

Parents In Child Protective Proceedings:
The Emergent Right to Counsel

Douglas J. Besharov, J.D., LL.M.
Guest Scholar, The Brookings Institution
October 25, 1979

When I was asked to discuss the representation of parents in child protective proceedings, I immediately realized how difficult it would be to make a successful presentation. The few moments we have here together are insufficient to discuss all of the important aspects of this form of defense advocacy. For example, I would have liked to discuss defense advocacy in relation to temporary custody decisions, not just because taking a child away from a parent can cause deep trauma, but also because a decision to remove a child can act as a stigmatizing label which inordinantly affects subsequent case handling decisions. Unfortunately, in the time we have, to cover all of the important issues in representing parents would have lead to the kind of generalized discussion that those of you with wide experience in child protective proceedings would find hopelessly superficial. (Furthermore, many of the other presentations during this conference will speak directly to, and in detail about, many aspects of representing parents.)

Therefore, I have chosen as my topic the parent's "emergent" right to counsel because its unsettled nature effects all aspects of representation and, thus, provides a useful introduction to those elements of this conference which relate to the representation of parents.

In criminal proceedings, the right to counsel for parents alleged to have abused or neglected their children is well established.⁽¹⁾ However, the parent's right to counsel in civil child protective proceedings is not as widely accepted.

Traditionally, the "civil" nature of child protective proceedings led courts to deny the parental right to counsel, or more precisely, to deny the right of an indigent parent to appointed counsel, since parents who could afford a lawyer were never precluded from appearing with one. However, under the impetus of In re Gault and other cases, courts now no longer feel bound by the labels attached to proceedings to determine the rights of the parties.⁽²⁾ As the Supreme Court emphasized in Winship, "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts."⁽³⁾ Thus, in considering the parent's right to counsel, most courts now look beyond the "civil" label attached to child protective proceedings to determine their true character.⁽⁴⁾

Using such an analysis, the parent's constitutional right to counsel (under both the Due Process and Equal Protection clauses) seems clear to me. For, in civil child protective proceedings, parents, in effect, stand "accused". A finding of abuse or neglect may encourage a criminal prosecution, may result in the removal of a child from parental custody,

and, ultimately, may result in the termination of parental rights. As the New York Court of Appeals stated:

In our view, an indigent parent, faced with the loss of a child's society, as well as the possibility of criminal charges, is entitled to the assistance of counsel. A parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right to be relinquished without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer. To deny legal assistance under such circumstances would--as the courts of other jurisdictions have already held--constitute a violation of his due process rights and, in light of the express statutory provision for legal representation for those who can afford it, a denial of equal protection of the laws as well. (5)

As a result, when the issue is raised, federal, state and local courts generally hold that indigent parents in civil child protective proceedings have a right to appointed counsel. (6)

However, I must caution that there is some imprecision in the case law on this subject and in the subsequent analysis of it. By far, the greatest number of right to counsel cases have involved proceedings to permanently terminate parental rights. In termination proceedings, where the potential state interference is so extreme, courts have readily held that parents have a right to counsel (as they have just as readily held that the quantum of proof must be at least (7) "clear and convincing").

On the other hand, in child protective proceedings, i.e., the initial proceeding that determines whether the child has been abused or neglected (and at which the maximum disposition is limited to the temporary removal of the child from parental custody), the case law is decidedly more mixed. Some courts still refuse to provide counsel for indigent parents.⁽⁸⁾ Such decisions usually are based on one or both of the following considerations: (a) in an ordinary child protection proceeding, removal of a child is sufficiently unlikely, and (b) a temporary loss of custody is sufficiently less significant (in constitutional terms, somehow less "fundamental") than a permanent termination, so that the right to counsel does not attach. In fact, the Ninth Circuit, the highest Federal Court to rule on the subject, held in 1974 that: "Application of these guidelines can and should be made by the state courts on a case-by-case basis."⁽⁹⁾

I am afraid that I do not find such considerations sufficient to deny counsel to parents caught up in child protective proceedings. Even if the extreme remedies of temporary or permanent removal of the child will not result, the intrusion into family life inherent in the initiation of the proceeding, and the likelihood of at least probation or other involuntary supervision of the home, are reasons enough for me to conclude that fundamental elements of the liberty and rights of parents are at stake in any "civil" child protective proceeding.

This residual uncertainty in the case law makes all the more surprising--and satisfying--the movement of state legislatures toward statutorily requiring the appointment of counsel in child protective proceedings. At this writing, over 25 states legislatively mandate the provision of counsel, although once again the emphasis is on termination proceedings. (10)

Given the growing consensus that indigent parents have a right to appointed to counsel, as reflected by the widespread legislative and judicial movement I have just traced, the reader may ask why I have titled this paper the "emergent right to counsel."

I have used the word "emergent" to emphasize that the appointment of attorneys to represent parents is but the first step in assuring adequate representation.

In far too many communities, even when the right to counsel is formally guaranteed:

- o attorneys are not paid for their work, and, instead, are coerced into volunteering their services;
- o or, when attorneys are paid, they are inadequately paid, and their fees are subject to an arbitrarily shifting ceiling;
- o funds for investigators, outside experts, pre-trial depositions, and other necessary litigation supports are frequently denied; and
- o most importantly, attorneys for parents are not acknowledged to be defense lawyers like other defense lawyers--charged with doing their utmost to protect the rights and interests of their clients.

These practices can be devastating to the parent's real right to counsel.

Sufficient Funding

Child protective proceedings cannot be defended on the run, or on a shoestring. If it is in an attorney's economic interest to dispose of a case with a minimum of effort, then weak cases as well as strong cases will not be contested, and admissions will come much more quickly. Furthermore, the defense needs access--that only supplemental funding can buy--to outside experts who can challenge the conclusions of official agencies.

While I realize that all forms of court appointed defense counsel suffer the ills of inadequate funding, attorneys representing parents in child protective proceedings are comparably much worse off than their colleagues in other areas of the defense bar. Perhaps they are too small a group to command the attention of legislative and budgetary officials, or perhaps the acknowledgment of the parent's right to counsel is not as complete as the absolute language of case decisions and statutes might imply--after all, as I will discuss in a moment, influential elements of our society remain queazy about the possibility that a child will go unprotected because effective defense advocacy gets a parent "off".

These shortcomings in the funding of defense services go to the heart of the right to counsel. If they cannot be remedied in any other way, they will have to be litigated.

Acceptance of Defense Role

The last, and most important reason that I gave for concluding that the parental right to counsel is only "emergent" is the ambiguous acceptance of the defense attorney's preeminent responsibility to the parent and to the parent's rights and interests. While the attorney's presence is tolerated as a necessary means of "protecting parental rights", the parent's attorney is viewed as an unavoidable encumbrance to the proper and efficient functioning of the court and the child protection agency. If defense attorneys attempt to assert their clients' legal rights, they often are made to feel "unreasonable", an obstacle to the system's benevolent attempt to "help" the parents meet their child rearing responsibilities.

Even if the other participants in the court process were not so adept in making defense attorneys feel uncomfortable about taking a strongly adversarial posture, many attorneys also feel, in themselves, the ethical and humanitarian double bind caused by the fear that a successful defense may only succeed in placing the child in greater danger. They are as

concerned about the health and well-being of children as are any other citizens. Like everyone else, they believe that society has a right, indeed an obligation, to intervene to protect children who are endangered by harmful parental conduct. (I realize that imprecise definitions of "child abuse" and "child neglect" make the implementation of such statements inherently subjective.) When a vigorous defense would result in the dismissal of a case in which a child is in real danger, attorneys representing parents are torn between their humanitarian concern over the sanctity of a child's life, the realities of the child protection system, and their ethical and constitutional obligations toward their clients. "It is unrealistic to expect the conflict always to be resolved in the direction of insisting on the rights." (11)

This clash in conflicting values results in a troubled defense attorney, a dissatisfied court, and a confused and hostile client.

Indeed, the popular culture adds to the ambivalence felt by defense attorneys. A recent television program on child abuse, Who Killed Mary Jane Harper?, showed how an attorney successfully defended a mother against charges that she beat her child. Throughout the program, the attorney was portrayed as a money hungry, amoral opportunist who had little concern for the welfare of an obviously endangered child. When his client subsequently killed her child, the program seemed to blame the attorney (as well as others) for the child's death.

What a heavy burden attorneys representing parents must bear . . . and yet, although we are not happy with the result, we do not similarly blame a criminal defense attorney who successfully wins the acquittal of a client on a "technicality", even if the client goes out and commits another crime.

The reason we do not feel as strongly about the lawyer's effective advocacy in ordinary criminal cases is that--while most Americans do not want to see a "guilty man" go free--the right of every defendant, even the worst miscreant of our society, to a "mouthpiece" has become part of the dominant American value system. In 1969, the New York Court of Appeals was merely reflecting this consensus when it stated that:

A lawyer's traditional professional duty in an adversarial proceeding is to do what he can and to fight as hard as he can, to see his client win. In the criminal case this is to see his client acquitted, the charge reduced, or the punishment minimized. (12)

Defense attorneys reconcile themselves to the fact that their efforts may "get a guilty man off" by studiously--and correctly--proclaiming their adherence to those professional strictures which guarantee every person, whether guilty or not, a zealous legal defense. (13) As Irving Younger points out:

The lawyer's commitment is embodied in no single document, but inheres in the lawyer's obligation to give any client and any cause his advocacy, regardless of his own moral judgment, because the question whether the client or the cause deserves a hearing is too profound for men to answer. It may be said that this is a justification for the "hired gun" view of lawyers. It is intended to be.

How then does a lawyer accommodate his own moral sense with vigorous advocacy on behalf of someone or something loathsome? The answer is that no accommodation is necessary. A lawyer's own moral sense requires him nothing else but vigorous advocacy, without regard to the client or the cause. The exigent moral sense originates in the lawyer's decision to be a professional advocate, to make the moral commitment to forgo moral judgments which each of the professions demands of its members. (14)

Somehow, we have come to feel that an alleged "child beater" has a lesser right to zealous representation than does an alleged "Mafioso". But I can find no reason why there is a greater need to protect children from their parents than there is to protect society from organized crime. Thus, it seems to be that the Code of Professional Responsibility provides all the guidance on this issue that an attorney representing parents needs:

The duty of the lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . (15)

The Code makes no exception for child protective proceedings, nor should it. If parents are entitled to counsel, either by statute or by caselaw, they are entitled to zealous representation. What other meaning could there be for the phrase: "right to counsel"?

Sometimes the need for attorneys to zealously defend parents is justified on the ground that court treatment facilities are so inadequate that a finding of neglect may only lead to inappropriate and even harmful intervention into the fragile family fabric. (16) Given the shortcomings of the present system, it is supremely easy to make such arguments. Furthermore, there can be no doubt that effective defense advocacy--by challenging the status quo--will ultimately serve to upgrade services to both children and parents. Nevertheless, I prefer to base the right of parents to zealous representation on the higher ground of their fundamental right to contest any state action which seeks to curtail their liberty, no matter how benevolent its stated purpose. As Justice Brandeis warned in a different context, "experience should teach us to be most on guard to protect liberty when the government's purposes are beneficent." (17) Therefore, in the unlikely event that a court had the finest services conceivable, my preference for legality would still require me to insist on according to parents full procedural and substantive rights.

I do not mean to suggest that parents who "abuse" or "neglect" their children should not be given the treatment services they need to help them meet their child rearing responsibilities. On the contrary, parents should be encouraged to seek and accept help when they need it, but such help should be and is available without coercive court action. Indeed, all the evidence shows that treatment services are most effective when they

are voluntarily accepted. But if parents refuse services, my personal and professional commitment to legality in child protective intervention leads me to conclude that parents should have the right to put the state to its proof. As I wrote in a recent article:

Implicit in most recent child protective legislation is the legislative finding that the balance between children's rights and parents' rights must be weighted in favor of protecting children. Yet, it is important to protect traditional American values of freedom and legality while trying to protect endangered children. If society is to intrude into family life without the free consent of parents, it must do so with due regard to parental rights, as well as the needs of children. . . State law should accord to both the child and the parent the full safeguards of fundamental fairness, confidentiality, and due process of law. (18)

I should mention that I feel qualified to take this position not because I have represented so many parents (in fact, I have represented far fewer than have many readers), but because I believe that my background--as a former prosecutor of child abuse cases, as Director of a legislative committee investigating the handling of child abuse cases, and as the first Director of the U.S. National Center on Child Abuse and Neglect--establishes my credentials as someone deeply committed to protecting children from abuse and neglect.

For those fearful that zealous defense advocacy will make it impossible for the state to protect children adequately,

I can only respond that effective child protective intervention need not be inconsistent with traditional American values of due process and basic fairness. If child abuse or neglect has actually occurred, the petitioner, with sufficient planning and preparation, and with the aid of a well functioning child protective agency, should be able to prove it in court. To protect children, child protective and law enforcement agencies need no tools and need no advantages greater than those they ordinarily possess. The array of protective workers, police, social workers, prosecutors, and so forth, that the state typically musters in child protective proceedings should be sufficient to build a case against a parent. They should not need the assistance of the parent's attorney to make their case stick. (19)

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To those who feel uncomfortable with the aggressive role that I believe attorneys representing parents should take, let me ask whether anyone has any doubt that a person who could afford to buy the services of a lawyer would not hire one that would provide "zealous" representation.

When a defendant engages a lawyer or has one assigned to him he has but one simple and understandable object; he wants to be free. He does not want to be edified with moral precepts, or be told that he should subordinate his selfish interests to the public good by pleading guilty and atoning for his sins. He wants to be free, and it's the lawyer's job to help him. (20)

Until the problems that I have described are remedied-- until attorneys representing parents are fairly and adequately compensated, until funds are available for litigation supports, and, most importantly, until defense lawyers are accepted as zealous advocates for their clients--the parent's right to counsel will be incomplete. If due process and equal protection are more than merely an elaborate shell game, then the indigent parent has a right to the same kind of vigorous representation as someone who can afford to purchase the services of an attorney.

Footnotes

1. See, e.g., Conn. Gen. Stat. Ann. s17-66b, -66c (West Supp. 1976); Md. Cts. & Jud. Proc. Ann. s3-821 (Supp. 1977); N.M. Stat. Ann. s13-14-25(F) (1976). Cf. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).
2. In Gault, the reader will remember, the Supreme Court treated as not controlling the fact that juvenile proceedings were denominated as "civil". In the Court's decision, Justice Fortas equated the seriousness of a juvenile court proceeding to that of a criminal prosecution: "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of liberty for years is comparable in seriousness to a felony prosecution." In re Gault, 387 U.S. 1, 36 (1967).
3. In re Winship, 397 U.S. 358, 365-66 (1970).
4. Cleaver v. Wilcox, 499 F.2d 940, 945 (9th Cir. 1974).
5. Matter of Ella B., 30 N.Y.2d 352, 356-57, 334 N.Y.S.2d 133, 136, 285 N.E.2d 288 (1972). Citations omitted.
6. See, e.g., Cleaver v. Wilcox, supra n.3; Davis v. Page, 442 F. Supp. 258, 263 (S.D. Fla. 1977); Smith v. Edmiston, 431 F. Supp. 941 (W.D. Tenn. 1977); Reist v. Bay Circuit Judge, 396 Mich. 326, 346 (1976); Crist v. New Jersey Div. of Youth and Family Servs., 128 N.J. Super 402, 415 (1974); In re Luscier, 84 Wash. 135, 138 (1974); In re Rodriguez, 34 Cal. App. 3d 510, 514 (1973); Danforth v. State Dept. of Health and Welfare, 303 A.2d 794, 795 (Me. 1973); In re R.I., 455 Pa. 29, 312 A.2d 601 (1973); In re Friesz, 190 Neb. 347, 208 N.W.2d 259 (1973); Matter of Ella B., supra n. 5; State v. Jamison, 251 Or. 114, 118, 444 Pac.2d 1005 (1968). See generally, "Neglect: Right to Counsel," 10 Juv. L. Digt. 119 (1978); Catz & Kuelbs, "The Requirement of Appointment of Counsel for Indigent Parents In Neglect and Termination Proceedings," 13 J. Fam. L. 223 (1973-74).
7. See, e.g., Alsager v. Dist. Ct. of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa 1975).

8. See, e.g., In re Robinson, 8 Cal. App. 3d 783, 87 Cal. Repr. 678 (1979, cert. denied sub nom., Kaufman v. Carter, 402 U.S. 964 (1974)), denying the right to counsel in child protective proceedings. Cf., Potvin v. Keller, 313 So.2d 703 (Fla. 1975), where the parents requested state care for the child (in effect, rev'd by Davis v. Page, supra n. 6.)
9. Cleaver v. Wilcox, supra n. 4, at 945. But see, Davis v. Page, supra n.6.
10. See, e.g., N.Y. Fam. Ct. Act s1043(a) (McKinney 1976); Ga. Code Ann. s24A-2001 (a) (1976).
11. Fox, S., The Law of Juvenile Courts In A Nutshell 161 (1971), discussing the conflict over the role of counsel defending juveniles accused of misconduct.
12. W. v. Family Court, 24 N.Y.2d 196, 199, 299 N.Y.S.2d 414, 417, 247 N.E.2d 253, 255, remittitur amended, 27 N.Y.2d 728, 314 N.Y.S.2d 536, 262 N.E.2d 675 (1969), rev'd, on the issue of the required quantum of proof in juvenile delinquency proceedings, sub nom., In re Winship, supra n. 3.
13. See, e.g., Thode, "The Ethical Standards for the Advocate," 39 Tex. L. Rev. 575 (1961); Levy, "The Dilemma of the Criminal Law," 9 Rec. of the Bar Assoc. of the City of N.Y. 215 (1954).
14. Younger, "The Lawyer's Responsibility to the Public," in Professional Responsibility: A Guide For Lawyers 131, 135 (ABA, 1978).
15. American Bar Association, Code of Professional Responsibility Canon 7-1 (1971), emphasis added.
16. Cf., Polier, J., A View From The Bench 57 (1964).
17. Olmstead v. United States, 277 U.S. 438, 479 (1928), Brandies, J. dissenting.

18. Besharov, "The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect," 23 Vill L. Rev. 458, 462 (1978).
19. Much of what I have said about the appropriate role of defense counsel is dependent upon there being effective representation for the petitioner. Otherwise, a serious imbalance between the parties will result--and the party to suffer will certainly be the parents, as the judge steps in to play the role of the absent prosecutor. See generally, Besharov, D., Juvenile Justice Advocacy: Practice In A Unique Court 39, et seq. (1974).
20. Levy, supra n.13, at 220.