The Inter-American Commission on Human Rights (IACHR), an autonomous body of the Organization of American States (OAS), held its 169th period of sessions at the University of Colorado Law School in Boulder, Colorado, from September 29 to October 5, 2018, marking the first time the Commission has held public hearings in the United States outside of its Washington, D.C. offices, and the first time that hearings have been held at an American law school. Amongst nearly forty sessions regarding alleged human rights violations throughout the Western Hemisphere, topics included: Reports of Harassment and Violence against Female Social Leaders in Bolivia, Rights of Indigenous Qeqchi Maya Families Affected by Forced Evictions in Guatemala, and Rights of Persons with Disabilities in El Salvador. On the evening of Thursday, October 4, the presentation was of particular interest to juvenile defenders and advocates for child welfare — Children and Adolescents in the Adult Criminal System of the United States. The presentation was a summary of IACHR’s new report, The Situation of Children in the Adult Criminal Justice System in the United States. Chief of the Cabinet Marisol Blanchard, President of the IACHR, Margarette May Macaulay, and the First Vice-President of IACHR, Commissioner Esmeralda A. De Troitoño presented the report. The report was prepared following a March 2013 hearing during the 144th period of IACHR sessions, where the Commission addressed the impact of incarcerating persons younger than eighteen in adult facilities. The resulting report addresses the very high number of children who enter the criminal justice system in the United States, and the additional human rights violations that transpire when they are confined in adult prisons. The recommendation of IACHR was that states strengthen efforts to respect and ensure rights of children who come into contact with the criminal justice system. Juveniles within American borders are theoretically guaranteed special protections, in addition to those of life, liberty, and due process, but once the legal system determines they are to be treated as an adult, they lose these special protections. The report is concerned with children stripped of rights following a subjective legal determination and the implications of that process within the framework of international law.

The United States is one of only two countries that has not ratified the Convention on the Rights of Children, has failed to adopt the internationally recognized definition of juvenile status — any person under age eighteen — within its laws, and has not recognized the rights and guarantees granted to children as part of international human rights: a right to non-discrimination, to be heard, and to full development. The Convention on the Children in the Adult Criminal Justice System: An International Human Rights Commission Presents Its Report on the Situation in the U.S.

ABOUT THE AUTHOR:
Alison Gordon is a 3L J.D. candidate at the University of Colorado School of Law with a strong interest in juvenile justice, child welfare, criminal defense, and family law. She is a 2018 Bergstrom Child Welfare Law fellow and NACC’s legal intern this fall.

The report addresses the very high number of children who enter the criminal justice system in the United States, and the additional human rights violations that transpire when they are confined in adult prisons.
Rights of the Child establishes that justice must specialize on rights of children, and the Universal Declaration on Human Rights itself recognizes the need for special protections for children and adolescents.

The adult criminal justice system is not prepared to serve this population of juveniles; the system will not provide the care these juveniles need while they are imprisoned with adults. Beyond the adult system's inability to assist in their rehabilitation, the IACHR report cites studies that show that it perpetuates active harm upon them: juveniles incarcerated in adult facilities are five times more likely to experience rape and/or abuse and two times more likely to experience abusive treatment by guards, as compared to juveniles incarcerated in juvenile facilities. Children incarcerated with adults are four to five times more likely to commit suicide than those in the juvenile system, and children who enter the adult system demonstrate higher recidivism rates than those adjudicated as juveniles.

How a child may enter the adult system differs on a state-by-state basis. Direct file jurisdiction allows criminal charges against children to be filed immediately into adult court at the prosecutor’s discretion. Transfer jurisdiction allows the matter to be filed into juvenile court and sent to adult court by the judge’s discretion. And “once adult, always adult” statutory schemes provide that a child who is tried in adult court once always remains an adult in the eyes of the law. The report notes that these mechanisms, which transform a child into an adult by way of a mere legal fiction, are applied inequitably: black children represent 16% of the total youth population in the U.S., yet they comprise 28% of all youth arrested, 35% of youth transferred to adult courts, and 58% of youth sentenced to confinement in adult prisons.

Brian Evans, the State Campaigns Director at the Campaign for Youth Justice, present at the Commissions sessions as a Civil Society Representative, compared methods of filing children into adult court. He noted that transfer jurisdiction at least allows an opportunity for a hearing, unlike direct file. In the absence of a state that simply doesn’t transfer juveniles, states that only use judicial transfer represent best practices. These states include California, Hawaii, Kansas, Missouri, and Tennessee. Formerly, thirteen states tried all sixteen- and seventeen-year-olds as adults, but that practice now only occurs in four states. Additionally, Vermont has raised juvenile court jurisdiction for misdemeanors to age twenty. Pursuant to New York’s Raise the Age law, as of October 1, 2018, the state no longer automatically charges all sixteen-year-olds as adults, and in October 2019, will do the same for seventeen-year-olds. Evans cautioned that while juvenile justice is improving in some respects across the states, stark racial disparities remain.

Civil Society Representative Andrew Stevenson, Attorney-Adviser at the U.S. Department of State, expressed his support for the Commission. Thomas Weatherall, an Alternate Representative from the U.S. Mission to the OAS, communicated the Commission’s sessions as a Civil Society mechanism, which promulgates four core requirements for eligibility for grants that fund prevention and intervention programs. Those eligibility requirements are reduction of disproportionate minority contact; deinstitutionalization of status offenders; separation of juveniles from adults in prisons, while about three thousand children are in jails. The government attempts to address racial and ethnic disparities through the Office of Juvenile Justice and Delinquency Prevention, which
secure facilities; and removal of juveniles from adult jails and lockups.

Finally, the IACHR welcomed two youth speakers who brought a unique perspective based on their direct lived experiences. Anlyn Addis, who works with ACLU of Michigan’s Juvenile Life Without Parole Initiative, brought these youth to speak in collaboration with her organization, the Youth Justice Fund. Elvir Purovic was incarcerated in prison at the age of fifteen and told the audience that “prison at fifteen means I had no human rights. I couldn’t get my GED until sixteen but could be locked up with adults at fifteen. I lost my childhood at fifteen, I lost my piece of mind, my serenity.” Dominic Passmore was fourteen when he was tried as an adult for armed robbery. He was sentenced to nine to fifteen years in adult prison, where he obtained his GED, left prison on earliest release, and is now certified as a personal trainer. Dominic shared “I used to stand inside my room, my cell, and see guys in suits. I used to think ‘maybe this guy is important and we’re going to get some kind of change.’ But help never came.” Dominic said that regardless of advances mitigating the conditions of juvenile confinement in adult facilities, “[i]t’s still kids in prison — no matter what the stats say, the number of children in prison is ridiculous.”

Both Elvir and Dominic shared powerful spoken word poetry, speaking power to the struggles they’d overcome. Tearfully, the Commissioner Esmeralda A. De Trotinó asked if both young men would provide their poems to put on the IACHR website, and concluded, “This meeting was not just about the report; as members of society, we need to recognize the value of all human beings...We must work to ensure that all souls together, regardless of race or color, can reach love.”

In this Season of Gratitude and Giving, NACC Honors and Acknowledges Our Special Fund Donors

The National Association of Counsel for Children is grateful to the major donors whose contributions established special funds for NACC’s programs and organizational sustainability.

Megan Louise Furth Youth Empowerment Fund

The NACC Megan Louise Furth Youth Empowerment Fund was created by former NACC board member Donna Wickham Furth to honor the life of her daughter Megan Louise Furth by supporting the Youth Empowerment Initiative of the National Association of Counsel for Children. Megan Louise Furth was a remarkable young woman who died in July 2003 at the age of 31. Megan was an example of the brilliance and power of youth. From a very young age, Megan showed great promise and grew into a scholar, teacher, writer, and athlete. Her young life was a testament to the value and contributions that youth make to society when given an opportunity to participate. The NACC Youth Empowerment Initiative was created to help promote the concept that children and youth are valuable persons and citizens with inherent legal and human rights. The NACC, a non-profit charitable national child advocacy organization, strives to serve this goal by promoting youth participation in NACC programs, including youth presentations at NACC’s annual conference. NACC’s 2019–2023 Strategic Plan calls for the inclusion of youth voices in NACC’s policy programs and we look forward to building this work in the coming years. The Megan Louise Furth Youth Empowerment Fund supports these initiatives.

Lea Fund for Justice

Wendell Lea worked throughout his life as a merchant marine engineer and willed all of his financial worth for the cause of “Justice for Children.” Don Bross, NACC’s Founding Executive Director met Mr. Lea in 1992 and developed a long friendship and relationship that led to Mr. Bross being appointed President of the Lea for Justice Fund. Mr. Lea valued the work of NACC and since 2006 an amount of nearly half of the value of his original estate has been donated to the NACC in furtherance of his goals and those of NACC. The Lea Fund for Justice was also established with a generous gift from the Steven Cahn Family. The Lea for Justice foundation is closing this year with gratitude for the work of NACC’s membership and with hope and expectations for their continuing efforts and achievements for children. NACC is grateful to Don Bross for informing Wendell Lea about our work. NACC’s Lea Fund for Justice was established to promote the long-term sustainability of NACC and its mission.

Contributions to these funds can be made on the Colorado Gives Day website. Contributions to NACC’s general fund, to support our strategic plan, can be made on NACC’s website.

Thank you!
NACC Presents Child Welfare and Poverty Webinar

Last month NACC was pleased to present a special webinar on Child Welfare and Poverty. NACC thanks our presenters Diane Redleaf of Family Defense Consulting and Ruth White of the National Center for Housing and Child Welfare. The discussion focused on the many respects in which the child protection system contributes to child and family poverty. Topics included: how child protection systems misidentify and mistreat poverty; how race, national origin, and class bias intensify the maltreatment of families; how child abuse registers operate as employment blacklists in the low-income workforce; economic security issues facing children aging out of foster care; and how policies that criminalize poverty operate unchecked in child protection systems in the US. Click to watch this free webinar (email registration required).

Stay tuned for more webinars for members in 2019!

NACC’s NEW Red Book Online Training Course

NACC is thrilled to continue our new online Red Book Training Course! This course was first piloted in the spring of 2018 and NACC will now be offering the course regularly twice a year—once in the spring and once in the fall. The Red Book Training Course was designed to assist participants in preparing for the Child Welfare Law Specialist (CWLS) examination and can also serve as an overall review of dependency competency areas. The course consists of seven webinars delivered over a period of 13 weeks, all of which are conducted live with active attendee participation, but also recorded to watch and/or listen after the fact at your leisure.

The material covered in the course is drawn from Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases (3rd Edition). This is a great opportunity for attorneys representing children, parents, and agencies to take their education and practice to the next level and apply for certification during our 40th Anniversary pricing year. One need not be a CWLS applicant in order to take the course, but we do encourage participants to become certified. The CWLS exam can be taken online at the convenience of the applicant and is remotely proctored over video.

NACC’s staff is ready to assist in registering a group for the course, ordering hard copies of the Red Book, and/or coordinating a cohort to become certified as CWLS. Please contact Daniel Trujillo, NACC Certification Director, at Daniel.Trujillo@NACCchildlaw.org for group registrations, additional information about the course, or CWLS certification.

Permanency Attorney Training in Missouri

NACC was invited by Casey Family Programs to lead part of the inaugural permanency attorney training in Missouri this October. NACC’s Brooke Silverthorn, Director of Legal and Policy Advocacy, customized a training to include the Red Book material and Missouri-specific material to provide an overview of federal and state child welfare law. NACC was honored to partner with Casey Family Programs and the Missouri Children’s Division in this special training event.

NACC at the American Association of Health and Human Services Attorneys’ Annual Conference


Interested in partnering with NACC for one of your trainings?

Thinking about adding on a one-day Red Book Live training to your state conference or incorporating NACC’s Red Book Training Course into your annual training offerings?

Contact Training@NACCchildlaw.org.
NACC’s Strategic Planning Process

For more than 40 years, the National Association of Counsel for Children (NACC) has strived to serve children and families by supporting a community of professionals dedicated to providing high-quality legal representation. NACC has trained tens of thousands of professionals, established a national, ABA-accredited certification for Child Welfare Law Specialists, produced pioneering publications — including Child Welfare Law and Practice — and steadfastly asserted the rights of children in hundreds of policy statements and amicus briefs in child welfare, juvenile justice, and family law systems.

With our 2019–2023 Strategic Plan, the National Association of Counsel for Children reaffirms our founding commitment to advancing justice, opportunity, and well-being for children and families affected by the child welfare system. While NACC will address the intersection of child welfare with juvenile justice and family law matters, NACC will focus on child welfare, its strongest area of expertise, in order to amplify and maximize our impact. The driving focus of NACC’s new strategic plan is to accelerate the growth, experience, diversity, and leadership of a national community of children’s lawyers and other child welfare legal professionals to Promote Excellence, Build Community, and Advance Justice.

NACC honed its organizational focus through a comprehensive strategic planning process guided by the consultants at Community Wealth Partners with the generous funding of the Annie E. Casey Foundation. The strategic planning process included external interviews, focus groups, membership surveys, market research, financial models, fundraising strategies, and board and staff retreats conducted over a nine-month period. The NACC Board of Directors adopted the 2019–2023 Strategic Plan on August 22, 2018.

The new plan clarifies who NACC is, what NACC stands for today, and the means by which NACC will effect change as a national nonprofit children’s legal advocacy organization. The plan sets NACC on a consistent course of growth to increase our impact through earned revenue and grant-funded programs led by NACC and in collaboration with organizational partners, members, and Child Welfare Law Specialists. NACC’s board and staff are profoundly grateful for all of the contributions made during this process.

NACC’s Vision, Mission, and Impact

NACC advances the rights and opportunities of children in the child welfare system by ensuring they have the right to effective assistance of counsel. We provide programs and resources that improve the quality of legal representation for children, parents, and agencies; support a community of hard-working and dedicated professionals and help attract and retain diverse talent in the children’s legal advocacy profession; and we advocate for policies that advance children’s rights, including the right to counsel.
Through our work to improve high-quality legal representation, NACC has an impact on the following policy outcomes and priorities:

1. The child welfare court system is more likely to be fair and equitable, and protect children’s well-being, rights, and opportunities.

2. Children can have equitable access to services and supports.

3. Children can be in loving, permanent families and exit the child welfare system as appropriate when their needs have been met.

4. Children and youth can be supported in ways that keep them from also being involved in juvenile and criminal justice systems.

Our Program Areas and Priorities

Over the next five years, NACC will achieve results in three main program areas:

Promoting Excellence

Building Community

Advancing Justice

Our Vision

Every child and family involved with the court system is well-represented by a lawyer who works to ensure that every child is raised by a nurturing family and has positive life opportunities.

Our Mission

To advance the rights, well-being, and opportunities of children impacted by the child welfare system through access to high-quality legal representation.
NACC Policy News

NACC Opposes Discrimination in South Carolina
The National Association of Counsel for Children joined Children’s Rights and a coalition of 20 leading nonprofit children’s organizations and advocates urging the US. Department of Health and Human Services to reject a waiver requested by the State of South Carolina that would allow federally-funded foster care providers to deny applications of prospective Jewish and other foster and adoptive parents on the basis of religious belief. Click to read the letter.

NACC Board of Director’s amends NACC’s Policy Agenda
At its annual meeting in San Antonio, the NACC Board of Directors updated NACC’s Policy Agenda. The amendments were made to explicitly include provisions regarding LGBTQ youth and foster families consistent with recent positions NACC has taken in amicus briefs and policy statements, so that every child has access to a loving nurturing family without discrimination based upon sexual orientation, gender identity or gender expression. Click for NACC’s Policy Agenda.

NACC Presents Testimony to the New York State Commission on Parental Legal Representation
The National Association of Counsel for Children presented testimony in September to the Commission on Parental Legal Representation in Albany, New York. Executive Director Kim Dvorchak praised the commission for its mission to study and ensure quality legal representation for parents, emphasizing NACC’s belief that the best possible outcomes in the child welfare system are achieved when all parties have access to high-quality, well-trained, independent legal counsel. NACC discussed its Child Welfare Law Specialist (CWLS) certification, the importance of institutionalizing standards of practice and caseload limits, and recommended a system of statewide oversight and funding. Click for NACC’s written testimony to the Commission.

NACC Presents at the Juvenile Justice Journalist Conference
NACC’s Executive Director Kim Dvorchak was invited to present at the journalist conference “Unfinished Business: Juveniles and Justice” at John Jay College of Criminal Justice in New York, this October sponsored by the Tow Foundation and the Annie E. Casey Foundation. Ms. Dvorchak joined a panel this month with Marsha Levick, Deputy Director and Chief Counsel of the Juvenile Law Center, and Michael Harris, Senior Director of Legal Advocacy and Juvenile Justice of the National Center for Youth Law, where she discussed her work reducing the prosecution of youth as adults in Colorado. She also shared her observations on the perceptions of children and youth depending upon in which system — criminal, delinquency, dependency — their case is adjudicated, urging “we must ensure fair, equitable, and developmentally appropriate treatment for all children.”

NACC Joins Amicus Brief Supporting Philadelphia’s Anti-discrimination Policy
NACC signed on to an amicus brief in the case Fulton v. City of Philadelphia in support of the Appellee City of Philadelphia. The case was filed by Catholic Social Services (“CSS”), which has a contract with the City to screen, train, and certify foster parents (in addition to providing case management and other services to children in the child welfare system), and three appellant foster parents. Earlier this year, the City learned that CSS would not certify same-sex couples as foster parents due to CSS’s religious beliefs, a violation of both CSS’s contract to provide foster care services and the City’s Fair Practice
Ordinance. In March, the City notified CSS it would no longer refer children if they continued to violate their contract and refuse to license same-sex couples. CSS refused to comply and the City stopped intake of new placements of children into CSS’s care. As a result, CSS sued the City alleging violations of the State’s Religious Freedom Protection Act; the First Amendment’s Free Exercise, Establishment, and Free Speech Clauses; and the Fourteenth Amendment’s Due Process and Equal Protection Clauses.

In its complaint, CSS requested that the court issue preliminary and permanent injunctions prohibiting the City from canceling CSS’s contract to provide foster care services and ordering them to reopen intake. In July, Judge Tucker of the U.S. District Court for the Eastern District of Pennsylvania denied CSS’s request for an injunction, finding that the City did not violate CSS’s religious freedom because the City’s nondiscrimination ordinance was generally applicable and not targeted at a particular religion. CSS appealed to the 3rd Circuit, which is where the case is pending. Click here for the amicus brief and stay tuned for updates.

**Brackeen v. Zinke**, a limited ruling that will nevertheless cause disruption and confusion for Indian families and child welfare professionals.

On October 4, 2018 the United States District Court for the Northern District of Texas issued a ruling in Brackeen v. Zinke that struck down the Indian Child Welfare Act (ICWA) and the 2016 ICWA regulations as unconstitutional. Judge O’Connor’s ruling was based on the idea that ICWA violates the Equal Protection Clause of the United States Constitution because it is a “race-based” law. Additionally, Judge O’Connor ruled that ICWA and the regulations exceed Congress’s authority under the Indian Commerce Clause. The National Indian Child Welfare Association created a comprehensive summary that outlines the legal issues involved in the case. Although the ruling is limited to the parties in the case, it deviates from decades of precedent upholding tribal sovereignty and the rights of Indian children and families. Therefore, it has the potential to pave the way for other states to file similar lawsuits, relying on this decision.

Subsequently, the Cherokee Nation filed a Motion to Stay the ruling pending appeal, which the Court denied on October 29, 2018. The court denied the stay saying that the defendants failed to demonstrate that harm may come to children, families and tribes because of the ruling. Despite the denial of the stay, it is expected that Cherokee Nation will file an appeal.

As an organization of attorney members representing parents, children and agencies, NACC is concerned about how this ruling will affect our member’s Indian clients, not just in Plaintiff states Texas, Indiana and Louisiana, but around the country. The confusion and uncertainty of this ruling has the potential to undermine the progress that states, agencies, courts and professionals have made in training, education and implementation of the ICWA provisions. NACC remains committed to assisting attorneys in providing high-quality legal representation which includes continuing to advocate for the rights of Indian children and families.
THE NACC EXTENDS A SPECIAL THANKS TO OUR 2018 CONFERENCE SPONSORS & EXHIBITORS:

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Children’s Commission
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NATIONAL CENTER ON FAMILY INVOLVEMENT IN CHILD WELFARE

And A Big Congrats to Our 2018 Award Recipients:

Barbara Elias-Perciful, JD
Outstanding Legal Advocate

Tara Grigg Garlinghouse, JD
Outstanding Young Lawyer

Abstracts are Now Open!
We are now accepting abstracts for Anaheim 2019! Take this opportunity to share your thoughts, research, and outcomes with hundreds of child welfare law professionals. Please click here for more information or to submit now. Final deadline is February 3, 2019.

And... Save the Date for 2020!

August 24-26
Pre-conference Aug 23
Baltimore Marriott Waterfront
Baltimore, MD
LaShanda Adams

Relevant Background/Bio: My interest in the child welfare system began in 1997 when I interned at the Child Advocacy Unit of the DeKalb County Juvenile Court. In 1999, I was awarded a Skadden Fellowship to develop a kinship caregiver representation project at The Children’s Law Center in the District of Columbia. After the fellowship ended, I continued at the Center as an attorney and Director of the Family Permanency Project. I then worked as a Child Advocate in the New Jersey Office of the Child Advocate, where I contributed to numerous reports evaluating the performance of state agencies providing services to families and children. I have also served as a staff attorney at the American Bar Association Center on Children and the Law, a Practitioner-in-Residence with the General Practice Clinic at American University Washington College of Law, and an adjunct associate professor teaching Juvenile Law: Children’s Legal Rights. Prior taking on my current role as Associate Dean of Academic Affairs at the University of the District of Columbia David A. Clarke School of Law, I was the Director of the school’s General Practice Clinic. I received my B.A., summa cum laude, from Spelman College, and my J.D. from New York University School of Law, were I was a Root-Tilden-Kern scholar.

Why the NACC Board? I have always respected the NACC and its work. In 2016, I was “reintroduced” to the NACC when I was asked to write a chapter for the Red Book. I decided to seek board membership after reviewing the NACC’s new strategic plan. I am excited about the direction in which NACC is moving and want to contribute. I believe that I am at the point in my career where I have the time and expertise to be an asset to the board and the organization as a whole.

Skills/Representation: I have practiced child welfare law for over 15 years and have represented children, parents, and caregivers. I have also authored numerous articles on issues related to the child welfare system and have spoken at conferences across the country on child welfare topics. I currently serve on the Maryland Citizen’s Review Board for Children, which provides oversight to Maryland’s child protection agencies. As board member, I conduct case reviews of children in out-of-home care, make timely individual case and systemic recommendations, and advocate for legislative and systematic child welfare improvements to promote safety and permanency.

Term Goal: Since I am based in Washington, DC, I hope to contribute significantly to the Board’s legislative agenda. As a former parent’s attorney, I hope to add a perspective that will enhance the Board’s work. At the same time, I anticipate that I will learn a lot from my fellow Board members and through my Board membership.

Kathryn P. Banks

Relevant Background/Bio: I always knew that I wanted to be a lawyer who advocated for children, but didn’t know what that looked like. Entering law school I assumed I would be a prosecutor prosecuting child abuse, but then I stumbled upon a position my 1L summer working in the Youth Advocacy Unit of the local public defender’s office and I was hooked. My journey since then has provided me the opportunity to work with children and families in St. Louis in a variety of capacities, as well as a year to theorize as I completed my LL.M. in Child and Family Law at Loyola Chicago. I’ve been privileged to represent youth in conflict with the law in delinquency proceedings and I’ve been honored to serve as Guardian ad Litem for children and youth.
in the foster care system through Voices for Children, a local CASA organization. I’ve served as a staff attorney in a variety of clinics at Washington University’s School of Law and am now the Assistant Dean of Clinical Education at Washington University while also serving as the director of our Children’s Rights Clinic. In the Clinic I am excited to work every semester with a group of students, who may or may not become attorneys for children, but who without a doubt become an ambassador for the issues facing children and families. We work on any matter of cases impacting children and youth in our community. My journey and focus in my career has been and continues to be figuring out how to maximize the voice of children and how to make changes- either child by child or systemic- so that every child is valued.

Why the NACC Board? I still remember to this day, sitting outside in the grass in Colorado, attending the Rocky Mountain Trial Skills program put on by NACC. Our group was working on how to introduce evidence and I still use the skills learned that day and that week in my practice today. NACC has made me a better advocate for children and youth. In almost 20 years of practice, I have come to see what a difference a well-trained attorney can make for young people. I believe in the mission of NACC and am excited about the opportunity to become a part of an organization that also sees the value and importance in the representation of children and youth.

Skills/Representation: I bring practical experience, having been an attorney since 2001, spending that time representing children and youth in a variety of capacities. I know what it looks like to be an overwhelmed new attorney with what seems to be an insurmountable caseload and I also know what it is like to be an exhausted experienced attorney with what seems to be an insurmountable caseload. I’ve had experience working for non-profits and have served on several boards. As a professor and clinic director, I am able to work with law students to help them learn about lawyering and best practices, while also being able to focus on particular issues facing children and youth. I also bring the voice of a woman of color, a group underrepresented in this area. I will be able to pull from all of these experiences, skill sets, and lesson learned to inform my work with the NACC Board.

Term Goal: I would like to support the efforts of bringing best practices to attorneys all over the country who represent kids- either as attorney or Guardian ad Litem. It is easy to be siloed doing this work and NACC presents the opportunity to connect and learn. I am also looking forward to the opportunity to work on the issues surrounding kinship care- both formal or informal as more and more family members and kin welcome children into their homes.

Lily Colby

Relevant Background/Bio: I’m a foster care policy advocate, former foster parent and former foster youth. At 18 years old, after my freshman year in college, I became the temporary foster parent to my youngest brother. While in law school my husband and I took in two teenagers. I’ve seen firsthand how disengaged attorneys can make a negligible or negative impact on a person’s poor circumstances but strong advocates can change lives for the better both on an individual basis and on a systemwide level.

Why NACC Board? I’m deeply tied to the mission of the NACC because of my own personal and professional ties to the foster care system. I believe strongly that we need high quality, well trained attorneys representing children and youth. Whether it’s immigration, custody, child welfare, juvenile justice or any other proceeding, youth deserve high quality kind but fierce advocates.

Skills/Representation: I’m a policy advocate, an attorney, and an alumna of the foster care system. In college I majored in economics and took courses in social work, child development, and political science. During weekends, evenings and summers I volunteered as a tutor and mentor, and helped young people apply to college. In law school, I provided direct services at the East Bay Community Law Center, Legal Services for Children, and Michigan’s Child Advocacy Law Clinic. After law school I went on to work as an Equal Justice Works Fellow at the Youth Law Center and the National Center for Youth Law, focusing on educational policies affecting foster youth. Currently I’m a board member for Legal Services for Children and a Commissioner on the ABA Commission on Youth at Risk. I understand the big picture demands of nonprofit planning, and will gladly share what I’ve learned through my educational, personal and professional experiences.
Term Goal: My term goal is to celebrate the important role child welfare attorneys play, support efforts to provide quality training to children’s attorneys, and elevate the voices of those impacted by the child welfare system in our courtrooms and capitol buildings.

Sheri Freemont

Relevant Background/Bio: As a tribal member, Sheri always knew she would find ways to serve tribal communities. After law school and receiving her J.D. and Certificate in Federal Indian Law, Sheri began her legal career as a prosecutor and worked in family violence and child abuse. Later, as Chief Prosecutor for a tribe she assumed the responsibility for the dependency and criminal cases. It was there that the power of child and family voice and engagement in the overall outcomes became clear. Currently, Sheri is a Senior Director with Casey Family Programs, Indian Child Welfare Program, in Denver, Colorado. She served on prior nonprofit boards including Native American Bar of Arizona and Child Crisis Center of Arizona.

Why the NACC? Sheri began attending the conference as a prosecutor and was impressed by the broad array of experts and disciplines involved in the conference. She regularly uses the Red Book and other materials as resources for her own work or to refer to others that she consults with. She feels that her access to attorneys nationwide, specifically in tribes and underrepresented communities will allow her to link the voices of these communities to the broader NACC community.

Term goal Sheri is committed to elevating the voices of the indigenous communities to the broader child welfare system, and helping the system have better understanding and respect for cultural differences through collaborative learning.

Skills/Representation: Sheri has been conference faculty or curriculum developer for several areas of child welfare law since 2004. Her experience as one of the founding collaborators for the tribal family advocacy center in Salt River Pima Maricopa Indian Community, and later Director, developed cultural humility and trauma informed engagements skills, critical for effective representation of children and families. From her board experience, she has advocated for policy change at state level and educated peers about the need for quality representation for children in the legal systems.

NACC Members now receive a discount when subscribing to The Chronicle for Social Change!
Child Welfare Law Specialist Certification

by Daniel Trujillo, Certification Director
and Ginger Burton, Certification Assistant

Last Chance to Take Advantage of 40th Anniversary CWLS Application Pricing!

NACC’s special 40th anniversary CWLS application fee discount ends December 31, 2018. The reduced price of $350 (which includes a copy of the Red Book) is only in effect until the end of the year, so now is the time to apply! The application fee will be going back up in 2019. Get your main 9-page application and $350 fee submitted by December 31st and then finish up next year with the spring 2019 online Red Book Training Course (separate registration and fee required) and then tackle the CWLS exam! Check out our CWLS website for more information including the application and how to submit it. Please click here to pay your application fee online. If you have any questions, please contact us at Certification@NACCchildlaw.org.

Make Your New Year’s Resolution to Get Certified!

The federal Children’s Bureau strongly encourages every attorney practicing child welfare law to obtain CWLS Certification. Make 2019 your year to join the national community of Child Welfare Law Specialists and take advantage of reduced application fees in 2018.

CWLS on the Bench!

NACC is excited to announce that two of our Child Welfare Law Specialists have just been elected to judicial office. We are proud that these women are bringing their knowledge, expertise, and the CWLS credential to the bench. They will set the expectations high for all those who appear before them – for these two know what exceptional legal representation looks like!

Judge-Elect
Juanita Boger-Allen, CWLS
Cabarrus County District Court
Concord, North Carolina

In 1992, Juanita Boger-Allen earned a Bachelor of Arts Degree in Professional English from North Carolina A&T State University in Greensboro, NC. In 1998, she graduated magna cum laude and received a Juris Doctorate Degree from Michigan State University-College of Law. She also served her country in the United States Army. As a native of Concord, North Carolina, Juanita has strong ties to the Cabarrus County and the Greater Charlotte, NC community. Juanita has been licensed by the North Carolina State Bar since 1999. In her legal career, she has owned and operated her own law practice and has served as the Senior Attorney for Cabarrus County, handling cases involving the protection and welfare of children and the elderly and strengthening families. In 2011, Juanita became the fifth person in the state awarded national certification as a Child Welfare Law Specialist.

Judge-Elect
Rosie González, CWLS
Bexar County Court 13
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Born and bred in Brownsville, Texas, Rosie González has lived in San Antonio for over 30 years and has a family law practice. She attended St. Mary’s University where she received a Bachelor of Arts in Political Science in 1987 and later her law degree in 2001. Her career experience includes working as a child abuse investigator, gang counselor, juvenile probation officer, and as an attorney at her private practice, the Law Office of Rosa Maria Gonzalez. As a solo practitioner of family law, and represents chil-
Why The Washington State Supreme Court Got It Wrong on Lawyers for Kids

by Leslie Heimov and Susan Abrams

Over the past year, there has been increased attention on the right to legal representation for children who have been separated from their families at our borders. Images and stories of young children attending court hearings alone, without an attorney, have been shared by media outlets all over the world. With this new focus on the legal rights of children comes an opportunity to examine this critical issue within the context of our dependency court system. In a recent article, The Chronicle of Social Change highlighted the October Washington State Supreme Court decision, In the Matter of the Dependency of E.H., which denies children a right to legal representation in their dependency court proceedings. The Washington Supreme Court got it wrong. All parties — including children — must have access to high-quality legal representation.

Like it or not, the dependency court system is an adversarial system. While there are many points during a child welfare case where collaboration is effective and serves the family well, it cannot be overlooked that families are brought into the court process because the government has stepped into their private lives. In dependency proceedings, the state or county is most often seeking to separate children from their parents — an action that is very rarely welcomed or wanted.

This action has a significant impact on the life of a child, as do the decisions that follow — where the child will live, what contact will continue between the child and parents, siblings and other relatives, whether the child’s educational and medical needs are being met, and whether the child will eventually return home. The child’s life rests in the hands of the court. Without genuine voice — legal representation — in these proceedings, the child is chattel. The Washington Supreme Court in part denied a right to counsel based on a confounding assumption that, unlike for parents, there is no great potential for a loss of liberty for the child. An attorney might “increase the child’s comfort and agency in the courtroom,” but per the court, there is very little concern of an erroneous abridgement of a child’s liberty.

Congratulations to these new CWLS!

Elizabeth Ferrin, JD, CWLS
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Rachel Fisher, JD, CWLS
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Children’s Law Center of California
Monterey Park, CA

Donald Lee, JD, CWLS
Gwinnett County Juvenile Court
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Stacey Pinckney, JD, CWLS
Office of the Child Attorney
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Madeline Reed, JD, CWLS
Children’s Law Project of Hawaii
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Mary Shea, JD, CWLS
Merrill and Merrill, Chartered
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Emily Torres, JD, CWLS
San Diego County Counsel
San Diego, CA

Amanda Whittle, JD, CWLS
South Carolina Department of Social Services
Columbia, SC

Joshua Wickard, JD, CWLS
Ada County Public Defender’s Office
Boise, ID
The Washington Supreme Court got it wrong. To a young child, an unwarranted separation from parents, extended family, community, classmates and other supports may be the greatest deprivation that child will suffer. When separation is necessary due to a finding of abuse or neglect, the harm resulting from erroneous decisions continues, as the court will make many other decisions permanently impacting the child’s well-being: medical and mental health care decisions, school, placement, relationships with extended family and more.

Placement in foster care, whether for a few days or many months, can have a lifelong effect on the child. Countless research studies have documented the trauma and harm of separation. While we maintain that attorneys for both parents and children are critical, the damage to a child, when her rights are left unprotected, cannot be easily undone.

Almost always it is the child who loses everything familiar to her. It is the child who becomes a victim of the very system set up to protect her. Younger children may not understand the concept of temporary separation, and older children become painfully aware of being treated as “less than” when the court denies them something as basic as a lawyer to represent them in court.

In California, the legislature recognized decades ago that children and parents have a right to counsel in a dependency court case. While California can be proud of our statutory scheme, rights alone are not enough. Effective representation requires sufficient resources to ensure manageable caseloads, proper training and supervision, and retention of experienced counsel. As evidenced by the holding in *In the Matter of the Dependency of E.H.*, children and some parents walk into dependency courtrooms every day, all across our country, without a lawyer.

It is inconceivable that life altering decisions are made about them and about their family without a highly skilled lawyer standing by their side. Courts can only make the best decisions when presented with all of the available evidence. When the party with the power, in this case the government, has the advantage of representation, and the disenfranchised family members do not — the scales of justice cannot possibly right themselves.

All but 14 states mandate some form of legal representation for children. Every state mandates legal representation for parents at a hearing to terminate parental rights, but not necessarily at the onset of a case when critical decisions are made that will set a family’s path.

Despite the extraordinary rights at stake, very few states provide the resources to ensure every parent and child has a trained attorney with a manageable caseload at each stage of a dependency proceeding. The government, by contrast, always has publicly funded counsel. This must change.

In 2016, in collaboration with a diverse team of partner organizations, Children’s Law Center of California (CLC), the American Bar Association Center on Children and the Law, the Center for Family Representation, and Casey Family Programs launched the Family Justice Initiative (FJI). FJI’s mission is to ensure every child and every parent has high-quality, multi-disciplinary legal representation when child welfare courts make life-changing decisions about their families.

We must make the investment needed to ensure children have a voice in a system meant to protect them. As expressed by Washington State Supreme Court Justice Mary Yu in her dissent, children are individuals to be heard with their own set of protected rights and interests. We as a nation must stand by this principle.

Leslie Heimov is executive director of the Children’s Law Center of California (CLC). Susan Abrams is director of policy and training at CLC.

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Amicus Brief 
Case Summaries

In re the Dependency of S.K-P.
and the Absolute Right to Counsel:
The Washington Case, the Brief,
and the Decision

"[I]n Washington, the child is the only
party to a dependency proceeding
without an absolute right to counsel,
leaving ‘the most vulnerable’ party ‘powerless
and voiceless’ in the courtroom."1 In an effort
to rectify this, NACC signed on to an amicus brief ("Brief")
in support of Plaintiff-Appellant S.K-P. before
the Washington Supreme Court. The Brief argued
that dependency proceedings pose risks to all
children’s physical liberty interests, which mandates
a universal right to counsel for children in all
dependency proceedings.2 In a divided opinion
issued in October 2018, the Washington Supreme Court
ruled that the discretionary standard for appointment
of counsel in RCW 13.34.100(7)(a)
provides children with sufficient due process
protection under both the state and federal constitutions.
3 Despite not finding a universal right to
counsel, this opinion has taken a step in the right
direction, as Amici presented a compelling argu-

ment that all children’s fundamental physical liberty
interests are at risk in dependency proceedings.
S.K-P. entered foster care when she was seven years old.4 During her dependency proceed-
ings, S.K-P. requested legal representation, but the
juvenile court denied the request after applying the
Mathews test.5 The Court of Appeals granted S.K-P.’s
motion for discretionary review, in which she
argued that all children have the right to attorneys
in dependency proceedings.6 On the same day,
the Washington Department of Social and Health
Services dismissed S.K-P.’s dependency.7 Though
the appeal became moot due to the dependency’s
dismissal, the Court of Appeals held that children in
dependency proceedings do not have a categorical
due process right to court-appointed counsel, and
that juvenile courts should continue to use the
Mathews balancing test to appoint counsel on a
case-by-case basis.8
The Washington Supreme Court granted S.K-P.’s
petition for review and consolidated the case with
In re Dependency of E.H.,9 another case that also
challenges the validity of RCW 13.34.100’s discretion-
ary standard for appointment of counsel for
children in dependency proceedings and seeks
a categorical right to counsel for all children in
dependency proceedings.10
The Brief in support of S.K-P. first argued that
children have a presumptive right to counsel in
dependency proceedings because their phys-

ical liberty interests are at stake.11 Of the myriad
well-recognized risks to children in dependency
proceedings, Amici highlighted four — maltreat-
ment, institutionalization, instability, and involun-
tary medication.12
First, the potential for maltreatment is well-
documented. According to an annual report
published by the U.S. Department of Health and
Human Services in 2016, while the national rates
of maltreatment of all children declined from
2010-2013, the rates of confirmed maltreatment
of children in foster care did not.13
Next, children do best in family settings, but
when under the care of the child welfare system,
they often find themselves in the most restrictive
physical settings: an institution or group home.
More than 50,000 children are taken into state care
nationally each year.14 One in seven children in
foster care is placed in a group setting, even though
there is no documented clinical or behavioral need
to do so for more than 40% of them.15

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2. Id. at 2
5. Id.
6. Id.
7. Id.
8. Id.
Amicus

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are spending an average of 8-9 months in group placements, and more than a third remain in such settings even longer.\textsuperscript{16} In Washington, the number of children in institutions and group homes has increased year over year from 2010-2014.\textsuperscript{17}

A further risk is placement instability. Both the Washington Supreme Court and the legislature recognize the harmful consequence of placement disruptions to children. The Washington Supreme Court in \textit{In re Dependency of M.S.R.}\textsuperscript{18} expressly tied placement moves to children's physical liberty.\textsuperscript{19} Wash. Rev. Code Ann. § 74.13.310 also provides that "placement disruptions can be harmful to children by denying them consistent and nurturing support."\textsuperscript{20}

National policy and research confirms that instability can "fundamentally and permanently alter the functioning of key neural systems involved in learning, memory, and self-regulation and the complex networks of neuronal connectivity among these systems".\textsuperscript{21}

Additionally, the national trends for medicating foster children are alarming: Rates of psychotropic medication use in regional Medicaid claims analyses range from 37%-52% among youth in foster care, compared to approximately 4% in the general population.\textsuperscript{22}

Beyond these immediate risks, the Brief also noted the negative long-term consequences. Children aging out of foster care are much more likely to encounter problems such as illegal drug use, unemployment, homelessness, incarceration, and educational and emotional difficulties.\textsuperscript{23} The Brief maintained that all children in dependency proceedings are subject to these same contextual risks to their liberty interests, hence the right to counsel should attach in all cases.\textsuperscript{24}

The second part of the brief argued that all three of the Mathews factors weigh heavily in favor of appointing counsel to children in all dependency cases.\textsuperscript{25} First, the child's private interest at stake is great because of the deprivation of physical liberty.\textsuperscript{26} Second, the risk of erroneously depriving this interest is significant. While the state has an interest in protecting the child from harm, children have additional interests such as maintaining family ties, remaining in the community, and being free from continuous disruptions.\textsuperscript{27} Because the state's and child's interests are not always aligned, the state may not be able to adequately represent the child's interest, which may create a constitutionally significant risk of the erroneous deprivation of rights.\textsuperscript{28} Additionally, child welfare agencies do not always follow federal and state laws in providing services to children.\textsuperscript{29} As a result, the state's ability to adequately investigate, make decisions and protect children's safety is hampered.\textsuperscript{30} The subjective nature of a case-by-case analysis and the complexity of dependency proceedings would also magnify the risk of erroneous fact-finding.\textsuperscript{31}

The appointment of counsel would allow for better decision-making because the court will have a complete record.\textsuperscript{32}

Lastly, the state's own interest supports a decision to appoint counsel to all children in dependency proceedings. The state's role as de facto parent places an obligation in the state to ensure the child's safety.\textsuperscript{33} and this parens patriae interest cannot be used to justify standards that harm the child's interests.\textsuperscript{34} The U.S. Supreme Court recognized in \textit{Lassiter v. Dep't of Soc. Servs.}\textsuperscript{35} that the state's secondary interest — that the decision be made as economically as possible — is "hardly significant enough to overcome the private interests as important as those here": children's fundamental physical liberty interests.\textsuperscript{36}

The Washington Supreme Court did not agree with Amici's argument. Instead, it relied on both federal guidance and independent state constitutional analysis in reaching its conclusion that the discretionary right to counsel granted to children in dependency proceedings is adequate under Washington's due process guaranty. According to the majority opinion, dependency proceedings are not uniform, and some are more fraught with tension and conflict than others.\textsuperscript{37} For instance, when parents agree to the dependency or when the state does not assume custody of the child, the tension will be lessened.\textsuperscript{38} In other cases where...
the dependency is contested or when the state assumes custody of a child, the tension may be heightened. 39 Accordingly, the amount of process due to children in dependency proceedings will vary with each case. 40

The majority first held that both recent state precedents and Gunwall analysis support that the state due process protections are coextensive with the Fourteenth Amendment’s, thus the court should follow federal precedents regarding when a case-by-case approach to appointment of counsel is appropriate. It also directed courts to consider certain key factors to decide whether to appoint counsel to a child, including the age and custodial status of the child, whether the child disputes the facts, whether the child presents complex argument against the state’s proposed action and whether the child’s interest are aligned with other parties in the case. 42

However, in a respectful and poignant dissent, Justice Yu pointed out that the three state precedents cited by the majority are of little relevance in this context because they either only considered children’s right to appointed counsel in a different type of proceeding, or did not consider appointment of counsel for anyone. 43 Further, the nonexclusive Gunwall factors are evenly split, supporting an independent interpretation of the state due process protection. 44

As for independent State Constitution analysis, the majority opinion applied the Mathews test and considered the case-by-case approach as appropriate. It held that, first, the private interest varies depending on the circumstances. 45 Second, the amount of decisional accuracy added by adopting the proposed rule of automatic appointment of counsel is difficult to calculate, because whether counsel is required also depends on the facts of each case. 46 Third, the government’s interest against adopting a categorical requirement of representation is high, both in terms of cost and practicability. 47

The dissent took the same position as the Amici regarding how Mathews factors weigh in the context of dependency proceedings. In light of the significant private interests and rights at stake, the unacceptably high risk of deprivation without counsel, and the fact that no countervailing government interests justify the risk, the dissent emphasized that the current system of appointing counsel on a discretionary, case-by-case basis does not satisfy the state due process requirement. 48

However, the majority concluded that the discretionary standard for appointment of counsel provides children with sufficient due process protection, provided that juvenile courts apply the Mathews factors on the record at the earliest practicable time and without a presumption against appointment of counsel. 49 But just as the dissent noted, under this system, each child is subject to the policies and viewpoint of the particular court presiding over the case, limited only by the minimum requirements of constitutional due process. 50

Washington is among the minority of states that does not assign legal counsel automatically to children in dependency cases. Despite not finding a universal right to counsel, this opinion has taken a step in the right direction. Juvenile courts will be required to consider appointment of counsel on the record at the earliest possible stage of the dependency proceeding. The majority also directed dependency court judges to consider specific factors when deciding whether to assign legal counsel to a child.

Read the amicus brief. Read the Court’s opinion.
Amicus from previous page

In re T.S. and the Right to Independent Counsel:

The Pennsylvania Case, the Amicus Brief, and the Decision

In child welfare law, it is widely contested whether and when children have a right to counsel. Most states utilize a best interest representation model; some utilize an expressed interest model; and a few, like Pennsylvania, have a hybrid model. Because part of NACC’s mission is to advocate for legal representation for children in all dependency proceedings, NACC signed on to an amicus brief ("Brief") authored by the Juvenile Law Center in a case that had the potential to solidify children’s right to counsel in Pennsylvania. Although the resulting opinion from the Supreme Court of Pennsylvania did not affirm that right, the arguments discussed in this case may nevertheless elucidate the importance of ensuring independent legal counsel for children across the country.

The issue in the case, In re T.S., revolves around the hybrid representation model used in Pennsylvania child welfare proceedings. What defines a hybrid model differs from state to state, but in Pennsylvania it means that guardians ad litem are “charged with representation of the legal interests and best interests of the child.” Pennsylvania statute also specifically requires the appointment of counsel to children in contested termination of parental rights (TPR) proceedings. Taken together, these statutes raise the question of whether the legal counsel required for TPRs requires more than the legal representation provided by a guardian ad litem in this dual-role.

The Pennsylvania Supreme Court answered this question in 2017 when it stated in In re Adoption of L.B.M. that the language of 23 Pa.C.S.§ 2313(a) “demonstrates that the legislature recognized and understood the difference between counsel and a GAL.” As such, because the legislature required that counsel — rather than a GAL — be appointed for contested TPR hearings, this indicates a requirement for a higher level of representation than for other dependency proceedings. Furthermore, the Supreme Court held in that same case that “the failure to appoint counsel for a child involved in a contested, involuntary termination of parental rights proceeding is a structural error and is not subject to harmless error analysis.” Therefore, a court’s finding that legal counsel was not appropriately provided in a TPR is grounds for a new trial, regardless of any resulting prejudice. However, the Pennsylvania Supreme Court and the lower Pennsylvania courts have continued to grapple with what level of counsel is sufficient to meet this statutory requirement. Despite Amici’s arguments, in August of this year the divided Pennsylvania Supreme Court held in In re T.S. that a GAL appointed during dependency proceedings could adequately represent the child’s legal interests for the TPR, and that failure to appoint independent legal counsel does not automatically amount to a structural error.

In re T.S. is a case in which mother T.H.-H.’s parental rights were terminated after her two-year-old, T.S., was adjudicated dependent and neglected. T.S. had a guardian ad litem throughout the dependency proceedings, but after the holding in L.B.M., T.S.’s mother appealed the termination, arguing that her child should have been appointed independent legal counsel in addition to the GAL. The Superior Court disagreed, holding that independent legal counsel is only required when the child’s legal interests and best interests conflict. However, Amici challenged this opinion, arguing that separate legal counsel should always be appointed to children in these proceedings regardless of a conflict determination.

The crux of the Brief was simple: because the legal interests at stake in TPR proceedings are so important, courts should be hesitant to eliminate
safeguards that protect them. One such safeguard is making sure that the child’s legal interests are effectively protected by counsel. Although the Pennsylvania legislature has clearly decided that dual-role representation is sometimes sufficient, the Supreme Court has also clarified that “when a child’s relationship with his or her birth family could be severed permanently and against the wishes of the parents...a lawyer who represents the child’s legal interests, and who is directed by the child, is a necessity.”

The Court further “determined an attorney-GAL who is present and representing a child’s best interest can properly fulfill the role of Section 2313(a) counsel where, as here, the child at issue is too young to be able to express a preference as to the outcome of the proceedings.”

The Court’s opinion hinged largely on the fact that T.S. was non-verbal, ignoring the broader issues that were raised in the Brief regarding inherent conflicts between attorney-GALs and legal interest attorneys. For instance, GALs and expressed interest attorneys have different confidentiality requirements that can create impossible tensions when applied to the same person. A GAL may be mandated to disclose information that should be kept confidential by an expressed interest attorney. Without the clarity of what the attorney should do in this instance, clients may be less likely to share important information for fear that it will be disclosed, which in turn affects the quality of the attorney-client relationship and the attorney’s ability to provide comprehensive representation. It is further confusing to the court and to the parties if one person is representing both the legal interests and the best interests of the child, or when a GAL switches roles once they are at TPR stage.

The Court’s opinion also raised the issue of whether the attorney is given the option not to exert “grandfathered” powers. Because the attorney is given the option not to exert these powers, the risk is that he will focus on the subjective best interest determination instead because it is easier to ascertain. Although there is no evidence that the outcome for T.S. would have been different, these arguments illustrate the concern that children who do not have counsel specifically focused on their wishes may receive less just outcomes across the board than children who are represented by independent legal counsel.

See 42 Pa.C.S. § 6311(a).
See In re Adoption of L.B.M., 639 Pa. at 441.
13. See Br. at 16.
15. See In re T.S. slip op. at 19.
16. See In re Adoption of L.B.M., 639 Pa. at 441.
17. Id. at 21.
This risk of inequity is the basis for Amici’s argument that a model calling for independent legal counsel to represent the child’s expressed wishes eliminates the risk that a conflict will go unnoticed by a court. First, the child’s legal interests are just one of myriad factors that the GAL must take into consideration, whereas independent counsel can focus solely on the child’s legal interests, based on the child’s expressed wishes. Furthermore, an attorney whose sole responsibility is to represent the child has a more explicit obligation to determine what the child’s wishes are. For example, the practice guidelines for child representatives in Massachusetts — where expressed interest counsel is appointed to all children in dependency actions — goes into great detail about the types of efforts an attorney must make in order to determine what the child’s wishes are.

Although we would argue that a child’s interests in TPRs do not change based on his ability to speak, T.S.’s age became a crucial factor in the Supreme Court’s decision. T.S. was only two years old during the TPR proceedings and did not expressly direct the Court’s decision. T.S. was only two years old during the TPR proceedings and did not expressly direct the Court’s decision. The end result was that T.S.’s maternal relationship was severed forever.

To be sure, the Pennsylvania Supreme Court had already established that harmless error analysis is not required to establish a structural error in these cases. Therefore, the possible difference in outcomes is merely illustrative that independent legal counsel and a dual-role attorney provide different levels of effectiveness, rather than a statement that a different outcome would have resulted here. TPRs are considered a “death sentence to a parent-child relationship” and the Pennsylvania legislature has requested a higher standard of counsel for such proceedings. It therefore stands to reason that a representation model that gives discretion to disregard the child’s wishes should not be sufficient to meet that standard. The lack of procedure ensuring that an appropriate conflict analysis will always be conducted, no less by someone with the appropriate knowledge of child development, coupled with the inherent conflicts between the duties of a GAL and a legal interest attorney, show that TPR proceedings should require independent legal counsel to be appointed in every instance.

This argument fell on deaf ears. Although the Supreme Court established that the right to counsel under § 2313(a) belongs to the child, it did not establish a procedure to effectuate that right. The Court held that separate legal counsel only needs to be provided when there is an actual conflict that arises between the child’s wishes and the GAL’s determination of what is in the child’s best interest. And yet, the Court failed to clarify who would be responsible for making sure that a conflict analysis is conducted or who would be responsible for determining if a conflict exists. Therefore, the Court’s solution in this matter ignores the practical concern that the dual-representation approach does not guarantee that the child’s interests are actually going to be sufficiently represented.

Read the Court’s opinion. Read the brief.

22. Mass. R. Prof. C. 1.14 (explaining that Massachusetts attorneys are expected to look to non-verbal cues from very young children, observations of the child with his or her parents, and other methods to determine what the child wants, even if the child cannot speak to those things. After all those options are exhausted, if the attorney cannot determine what the child’s wishes would be, he is still obligated to maintain a normal client-lawyer relationship as much as possible.)

23. See In re T.S., slip op. at 21.


In April 2018, NACC filed an amicus brief in MD v. Abbott, No. 18-40057, in the United States Court of Appeals for the Fifth Circuit. NACC filed its brief in support of appellants and argued that the court affirm the United States District Court's ruling. Appellees, a certified class of minor children in foster care, originally filed suit alleging that the state of Texas violated their substantive due process rights under the 14th Amendment. The District court agreed, finding that the policies and practices of the Department of Family and Protective Services (DFPS) related to caseloads, monitoring and oversight, placement, and group homes violated plaintiff's substantive due process rights. Special Masters were appointed to study DFPS policies and procedures and submitted a list of findings and recommendations after two years. Shortly thereafter the district court entered a final order in favor of the Plaintiffs. The state appealed.

In its brief, NACC asserted three main arguments. First, in its appeal the state did not challenge the district court's holding that foster children have a 14th amendment substantive due process right to be free from an unreasonable risk of harm by the state and therefore waived that issue. Second, contrary to the state's assertions, the "special relationship" between foster children and the State imposes on the state a constitutional duty to protect foster children from an unreasonable risk of harm. And third, the district court correctly found that Texas violates the substantive due process rights of foster children.

On October 18, 2018 the United States Court of Appeals for the Fifth Circuit issued its opinion, in which it upheld significant portions of the district court's ruling related to the systemic flaws that create an unreasonable risk of harm to children placed in Texas's foster care system.

In addressing the violation of substantive due process claims, the court acknowledged that some psychological harm naturally befalls children who are removed from their home and placed in foster care, which does not rise to the level of a constitutional violation. However, the court did agree that children have a substantive right to "personal security and reasonably safe living conditions," which includes the very limited right to be free from severe psychological abuse and emotional trauma..." As examples, the court noted "persistent threats of bodily harm or aggressive verbal bullying." The court drew on precedent from the Deshaney case, in which the Supreme Court noted that "in a custodial setting, the State assumes at least 'some responsibility' for both an individual's 'safety' and his 'general well-being'."

The court then had to address whether the state could be held liable as a matter of law, noting that the state's conduct must be found to "shock the conscience." The court noted that under the standard, negligent conduct is not constitutionally sufficient. Rather, conduct showing an intent to injure or deliberate indifference is required. Significantly, the court noted that in assessing deliberate indifference, "it is enough that the [State] acted or failed to act despite [its] knowledge of a substantial risk of serious harm." Next, the court addressed causation. Disappointingly, the state argued that children who are placed in foster care are already "damaged" by the harm that was done to them and therefore, it is not possible to prove that the state, through its policies and procedures, inflicted the damage to children. Fortunately, the court quickly dismissed that argument, stating, "it cannot be the case...that because a child has experienced some form of abuse before the State intervenes, he is not capable of being further harmed by additional abuse or neglect while in foster care. It is illogical to argue that because a child comes in already 'damaged' the State cannot be held liable for inflicting further harm that compounds that damage – even if it cannot be measured with mathematical certainty."

The court further noted that there was a "wealth of evidence at trial" showing that many children experienced concrete harm after entering foster care. In addressing the appellants claims regarding DFPS policies and procedures, the court broke down the general argument into the four categories that were alleged to be constitutional violations: caseloads, monitoring and oversight, placement, and foster group homes.

2. Id
4. Id at 199-200.
5. MD v. Abbott, No. 18-40058 (5th Cir. Oct. 18, 2018).
6. Id
The 5th Circuit Court of Appeals found two of the four categories constitutionally problematic. Although professional standards and experts recommend caseloads of no more than 15 children, evidence presented to the District Court showed that some caseworkers have up to 60 cases and that the Assistant Commissioner of CPS itself testified that the average caseload is 28.1 children. The court noted that “numerous reports, internal audits, and comprehensive studies of the system conducted over several years — including some that were commissioned by DFPS itself, have informed the agency that caseloads are too high and that, as a result, children are at greater risk of harm.”

Lending further support for deliberate indifference, the court stressed that DFPS has failed to develop standards for appropriate caseloads, despite knowing that caseloads were too high and having the opportunity to do so. Tellingly the court stated, “[t]he lack of agency standards colors the lens through which we view the steps DFPS claims it has taken toward addressing the caseload management problem.”

As to the placement category, the circuit disagreed with the district court that out of region and suboptimal placements cause the type of negative effects that would rise to the level of constitutional significance. Furthermore, the court noted that even if it did rise to that level, there is not sufficient evidence that DFPS was deliberately indifferent because it showed “at least some concerted effort to remedy the problem.” Similarly, the circuit court also disagreed with the district court’s analysis and finding as to the foster group homes. Although the district court found that mixing children of different ages, sexes and service levels, along with insufficient monitoring and oversight in foster group homes placed them at an unreasonable risk of harm, the circuit court found a problem with the causation issue. Specifically, the circuit court noted that this “mixing” is often done in foster family home settings and yet, is not considered constitutionally defective. According to the circuit court, the plaintiffs failed to how and the degree to which mixing children of different ages, sexes and service levels magnifies the risk of harm to a constitutionally intolerable level.

Lastly, the court addressed the remedy, finding that the district court’s injunction was overly broad. The circuit court therefore vacated the injunction, and remanded with instructions to “remove the remedial provisions related to placement array and FGHs, and to strike provisions that are not necessary to achieve constitutional compliance.” However, the court upheld injunctive remedies on issues that the court found to be constitutionally infirm. Further, the court also upheld “crossover provisions” that were narrowly tailored to remedy the violations related to caseloads and monitoring and oversight.

Although the circuit court declined to affirm the full district court opinion, it did affirm much of the district court’s lengthy permanent injunction. In doing so, it is the first federal appellate decision to approve such a large scale overhaul and supervision of a state foster care system. It also significantly upholds the constitutional right of foster children to be free from unreasonable risks of harm while in state custody, paving the way for similar protections across the country.

10. Id. at 31.
11. Id. at 34.
12. Id. at 44.
13. Id.
14. Id. at 46.
15. Id. at 48.
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