EXECUTIVE DIRECTOR’S MESSAGE:

What Can One Person Do?

by Kendall Marlowe, MA, JD

NACC is an organization that wants to have it both ways: we are a membership organization that uses training, Child Welfare Law Specialist certification and our annual conference to raise the level of practice in our field, but we are also an advocacy organization that seeks to reform the legal systems that serve our clients. We want to better advocate for vulnerable children and families, but we also want to transform the landscape of that advocacy.

The first juvenile court in this country dates all the way back to 1899, and it’s common to feel that ‘nothing ever changes’ in how we address cases of families in crisis. Something about our line of work is isolating — it can feel like us against the entire world — and something about our legal systems discourages change and reform. And so we feel alone in our battles for kids and their families, and we doubt that any of us can defeat the immense power of the status quo. What can one person do?

In partnership with you, we’re answering that question every day at NACC. In the last month alone, we’ve been working with members from Florida, Missouri, Arizona, Colorado, Ohio and Washington, to name just a few jurisdictions. Protecting the rights and interests of children and families is a 50-state affair, with a different context for reform in every state. Some state legislatures are actively writing new law as part of an ongoing reform campaign, while in other states litigation seems the only hope. Public opinion, reflected in the work of individual legislators, may swing from supporting community integrity, family preservation and parents’ rights to calling for aggressive action to remove children in the name of safety. In any state, it is often NACC members who best understand where we stand and where we need to go. Reform can, and often does, start with the commitment of just one person.

So call us. Write us. Join us at the conference this August in Denver (where we’re having a session on just this question.) We want to know how we can help you get done what needs to get done in your part of the country. Every reform effort began with one person saying, “This must change.” NACC is here because of you, and you know better than anyone what we must do. We look forward to working with you.
Membership News

With Certification open in 39 states, training opportunities all over the country and our National Conference just around the corner, it’s an exciting time to be part of the NACC.

Thank you to all our members for your continued support of the NACC.

Please take a minute to update your NACC Member Profile on our website. We are expecting our membership numbers and website visitors to increase over the next few months and your profile will most likely be viewed.

Member Resource Request — Have a legal question? Looking for a specific resource? Members may submit questions online or via email to our resource staff at advocate@naccchildlaw.org.

Amicus Curiae

IN RE FELICITY S.

by Kendall Marlowe, MA, JD
NACC Executive Director

In response to a November 26, 2013 Order to Show Cause, NACC submitted an amicus curiae brief on February 11, 2014 in support of Felicity’s appointed appellate counsel.1 The Superior Court of the County of Contra Costa, Hon. Barry Baskin, Judge, had used the Order to Show Cause to propose to admonish appellate counsel for the minor for ‘taking a position that was ‘diametrically opposed’ to that taken by trial counsel and for taking that position without his consent, without any showing that doing so was in Felicity’s best interests, and with no explanation as to why she had done so.”2 The brief argues that any admonishment of appellate counsel is unwarranted, as children are entitled to the same zealous representation in the courts of appeal as are adult clients, and counsel is bound by consistent rules of ethics when representing children or adults.3

As held in Josiah Z., California law provides a right to competent counsel in dependency proceedings when a child’s significant interests are at stake.4 So long as the client is mature enough to develop a position, that same zealous advocacy must be provided by competent counsel on appeal.5 Because the minor in this case was thirteen years of age, appellate counsel was ethically bound to advocate for the youth’s position, regardless of the position taken by minor’s trial counsel.6 On the heels of Josiah Z., the state legislature provided for appointment of appellate counsel for minors on appeal, which was followed by a corresponding rule of court adopted by the Judicial Council;7 this is an implicit acknowledgment that appointment of appellate counsel is necessary to represent children when the child’s wishes differ from the wishes of trial counsel.

Both legal ethics and the presumption in California law that children age ten or older are mature enough to participate in their own dependency cases required that Felicity had the right to participate in and make decisions regarding her appeal.8 In this case, trial counsel failed on several fronts to advocate for Felicity’s own position and interests.9 In contrast, Felicity’s appellate counsel provided the zealous advocacy every client deserves, and for that she merits not our admonishment but our applause and respect.

2. Id. at p. 6.
3. Id. at p. 32.
5. Proposed Brief of the National Association of Counsel for Children in Support of Minor’s Counsel, S. Lynne Klein, at p. 5.
6. Id. at p. 6.
7. Id. at pp. 10-11.
8. Id. at p. 21.
9. Id. at pp. 21-22.

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P.P.H., T.S.H., and N.M.H. 2 P.P.H. was initially placed in M.A.H. and R.J.H.’s care as a foster child in 2007. 3 In September 2007, three-year-old P.P.H. was examined by a licensed child psychologist and diagnosed with reactive attachment disorder (RAD), post-traumatic stress disorder (PTSD), and developmental delays. 4 P.P.H. also had food issues pre-dating his placement with M.A.H. and R.J.H., including non-stop eating, failing to stop eating when full, repeatedly asking about the next meal, and a fixation on food. 5 The psychologist strongly recommended that P.P.H. receive ongoing psychotherapy, that physical discipline be avoided, and that food not be used as a reward or punishment. 6 M.A.H. and R.J.H. did not follow the psychologist’s recommendations. 7 They did not seek psychiatric care for P.P.H., used spanking as punishment, and told medical personnel they withheld food from their children until chores were finished. 8

In 2011 M.A.H. and R.J.H. became aware that P.P.H. was regurgitating and ruminating his food. 9 To treat his nocturnal enuresis, M.A.H. and R.J.H. had P.P.H. wear pull-ups to bed, left a “potty” chair in his room, and put a waterproof mattress cover on his bed. 10 They purchased a plastic sled and had P.P.H. sleep on the sled to avoid getting urine on the bed or floor. 11 P.P.H. was sometimes hosed off in the morning after he wet the bed, with his siblings handling the hose. 12 In 2012 P.P.H. was taken to the hospital. 13 He was mildly hypothermic, had low blood pressure, and a slow heartbeat. 14 He also had “concerningly low” hemoglobin and low levels of electrolytes. 15 His belly was protruding and he appeared emaciated. 16 When the doctor told M.A.H. that P.P.H. would have to be hospitalized because of malnourishment, she said to P.P.H., “See, this is what happens when you do things like this.” 17

M.A.H. and R.J.H. were the biological parents of A.J.H. and, by adoption in 2008, the parents of P.P.H., T.S.H., and N.M.H. 2

The Minnesota Court of Appeals considered two issues: (1) whether severe malnutrition coupled with psychological harm from a family dynamic in which the child was vilified rather than receiving needed care constituted “egregious harm” sufficient to terminate parental rights pursuant to Minn. Stat. §§ 260C.301, subd 1(b)(6), 260C.007, subd. 14 (2012); and (2) whether the district court abused its discretion by declining to terminate the parental rights as to the child’s three siblings given their participation in the maltreatment. 4 The appellate court held malnutrition and psychological harm constituted “egregious harm” under the statute, and that the law did not mandate termination of parental rights as to the child’s siblings.

M.A.H. and R.J.H. were the biological parents of A.J.H. and, by adoption in 2008, the parents of P.P.H. did not receive any professional medical care. 12 To treat his nocturnal enuresis, M.A.H. and R.J.H. had P.P.H. wear pull-ups to bed, left a “potty” chair in his room, and put a waterproof mattress cover on his bed. 13 They purchased a plastic sled and had P.P.H. sleep on the sled to avoid getting urine on the bed or floor. 14 P.P.H. was sometimes hosed off in the morning after he wet the bed, with his siblings handling the hose. 15 In 2012 P.P.H. was taken to the hospital. 16 He was mildly hypothermic, had low blood pressure, and a slow heartbeat. 17 He also had “concerningly low” hemoglobin and low levels of electrolytes. 18 His belly was protruding and he appeared emaciated. 19 When the doctor told M.A.H. that P.P.H. would have to be hospitalized because of malnourishment, she said to P.P.H., “See, this is what happens when you do things like this.” 20

2. Id. at 734.
3. Id
4. Id
5. Id at 735
6. Id. at 734
7. Id
8. Id
9. Id
10. Id
11. Id. at 738.
12. Id. at 736.
13. Id. at 736.
14. Id
15. Id at 735-36.
16. Id. at 736.
17. Id.
18. Id
19. In re M.A.H., 839 N.W.2d at 736.
20. Id.

Do you know of an important case which you feel NACC members should be made aware of?

If so, please let us know. Email: advocate@naccchildlaw.org.
P.P.H. was transferred to the Mayo Clinic and treated for malnourishment, and his regurgitation and preoccupation with food gradually diminished.\textsuperscript{21} M.A.H. told the Mayo Clinic staff that she believed P.P.H.’s food issues stemmed from his desire to control situations and to gain attention.\textsuperscript{22} P.P.H. reported that his main concern was feeling that he would not get enough to eat.\textsuperscript{23} Mayo Clinic’s psychiatry unit reported that P.P.H.’s malnourished state was not the result of an internally driven eating disorder, but was likely caused by an external or environmental source.\textsuperscript{24} After making a remarkable recovery at Mayo Clinic, P.P.H. was released to foster care.\textsuperscript{25} M.A.H. and R.J.H. resented Mayo Clinic’s care of P.P.H. \textsuperscript{26} A dependency petition and criminal investigation were opened as to the parents, and all four children were placed in foster care.\textsuperscript{27} During a trip to the foster home, the three siblings were very upset and made a number of angry statements blaming P.P.H. for their situation, calling him a liar and a thief, and saying he was bad.\textsuperscript{28} In November 2012 the department filed a petition requesting termination of M.A.H. and R.J.H.’s parental rights as to all four children.\textsuperscript{29} The district court granted the petition as to one child.\textsuperscript{30} The appeals court first considered whether the district court abused its discretion when it concluded that the county met its burden to show P.P.H. suffered egregious harm while in the care of his parents.\textsuperscript{31} The court found unpersuasive M.A.H. and R.J.H.’s argument that there was not a lack of care in this case, but simply an unsuccessful choice in the type of care used.\textsuperscript{32} Indeed, P.P.H.’s condition was the result of a series of unfortunate and, to a large extent, preventable circumstances.\textsuperscript{33} The court found evidence of emotional and psychological harm, such as the methods M.A.H. and R.J.H. used to address P.P.H.’s bedwetting, refusing to take responsibility for his condition and blaming him for his hospitalization, and a family dynamic in which he was vilified for his condition rather than given the care he needed.\textsuperscript{34} Because the record showed that P.P.H. suffered severe, life-threatening malnutrition arising from the failure of M.A.H. and R.J.H. to obtain proper medical and psychological care for P.P.H., the appeals court held the district court’s finding that P.P.H. suffered “egregious harm” was proper, and termination of M.A.H. and R.J.H.’s parental rights was not an abuse of discretion.\textsuperscript{35} The lack of any “assaultive behavior” by M.A.H. and R.J.H. did not preclude a finding of egregious harm.\textsuperscript{36}

The court of appeals then considered whether as a matter of law the district court erred when it concluded that the county failed to establish a statutory ground to terminate M.A.H. and R.J.H.’s parental rights as to the other three children.\textsuperscript{37} Under Minnesota law, if any child is found to have experienced egregious harm in an individual’s care, that harm may establish the statutory grounds for termination of that individual’s parental rights as to any other children.\textsuperscript{38} The rule recognizes the district court’s unique ability to evaluate witness credibility and weigh conflicting evidence, and therefore leaves the termination decision as to any other children to the district court’s discretion.\textsuperscript{39} The court is not required to terminate parental rights as to all children if an egregious harm finding is made as to one child.\textsuperscript{40} Therefore, the district court’s decision not to terminate the parental rights of M.A.H. and R.J.H. as to the remaining three children would only be reversed if unsupported by the evidence.\textsuperscript{41} The court of appeals took care to note M.A.H. and R.J.H. presented evidence that their relationship with the other three children did not involve the same sort of inappropriate “power struggle” they engaged in with P.P.H.\textsuperscript{42} And although the three children were made to witness and participate in the mistreatment of P.P.H., these actions did not constitute “grave and weighty reasons”.

\textsuperscript{21} Id. \\
\textsuperscript{22} Id. \\
\textsuperscript{23} Id. \\
\textsuperscript{24} Id. at 737. \\
\textsuperscript{25} In re M.A.H., 839 N.W.2d at 737. \\
\textsuperscript{26} Id. \\
\textsuperscript{27} Id. at 737-38. \\
\textsuperscript{28} Id. at 738. \\
\textsuperscript{29} Id. \\
\textsuperscript{30} Id. at 740. \\
\textsuperscript{31} In re M.A.H., 839 N.W.2d at 740-45. \\
\textsuperscript{32} Id. at 742. \\
\textsuperscript{33} Id. at 741. \\
\textsuperscript{34} Id. at 743. \\
\textsuperscript{35} Id. at 743-44. \\
\textsuperscript{36} Id. at 742. \\
\textsuperscript{37} In re M.A.H., 839 N.W.2d at 741. \\
\textsuperscript{38} Id. at 745-46. \\
\textsuperscript{39} Id. at 746. \\
\textsuperscript{40} Id. \\
\textsuperscript{41} See In re M.A.H., 839 N.W.2d at 746. \\
\textsuperscript{42} Id. at 746. \\
\textsuperscript{43} Id. at 747.
necessary to terminate M.A.H. and R.J.H.’s parental rights as to the siblings. Finally, the court of appeals rejected the department’s argument that the abject failure to get care for P.P.H. warranted a legal conclusion that the statutory criteria for termination was met for all three children.

Applying a close reading of the law, the parental duties provision of the termination statute referenced a failure in “providing the child” with such care “necessary for the child’s physical, mental, or emotional health and development.” The court held failure to obtain appropriate care for P.P.H. did not extend to failure to obtain care for his siblings.

NOTICE TO READERS: Reported decisions may not be final. Case history should always be checked before relying on a case. Cases and other material reported are intended for educational purposes and should not be considered legal advice. Featured cases are identified by NACC staff and our members. We encourage all readers to submit cases. If you are unable to obtain the full text of a case, please contact the NACC and we will be happy to furnish NACC members with a copy at no charge.

44. Id. at 747-48.
45. Id. at 749.
46. Id. (emphasis in original).
47. Id.
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As a multidisciplinary membership organization, we work to strengthen legal advocacy for children and families by:

- Ensuring that children and families are provided with well resourced, high quality legal advocates when their rights are at stake
- Implementing best practices by providing certification, training, education, and technical assistance to promote specialized high quality legal advocacy
- Advancing systemic improvement in child-serving agencies, institutions and court systems
- Promoting a safe and nurturing childhood through legal and policy advocacy for the rights and interests of children and families

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