

REPORT OF THE WORKING GROUP ON THE ROLE OF THE FAMILY*

I. INTRODUCTION

This Working Group was asked to explore the role of families in representing children in light of ethical guidelines for attorneys and the needs, life and identity of the child. Conference organizers provided a series of questions to focus the Group, asking us to look beyond a myopic view of children's advocacy as legal interest representation, and to question how treating children as completely autonomous beings may ignore a central truth about them: that they are inherently dependent and their dependency is reflected in their being members of families, legally and emotionally. We were asked to consider the role of our child clients' families in our legal representation of them, focusing on the role that families play in defining a child's needs and interests, the implications of representing the child as an entity separate from the child's family, and how lawyers should approach the question of possible conflicts between children and their families.

The work of our Group was significantly influenced by the opening papers to this Conference contributed by three of our members: Marty Guggenheim's article, *How Children's Lawyers Serve State Interests*; Susan Brook's article, *Representing Children in Families*, and Kris Henning's article, *It Takes a Lawyer to Raise a Child? Allocating Responsibilities between Parents, Children, and Lawyers in Delinquency Cases*. It was also framed by discussions that our Group had on four important questions: (1) How should family be defined? (2) should there be a presumption in favor of families as generally best situated to make good judgments about what is best for their children? (3) what alternatives exist to the adversarial system that are more inclusive and less destructive of family bonds? and (4) what specific things are wrong with the way that our current systems view families?

II. BACKGROUND DISCUSSIONS

A. Definition of Family

As a prelude and guiding theme for our work, our Group first turned to the question of how "family" should be defined. Discussion in the Group centered around whether or to what extent the definition of family needed to vary by context; and the related question of whether the legal and social definition of family did or should be different. The Group tended to agree, however, on two basic principles. First, the definition of family should not be constricted to

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those with legal bonds to the child, but should include those who have biological, natural, and social bonds, as defined by the child. Second, that the consent of the parents in creating these bonds is an important limiting factor, to ensure that the definition protects against rather than aggravates state intervention into families. The definition of family crafted according to these principles was a modified version of a definition of family systems found in Susan Brooks' draft article:¹

Families are defined by biological, natural and legal bonds that can include but are not limited to extended family as well as neighbors, close family friends, "fictive kin," and foster parents. Family systems also include individuals with a real basis or interest in establishing bonds of intimacy with the child, as well as those with whom a bond of intimacy already exists, with the consent of the parent. They should include at least individuals whom the parent has implicitly or explicitly invited, consented, or would want in the child's life.

After crafting this definition of family, the Group then bracketed the question of whether it should be limited in the context of particular recommendations.

B. Presumption in Favor of Families as Experts on Themselves

Our Group agreed that there should be a baseline presumption that given the opportunity, parents or other family members are best situated to make good judgments about what is best for their children. While this deference to families was deemed an important starting point, the Group also agreed that it was important to understand the situations in which it might not hold true. The Group felt it important to define boundaries to guide a lawyer's judgment when the lawyer deviated from the presumption that families are generally the best source of information about their children's well-being.

Even more important than drawing these boundaries, however, was addressing the lack of attention to the importance of families in the lives of their children that pervades the child welfare and juvenile justice systems. We felt that these systems were dysfunctional in failing to be inclusive of families as they intervened in the lives of children. We recognized that the adversarial context created barriers between children and their families, especially when representation by separate counsel and ethical considerations impede communication between lawyers for children and other family members. In deference to the norms of the adversarial context, lawyers often fall prey to the easy solution of building walls to cut off the influence of parents on children, rather than appreciating the importance and power of families to children's decision-making.

Although families may not make ideal decisions, we saw the need for educating and building capacity for good decision-making in families first, rather than substituting professional judgment of any kind for what would be best for them. We noted that professional expertise of all kinds tends to be paternalistic and silencing of the voice of children, and that substituting mental health or other expertise for the expertise of lawyers would not solve the problem of devaluing the importance of families in the lives and interests of chil-

¹ See Susan L. Brooks, *Representing Children in Families*, 6 NEV. L.J. 724, 725 (2006).

dren. We felt that the expertise inherent in families was overlooked by a system that dictated from the top down, rather than learned from the bottom up.

Finally, we stressed the need for building alliances with families rather than creating distance from them. Although the problems of devaluing families were systemic, we thought that lawyers often shared the attitudes of the system. We emphasized the need for humanistic and three-dimensional understandings of our child clients' parents that, for example, would understand someone as a "person who has a problem with drugs," rather than as a "drug addict"; the need for interdisciplinary involvement throughout the process; the need for genuine buy-in to the normative importance of families in the lives of children; and the need to view families as experts on themselves.

C. Visions of Alternative Systems

Our Group spent time discussing alternative systems for dealing with family conflict or issues of family intervention. These included:

1. Scottish System

A system where a three member non-adversarial lay judge panel that intervenes in family situations when there is an arrest of a child or an allegation of abuse or neglect. Parents and children are at the table together, and may bring anyone else to the table for a facilitated conversation about what to do, employing a strengths-based model;

2. Family Group Conferencing

A convener consults with a child and family to get as many people who are meaningful to the child to the table (teachers, social workers, family members, etc.), as well as anyone that parents or children view as support people. Participants share "concerns" rather than "problems" and in the purest form, professionals leave the room to allow the family to work out a solution and present it to the professionals and then to the court. The model is again based on assessing strengths and on intervening early;

3. Child and Family Teams

Child and family teams are convened by the department of family services or any attorney in an abuse and neglect case. The goal is to include families, children, foster and adoptive parents together to reach consensus on an outcome to be presented to the court. The methodology is based on identifying strengths.

4. Mediation in Abuse and Neglect or Delinquency Cases

Diverted from the court to allow the parties to reach their own consensus on how the situation that brought the child or family into the court system should be resolved.

5. Interdisciplinary Team Approach

An approach to legal representation in which lawyers, social workers and other professionals, each function within the scope of their own expertise, and in which social workers bring a family systems focus, but legal concerns may predominate and provide a trump on approaches that threaten the client's legal rights or interests.

From this discussion, we noted continuities, such as the focus on participation, individualization, and the employment of an interdisciplinary and

strengths-based approach to addressing problems that bring families into contact with legal systems. We also talked about ways broader ways to engage or to meaningfully involve all the players impacted by decisions about the lives of children. These included the development of advisory councils of older and former foster youth, group meetings in the community to educate and hear reactions from members of the community about court-based services, and institutional structures to help foster a political voice for parents involved in delinquency and child welfare systems. Finally, we emphasized the importance of creating a high threshold for court intervention and tailoring the services provided to the reasons why clients come into the system.

D. Indicting the System

Finally, and perhaps most powerfully, our Group responded to the urging of Marty Guggenheim to identify the current failings of the systems in which we work, as a way of envisioning how things might be done differently. To that end, we crafted a statement indicting the system, which became the Preamble and Statement of Principle for our specific recommendations:

III. PREAMBLE AND STATEMENTS OF PRINCIPLE

We are professionals or individuals involved in a system affecting children, trying to advance the interests of children, and deeply critical of current practice. Despite its lofty ideals, our current system too commonly disserves the interests of children, and too often does so by devaluing and condemning the families to which they are born. Our conviction is that the systems that intervene in the lives of children and families should be reoriented toward identifying the strengths and benefits we conclude exist in those families. Until those systems recognize that they must value the children's families, no procedural or substantive change has any real hope of making a difference. Our definition of family goes beyond those persons who may be legally defined, to include those persons who have significance to the child.

- Once involved, the systems over-involve themselves. They seek, in good faith, to do too much. Perhaps counterintuitively, we ask them to strive to do less.
- They believe they have the authority to *force* families to change their ways. Instead, we ask them to help families understand why families should change. There is a lack of humility; a lack of understanding of the capacity for overreaching; failure to check the power that has been unleashed.
- The current system does not adequately define and advise constituents of the limitations and responsibilities that define the roles of different players in the system. We need clear understanding of the roles people are playing and the interests that the system is being asked to serve.
- The legal players in the system too often fail to appreciate the limitations of their expertise and claim the authority to dictate decisions beyond the scope of their expertise. System players should strive to work collaboratively with those who have the information and expertise that are necessary to aid in decisions, including families, children and other professionals.
- The constituents are too often excluded from the decision making that decides the forum and process by which their own problems are addressed, including the

adversarial process. Families should be provided with meaningful choices and alternatives for solving the problems that bring them into the system.

- The system too often treats families punitively. Rather, it should involve the family in defining the problems that it faces and helping the family address those problems.
- The system too often relies on existing programs and resources, and defines the family's needs in terms of available services, thereby providing inappropriate, ineffective or unnecessary services. Rather, it should focus on the needs of the family in pursuing and tailoring services to meet those needs.
- We reaffirm the general principle of the *Fordham Conference* that lawyers should not substitute their own judgment of what is best for children for the child's wishes. Too often lawyers have attempted to achieve the best practices defined by Fordham by counseling clients as if they exist in isolation of their family context. Rather, in counseling their clients, lawyers should recognize the role and importance of family in the lives of their clients.

IV. RECOMMENDATIONS

Out of these discussions, our Group produced the following specific recommendations, which we took to the Plenary panel for discussion.

A. *Representation of Parents*

Too often in child protection cases, parents are left either unrepresented or inadequately represented. This practice undermines due process and impairs the court's ability to achieve fair and appropriate outcomes for children. As children's advocates, we believe that in child protection cases, parents should have the right to counsel. At least in large urban areas, we believe that the goal of providing effective representation for parents should be met by relying upon an institutional legal services provider.

B. *Representation of Children*

We are also dismayed that the *Fordham Conference* has still not yet resulted in children being represented in all child protection proceedings, and we reaffirm that call.

C. *Conditions for Effective Representation*

In too many circumstances in which children are represented—including child protection, delinquency, and other types of proceedings—representation remains ineffective. In too many instances, children are represented in name only by overburdened lawyers suffering from choking caseloads. In too many communities today lawyers for parents—even when appointed—are expected to perform their important tasks under conditions that make effective representation impossible. As children's advocates, we believe that in all situations in which children or parents are represented by counsel, counsel should:

- be adequately trained;
- be adequately compensated;
- have strict caseload limits, and for attorneys representing children, caseloads limits should be based on the number of clients, rather than the number of cases; and

- be provided with adequate resources to ensure that their representation is effective.

In all events, attorneys for parents and children need to spend considerable time out of court working on these cases.

D. Counseling Child Clients

We reaffirm the general principle of the *Fordham Conference* that lawyers should not substitute their own judgment of what is best for children for the child's wishes. Too often lawyers have attempted to achieve the best practices defined by Fordham by counseling clients as if they exist in isolation of their family context. Rather, lawyers for children need to recognize the role and meaning of family in the lives of their clients, and in understanding their clients' wishes, perspectives, and processes of making decisions.

E. Attorney-Client Privilege

The attorney-client privilege should be extended to include those family members or other advisors invited by the child to participate in attorney-client consultations to facilitate communication between the child and the attorney and/or to assist the child in making decisions. The child's invitation of a third party family member or advisor should not usurp the child's right to direct the legal representation.

F. Strengths-Based and Individualized Services

Effective resources are critical to the success of children and families in the system. In order to address the concerns which brought the family into the system, service plans should build upon their strengths and be tailored to their unique needs. Service plans should include clear and measurable goals. There should be a presumption that parents and children will participate in the process of creating these plans. Implementing this strengths-based and individualized approach requires attorneys to reach beyond the boilerplate responses and standard resources of the department to identify culturally sensitive, appropriate, and easily accessible community-based resources, cash assistance, and other services.

G. Stakeholder Input into Court Processes

Courts should establish and participate in partnerships with advisory councils made up of alumni of foster care and juvenile delinquency systems, foster/adoptive parents, biological parents, and other family members affected by the foster care and delinquency systems to advise the courts on the effectiveness of their policies and procedures. These councils should include and reflect the voices of current youth in care, alleged or currently adjudicated juveniles through community meetings, focus groups and other forums.

H. Alternative Dispute Resolution

Despite a limited number of successful examples, the legal system as a whole has yet to embrace the value of alternative dispute resolution and deci-

sion-making processes for addressing concerns related to children and families. Such alternative mechanisms have great potential for recognition of the importance of families in children's lives. Unless these processes are based on sound principles, there is the potential that the participants will not benefit from them.

In order to achieve this potential any alternative process must reflect the following principles:

1. respect the dignity and rights of all individuals and families;
2. treat all children as members of families;
3. appreciate individual, family, and cultural differences; and
4. focus on identifying and utilizing strengths to empower children and families.

All such processes must be voluntary and emphasize meaningful participation of the child, family, and other individuals important to the child.

I. Family-Friendly Courts

In too many jurisdictions, courts that serve children and families are dehumanizing places characterized by chaos, disorder, inadequate resources, and inappropriate facilities. Courts should have adequate staffing and case management technologies, to avoid situations in which families suffer lengthy waits for their cases to be called. Courts should provide child-friendly spaces.

J. Lawyer Involvement in Client Communities

Lawyers representing children and parents should engage the communities from which their clients come to gather information about the effectiveness and deficiencies of existing legal systems affecting the family, educate and learn from the community about existing and potential alternatives for problem-solving in the family, and to collaborate with the community to generate new ideas for problem-solving.

K. Decriminalizing Parents

Lawyers representing children should work to reform the law to remove criminal sanctions that hold parents accountable for the behavior of their children and impose on parents the costs of prosecuting cases and placing children, and should advocate for measures that will instead provide resources to support the efforts of families to address the needs of their children.

L. Public Awareness

Lawyers should engage the media to expose deficiencies in the legal systems that impact children, and should use the media to help alter public perceptions detrimental to families who become the subject of state intervention.