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FOSTER CARE & ADOPTION REFORM LEGISLATION: IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT OF 1997

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I would like to talk about the Adoption and Safe Families Act as a component of a broader context of a movement which we call "permanence" or "permanency planning." ASFA is about outcomes. Specifically it is about producing better outcomes for children than the last system produced. It is founded on the principle that, unlike the old system in which too much attention to family preservation and reunification was paid, the new system will pay attention to and place priority on the safety and health of a child. That is the permanency movement. Do not err on the side of family preservation; err on the side of safety and health for the child.

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Previously, Mr. Ventrell was engaged in the private practice of law, where he represented children in all types of litigation. He is a member of the Colorado and Montana Bars and has served on committees of the U.S. Department of Health and Human Services, the American Professional Society on the Abuse of Children, the National Council of Juvenile and Family Court Judges, the American Bar Association, and the Colorado Bar Association.

Mr. Ventrell is also an attorney consultant to the Kempe Children's Center State and Regional Crimes Against Children Team. He serves on the editorial staff of the *Children's Legal Rights Journal* and as reviewer for *Child Abuse and Neglect*, the *International Journal*. He is editor of *The Guardian*, the newsletter of the NACC, and of the NACC's *Annual Children's Law Manual*.

Mr. Ventrell is the author of various articles regarding representation of children, and lectures on the role and responsibilities of the child's attorney. He serves as faculty trial skills trainer at the Annual Rocky Mountain Child Advocacy Training Institute. He recently completed an article entitled *Evolution of the Dependency Component of the Juvenile Court*, which is published in a centennial issue of the *Juvenile and Family Court Journal*, celebrating the 100th anniversary of the first juvenile court.

I am not sure that I fully agree with the movement. I am not sure that the old system was misguided. In fact, I think in terms of pure federal policy, it was not misguided. In application, however, it may well have been. I certainly will agree, and I know this from representation experience, that the system did allow children to languish in foster care and re-victimized children in many cases.

I recall a case of my own in which an eleven year old girl, a victim of incest, raped repeatedly in her home from which she was removed and placed in multiple foster care homes. She told me it was not the sex she minded so much, but rather it was being moved all the time that was so hard. That is a powerful statement, raising all kinds of issues, but it certainly confirms that we re-victimize children, at least from time to time.

As a matter of federal public policy, I think ASFA is well guided. As the previous presenters have said, its implementation is yet to be seen and we do not know what the outcome is going to be. It does make sense, however, in terms of perhaps better balancing the guideposts of our system, which are the best interests of the child, on one hand, and family preservation and reunification, on the other.

ASFA, however, is only one component of the permanence movement. In and of itself, it will not accomplish permanence for children. The passage of ASFA, and the adoption of specific rules in states will not accomplish the goal of permanence. It is but one component.

I would like to talk about another component, and that is the legal representation of children. ASFA will take place in the context of our adversarial system. It does not create a new system. ASFA rules are placed in the context of an adversarial system, which is founded on the proposition that good outcomes come from the zealous advocacy of competing interests. The value and reality of that proposition are arguable. I think we should argue that children's cases and family cases are not always appropriately resolved in the adversarial system, but I am happy to debate that question another day.

For today, as we place ASFA in the adversarial system, we have to be prepared to make it work. One of the things we know about that system is that underrepresented interests, those not accompanied by zealous, competent and independent advocacy,

will not be heard. In other words, children without representation will not get the ASFA intended outcomes. Therefore, we have to talk about all of the other components of permanence, and we should focus much of our attention on the legal representation of children. The question is, are children receiving competent independent representation and will they in the new system. No and probably not.

For the most part, children across the United States are not well represented by their attorneys, law guardians, attorneys guardian ad litem, GAL's, whatever the advocacy term a state chooses to use is. They are by and large not well represented. It is a horrible system. The abuses that occur in the representation of children do not occur in other disciplines and I am not talking about violations of the niceties of the Code of Professional Responsibility. I am talking about attorneys who systematically fail to show up for hearings, or fail to ever see their client. To the extent they see their client, they see him or her five minutes before the hearing. They do not present evidence, they do not do what "lawyers" do.

Many lawyers do a good job under this system. I would like to think that from time to time I did a good job representing my child clients and I bet that representatives here today do a good job representing their child clients, but they succeed despite the system, not because of the system. Remarkable lawyers can do a good job for children under the current system. Average to poor lawyers cannot, and we need to build a model in which success is likely, not unlikely. In order to do that, we need to understand what the problem is, and there are many problems involved in the representation of children. The primary culprit is role confusion.

Unlike any other area of practice, children's lawyers do not have a clear articulation or model of their role. They do not even agree oftentimes on the fundamental duties for which they are appointed to represent the child, and that's a system doomed to failure.

The National Association of Counsel for Children, together with others, including Jean Koh Peters at Yale University, has studied models of representation and how we can improve them.¹

¹ See Jean Koh Peters, *The Roles And Content Of Best Interests In Client-Directed*

We knew when we set out that we would find a number of models and that they would be confusing. Of the 56 U.S. jurisdictions, Professor Peters concluded that there are 56 different models of representation of children, that no two jurisdictions represent children the same way. Additionally, within those jurisdictions, there is frequent disagreement about the fundamental role of the attorney. Even within venues of a particular jurisdiction, there is frequent disagreement from one office, such as a public guardian's office to the private attorneys who do the same work, as to what attorney's are supposed to be doing. Quality representation of children cannot occur unless we do something about this mass role confusion.

When you boil all the models down, you can come down to two primary models that have many variables. First, there is the "pure attorney" model, where an attorney acts like an attorney and represents the client in a traditional client-directed fashion. There is also the "attorney guardian ad litem" model, where an attorney is appointed to represent the child but told, "you are not exactly an attorney, you are an attorney charged with the representation of best interests."

Some states are clear about which model they have. About 60 percent of the jurisdictions have the "attorney / guardian ad litem" model. Many states have the "attorney / guardian ad litem" (or "law guardian" model) but are not clear whether their role is to represent the best interests or express wishes of their child clients. These two views have tended to dominate the dialog about creating a model. Basically, the policy-makers on this issue get together and divide on opposite sides of the aisle. There are those of us who have tended to fall into the autonomous attorney model, and there are those of us who have tended to fall into the best interest model. We are polarized in that way and insist that it must be one over the other, when in

Lawyering For Children In Child Protective Proceedings, 64 FORDHAM L. REV. 1507, 1564-70 (1996) (recommending model of representation for lawyers and child clients); see also Frances Gall Hill, *Clinical Education and the "Best Interest" Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering and Pedagogy*, 73 IND. L.J. 605, 611-25 (1998) (discussing models of representation of children); William A. Kell, *Ties That Bind?: Children's Attorneys, Children's Agency, and The Dilemma Of Parental Affiliation*, 29 Loy. U. Chi. L.J. 353 (1998) (discussing advocate's roles and dilemmas); Robert E. Shepherd, Jr. and Sharon S. England, *"I Know the Child is my Client, But Who am I?"*, 64 FORDHAM L. REV. 1917, 1939-43 (1996) (discussing models of representation of children).

fact we know that both are flawed, and both have merit.

I would like to suggest here today that we stop that dialog, the best interests versus expressed wishes debate is no longer productive. We have been having this debate since before the passage of the Child Abuse Prevention and Treatment Act in 1974² and it has not gotten us anywhere. It may have been an appropriate discussion at one time, but it has not helped us reach a resolution. I suggest we move away from that to create a new dialog to try something else, try something that works. One thing we know for sure is that the current dialog and the current system are not working very well.

Now, a new model, which I call the "child's attorney" model, really has begun to emerge, and I think it exists in large extent in the State of New York. It has its origins in the 1995 Fordham conference on ethical issues in the representation of children.³ It was further moved along in 1996 by the adoption of the American Bar Association Standards of Practice for lawyers who represent children in child abuse and neglect cases.⁴ In 1997, it was moved even further along when Professor Peters published her book, "Representing Children in Child Protective Proceedings."⁵

These events together demonstrate a move away from the predominant "attorney / guardian ad litem" model to a more autonomous attorney model. In fact, they all recommend discarding the label "guardian," "law guardian" or "guardian ad litem" because it creates an untenable situation for the attorney. There are distinctions between the Fordham, ABA rules and Professor Peters' work, but they all have that in common. The model is not naive, though. The model recognizes that children are not simply little adults, and that we cannot simply act as attorneys in the traditional sense with no exceptions. We have to make exceptions. Clearly pre-verbal children and very young children cannot direct their litigation in the way that perhaps a

² Pub. L. No. 93- 247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. § 5101-06) (1988).

³ See generally Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, 64 FORDHAM L. REV. 1301 (1996).

⁴ See A.B.A. Juv. Just. Stds. Relating to Abuse § 6.4 (1980) (noting that "goal of all dispositions should be to protect the child from the harm justifying intervention in the least restrictive manner available to the court").

⁵ JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (1997).

16 or 17 year-old can. So, given the time constraints, and without going through the details, I will tell you that exceptions are made for those situations. The model recognizes that you can give a child too much autonomy in the legal process and that children do not always know what is best for them.

We recognize it would be ludicrous to tell an attorney when his 12 year old incest victim tells him that she wants to be returned to the untreated perpetrator father, that he simply march off accomplish that. That is not what this model is about. It makes exceptions in those cases, but it does establish clarity that has simply not existed up until this point and, frankly, gives us a fair chance of providing better representation for children.

How does that come into play with ASFA? Well, the need for competent representation has always existed. ASFA highlights the need. ASFA does some things that make it imperative that the child's attorney understand fully what his or her role is and be in a position to advocate aggressively for it. I'll hit on the one that Bernadine talked about a little bit, which is the "no reasonable efforts" finding.⁶

Part of this new process is an option very early on in the proceeding for a no "reasonable efforts finding," if certain conditions are met: that there had already been termination as to a sibling, or aggravated circumstances, or enumerated crimes. That is going to occur, you are going to be representing a child as a child's attorney a month or two into removal or litigation and I am certain that states will feel compelled on borderline cases, or be required to move for a "no reasonable efforts" finding.

I can tell you right now that it will be nearly impossible to assess at that time a child and preclude any real probability of reunification with the family. As a result, I believe that children's attorneys, if they are doing their job, completing an independent investigation like real lawyers do and aggressively opposing in some cases, the state or department's move for a "no reasonable efforts" finding. That is not going to be popular. GAL's and law guardians frequently align themselves with the state and the department, and frequently that is because the position is sound. However, I think that one provision of the ASFA indicates the heightened need for independent zealous

⁶ N.Y. SOC. SERV. L. § 358-(a)(3)(b)(2)-(5) (McKinney's 1999).

advocacy on behalf of children.

I would like to mention a couple of other pieces that fall into this permanency puzzle that are coming out soon and will affect it. One is the "Adoption 2002" project,⁷ where Secretary of Health and Human Services Donna Shalala and President Clinton initiated this before ASFA was proposed in Congress, and it is basically part of the permanency movement. One of the things that is very interesting about this policy paper is that it includes as a component of achieving permanence, the quality of legal representation of all parties, but specifically children. Additionally it advocates, among other options, this child's attorney model.

There is also a new Senate bill⁸ sponsored by Senators DeWine from Ohio and Rockefeller from West Virginia, which looks favorable. It provides such things as training for advocates, training for attorneys in the system. So it will be very interesting to see if that passes and how its piece falls into the puzzle. Thank you very much.

⁷ See U.S. DEPT. OF HEALTH & HUMAN SERV'S., ADOPTION 2002: A RESPONSE TO THE PRESIDENTIAL EXECUTIVE MEMORANDUM ON ADOPTION, issued December 14, 1996, at 1 (1997), available at <<http://www.acdf.dhhs.gov/programs/cb/special/2002pr.htm>> (outlining action plans to help states set and meet new adoption targets).

⁸ *Strengthening Abuse and Neglect Courts Act of 1998*, S. 2607, 105th Cong. (1998).

