

Legal Representation in Child Protective Services Cases

How do we ensure parents and children receive high-quality court-appointed attorneys?

BY DYLAN MOENCH

For almost four decades, the U.S. Supreme Court has recognized the constitutional implications in cases of involuntary termination of the parent-child relationship by government entities. The complex area of law governing the rights of parents and children in such cases requires lawyers to have specialized training and expertise. Cases involving termination of parental rights are often fraught with issues of substance use and addiction, poverty, inadequate and insecure housing, domestic violence, mental health issues, various levels of interpersonal and historic trauma, and disproportionality and disparities. Court-appointed legal representation is mandated by law for all children removed to foster care and for their parents, if indigent, but resources are limited and providing high-quality representation is a challenge for both courts and attorneys.

Texas has a well-regarded statutory framework for the appointment of children's attorneys. The Children's Advocacy Institute gave Texas an "A" rating in the fourth edition of its evaluation of state laws relating to the legal representation of children in civil child abuse and neglect proceedings.¹ Though not required by federal law, since 1995 Texas has mandated the appointment of an attorney, referred to as an attorney ad litem, for every child in the conservatorship of the Texas Department of Family and Protective Services, or DFPS.² An attorney ad litem appointed by a court has numerous rights and duties related to providing legal representation to a child. For example, the attorney ad litem has the right to access the child and any information relating to the child including school records, medical records, court records, and law enforcement records.³ The attorney has a duty to meet with the child before each hearing, conduct a full, independent investigation into the child's case, and participate in the litigation to the same extent as all other attorneys on the case.⁴ Unlike other states where an attorney for the child advocates for what the attorney determines is the child's best interest, under Texas law, the attorney ad litem follows the child's expressed objectives if the child is able to understand the nature of the attorney-client relationship.^{5,6} The only circumstances in which an attorney can substitute his or her judgment for the child's are if the

child lacks sufficient maturity to form an attorney-client relationship, the child is incapable of making reasonable judgments and engaging in reasonable communication, or the child persistently expresses objectives that are seriously injurious to the child.⁷

Attorneys for parents have the same duties and training requirements, but unlike a child's attorney, who must be appointed when the state files a petition for conservatorship or termination, a parent is not guaranteed an appointed attorney until he or she appears before the court in opposition to the state's request and confirms he or she is indigent.

The Texas Family Code requires that each appointed attorney fulfill various duties and responsibilities, including becoming familiar with the standards of representation adopted by the National Association of Counsel for Children⁸ and the standards issued by the American Bar Association.⁹ However, Texas has not adopted either standard nor has it established its own standards of representation for parents and children.¹⁰ Training requirements are minimal. Attorneys representing parents and children are required to have only six hours of training specific to child protection law before becoming eligible to take appointments. The system of appointment for attorneys, the fee schedule for attorney compensation, and oversight of attorney performance varies from county to county.

There is no uniformity of practice for children's attorneys in Texas and there are no standards for how legal representation should function at a local or statewide level. This deficiency has long been a concern of the Supreme Court of Texas Children's Commission, which has maintained a legal representation committee almost since its inception in 2007 and conducted its first study of legal representation of court-appointed attorneys in child protection cases in 2010. In 2017, the Children's Commission began an updated and expanded study of legal representation by eliciting information from parents, youth currently in care, relatives, foster parents, attorneys, mediators, judges, and other professionals involved in the child welfare system about how the system for appointing attorneys for parents and children in Child Protective Services, or CPS, cases is functioning, how that

functioning impacts the quality of legal representation provided, and potential reforms that could impact the quality of representation. The study culminated in a report to the Texas Legislature in September 2018 titled *Supreme Court of Texas Children's Commission 2018 Study of Legal Representation in Child Protective Services Cases*.¹¹

The study revealed some significant differences between how various stakeholders viewed attorneys' compliance with their statutory obligations. Eighty-five percent of judges surveyed reported that, as required by statute, attorneys for children always or often visited their client prior to each review hearing conducted to assess progress in the case, the safety and well-being of the child, and the status of parents and family members. However, less than 20% of foster parents, CPS caseworkers, and other child advocates surveyed agreed that attorneys for children always or often complied with this duty.¹² Furthermore, only 20% of youth in care surveyed reported that their attorney always visited them before each review hearing.¹³ A similar disparity was found regarding a question designed to assess whether attorneys who did not fulfill their statutory duties were held accountable for failing to do so. Sixty-eight percent of judges surveyed reported that attorneys in their courtrooms who failed to comply with their duties were always or often removed from the list of appointed attorneys. Yet, only 16% of attorneys representing DFPS agreed that attorneys for parents and children who failed to fulfill their statutory duties were removed from cases or rotating appointment lists. Less than 10% of CPS caseworkers and Court Appointed Special Advocates volunteers agreed that these attorneys were removed from court-appointed rotation.¹⁴

The study also found a lack of clarity regarding the mechanisms for ensuring that attorneys perform their duties. While 72% of judges thought that monitoring attorney accountability was an appropriate task for the judiciary, only about a quarter reported having sufficient time and resources to review attorney performance and 12% reported using a formal review process to evaluate attorneys on the appointment list.¹⁵ Although 88% of attorneys reported specifying the actions taken on behalf of their clients in the billing they submit to the court, only 4% of court coordinators reported using information from attorney billing in an evaluation process.¹⁶ When asked which reforms would have a strong positive effect on improving the quality of representation provided to children, improving oversight over attorney performance received the most support across all stakeholders surveyed.

While there is room for improvement, the survey data and report also reveal that there are many dedicated court-appointed attorneys across the state who zealously represent vulnerable children and parents and who make a positive difference in the lives of their clients. Equally important, there are also devoted attorneys who represent the state of Texas in CPS cases and provide critical legal representation in these high-stakes matters. Attorneys who seek out court appointments to represent children and parents, as well as those who represent DFPS, for the most part, are dedicated and committed individuals who see this work as a calling.

The Texas legal community has made great strides in seeking to improve the quality of representation in several ways. In 2017, Texas became one of the first states in the nation to establish a board-certified legal specialization exclusive to the practice of child protection law, and in 2018, the Texas Board of Legal Specialization certified 45 Texas attorneys as specialists in the field. In 2018, the State Bar of Texas Board of Directors approved the Child Protection Law Section as a stand-alone section of the State Bar. The Child Protection Law Section hosted Advanced Child Protection Law conferences in 2018 and 2019.

In the fall of 2019, the Children's Commission will establish a Legal Representation Task Force to explore the best ways to respond to the needs revealed by the survey data. The task force will primarily focus on the feasibility of implementing systemic oversight and accountability of the Texas court-appointment system in child protection cases. Providing high-quality legal representation that matches the high-stakes decisions inherent in child protection cases is important to our collective sense of justice. Quality legal counsel is essential for all parents and children to help ensure that courts strike the appropriate balance between the rights and duties for all involved. Though there is still progress to be made, Texas is taking steps to ensure that the promise of high-quality advocacy envisioned by the Texas Family Code is matched by the practice of all attorneys appointed for Texas children and parents in child protection cases. **TBJ**

Notes

1. Noy Davis, Amy Harfel & Elisa Weichel, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children*, First Star Institute and the Children's Advocacy Institute, at 138 (4th ed. 2019), available at <http://www.caichildlaw.org/Misc/RTC4.pdf>.
2. Tex. Fam. Code § 107.012.
3. *Id.* at § 107.006.
4. *Id.* at § 107.003.
5. *Id.* at § 107.004.
6. Tex. Disciplinary Rules Prof'l Conduct preamble, R. 1.05-.06.
7. Tex. Fam. Code § 107.008.
8. National Association of Counsel for Children (1996). *American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases, NACC Revised Version* (Amended April 21, 1999), available at https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/Standards/ABA_S_standards_NACC_Revised.pdf.
9. American Bar Association (1996). *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases*, available at https://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf.
10. *Id.* at § 107.004.
11. Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families, *2018 Study of Legal Representation in Child Protective Services Cases*, available at <http://texaschildrenscommission.gov/media/83923/2018-legal-representation-report-final-online.pdf>.
12. *Id.* at 100.
13. *Id.* at 61.
14. *Id.* at 101.
15. *Id.* at 87-88.
16. *Id.* at 89.



DYLAN MOENCH

is a staff attorney with the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families.