as the type of problem alleged were statistically controlled, parents who were represented were significantly less likely than non-represented parents to experience high levels of custodial

64. Aber, *The Involuntary Child Placement Decision: Solomon's Dilemma Revisited*, in *CHILD ABUSE: AN AGENDA FOR ACTION 156* (Ross & E. Zigler, eds. 1980).

65. Analysis of discrete types of problems indicated that problems of physical violence, sexual abuse, substance abuse and abandonment were no more or less likely to result in removal or return of custody than problems strictly related to poverty or parental status offenses. Kelly & Ramsey, *Attorneys for Children*, *supra* note 2.

judicial intervention (Beta = .142, $p = .03$).⁶⁶

To explore this issue further a second outcome measure referred to as *Speed of Return* was developed. This measure distinguished between those cases in which custody was removed and not returned during the period under study, and those cases in which custody had been removed but had also been returned to the parents in a short period of time. Again a multivariate model was estimated. Parents who were represented were found to achieve the expeditious return of their children to a significantly greater degree than nonrepresented parents (Beta = .12, $p = .086$).⁶⁷ While neither of these relationships is extremely powerful, they are statistically significant⁶⁸ and they are in the predicted direction. The results suggest that attorneys who represented parents effectively promoted their clients' interests in child protection proceedings.⁶⁹

B. *The Impact of Children's Attorneys*

Evaluating the impact of attorneys who represented children was more complex than evaluating the impact of attorneys who represented parents. Because of the multiple issues involved in the representation of a child, three measures of attorney effectiveness were employed. The *first* measure was based on the custodial dispositions ordered by the court; the *second* was based on the extent to which the court ordered that social services be provided to the child and its family; and the *third* was based on the court's use of the child's kin and family resources in the resolution of the case.

The *first* approach was similar to the analysis employed to evaluate parents' attorneys. The North Carolina system was highly interventionistic and no significant relationship could be found between the seriousness of the alleged problem and custodial disposition. There was therefore a basis for suggesting that reuniting families in which custody had been removed from the parents would be a goal which the children's attorneys, as a group, would pursue. The use of

66. Kelly & Ramsey, *Children in Protection Proceedings*, *supra* note 2.

67. Kelly & Ramsey, *Attorneys for Children*, *supra* note 2.

68. The processes that influence custodial decisions in protection proceedings are extremely difficult to statistically model and, as a result, produce low yields of explained variance (R^2), i.e., the fraction of all variation in the dependent variable that is explained by the independent variables in the model. Fanshel, *Decision Making Under Uncertainty: Foster Care for Abused and Neglected Children*, 71 AMER. J. PUB. HEALTH 685 (1981). When compared with other efforts to model similar processes, the models discussed in this paper are highly effective and efficient in that they explain an average 25% of the variance in the dependent variables with relatively small groups of independent variables. For a similar effort to model outcomes in child protection cases see Runyan, Gould, Frost & Loda, *Determinants of Foster Care Treatment for the Maltreated Child*, 71 AMER. J. PUB. HEALTH 706 (1981).

69. It was also found that represented parents who had had their child removed were more likely to have their children returned regardless of the "speed of reunion". (Beta = .166, $p = .012$). Kelly & Ramsey, *Attorneys for Children*, *supra* note 2, at 446.

such a standard for attorney performance is supported by research suggesting that there is little, if any, support for the belief that children who are removed from home in protection proceedings and placed in foster care fare better than children who are not removed.⁷⁰ Foster care does indeed have many negative aspects. Recent federal government public policy initiatives have sought to reduce removals of children from parents and reunite them quickly if separation has already taken place.⁷¹ For these reasons, the impact of the appointment of an attorney on the two previously discussed outcome measures, *Custodial Judicial Intervention* and *Speed of Return*, was assessed in multivariate models.⁷²

The results of these analyses revealed that the childrens' attorneys for the most part were not effective. The appointment of an attorney had no significant impact on *Custodial Judicial Intervention*, although it had been expected that effective attorneys would have a significant negative impact on this outcome measure.⁷³ The results of the multivariate analysis of *Speed of Return* were even more discouraging. In cases in which children were represented the speed with which they were returned was significantly reduced (Beta = .145, p = .033).⁷⁴ Emphasis must be placed on the fact that these findings are derived from controlled models; to the extent possible, all differences between represented and non-represented cases regarding important characteristics, such as the types of problems alleged in the petition, have been statistically removed. Thus, if attorney impact is evaluated in terms of custody decisions, the representation of children by attorneys apparently provides no benefit. There is even some evidence to suggest a negative impact.⁷⁵

The *second* measure used to explore the impact of guardians *ad litem* on the outcome of a case was based on the extent to which the court ordered that social services be provided to the child and its

70. See Gil, *Institutions for Children*, in CHILDREN AND DECENT PEOPLE 53 (A. Schorr ed. 1974); Cox & Cox, *supra* note 16; Mnookin, *Foster Care—In Whose Best Interest?* 43 HARVARD EDUC. REV. 599 (1973); Wald, *State Intervention of Behalf of Neglected Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975); Wald, *State Intervention on Behalf of Neglected Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976).

71. The Federal Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 501, (codified at 42 U.S.C. §§ 670-76) for example, conditions a state's receipt of Federal funds on the development of service programs designed to keep families together. See *id.* at § 676.

72. Kelly & Ramsey, *Attorneys for Children*, *supra* note 2; Kelly & Ramsey, *Children In Protection Proceedings*, *supra* note 2.

73. Kelly & Ramsey, *Children in Protection Proceedings*, *supra* note 2.

74. Kelly & Ramsey, *Attorneys for Children*, *supra* note 2.

75. Note that in the two other studies most relevant to this research each used outcome/impact measure based on custodial dispositions. See Clarke & Koch *supra* note 15; *Representation in Child Neglect Cases*, *supra* note 37.

family.⁷⁶ Using court-ordered social services as a measure of attorney effectiveness was attractive because in addition to custody decisions, the other major activity of the courts in protection proceedings is ordering that social services be provided to children and their families. These services can be thought of as resources that a child's representative would be expected to seek for his or her client.⁷⁷ Recent research supports the intuitively appealing expectation that providing social services early in a case's history significantly benefits families under stress.⁷⁸ An outcome variable was therefore constructed that is the average of the number of court-ordered services for each case during its first two hearings.⁷⁹ In constructing the variable, more attention was focused on the early hearings in the case histories because attorneys would probably have their greatest impact early in the proceedings. Examples of the types of services actually ordered by the courts include: parent, child and/or family to undergo group or individual psychological counseling, public health nurse to monitor, supervise and develop plan for family, or social service department to arrange better day care for the child. The findings indicated that slightly over 40% of the cases had no social services ordered during the first two hearings. Furthermore, for cases in which services were ordered the average number of services ordered per hearing was 0.9. Recall that the analysis of court-ordered services began with the expectation that the attorney, as an advocate, would seek to acquire resources from the court for the child.

A multivariate model of court-ordered services, when estimated, reveals again how this expectation was frustrated. Courts ordered significantly fewer services in those cases in which an attorney had been appointed (Beta = -.22, $p = .081$). This finding supports the conclusion drawn from the analysis of custodial dispositions, namely that attorneys for children, as a group, either have no impact on the proceedings or actually represent a hinderance to their clients.⁸⁰

A *final* outcome variable that was used to assess the impact of attorneys for children in protection proceedings measured the court's

76. Kelly & Ramsey, Determinants of Effective Court Intervention, *supra* note 2. Additional, recently completed unpublished analyses support this as well.

77. One of the duties of the guardian *ad litem* was to "determine . . . the resources available within . . . the community" to meet the needs of the child. N.C. GEN. STAT. § 7A-283 (1977) (the present version of this law is codified at N.C. GEN. STAT. § 7A-586 (1981)).

78. M. JONES, R. NEWMAN & A. SHYNE, A SECOND CHANCE FOR FAMILIES (1976); Dunu, *The Lower-East Side Family Union: Assuring Community Services for Minority Families*, in HOME BASED SERVICES FOR CHILDREN AND FAMILIES: POLICY, PRACTICE AND RESEARCH 211 (S. Maybanks and M. Bryce eds. 1979).

79. An average was used to control for those cases in which there was only one hearing during the time period studied.

80. The model upon which these findings are based was recently completed but has not yet been published. More information concerning the analysis is available from the authors upon request.

use of the child's kin in the disposition of the case. A large body of social scientific and medical research suggests that kin can provide a type of social support that is associated with a reduction in the negative effects of stressful family events and conditions.⁸¹ Further, the involvement of kin in the resolution of an abuse/neglect problem may lessen the trauma experienced by the child, especially when compared to placement in foster care with an unknown family. These reasons support the hypothesis that childrens' attorneys, to fulfill their statutory duty to "determine . . . the resources available within the family,"⁸² would seek to involve kin in the resolution of their clients' cases. An outcome variable was constructed which assessed whether, at any time since the filing of the abuse/neglect petition, the court had ordered or sanctioned the involvement of relatives in the resolution of the case. For the purpose of constructing this measure, all cases in which kin (generally the grandparents, aunts or uncles of the children) were found to be part of the problem that brought the case to the court's attention were excluded. The courts were found to have utilized kin resources in 62% of all cases in the sample. However, the multivariate analysis of kin utilization revealed that the presence of an attorney for the child had no impact on the likelihood that relatives would be involved in the case's resolution by the court.⁸³ As in the analyses of the custodial dispositions and social services outcome measures, attorneys for children, as a group, had no significant impact on the outcome of the protection proceeding.⁸⁴

In evaluating the meaning of the several impact analyses discussed above, it should be noted that significant disagreements exist about the nature of a good outcome in a child protection proceed-

81. For useful reviews of this literature, see Unger & Powell, *Supporting Families Under Stress: The Role of Social Networks*, 29 FAM. REL. 566 (1980); Cobb, *Social Support As a Moderator of Life Stress* 38 PSYCHOSOMATIC MEDICINE 300 (1976).

82. N.C. GEN. STAT. § 7A-283 (1977) (the present version of this law is codified at N.C. GEN. STAT. § 7A-586 (1981)).

83. L. Herskowitz, *supra* note 43.

84. While there may not be a unanimity of opinion concerning the individual value of each of the outcome variables discussed, it is important to note that there are relatively few studies that attempt to measure attorney impact in the young field of legal evaluation research. Carlson, *Measuring The Quality of Legal Services: An Idea Whose Time Has Not Come*, 11 LAW & SOC'Y REV. 287, 298 (1976) [hereinafter cited as Carlson]. The problems involved in measuring the impact of attorneys are difficult but pressing. For a discussion of the major problems resulting from efforts to measure the impact of Federal efforts to provide legal services, see Hollingsworth, *supra* note 12, at 287-89. One commentator, noting the problems of measurement, has urged that behavioral measures of legal services impact be developed. See Marks, *supra* note 25, at 201-02. It has also been argued that impact measures should incorporate indices of systemic/structural efficacy in addition to indices of individual performance. Carlson, *supra* at 301. Within this context it should be noted that the outcome measures used in the North Carolina study emphasize measuring the degree to which broad policy and organizational goals are achieved.

ing.⁸⁵ For this reason, several types of outcome standards were used to assess attorney impact. Thus, if one disagrees with the rationale for using any specific outcome standard, attention may be focused on another, more agreeable standard. In this context, note that in all of the standards used here, there is not a single finding that supports the hypothesis that the appointment of attorneys produced a significant benefit for their youthful clients.

The empirical results of the analyses presented thus far may be summarized in four statements: (1) the processes by which parents acquired legal representation in child protection proceedings conform to the market model of legal service acquisition; (2) the outcome standard implicit in the measures, *Custodial Judicial Intervention* and *Speed of Return*, show that attorneys who represented parents were effective in achieving the goals of their clients; (3) the processes by which children acquired legal representation conform to the therapeutic model of legal service acquisition; and (4) several standards used to measure outcome demonstrate that the attorneys who represented children in the North Carolina sample either had no impact or had a negative impact on the outcome of their cases.

Taken as a whole these findings are not surprising. Consider first the lack of a positive impact or the negative impact created by legal representation for children. Substantial empirical research supports the conclusion that legal representation — in itself — does not produce benefits for either juveniles or other similar categories of clients such as the alleged mental incompetent.⁸⁶ The results of the North Carolina study indicate that attorneys who represented children seldom become true active advocates for their young clients. The attorneys appear to have been appointed by courts that fully intended to maintain a high degree of judicial discretion and to continue their traditional *parens patriae* role. The attorneys for children, appointed under such conditions, appear to have been integrated into this therapeutic/discretionary judicial ideology. Attorneys were appointed by the court, were paid by the court, served at the pleasure of the court, and as a result did not oppose the court's traditional method of handling child protection cases, a method that limited the achievement of broader policy objectives such as the reunification of families and the provision of social ser-

85. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287 (1983) [hereinafter cited as *Decision Making Capacity*].

86. See Clarke & Koch, *supra* note 15; HOROWITZ, *supra* note 15; T. SCHEFF, BEING MENTALLY ILL: A SOCIOLOGICAL THEORY (1966) [hereinafter cited as T. SCHEFF]; Cohen, *The Functioning of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424 (1966); Zander, *Civil Commitment in Wisconsin: The Impact of Lessard v. Schmidt*, 1976 WISCONSIN L. REV. 503 (1976).

vices.⁸⁷ The therapeutic model, the dominant mechanism through which appointments of attorneys were made, also characterized the dispositional phase of the protection proceedings. Courts that used therapeutic criteria in their decisions about the appointment of attorneys were apparently unwilling to change their approach to the attorneys by either encouraging or allowing them to behave as advocates of the children's interests.⁸⁸

A series of related analyses were undertaken to explore the question of whether the appointment of *specific* types of attorneys, rather than the appointment of attorneys as a group, had any notable impact on the previously discussed outcome measures.⁸⁹ Discussion to this point has been of analyses based on comparisons between cases in which attorneys were appointed and cases in which no appointment was made. Extensive interview information was gathered from attorneys who actually served in these cases, and so comparisons among the various types of attorneys who were appointed was possible. The findings presented below are derived from this type of analysis. The results of these multivariate analyses may be summarized as follows.

- (1) Attorneys who worked more than the average number of hours on their cases, attorneys who were matched with their clients by race and attorneys who generally were skeptical about the impact that they could have in protection cases were more likely to *reduce* the degree of Custodial Judicial Intervention.
- (2) Attorneys who felt that they were expected to act as factfinders and who had spoken with their young clients were *more effective* in having the courts order social services for their clients.
- (3) Attorneys who worked more than the average number of hours on their cases were *better able* to expedite the reunion of parents and children in those cases in which custody had been removed.
- (4) Attorneys who had extensive experience as guardians *ad litem* (as measured by the number of child protection cases handled in the past), attorneys who spent a disproportionately large amount of their time negotiating with other parties to the proceeding, and attorneys whose background

87. For a discussion of judicial case management as conservative and "adverse to risk", see Kelly & Ramsey, *Children in Protection Proceedings*, *supra* note 2; T. SCHEFF, *supra* note 86.

88. See also Platt, Schectter & Tiffany, *In Defense of Youth: A Case of the Public Defender in Juvenile Court*, 43 IND. L.J. 619 (1968); D. HOROWITZ, *supra* note 15, at 189.

89. Kelly & Ramsey, *Attorneys for Children*, *supra* note 2; Kelly & Ramsey, *Children in Protection Proceedings*, *supra* note 2; Kelly & Ramsey, *Determinants of Effective Court Intervention*, *supra*, note 2; L. Herskovitz, *supra* note 43.

was in a general rather than a specialized practice, were able to *significantly increase* the odds that the courts would utilize kin resources in the resolution of the case.

These findings suggest that in spite of the fact that attorneys as a group had little impact on the outcome of proceedings, when attorneys became active, independent and experienced in their roles they were able to produce significant benefits for their clients. The findings also suggest certain characteristics of effective representation that should be emphasized in future programs. This topic is taken up in greater detail below.

Attorneys generally were ineffective in their representation of children, but the attorneys who represented parents were effective. This finding is important because it shows that even the highly interventionistic courts of North Carolina were susceptible to the pressures that might be brought to bear by parties to the proceedings who did have counsel. What was it about the parent's attorneys that resulted in a significant and beneficial impact? Unfortunately, direct information on this issue is not available because interview data from the parents and the attorneys who represented them could not be collected. The empirical and theoretical arguments developed thus far, however, do provide strong inferential bases for an answer, using a comparative analysis of the effectiveness of parent's attorneys and the ineffectiveness of children's attorneys.⁹⁰ If the processes through which parents obtained legal services correspond to a market model of legal services acquisition, it then follows that parents, relative to their children, possessed a significantly greater *degree of control* over the acquisition, instruction, monitoring and retention of their attorneys. Attorneys who represented children were responsible to the court and not to the children and thus they were part of the court's therapeutic *modus operandi*. Posing the issue in these terms however raises a new question, namely is there another locus in which control over the child's interests might be placed? The next and concluding section addresses this question.

VII. Conclusion: Locus of Control and Legal Services for Children

Compared to the attorneys who represented parents, those who represented children were ineffective. Their failure was due not so much to individual shortcomings as it was to systemic and structural problems, related both to how they were provided to their young clients and to what was expected of them. The earlier discussion of the market and therapeutic models of legal services acquisition provides

90. Marks has noted that research on legal delivery systems and their impact must, of necessity, be comparative. Marks, *supra* note 25, at 200.

insight not only into sources of these problems but also into the possibilities for reform.

The high degree of discretion that characterized the processes by which attorneys were appointed to represent children was but the first step in an institutional process that resulted in the attorneys having no beneficial impact. The paternalistic approach of the court can be seen not only in the therapeutic model of attorney appointment but also in other aspects of the processing of cases by the courts. For example, the court also controlled the compensation received by the attorneys and could thereby discourage attorneys from spending much time on their cases. In fact, attorneys overall spent a median of only five hours per case, including court time.⁹¹ A majority (68%), in addition, felt that they were not adequately paid. Perhaps because of this minimal time commitment, attorneys in 88% of the cases indicated that they simply followed the recommendations of the department of social services, thereby minimizing their own contribution to the disposition of the case.

In addition to the problems of time and compensation, attorneys were inhibited because they were confused about the role attorneys representing children were supposed to take. The attorneys sampled believed that only a bare majority of judges (53%) felt that they should take an active adversarial role. This ambivalence about the attorneys' role makes it easier for a judge to limit an attorney's activities. Furthermore, attorneys typically had no previous specialized training in child abuse and neglect cases and were therefore probably even more susceptible to accepting the courts' definition of their proper role.

The analyses indicated that attorneys for children were appointed according to the therapeutic model and to a great extent they either did not or were unable to exercise any independent adversarial representation for their clients. The problem plaguing this system which provides representation for children is that children by definition lack the independence that adults possess. The absence of this client-centered independence, or locus of control, encourages the attorney to become part of the on-going judicial therapeutic ideology. How can this unfortunate result be avoided? It is possible to treat children as anything other than children? To pose the question in different terms, if one of the reasons that attorneys who represented parents were successful was that the parents were able to ex-

91. Lawyers in the attorney survey reported a median of 6.6 hours per case and a mean of 10.5 hours. The mean figure reflects the inflationary effect of a small number of extreme scores in the distribution. We think that the lower figure of five hours used in the text is more accurate in that it was taken from actual requests to the court for payment. It is also likely that attorneys inflated their estimates of hours spent on cases in the phone interview.

ercise some degree of independent control over their attorneys, is there any way to emulate this pattern of control when the client is a child?

Children generally lack the knowledge necessary to choose attorneys and to assess the quality of representation, as well as the resources required to "complain" about the quality of their representation. An independent agency charged with providing and monitoring legal services might be created with the explicit goal of producing the independence with respect to legal representation for children that children inherently lack.⁹² This agency would be organizationally and financially independent of the judiciary, the social service system and the child's parents, (although it would be expected to cooperate with each of these parties) and would attempt to imitate the legal service market that operates well for parents. The agency would be in charge of appointing, training, monitoring, and paying the attorneys for children.

In order to provide adequate, independent representation certain requirements should be imposed. Attorneys appointed as representatives for children should be able to serve on a number of cases so that they can become proficient in this area of practice. Staff attorneys or a small number of select attorneys in private practice could be particularly effective in this regard. These attorneys would be expected to undergo specialized training to facilitate the development of expertise in the legal and other issues related to child protection.

Training provided by independent agencies could instill the proper attitude in the child advocate. As part of their training as representatives for children, lawyers would be strongly encouraged to view the children that they represent as their *clients* rather than as mere *wards* who come under their guardianship. The emphasis on the "attorney-client" relationship would imitate the market model and would further remove the attorney role from the influences of the court's therapeutic ideology.⁹³

Additionally, an independent agency would be better equipped to constantly monitor the quality of the services provided. Research on lawyer-client interaction and satisfaction suggests that clients

92. The New York study of representation for children also proposed an independent agency. Knitzer & Sobie, *supra* note 2. For similar recommendation with regard to representing the mentally ill see Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic and a Proposal*, 45 MISS. L.J. 43 (1974). In designing a structure for the provision of representation of children, attention should be paid to the efforts already made in providing counsel to the mentally ill in commitment proceedings. Kelly & Ramsey, *Attorneys for Children, supra* note 2, at 455.

93. In other analyses it was found that attorneys who were themselves skeptical of the court's therapeutic ideology, and independent and adversarial in their approach to their role as representatives, were more likely to produce beneficial impacts. Kelly & Ramsey, *Attorneys for Children, supra* note 2; Kelly & Ramsey, *Children in Protection Proceedings supra* note 2. These traits probably are more likely to be found in an "attorney-client" relationship.

who are able to participate in their representation, who follow-up on their instructions to counsel, and who monitor the quality of their representation with second opinions are more likely to achieve their goals.⁹⁴ Monitoring of this type could be performed by an independent agency.⁹⁵ There are a number of peer review systems for evaluation of attorney competence which have been proposed and tried.⁹⁶ Unfortunately, it is beyond the scope of this paper to review them in detail in relation to the proposed agency monitoring function. Another possibility is that the monitoring function of the agency could be modeled along the lines of the Professional Standards Review Organizations that now scrutinize federally supported medical services.⁹⁷ Such a review system might have a review panel of child development, social service and legal experts who would meet periodically to review representation provided by attorneys under its jurisdiction. While such panels might pose problems with respect to client confidentiality, it should be recalled that the clients in protection proceedings are very special in that they are unable to monitor their own representation.⁹⁸

Whichever system of peer review is initially adopted, the system itself should be tried on a demonstration basis and critically examined using experimental cost-benefit evaluation research designs.⁹⁹ In such a system it would be advisable to monitor randomly selected cases from the entire caseload of the agency,¹⁰⁰ problem cases that had emerged, and cases of newly hired attorneys.

Several objections might be raised to the use of these review panels. *First*, would lawyers strongly resist attempts to monitor their performance? There is certainly a history of such resistance in the medical profession. The need to monitor, however, has been clearly demonstrated because the major evaluations of attorney performance indicate that the attorneys are ineffective.¹⁰¹ Further, public funds

94. D. ROSENTHAL, *LAWYERS AND CLIENTS: WHO'S IN CHARGE* 44 (1974).

95. It has been persuasively argued that the public interest is best served when the impact of the expenditure of public funds is regularly audited. Carlson, *supra* note 84; J. COLEMAN, *POLICY RESEARCH IN THE SOCIAL SCIENCES* (1972).

96. See AMERICAN LAW INSTITUTE—AMERICAN BAR ASSOCIATION—A MODEL PEER REVIEW SYSTEM (1980) [hereinafter *Peer Review*]; AMERICAN LAW INSTITUTE—AMERICAN BAR ASSOCIATION, *ENHANCING THE COMPETENCE OF LAWYERS* (1981).

97. 86 STAT. § 1329-1493 (1972) (codified in segments of 42 U.S.C. § 201-4918 (1972)).

98. For a discussion of the confidentiality issue and its relationship to the development of evaluation standards see Rosenthal, *Evaluating the Competence of Lawyers*, 11 L. & SOC'Y REV. 257, 281-83 (1976) [hereinafter cited as Rosenthal].

99. FEDERAL JUDICIAL CENTER, *EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW* (1981).

100. For a similar proposal to monitor randomly selected legal services cases see H. DUFFY, J. SCANLON, L. VOGT, T. WHITE & T. WHOLEY, *FINAL REPORT: DESIGN OF AN ON-SITE EVALUATION SYSTEM FOR THE OFFICE OF LEGAL SERVICES OF THE OFFICE OF ECONOMIC OPPORTUNITY* (1970).

101. Knitzer & Sobie, *supra* note 2; Kelly & Ramsey, *Attorneys for Children*, *supra*

are expended to employ these attorneys and the public deserves an accounting of both the use and the impact of these funds.

Second, would review panels be unable to reach a consensus about basic elements and goals of competent representation? There is certainly a great deal of disagreement in the field of child development and social welfare concerning the best approach to follow in dealing with the many types of abuse/neglect cases typically handled by the courts.¹⁰² However, several arguments can be advanced for the success of these review panels. Scholars and practitioners are now vigorously pursuing the development of performance standards for attorneys and, as our analyses suggests, there will probably be no better sphere of legal work in which to demonstrate and evaluate such standards than that of representation in child protection proceedings.¹⁰³ Also, in the task of monitoring attorney performance it is probably more important to be able to recognize poor representation than it is to agree on the nature of good representation. Poor representation is recognizable.¹⁰⁴ Finally, it should be emphasized that a major impact of the "process" of monitoring, over and above the actual evaluations rendered through the review process, would presumably be to make the representatives realize that their work is important, that it is being scrutinized, and that they will be held accountable for it. This, in itself, might improve the quality of representation.

Third, would the process of choosing "problem" cases and a random selection of cases, and then periodically reviewing them be too time consuming and expensive? Not necessarily. The selection of both types of cases could easily be handled by relatively simple micro-computer programs. Such selection programs and procedures and the caseload profiles upon which they are based are already routinely used by medical care providers and third party providers such as health insurance corporations. As to cost, the value of review procedure, while certainly involving additional expenditures, will ultimately have to be judged in relation to the *status quo*; presently a system in which little of the money spent on the representation programs produces a significant result.

note 2.

102. For a discussion of these disagreements in the context of the attorneys' determination of the weight that should be given to a child's wishes in a protection proceeding, see Ramsey, *Decision Making Capacity*, *supra* note 85.

103. See ABA-ITA *Peer Review* *supra* note 96; Rosenthal *supra* note 98; Smith, *Peer Review: Its Time Has Come*, 66 A.B.A.J. 451 (1980) [hereinafter cited as Smith].

104. For example, poor representation generally involves several of the following characteristics: (1) The representative spends little time on the case, (2) the representative relies exclusively on the department of social services records and does not pursue additional professional evaluations, (3) the representative changes frequently, (4) the representative does not speak to the child, the child's parents, siblings or kin.

In addition to monitoring representation for children, an extremely important function of a specialized agency would be to provide a competitive rate of payment for attorneys who represent children. In other analyses of the North Carolina data¹⁰⁵ it was found that when attorneys worked more hours on their cases they were able to produce more beneficial impacts, but that attorneys usually committed very few hours to their cases. Furthermore, judges controlled the payments and attorneys were generally displeased with the compensation they received.

The policy question arising from these findings can be clearly posed in economic terms: How can the supply of time that attorneys allocate to their cases be increased? Assuming that attorneys, as rational actors, will allocate their time and services as a function of the price that they can expect in return for their effort, it follows that the payment system needs to become more competitive with other legal payment systems. Charity and pro bono services provided by attorneys are simply not enough to assure the needed supply of quality legal services.

Giving the responsibility for paying attorneys to an autonomous agency would eliminate the problematic situation in which the judge before whom the attorney must appear often is the same judge who authorizes payments. Furthermore, an important shift in control over financial resources would result; one in the direction of the child's interests and away from the court's paternalistic and organizational interests.

A specialized agency and a monitoring system of the type proposed here could arguably be criticized as both too Draconian and too Orwellian to be used as solutions for the problems that exist in representing children in protection proceedings. Moreover, in a time in which deregulation is a dominant political theme, a proposal for a new agency no doubt will come under severe scrutiny. Nonetheless, the proposal to systematically regulate and monitor attorneys who represent children is founded on three important facts: (1) it is unlikely that children can be served adequately by a market system of legal acquisition, (2) the therapeutic system of legal service acquisition is similarly unable to serve children's need for independent legal representation, and (3) public funds are now being spent to provide inadequate representation. Criticism of our proposal and suggested alternative proposals must first come to terms with or refute each of these facts. For example, these three facts would appear to strongly

105. Kelly & Ramsey, *Attorneys for Children*, *supra* note 2; Kelly & Ramsey, *Children in Protection Proceedings*, *supra* note 2; Kelly & Ramsey, *Determinants of Effective Court Intervention*, *supra* note 2.

militate against the use of voluntary peer review systems.¹⁰⁶

We have argued that by shifting the locus of control over the appointment, training, supervision, and payment of attorneys who represent children in protection proceedings from the court to an independent and specialized agency, the goals of independent and adversarial representation for children are more likely to be achieved. The argument is based both on past research in other areas, such as delinquency, and the empirical analyses of the child protection system in North Carolina. The proposals presented here do not, however, represent an attack upon the ideal of therapy as a goal of the juvenile court. The court would still ultimately decide what disposition was in the best interests of the children brought before it. What would change is that children would have an independent representative whose duty would be to represent the child even in cases in which this representation ran counter to the court's own therapeutic inclinations. In short, the child would have an independent voice, not just a voice which was an echo of the existing system.

106. See ABA-IJA, *Peer Review*, *supra* note 96; Smith, *supra* note 103.

Appendix*

List of Variables Analyzed as Possible Determinants the Acquisition of Legal Services by Parents and Children and Other Outcome Variables.

Category 1: Characteristics of Child, Parent and Family

- Race (white, black, Indian (0,1)
- Sex (0,1)
- Ratio of male to female children in the case
- Number of children referred to in the petition
- Age of youngest child named in petition
- Age of oldest child named in petition
- Average age of all children named in the petition
- Family has long history of Department of Social Service involvement
- Petition Problems Alleged
 - any substance abuse (0,1) (SA)
 - any violence/sexual abuse (0,1) (VS)
 - any poverty/status related problem (0,1) (PS)
 - any abandonment/neglect (0,1) (AN)
 - removal risk (count of high risk problems cited in petition)
 - total number of alleged problems
 - SA, VS, PS, AN, each as a fraction of all problems alleged
 - all petition problem interaction
- Source of problem
 - mother
 - father
 - both parents
 - kin
 - other
- Family Structure
 - two parent
 - single female parent
 - single male parent
 - other guardian

Category 2: Characteristics of the Court's Processing of the Case

- Petitioner
 - Department of Social Services (DSS) alone
 - DSS and Other Party (police, hospital, relative, etc.)
 - relative or family friend alone

* Note: Descriptive statistics on the variables not included in the text are available upon request.

- Petition date
- Issuance of an immediate custody order
- Total number of hearings in the case
- Total number of days in the court system
- Hearings per weighted unit of time in the case history
- Parents are represented by legal counsel
- Child is represented by legal counsel
- Interaction of parent/child representation by legal counsel
- Reason given by court for not appointing attorney to represent child

Category 3: Characteristics of the Attorney Who Represented Children and How They Were Represented

- Attorney's age
- Attorney's sex
- Attorney's race
- Number of child protection cases handled by attorney
- Average number of hours that attorney works on child protection cases
- Attorney feels adequately paid for child protection work
- % of time in child protection cases spent in court
- % of time in child protection cases spent in investigating
- % of time in child protection cases spent in negotiating
- % of time in child protection cases spent in research
- % of time in child protection cases spent in consultation with

DSS

- Frequency with which attorney speaks with child
- Frequency with which attorney speaks with parents
- Frequency with which attorney speaks with parents' attorney
- Attorney sees role mainly as advocate
- Attorney sees role mainly as mediator
- Attorney sees role mainly as factfinder
- Attorney believes that children are represented early enough in the proceeding
- Attorney usually follows up on the case
- Attorney had law school preparation for representing children

Category 4: County/Social Service and Judicial System Characteristics
(selected examples)

- 1976 unemployment rate
- 1975 per capita income
- % of county population receiving AFDC in 1977
- % of county land urban

- % non-white population 1976
 - Children in Headstart per capita
 - New employment per capita 1976
 - County has Legal Services Office
 - 1978 neglect hearings per capita
 - 1978 assigned counsel expenditures per capita
 - 1976 average weekly wage in industry
 - Natural population increase, 1970-76
 - Judicial district
-

Note: Descriptive statistics on the variables not included in the text are available upon request.

