

ARTICLE: WHY A LAWYER?--THE IMPORTANCE OF CLIENT-DIRECTED LEGAL REPRESENTATION FOR YOUTH

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LexisNexis Summary

... It requires advocates who take the time to gain a youth's trust, build a youth's capacity, and give youth their voice. ... According to the Rocky Mountain Children's Law Center, only 46% of foster youth graduate from high school, as compared to graduation rates of 84% in the general population. ... Meanwhile the child--whose rights to his or her parents and family unit and home and future are all being determined--has no recognized constitutional right to counsel in these proceedings. ... While appointing lawyers for every child in an abuse and neglect case may impose additional financial costs for those states not currently providing lawyers, the liberty interests involved in these proceedings greatly outweigh the cost to the state. ... Providing youth in abuse and neglect cases with a client-directed lawyer is also consistent with recent trends and the evolving thinking of national children's law experts. ... First, the best interest model is at odds with the ABA Model Rules because the attorney is not directed by the client, as required by Model Rule 1.2, which directs a lawyer to abide by a client's decisions concerning the objectives of representation. ... "The federal Child Abuse Prevention and Treatment Act (CAPTA) requires the appointment of a 'guardian ad litem' for a child as a condition of receiving federal funds for child abuse prevention and treatment programs, but the role and identity of that representative are largely undefined." ... The work of the ABA's Bar Youth Empowerment Project (in partnership with Casey Family Programs and the Eckerd Foundation) similarly has sought to advance an enhanced voice for youth in the legal process and to educate professionals around the nation about the importance of legal representation for youth.

Highlight

This article begins with a discussion about the importance of ensuring that all children have lawyers in abuse and neglect cases. Lawyers provide a vital role in giving youth a voice in proceedings that sound profoundly affect their

¹ I thank Miriam Krinsky and Cathy Krebs for their substantial input and edits.

lives. The article then discusses why the client-directed lawyer's role is consistent with federal law and legal ethics. Finally, the article discusses the growing support for client-directed representation and what the American Bar Association has done to support this type of child representation.

Keywords: *child's attorney; attorney for children; guardian ad litem; client-directed representation; abuse and neglect; dependency; right to counsel*

Text

[*277] You are the one who makes the decisions, and I need to be heard so people may understand how I feel or what I need. Listen to me, since no one else will, and try to understand where I'm coming from. Maybe I am a child, but I'm not dumb; I know right from wrong. I need to know that you will make the right decisions for me, so that I can live life the way it's supposed to be.

Former Foster Youth ²

I. INTRODUCTION--THE CRITICAL IMPORTANCE OF LEGAL REPRESENTATION FOR YOUTH

When a dependency case is initiated, the child often has little say in whether he is removed from his home and family, where he is placed, where he will go to school, and what type of contact he will have with his siblings or family of origin. Youth are expected to adapt to their new surroundings, but have little or no input into where and what those surroundings may be. The judge is expected to make life-changing decisions for the youth with information from the social worker and the caregivers'/parents' perspectives, yet the youth's voice in this process is often nonexistent. When the youth does not have a lawyer, the judge lacks critical pieces of information from the youth's perspective and is thereby deprived of key facts that can ensure a fully informed decision-making process aimed at promoting the best interests of the youth. When a youth does have a lawyer, the judge is in a better position to make a more informed, safe, and accurate decision.

Dependency cases have a tremendous impact on a youth's fundamental interest in safety, permanency, and well-being. The youth stands to lose a great deal, including all-important relationships with siblings and family. The child welfare agency can move a youth at any time, day or night, with no notice, and even has the authority to place a youth in a facility where physical liberty may be restricted. In many cases, the youth is placed in a foster home or residential facility based on the availability of bed space, not based on the individual needs of the youth.

[*278] When youth exit foster care, their success depends a great deal on decisions made during foster care as well as the path that is charted for them as they exit foster care. Too often, however, foster youth face discouraging outcomes as they move into adulthood. According to the Rocky Mountain Children's Law Center, only 46% of foster youth graduate from high school, as compared to graduation rates of 84% in the general population. ³ Often, this lack of educational success is because youth in foster care move placements and consequently schools many times throughout their time in foster care. Thereafter, 20% of foster youth end up homeless. This is often because appropriate housing arrangements were not secured before the youth left foster care. Foster youth also are more likely to end up in the justice system--25% are incarcerated within the first two years of leaving foster care. And girls who spent time in foster care are six times more likely to be pregnant by the age of twenty-one than their peers. ⁴

Lawyers can change these statistics. Lawyers can advocate against inappropriate placements or excessive school changes, lawyers can advise their clients about housing options and how to negotiate with landlords, and lawyers can represent youth at school hearings for special education and disciplinary actions. Lawyers can request

² Writing by Antoinette, To the Judge, in MY VOICE, MY LIFE, MY FUTURE/MI VOZ, MI VIDA, MI FUTURO 13 (Home At Last ed., 2006).

³ Rocky Mountain Children's Law Center, <http://www.rockymountainchildrenslawcenter.org/> (last visited Nov. 22, 2009).

⁴ *Id.*

emergency hearings if the youth is being placed in a psychiatric facility or some other placement the youth doesn't consent to. In sum, lawyers can make a life-changing difference for youth who might otherwise find themselves completely alone and with no voice in a system that seeks to plan for their entry into adulthood.

II. DEFINING THE LAWYER'S ROLE

I would feel like I was just being passed around and not really knowing what was going on. No one explained anything to me. I didn't even know what rights I had . . . if I had any. . . . I knew there were bad things going on, but no one really explained it to me. ⁵

In the court drama that determines the futures of these children, the other parties have counsel . . . terminating parental rights is a major interference in the fundamental right to raise one's children and commands a high level of due process. Hence, virtually every parent gets counsel to whom the full panoply of American Bar Association's Rules of Professional Conduct applies. The state gets counsel to support the agency's position regarding the child's removal and subsequent placements. Meanwhile the child--whose rights to his or her parents and family unit and home and future are all being determined--has no recognized constitutional right to counsel in these proceedings. ⁶

There are many different views concerning the best way to represent children. Many states appoint a guardian ad litem (GAL) that may or may not be a lawyer. The GAL's duty is to report to the court what the GAL thinks is in the child's best interest. In some of those jurisdictions the GAL is required to inform the court whether the youth's opinion differs from that of the GAL and what the youth's opinion is. Other jurisdictions require the GAL to request that an attorney be appointed if the youth's view differs from the GAL.

Over time, more and more states have developed client-directed polices and practices that reject the view that youth are better off with a lawyer who represents what the *lawyer* thinks is best. The approach embraced by these states recognizes that few lawyers have been in the shoes of the youth they represent. Lawyers who advocate their *own* view of what is best for their client necessarily bring their own biases and perspectives, rather than the very different lens of their client, when determining what position to advance. Accordingly, [*279] these states require the representative for the youth to be a *client-directed* attorney. This client-directed approach is particularly important when the child is an older youth and about to transition out of the system.

The client-lawyer relationship for a foster youth's lawyer is in many ways indistinguishable from the client-lawyer relationship in any other situation. This relationship includes duties of client direction and advice, confidentiality, diligence, competence, loyalty, and communication. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation.

In order for youth to have a truly meaningful voice in abuse and neglect proceedings, the lawyer should advocate for the youth's counseled and expressed wishes. Providing the youth with an independent and client-directed lawyer ensures that the youth's legal rights and interests are adequately articulated and protected as the legal process unfolds. Most importantly, a lawyer provides the youth with the sense that his or her voice is being considered and that the youth has a say in decisions that will affect the rest of his or her life.

The youth's lawyer helps to make the youth's wishes and voice heard but is not merely the youth's mouthpiece. As with any lawyer, a youth's lawyer is both an advocate and a counselor for the client. The lawyer should, without unduly influencing the youth, advise the youth by providing options and information to assist the youth in making decisions. The lawyer should explain the practical effects of taking various positions; the likelihood that a court will accept particular arguments; and the impact of such decisions on the youth, other family members, and future legal

⁵ *Id.*

⁶ FIRST STAR & THE CHILDREN'S ADVOCACY INSTITUTE, A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN 4 (2d ed. 2009).

proceedings. The lawyer should investigate the relevant facts, interview persons with significant knowledge of the youth's history, review relevant records, and work with others in the case.

To fulfill this role, the lawyer must establish a trusting relationship with the youth. The lawyer should develop a thorough knowledge of the client's circumstances and needs. The lawyer should visit the youth in his or her home, school, or any other appropriate place where the youth is comfortable. The lawyer should observe the youth's interactions with parents, foster parents, and other caregivers. The lawyer should maintain regular and ongoing contact with the youth throughout the case.

The result of these efforts to build a trusting lawyer-client relationship is that the youth has one person within the case whom she can trust completely. She has one person who will explain the outcome of each court hearing. She has one person who works with her to formulate her position and one person who will present that position to the court. The result of this trust is that the youth will be more forthcoming with information and be more likely to trust in the integrity of the process. In particular, the youth may be more willing and able to identify relatives who might become foster parents or reveal abuse that the social worker and court did not even know about. Additionally, studies have shown that youth who had input into the court decision are more likely to accept that court decision, even if the ultimate outcome is not what they wanted.⁷ Youth feel empowered when they think their input is being considered.⁸ Youth believe the court system would be more effective if decision makers actually heard what they think about plans for their own future, ideas that the social worker or someone advocating for what they think is in the youth's best interest do not have.⁹

III. GROWING SUPPORT FOR CLIENT-DIRECTED LAWYERS FOR FOSTER YOUTH

The mandate for appointment of an attorney for every child in an abuse or neglect proceeding is consistent with trends across the United States. Currently, more than half of [*280] the states require the appointment of an attorney or an attorney/GAL by statute or case law, and all but about a dozen states regularly appoint attorneys for children as a matter of practice whether or not required to do so by state law.¹⁰ Moreover, at least one federal district court has held that appointment of counsel for every child in the state foster care system is constitutionally required as a matter of procedural due process.¹¹ While appointing lawyers for every child in an abuse and neglect case may impose additional financial costs for those states not currently providing lawyers, the liberty interests involved in these proceedings greatly outweigh the cost to the state.¹²

⁷ HOME AT LAST: MY VOICE, MY LIFE, MY FUTURE (2008), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/foster_care_MyVoiceMyLifeMyFuture.pdf.

⁸ *Id.*

⁹ GLORIA HOCHMAN ET AL., FOSTER CARE: VOICES FROM THE INSIDE (2004), available at <http://pewfostercare.org/research/voices/voices-complete.pdf>.

¹⁰ See U.S. State by State Chart, compiled by the Yale Representing Children Worldwide Project, available at http://www.law.yale.edu/rcw/rew/jurisdictions/am_n/usa/usa.htm. According to that 2005 Survey, more than thirty states currently require the appointment of an attorney or an attorney/GAL, and an additional half dozen states routinely appoint lawyers for children as a matter of practice even though not required by law to do so.

¹¹ NCCUSL Act, *supra* note 1, at Prefatory Note. In *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005), the court held that every child in foster care within the state was entitled to appointed counsel as a matter of procedural due process under the Georgia state constitution. Significantly, the Georgia constitutional provision tracks the federal Due Process Clause, and the court relied on interpretations of the Due Process Clause in the U.S. Constitution in its analysis.

¹² *Moore v. City of Cleveland*, 431 U.S. 494, 503 (1977) (recognizing that there is a liberty interest in maintaining familial relationships protected by the due process rights of the Fourteenth Amendment).

Providing youth in abuse and neglect cases with a client-directed lawyer is also consistent with recent trends and the evolving thinking of national children's law experts. Over a decade ago (in 1996), a conference on the representation of children entitled *Ethical Issues in the Legal Representation of Children* was held at Fordham Law School. The conference attendees recommended that lawyers for children should act as lawyers, not as GALs.¹³ The co-sponsors and participants at the Fordham conference included national children's experts, academicians, and law organizations.¹⁴

In 1996 the American Bar Association (ABA) adopted the ABA Abuse and Neglect Standards which called for a lawyer for every child subject to abuse and neglect proceedings.¹⁵ The National Association of Counsel for Children (NACC) issued its own revised version of the ABA Standards in which it endorsed most of the ABA guidelines but also emphasized the counseling function of the child's lawyer.¹⁶

Ten years later, in 2006, children's law experts gathered again at a conference at the University of Nevada, Las Vegas (UNLV), to review the state of legal representation of children. Like the Fordham Conference, the UNLV participants produced a set of thorough and thoughtful recommendations.¹⁷ The UNLV Recommendations encourage lawyers to seek to empower youth by helping them develop decision-making capacity. In discussing the role of the lawyer, the UNLV Recommendations strongly support client-directed representation for youth capable of making considered decisions.¹⁸ Again, the list of co-sponsors and participants included nationally respected children's law experts, policy makers, and organizations.¹⁹

IV. ETHICAL AND FEDERAL LAW IMPLICATIONS OF LAWYERS FOR FOSTER YOUTH

Some states currently utilize an attorney-GAL model in which a lawyer is appointed to represent the youth with capacity, but rather than being directed by the youth, the lawyer represents what is in the child's best interests. This so-called "best interest" model implicates a variety of ethical concerns.

¹³ *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, [64 FORDHAM L. REV. 1301 \(1996\)](#) (Fordham Recommendations) (attorney must follow child's expressed preferences and attempt to discern wishes in context in developmentally appropriate way if child is incapable of expressing viewpoint).

¹⁴ Conference co-sponsors included the Administration for Children, Youth and Families, U.S. Department of Health and Human Services; ABA Center on Children and the Law, Young Lawyers Division; ABA Center for Professional Responsibility, ABA Section of Criminal Justice, Juvenile Justice Committee; ABA Section of Family Law; ABA Section of Individual Rights and Responsibilities; ABA Section of Litigation Task Force on Children; ABA Steering Committee on the Unmet Legal Needs of Children; Juvenile Law Center; National Association of Counsel for Children; National Center for Youth Law; National Council of Juvenile and Family Court Judges; and Stein Center for Ethics and Public Interest Law, Fordham University School of Law.

¹⁵ ABA, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996), at Preface.

¹⁶ NAT'L ASS'N OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES (2001).

¹⁷ See *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, [6 NEV. L.J. 592, 592-615 \(2006\)](#).

¹⁸ As stated in the Recommendations, "[c]hildren's attorneys should take their direction from the client and should not substitute for the child's wishes the attorney's own judgment of what is best for children or for that child." *Id.* at 609.

¹⁹ Co-sponsors of UNLV included the ABA Center on Children and the Law, Young Lawyers Division; ABA Center for Professional Responsibility; ABA Child Custody and Adoption Pro Bono Project; ABA Section of Family Law; ABA Section of Litigation; Home at Last, Children's Law Center of Los Angeles; Juvenile Law Center; National Association of Counsel for Children; National Center for Youth Law; National Council of Juvenile and Family Court Judges; National Juvenile Defender Center; Stein Center for Law and Ethics, Fordham University School of Law; Support Center for Child Advocates; and Youth Law Center.

First, the best interest model is at odds with the ABA Model Rules because the attorney is not directed by the client, as required by Model Rule 1.2, which directs a lawyer to abide by a client's decisions concerning the objectives of representation. The best interest model also fails to conform with Model Rule 1.6, which contains an injunction against the disclosure of confidential information without the informed consent of the client, a violation that is compounded by the use of the confidential information adverse to the client without informed consent in violation of Rule 1.8. Children's lawyers, like all lawyers, need to be guided by the ABA Model Rules.

Some states have also expressed concerns that legal representation for youth--and especially a client-directed formulation of the lawyer's role--would contravene federal [*281] law. In fact, requiring lawyers to represent youth in abuse and neglect cases is fully consistent with federal law. "The federal Child Abuse Prevention and Treatment Act (CAPTA) requires the appointment of a 'guardian *ad litem*' for a child as a condition of receiving federal funds for child abuse prevention and treatment programs, but the role and identity of that representative are largely undefined."²⁰ All states that provide lawyers for youth have been found in compliance with CAPTA, and Health and Human Services (HHS) has issued guidance suggesting that appointing counsel for a child promotes the child's best interest consistent with CAPTA.²¹ Accordingly, states have no basis for arguing that providing a child with a traditional client-directed lawyer will raise concerns under CAPTA.

V. ABA EFFORTS TO PROMOTE CLIENT-DIRECTED LAWYERS FOR FOSTER YOUTH

The ABA has worked for many years to advance the need for client-directed representation for foster youth. A Model Act presented to the ABA House of Delegates in the summer of 2009, and under continued discussion within the ABA, was developed to underscore the critically important need for legal representation for children and youth, the importance of training and standards for those lawyers, the need for lawyers for children to abide by standards of professional responsibility, the nature of the role of the child's representative, and the need for children and youth to be engaged participants in the court and legal process.

The Model Act embraces the view that every youth is entitled to a lawyer who functions as a traditional client-directed lawyer guided by the Model Rules of Professional Responsibility. The main authors of the Model Act--all of whom subscribe to this starting point--are ABA Section of Litigation Children's Right Litigation Committee, the ABA Bar-Youth Empowerment Project, and First Star. Over the course of two years, the Model Act has been revised and vetted through leading child welfare advocates from the ABA, NACC, CASA, NCJFCJ, ethics experts, judicial officers, academicians, and practitioners. After further discussion with other sections within the ABA, the drafters intend to present the Act, with any revisions, to the ABA House of Delegates for consideration anew.

The work of the ABA's Bar Youth Empowerment Project²² (in partnership with Casey Family Programs and the Eckerd Foundation) similarly has sought to advance an enhanced voice for youth in the legal process and to educate professionals around the nation about the importance of legal representation for youth. To that end, project staff have provided technical assistance to states as they draft legislation to ensure that youth have lawyers and that youth have input in the process. To encourage youth's involvement in the legal process, project staff train lawyers, judges, social workers, GALs, and court-appointed special advocates across the country. In each of these trainings, former foster youth have provided much of the substance. Youth not only need a voice in their own cases, but also in broader efforts to advance systemic changes and improve outcomes for the foster youth who will come

²⁰ See [42 U.S.C.A. § 5106a](#)(b)(2)(A)(xiii) (2003), which requires states to have "provisions and procedures in every case involving an abused or neglected child which results in a judicial proceeding, a guardian *ad litem*, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings--(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child."

²¹ U.S. DEP'T OF HEALTH AND HUMAN SERVICES, ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCY FOR CHILDREN (commentary to Guideline 15A) (1999).

²² ABA, *The Bar-Youth Empowerment Project*, <http://www.abanet.org/child/empowerment/home.html>.

after them. The project has also produced a wide array of written materials and articles, including "A Lawyer for Every Child: Client-Directed Representation in Dependency Cases," which presents constitutional, statutory, and public policy arguments strongly supporting a youth's right to counsel.

[*282] VI. CONCLUSION

The youth advocacy field is unlike any other area of the law. It requires general advocacy skills as well as specialized skills to work and advocate for youth. It requires advocates who take the time to gain a youth's trust, build a youth's capacity, and give youth their voice.

The child welfare legal system can be overwhelming even to an adult. Youth deserve effective lawyers who have manageable caseloads and proper training to navigate the system with them. Youth deserve lawyers who can enable and empower the youth's unique and critically important voice in the legal system that will define their future.

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