

Representing Parents: Effective Advocacy Can Make a Difference

by Douglas J. Besharov

Editor's Note: This article is adapted from a manual for attorneys appearing before the D.C. Superior Court. Although it was written before drug problems so completely engulfed child protective programs, its discussion of effective legal representation remains valid.

I. Introduction

Child abuse and child neglect are serious national problems. In 1989, almost 2.4 million children were reported to the authorities as suspected victims of child maltreatment. Although about 60 to 65 percent of these reports are determined to be "unfounded" upon investigation, there are still a little over 900,000 substantiated reports each year.¹ Of these substantiated reports, about 20 percent end up in court—about 5 percent in criminal prosecutions and about 15 percent in civil, child protective proceedings.

The initiation of a child protective proceeding usually means that the parents are contesting the agency's determination that they abused or neglected their child or that they are unwilling to accept the agency's treatment plan (which can include the child's foster placement). These parents need the assistance of counsel.

II. The Importance of Advocacy

The defense of a child protective case is, in large measure, like any defense. The juvenile court is a court—not a social agency. As one of the pioneers in the juvenile court reform movement wrote almost 30 years ago:

The order of disposition which may ultimately be issued affects the basic rights of some parent and child... Accordingly, the lawyer... must stand as the ardent defender of his client's Constitutional and legal rights. He should bring to this task the usual tools of the advocate—familiarity with the applicable law, the ability to make thorough investigation and logical presentation of the pertinent facts and the faculty for forceful and persuasive expositions of his client's positions.²

Unfortunately, nationwide, the legal representation that parents receive often leaves much to be desired—from the point of view of the parents as well as society. The representation of parents is now too often limited to the assertion of constitutional or procedural "rights." Motions to dismiss are made on the grounds of inadequate notice, vague statutes, and improper standards of proof (clear and convincing versus a mere preponderance). And motions are made to suppress evidence allegedly obtained in violation of the parents' privilege against self-incrimination and protection against unreasonable search and seizure.

When such motions fail, as they usually do, too many defense attorneys act as if there is nothing else that they can do

to protect the parents' interests. Some all but retire from active advocacy, contenting themselves with the aggressive (and often hostile) cross-examination of the petitioner's witnesses, to little avail, and with an impassioned oral argument about the right of parents to be free from unwarranted governmental interference. One problem is that defense attorneys tend to think that it is impossible to obtain the dismissal of child abuse charges against parents. This is a mistake. Although there is intensive screening of cases before they reach court, this diversionary process does not keep every inappropriate case out of court. "Skilled counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal."³

The screening process may have malfunctioned or may have been bypassed, new facts may have been discovered, or the parents' improved ability to care for the child may have gone unnoticed. Hence, in a certain number of limited—but by no means uncommon—situations, court action may not be needed to protect the child. In such cases, effective defense advocacy may convince the decisionmakers, the child protective workers, prosecutors or agency attorneys, and judges, that the child has not been maltreated or that the child does not need society's protection.

Vigorous defense advocacy can make a difference. In 1968, a New York study (apparently the only one of its kind) documented the impact of counsel for the parent. (See the following chart).

| Disposition | Percentage Represented By Counsel | Percentage Not Represented By Counsel |
|---|-----------------------------------|---------------------------------------|
| Children placed outside the home | 18.2 | 40.6 |
| Discharged under court supervision | 45.4 | 39.6 |
| Discharged without court supervision | 9.1 | 5.0 |
| Petition dismissed after initial adjudication | 9.1 | 3.0 |
| Other | 18.2 | 11.8 |

Defense advocacy at the dispositional stage is also often not as effective as it might be. Even after an adjudication, effective defense advocacy can have significant results. It can mean the difference between a dispositional order that leaves the child in the home or returns the child there (and provides supportive services for the family) and an order that continues a foster care placement or removes the child from parental custody (for weeks, months, and perhaps years)—to the detriment of the child no less than the parents. Unfortunately, most defense attorneys seem unaware of all of the things that they can do to establish that a child can safely be left in the family home. Instead, as at the adjudicatory hearing, they tend to limit their activity to cross-examining the social worker who prepared the dispositional recommendation and arguing, in the abstract, that the parents can adequately care for the child.

Successful dispositional advocacy requires that the parents' counsel actively identify suitable alternative treatment programs that, by helping the parents to care adequately for the child, obviate the need for foster care. It also requires that counsel monitor the treatment plan so that the plan is effectively and compassionately implemented.

III. Representing Parents Versus Protecting Children

Representing parents means serving as their advocate.

The attorney for the parents is charged with representing the interests of his or her clients zealously within the bounds of the law. Advocacy for the parent usually takes the form of minimizing the effects of state intervention on the family. Advocacy for parents may include diplomatic attempts to get petitions dismissed, in-court advocacy for dismissal, insistence that the charges brought by the state be legally proven in court, and negotiation for dispositions that are most acceptable to the parents.⁵

As for parents, an acceptable disposition means, fundamentally, preventing the child's removal from the home (or obtaining the child's return), but it also extends to the type and duration of treatment imposed on the parents.

Defense counsel often feel torn between their professional role as the parents' lawyers and their humane concern for the welfare of the child. They fear that by getting the case dismissed or the child returned home they will only succeed in placing the child in greater danger. "It is unrealistic to expect the conflict always to be resolved in the direction of insisting on the rights [of clients]," notes law Professor Sanford Fox.⁶ This clash in conflicting values often results in a troubled defense attorney, a dissatisfied court, and a confused and angry client.

In criminal cases, 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 that guarantee every person, whether guilty or not, a vigorous legal defense. In the words of Irving Younger, a law professor and former judge:

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

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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 of 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.⁷

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:

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.⁸

Because of the tremendous sympathy that abused children arouse, we somehow feel that an alleged "child beater" has a lesser right to vigorous representation. But neither the *Model Code of Professional Responsibility*⁹ nor the *Model Rules of Professional Conduct*¹⁰ make any exception for child protective proceedings, nor should they. The need to protect children from their parents is not greater than the need to protect the elderly from street crime. If parents are entitled to counsel, either by statute or by case law, they are entitled to vigorous advocacy. What other meaning could there be to the phrase "legal representation"?

Parents have a fundamental right to contest any state intrusion into private family matters, no matter how benevolent its stated purpose. After all, they may be innocent. 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."¹¹

Laws against child abuse are an implicit recognition that family privacy must give way to the need to protect helpless children. In seeking to protect children, however, it is all too easy to ignore the legitimate rights of parents. In our society, parents have the prime responsibility of caring for their children. They have broad discretion to do what they think is best for their children. Many state laws and court decisions recognize and seek to protect parental rights. Moreover, the United States Constitution also protects the parental right to be free from unwarranted governmental interference. The Supreme Court's most widely quoted statement on the subject

was written by Justice White in *Stanley v. Illinois*.

It is plain that the interests of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "Basic Civil Rights of Man," and "rights more precious ... than property rights."¹²

The well-intentioned purpose of child protective proceedings does not prevent them from being unpleasant—and sometimes counterproductive—intrusions into family life. A petition alleging that a child is "abused" or "neglected" is an explicit accusation of parental wrongdoing or inadequacy that can be deeply stigmatizing. In the words of Supreme Court Justice Hugo Black, the parent "is charged with conduct—failure to care properly for her children—which may be viewed as reprehensible and morally wrong by a majority of society."¹³ Researchers have documented the effect of such labeling on the parents.

Once an agency ... labels a parent as abusive, other agencies tend to accept this label and treat the family accordingly. Consistency across agencies occurs even though initially a second agency may not have labeled the family as abusive by its own criteria. Similarly, informal communication of the label through the family's court appearances or social worker visits may promote adoption of the abuse tag by friends and relatives ...¹⁴

Besides the stigma involved, an adjudication of abuse or neglect may cause the parents to be placed under long-term court supervision and forced to submit to court or agency treatment programs, may result in the removal of the child from the home for months and perhaps years, and, ultimately, may lead to the permanent termination of parental rights.

If society is to intrude into family matters, it should do so with due regard to parental rights, as well as the needs of children. While trying to protect maltreated children, traditional American values of due process and basic freedom should also be protected.

This is not meant to suggest that abusive or neglectful parents do not need treatment services or would not benefit from them. On the contrary, many parents need outside assistance in caring for their children and are willing to accept it. Parents should be encouraged to seek and accept help when they need it, but such help should be available—and is available—without a formal court adjudication. Moreover, developing a plan for noncourt services to help parents meet their child care responsibilities is often an important defense strategy. Therefore, defense counsel should aid these parents in obtaining help without an adjudication, whenever that is possible. But if parents claim innocence or refuse such services, defense counsel should help these parents to contest state intervention.

IV. A False Conflict

Those who feel uncomfortable with an aggressive role for attorneys representing parents should ask themselves whether, if they were charged with child abuse, they would want any-

thing but full and vigorous 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.¹⁵

Parental rights can be protected without jeopardizing the safety and well-being of maltreated children. Vigorous defense advocacy does not make it impossible for the state to protect children adequately. If there is good and sufficient reason for believing that child abuse or child neglect actually occurred, the government, with sufficient planning and preparation, and with the aid of a well-functioning child protective agency, should be able to prove it in court. 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 a compliant parent's attorney to make their case stick.¹⁶

Therefore, even if the court had access to the finest social services conceivable, concepts of fundamental fairness and legality would still require that parents be accorded vigorous representation. But it does not. An adjudication of abuse or neglect may only lead to inappropriate and even harmful intervention into an already tenuous family situation.¹⁷

Long-term foster care, for example, can leave lasting psychological scars. It is an emotionally jarring experience that confuses young children and unsettles older ones.¹⁸ Over a long period, it can do irreparable damage to the bond of affection and commitment between parent and child. The period of separation may so completely tear the already weak family fabric that the parents have no chance of being able to cope with children when they are returned.

While in foster care, children are supposed to receive treatment services to remedy the effects of past maltreatment. Few do. Worse, children who stay in foster care for more than a short time, especially if they are older, tend to be shifted through a sequence of ill-suited foster homes, denying them the consistent support and nurturing that they so desperately need.¹⁹ Increasingly, many graduates of the foster care system evidence such severe emotional and behavioral problems that some thoughtful observers believe that foster care is often more harmful than the original home environment.²⁰ In fact, when these children start to engage in antisocial behavior caused by these traumatic conditions, they are often dumped back on the parents. These realities led Marion Wright Edelman, President of the Children's Defense Fund, to call the conditions of foster care a "national disgrace."²¹

Society benefits when court intervention is limited to situations of real danger to children, and when the degree and type of intervention is limited to that which is appropriate to the child's need for protection.

Moreover, effective defense advocacy that challenges the status quo ultimately could serve to upgrade services to both children and parents. Although social agencies and the court have an obligation to consider alternatives to foster care before placing the child, and usually try to do so, there have never been enough services for children and families to enable as many as

possible to keep their children at home. The most likely source of on-going pressure for more and better in-home services will come through the demands of parents represented by attorneys.

V. Counselor and Diplomat

Notwithstanding the importance of formal advocacy efforts, the juvenile court is not simply a court. It is a court with social objectives and a social service orientation. Defense lawyers

have the obligation to understand the purposes of the court and "must be familiar with social techniques to give truly effective representations." Conscientious counsel will have to exercise intelligent discrimination in the use of tactics learned in other courts since wholesale importation of techniques developed in the handling of criminal or civil cases ... may not only threaten the objectives of the court but will rarely serve the interest of the ... client.²²

The primary difference in handling cases in family court is the greater importance of the functions of counselor and diplomat.

Attorneys frequently forget how truly frightening the court process can be. "The attorney for the parents will usually be counseling highly emotional parents at a traumatic time in their lives."²³ The attorney owes to the parents an obligation to help them cope with the inevitable stresses of court action. Hence, a first priority is to explain to the parents the nature of the proceeding, their legal rights in it, and the possible outcomes. Duquette describes what must come next:

The lawyer as counselor to parents must ... evaluate the parents' difficulties and their legal and social situation, and then provide legal counsel as to how to accomplish their goals. The lawyer may well explore with parents whether or not personal and family problems exist with which the social agencies may assist. He or she may counsel parents to accept certain services, seeking postponement of the court process in the interim. As a result the parents may be willing to accept some limited assistance from an agency voluntarily. The parents may even be well advised to forego immediate legal advantage in order to benefit from a social intervention that is calculated to prevent recurrence of abuse or neglect.²⁴

Defense attorneys must also be ready to counsel the court about dispositional alternatives. They must be mindful that they are not trained social workers. On the other hand, they are not "required to forfeit common sense and to accept social evaluation of [their clients'] needs without applying that degree of critical skepticism necessary to insure at the least that the analysis is predicated on complete and accurate facts."²⁵ In addition, defense attorneys

should be thoroughly familiar with the nonlegal aspects of abuse and neglect, such as its medical consequences, social and psychological dynamics, and the available diagnostic and treatment resources in [their] community. [They should get] to know local experts in the medical, mental health and social services fields who can provide [them] with necessary consultation and technical assistance.²⁶

Whatever the final outcome of the case, if the parents need help and want it, the defense attorney should help them try to

get it. As mentioned above, the challenge is to obtain that help while avoiding a harmful court adjudication.

Defense attorneys also serve as diplomats between the parents and court and agency staff. For those who appear in court regularly, cooperative relationships develop that provide opportunities for informally facilitating their work and advancing their clients' cause.

The effective advocate seeks to gain agreement with government agencies and the guardian ad litem. At all stages of the proceeding, their cooperation can relieve the advocate's persuasive burden with the judge, for judges tend to rely on their recommendations. Developing such a relationship requires mutual receptivity and is assisted when all parties believe that cooperation will be beneficial to their separate causes. An advocate should try "to provide these individuals with favorable information about [the] client before they become locked into an opinion."²⁷ Such low-profile lawyering can be highly effective.

Defense lawyers, as officers of the court, should also serve as diplomats from the court to the parents. They should help interpret the court and its objectives to the parents, helping them to accept the disposition and to work with the public child welfare agency. For example, it may be necessary to "try to get the parents to recognize the existence of a serious parenting problem, to learn how to improve their parenting so that it will be acceptable to the social worker and judge, and to know how to respond appropriately within the rule-oriented judicial system."²⁸

VI. Conclusion

No one should suggest that representing parents who may have abused or neglected their children is easy or pleasant. But who said that was the test for determining what cases to accept and defend vigorously?

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Endnotes

1. U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT. HHS. CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY 15 (June 1990).
2. Isaacs, *The Role of the Lawyer Representing Minors in the Family Court*, 12 BUFFALO L. REV. 501, 506 (1963) (footnotes omitted).
3. *Lassiter v. Department of Social Servs. of Durham County, N.C.*, 452 U.S. 18 (1980) (Amicus Brief of the ABA) (Clearinghouse No. 29,118).
4. Note, *Representation in Child-Neglect Cases: Are Parents Neglected?* 4 COLUM. J.L. & SOC. PROBS. 230, 241-242 (1968).
5. Duquette, *Liberty and Lawyers in Child Protection*, in THE BATTERED CHILD, 316, 326 (C.H. Kempe & R. Helfer, eds. 3rd ed. 1980).
6. S. FOX, THE LAW OF JUVENILE COURTS IN A NUTSHELL 161 (1971), discussing the conflict over the role of counsel defending juveniles accused of misconduct.
7. Younger, *The Lawyer's Responsibility to the Public*, in PROFESSIONAL RESPONSIBILITY: A GUIDE FOR LAWYERS 131, 135 (ABA 1978).
8. *W. v. Family Court*, 24 N.Y.2d 196, 199, 299 N.Y.S.2d 414, 417, 247 N.E.2d 253, 255, *remititur amended*, 27 N.Y.2d 728, 314 N.Y.S.2d 536, 262 N.E.2d 675 (1969), *rev'd sub nom.*, on the issue of the required quantum of proof in juvenile delinquency proceedings, *In re Winship*, 397 U.S. 358 (1970).
9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, EC 7-1 (1982) ("The duty of a lawyer, both to his client and to the legal system, is to *represent his client zealously* within the bounds of the law.") (Emphasis added.)
10. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1987), providing that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." The Comment to this Rule states, in part: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer shall act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."
11. *Olmstead v. United States*, 277 U.S. 438, 479 (1928), (Brandeis, J., dissenting).
12. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citations omitted) (Clearinghouse No. 3262).
13. *Kaufman v. Carter*, 402 U.S. 964, 969 (1971) (Black, J., dissenting from a denial of certiorari).
14. Parke, *Socialization into Child Abuse: A Social Interactional Perspective*, found in J. TAPP & S. LEVINE, LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY 183, 184-185 (1977).
15. Levy, *The Dilemma of the Criminal Law*, 9 REC. OF THE B.A. OF THE CITY OF N.Y. 215, 220 (1954).
16. Of course, the lack of effective representation for the petitioner can create an equally serious imbalance between the parties. But, here, too, the party to suffer will likely be the parents, as the judge steps in to play the role of the absent prosecutor. See generally, D. BESHAROV, JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE COURT 39 *et seq.* (1974).
17. Cf. POLIER, J., A VIEW FROM THE BENCH 57 (1964).
18. See, e.g., E. WEINSTEIN, THE SELF-IMAGE OF THE FOSTER CHILD (1962); see also S. KATZ, WHEN PARENTS FAIL 90-113 (1971).
19. See, e.g., U.S. CHILDREN'S BUREAU, HEW, NATIONAL STUDY OF SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES 117-18, Table 5-4 (1979).
20. See, e.g., J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 13 (1980).
21. CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES: AN EXAMINATION OF PUBLIC RESPONSIBILITY TO CHILDREN IN OUT-OF-HOME CARE, p. xiii (1978).
22. Isaacs, *supra* note 2, at 506 (footnotes omitted).
23. Spivak, *Advising Parents Under the New Child Abuse Laws*, CALIF. LAW. 11 (Jan. 1984).
24. Duquette, *supra* note 5, at 327.
25. Isaacs, *supra* note 2, at 506.
26. NAT'L LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, ABA, REPRESENTING CHILDREN AND PARENTS IN ABUSE AND NEGLECT CASES 8 (1980).
27. *Id.* at 6.
28. Spivak, *supra* note 23, at 11-12.