REPRESENTATION OF PARENTS AND CHILDREN IN ABUSE AND NEGLECT CASES: THE IMPORTANCE OF EARLY APPOINTMENT

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Parents and children need competent, well-prepared, legal representation in abuse and neglect cases. California law provides attorneys for parents in abuse and neglect cases, but the timing of that appointment often means that the attorney is not prepared for the initial hearing. Policy makers and experts have written widely on the benefits of representation and the proper role of the attorney and GAL in abuse and neglect proceedings, but one issue seems to have been neglected, and that is the timing of the appointment. Unless the attorney/GAL is appointed well before the initial hearing and represents the client from the beginning of the case, the representation will likely be ineffective. This article will discuss the importance of appointing legal representatives for parents and children in child protection cases before any court hearings take place.

THE INITIAL HEARING

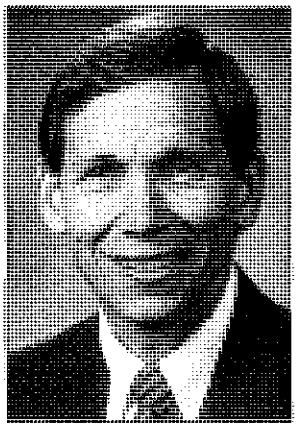
The initial hearing takes place shortly after a child has been removed from parental care. In California the hearing takes place within 72 hours of the removal. The hearing takes place on an emergency basis because time is of the essence in a child protection case.

The importance of the initial hearing led the experts who wrote The *Resource Guidelines* to recommend that the hearing take at least an hour.[1] They concluded an hour of court time was necessary to address the critical issues facing the court. The *Resource Guidelines* enumerate those issues as well as the value of a thorough examination of the case facts so that a child is not unnecessarily placed out of home.[2]

Judges make critical decisions throughout juvenile dependency cases and particularly at the initial hearing. The judge must decide whether the child can be immediately and safely returned to parental care before the adjudicatory hearing. Many policy makers believe this initial decision is the most important decision to be made in an abuse and neglect case.[3] Often the decision to remove at the initial hearing will create the status quo that will be difficult to change in subsequent hearings. As noted in the *Resource Guidelines*:

> Once a child is removed it becomes logistically and practically more difficult to help a family resolve its problems.[4]

Other decisions the judicial officer will make at the initial hearing include whether notice to the parents and relatives has been properly completed, who the child's legal parents are, and whether the child has Indian heritage. The judicial officer will make certain the parties (parents and child) understand the nature of the proceedings and the possible consequences and that they are represented by counsel or a GAL. The judicial officer will also make two additional enquiries and findings, both required by federal law. First, the judicial officer will determine whether it would be "contrary to the best interest of the child" to remain in the home,[5] and, second, whether the agency has made "reasonable efforts to prevent removal of the child."[6]



The emergency nature of the initial hearing places pressure on the judicial officer. When the docket is crowded and time is short, there may be no opportunity for a full discussion of the issues. Some courts devote only a few minutes to the initial hearing. The most conservative judicial position is to remove the child "just in case" more abuse or neglect may take place. After all, the thinking goes, there will be time to sort things out and in the meantime no harm can come to the child in placement for a few days. The approach in many social service agencies and courts is that removal is the safest course of action. However, removing a child from parental care is perhaps the most significant governmental form of intrusion into a family. Such intrusion is traumatic to all family members. Child development experts believe that the child needs consistent care from a caretaker, and removal disrupts the child's stability.[7] With confused and inexperienced parents and children appearing in court, it becomes even more important for a more deliberate and lengthier hearing with well-prepared attorneys and GALs.

THE IMPORTANCE OF EARLY APPOINTMENT OF COUNSEL BEFORE THE INITIAL HEARING

Most parents do not understand what happens in child protection proceedings. They find the courtroom setting intimidating and have little or no experience with complex child protection system. They need assistance when facing the state with all of its resources and power. They need someone who understands how to reinforce messages from the court and agency that are designed to assist them, and speak up and challenge the positions taken by the child protection agency and its attorney when those positions are not supported by the law or evidence.

Taking more time at the initial hearing will produce better results for children and families. The Permanency Planning for Children Department at the National Council of Juvenile and Family Court Judges conducted an experiment in three juvenile courts, including one from California, in which the judicial officer spent additional time at the initial hearing and asked specific questions from a benchcard. The results of this study demonstrated that an enhanced initial hearing resulted in fewer children being removed

from parental care, more family placements, and fewer children placed in non-relative foster homes.[8]

Early appointment of counsel for parents and the child will result in more meaningful initial hearings, more attention to critical issues, a strong voice for the child during legal proceedings, and more accountability for the child welfare agency. It will also result in serving the best interests of the child.

Numerous factors prevent the attorney from being effective at the initial hearing.

ATTORNEYS FACE TIME PRESSURES

In most counties, the court appoints an attorney at or just before the initial hearing. The agency generally will provide copies of the petition or other moving legal papers as well as supporting documents at or just before the initial hearing. As a result, there is insufficient time for either the attorneys or GALs to be fully prepared for that hearing. The attorney must locate and meet the client, develop an attorney-client relationship, and learn about the facts of the case. The attorney must inquire about alternative placements and services that might provide a less-intrusive placement than foster care such as with a relative. The attorney must review the moving papers filed by the child protection agency and the supporting documents. Those documents may differ significantly from the facts provided by the client, and the attorney must discuss those differences with the client. If relatives can provide placement alternatives, the attorney will have to discuss the case with them. The attorney must also discover what efforts the agency made to prevent removal and determine whether these efforts were reasonable given the facts of the case. All of this must happen in the face of judicial and peer pressure to call the case and complete the calendar.

As a result the parent and the parent's attorney have little to say at the most important stage of the child protection process, the initial hearing. A national survey of representation in abuse and neglect proceedings summarized this situation when it concluded that "there is poor preparation" by attorneys.[9]

The lack of appellate case law reflects the failure of attorneys to challenge by writ or appeal actions taken at the initial hearing. This is understandable. An attorney seeking appellate relief has the burden of reviewing transcripts and filing briefs in a short time, almost always without additional compensation

ATTORNEYS HAVE TOO MANY CASES

Because attorneys representing parents are often under-paid, they often have to carry high caseloads or take on other case types in their legal practice in order to make a living. The demands of too much legal work can result in cutting corners, being unprepared in court, and less than zealous advocacy for their clients.

ATTORNEYS LACK TRAINING

Even if the parents are represented by counsel at the initial hearing, many attorneys lack training to alert them to the issues that should be raised at the hearing and particularly the reasonable efforts issue. A national study of parents' attorneys and GALs reported that training was the area needing the most improvement.[10] This training should include the dynamics of domestic violence, substance abuse, mental health, child development, family dynamics, and legal issues such as the reasonable efforts finding.[11] Attorneys practicing child welfare law receive little to no training on how to engage and successfully communicate with the client population or deal with vicarious or secondary trauma, thus increasing the rate of burnout, particularly among parent's attorneys.

BARRIERS TO EARLY APPOINTMENT

Judges and court administrators do not purposely deny parents adequate representation at the initial hearing. In most situations, they follow practice that originated in criminal courts where attorneys often are appointed for indigent defendants upon commencement of the first hearing. Child protection cases differ from criminal cases in the nature of the proceedings, the time necessary to be adequately prepared for the hearing, and the critical decisions that are made at the initial hearing. Early attorney appointment is necessary to protect the interests of the parents and the child.

Many judges have been reluctant to appoint attorneys early in child abuse and neglect cases. Some typical judicial concerns are discussed below.

I CAN'T APPOINT AN ATTORNEY WHEN I DON'T KNOW IF THE CLIENTS WANTS ONE

Some judges believe they cannot appoint an attorney until the case comes to court and the client asks for an attorney. They ask "what if the client does not want an attorney?" This occurs rarely in abuse and neglect cases, but when it does, the judge can relieve an appointed attorney once the parent indicates his or her desires. This solution will work if the judge and court administration have created a working relationship with the attorneys who typically represent parents in abuse and neglect proceedings. The details of such an arrangement are described below.

WHAT IF THE CLIENT COMES TO COURT WITH A PRIVATE ATTORNEY?

If the client comes to court having retained a private attorney - another rare occurrence in most juvenile and family courts - once again the judge can relieve the appointed attorney at that time.

HOW DOES THE COURT KNOW IF THE PARENT IS INDIGENT?

Judges have an additional concern. What if the parent does not qualify for an attorney at state expense? The attorney can determine whether the client is indigent when he or she first meets the client. If the client is not indigent, the attorney could advise the client about retaining private counsel. Some courts have gone so far as to permit the attorney to represent the client through the initial hearing, and the county financial office can seek reimbursement after the hearing. This practice demonstrates the court's emphasis on having a meaningful initial hearing.

HOW CAN AN ATTORNEY WORK WITHOUT AN APPOINTMENT?

Judges ask how an attorney can work without a judicial appointment. This can occur if the judge and court administration work

out a contractual agreement with the attorneys and GALs who represent parents and children in child protection cases.[12] The agreement would specify when the appointment would begin, typically simultaneously with the filing a petition on behalf of a child. The child welfare agency can be ordered to deliver the moving papers and supporting documents to the designated attorney or attorney office immediately after filing the petition. In many court systems this has been accomplished electronically. The attorney would receive a copy of the petition as well as the supporting documents and take steps to meet with the client and begin preparation for the initial hearing. If an indigent parent has agreed to attorney representation at the initial hearing, but now wishes to waive his or her right to an attorney, the court would permit the attorney to withdraw from the case. If the attorney is not relieved, the court would confirm the appointment from the bench, and that attorney would continue representation of the client for the remainder of the case.

Several juvenile courts hearing abuse and neglect cases instituted these procedures years ago. Sacramento and Santa Clara Counties worked with the attorneys who represent parents and the attorneys and GALs who represent children and devised protocols that insure that these representatives are well prepared at the time of the initial hearing. They report that the system works very well.

RECOMMENDATIONS

Meaningful initial hearings require well-prepared advocates for parents and children. Current practice should be modified so that parents' attorneys and GALs are appointed simultaneously with the filing of a petition so that they have an opportunity to be as well prepared as possible for the initial hearing.

One court recognized this reality several years ago. The judges in Multnomah County (Portland, Oregon) schedule a second shelter hearing a few days after the initial hearing so that the critical decisions made at the outset of the case could be more carefully addressed.[13] An evaluation of the second shelter hearing concluded that more parents appear at this hearing, and that they remain involved through the adjudication process. This hearing also resulted in increased numbers of fathers and relatives identified and shortened the time for that identification. Furthermore, more valuable information was available to the court by the time of the second shelter hearing.[14]

Whether or not a court adopts the second shelter care hearing, presiding judges and court administrators should modify their procedures so that attorneys and GALs are appointed no later than the moment a child abuse and neglect case is filed. The child welfare agency should be required to send copies of the petition and supporting documents to the appointed attorney's office immediately after their office has filed the petition. The appointed attorney should immediately contact the client and begin preparing for the initial hearing. Should the client decline representation, the attorney should report that to the court. If the client is not indigent, the attorney should inform the client to retain a lawyer immediately or represent the client through the initial hearing with reimbursement to the court thereafter. At the hearing the attorney should vigorously address a number of critical issues including the reasonable efforts to prevent removal, the legal sufficiency of the petition, relative placement, and visitation. If the court appoints the attorney/GAL at the initial hearing, the attorney/GAL should ask for a short continuance to prepare for the hearing.

By using these procedures the parents and child will have more effective representation at the initial hearing. Without some court procedure that results in early appointment of counsel, the attorney will be unprepared, and the parents and child will be helpless before the juvenile court. More children will be detained at the initial hearing, many unnecessarily, and other critical issues will not be addressed fully, if at all.

Endnotes:

1 *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases*, NCJFCJ, Reno, 1995, at p. 42. (hereinafter *Resource Guidelines*). "A complete preliminary protective hearing requires a substantial initial investment of time and resources." at p. 32.

2 *Id.*, at p. 31.

3 *Id.*, at p. 30.

4 *Id.*, at p. 30.

5 Section 472(a)(2)(A)(ii) of the Social Security Act and 45 CFR 1356.21(c).

6 Section 472(a)(2)(A)(ii) of the Social Security Act and 45 CFR 1356.21(b)(1)

7 Fahlberg, Vera, *A Child's Journey Through Placement*, Prospective Press, Indianapolis, 1996, at pp 170-174. For an extensive discussion of the need for timely action in a child protection case see Edwards, L., "Achieving Timely Permanency in Child Protection Courts: The Importance of Frontloading the Court Process," *Juvenile and Family Court Journal*, Vol. 58, No. 2, Spring, 2007, 1-37 at pp 5-6.

8 "Right From The Start: The CCC Preliminary Protective Hearing Benchcard Study Report: Testing A Tool For Judicial Decision-Making," PPCD, NCJFCJ, Reno, 2011, at p. 3.

9 National Council of Juvenile and Family Court Judges, Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice, 1998, at 15.

10 "The number one area identified as needing the most improvement with regard to representation was training of attorneys and guardians ad litem (GAL's)." *Id.*, at p. 15.

11 *Id.*, at pp 33-35.

12 The court has the authority to appoint lawyers for indigent parents. That authority encompasses the ability to make contractual arrangements concerning the details of the terms of appointment.

13 The second hearing is referred to as second shelter hearing. For details see "The Portland Model Court Expanded Second Shelter Hearing Process: Evaluating Best Practice Components of Front-Loading," Technical Assistance Bulletin, Vol. VI, No. 3, PPCD, NCJFCJ, Reno, July, 2002 .

14 "The Portland Model," *Id.*, at p. 98.