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THE ROLE OF THE CHILD'S ATTORNEY IN CHILD PROTECTION PROCEEDINGS:

WHEN TO ADVOCATE A CHILD'S BEST INTERESTS VS. EXPRESSED WISHES

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THE ROLE OF THE CHILD'S ATTORNEY IN CHILD PROTECTION PROCEEDINGS:

WHEN TO ADVOCATE A CHILD'S BEST INTERESTS VS. EXPRESSED WISHES

The purpose of this paper is to educate attorneys for children in child protection proceedings about child development and the impact of trauma in order to help them make better informed determinations regarding their child client's capacity to direct the objectives of the representation.

The debate over the proper role of attorneys for children has been raging for well over two decades.¹ There are principally two points of view on this issue. According to the guardian ad litem (GAL) or "best interests of the child" school of thought, children's lawyers must conduct a thorough investigation, make their own determination as to the best interests of the child and advocate that position zealously, regardless of whether the child agrees with that position. According to the "client-directed" or "expressed wishes" school of thought, children's lawyers should take direction from their clients about the objectives of the representation. The lawyer must advocate for the youth's counseled and expressed wishes (Buss, 1999; Duquette, Orlebeke, Zinn, Pott, Skyles & Zhou, 2016; Khoury, 2010; UNLV Conference on Representing Children in Families, 2006). In some states the role of the child's attorney may be predetermined by state statute, rule or court order.

Few attorneys in either camp "take an absolutist position" (Buss, 1999, p. 903; Duquette et al., 2016, p. 57). Both types of attorneys are bound by ethical rules of conduct similar to those set forth in the ABA Model Rules of Professional Conduct (1983), Rule 1.2 ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation...") and Rule 1.14 which governs an attorney's responsibilities when dealing with a client with "diminished capacity to make adequately considered decisions because of minority, mental impairment or for some other reason." Thus, "expressed wishes" attorneys assume the client-directed role only in those cases where the child client is at least capable of communicating a position. On the other hand, "best interests" attorneys recognize that in some cases their child clients have reached a level of maturity that warrants treating them like adult clients to whom they owe a duty of zealous advocacy for their client's position as to the objectives of the litigation (Buss, 1999).

¹ See, e.g., the varying viewpoints presented in the special issues of the Fordham Law Review (Volume 64, 1996) and the Nevada Law Journal (Volume 6, 2006)

There is considerable variability among states' legislation and rules defining the role of the child's attorney. For example, in many jurisdictions that require the appointment of a GAL/attorney, the GAL must inform the court what the child's opinion is and, if it differs from that of the GAL, the court may appoint an attorney to represent the child's expressed wishes, often depending on the child's age. In some jurisdictions the court must appoint an "expressed wishes" attorney under certain circumstances. Other states have drawn the line at certain ages. For example, in Vermont, a child under the age of 13 is rebuttably presumed to be incapacitated and thus the attorney must take direction from the court-appointed GAL as to the objectives of the representation (Piper, December 1998).² Other states place the line of demarcation at different ages: 12 (Idaho), 10 (Minnesota) and 14 (New Mexico and North Dakota)³. Some states dictate that attorneys should assume the "best interests" role if the child lacks "considered judgment" (Maryland and Oregon), is incapable of "knowing, voluntary and considered judgment" (New York), is "incapable of judgment and meaningful communication" (Oklahoma) or is not competent to understand the nature of an attorney/client relationship (Texas)⁴ (First Star, 2018).

According to the 1996 ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (Commentary to B-3), the child's attorney should determine whether the child is "under a disability" with respect to each issue on which the child is called upon to direct the attorney. The standards stress that disability is "functional," "contextual, incremental and may be intermittent" (American Bar Association, 1996, p. 4).

In 1996, the National Association of Counsel for Children (NACC) offered a revised version of the ABA standards (National Association of Counsel for Children, 1996, amended 1999). In 2001 the NACC issued its own recommendations for representation of children in abuse and neglect cases. The NACC endorsed the ABA's position that the child's attorney should represent the child's expressed preferences but stressed the attorney's counseling function, stating that "attorneys are not required, without first counseling their client as to more appropriate options, to blindly follow directives that are clearly harmful to the client." NACC recommendations call for attorneys to assume the role of the GAL, substituting judgment based on objective criteria where the child is "incapable of judgment and meaningful communication" (National Association of Counsel for Children, 2001, p. 9-10). The NACC also recommends that attorneys should

² In support of this approach, see Grisso (2005:7): "We are fairly certain that youth in pre-adolescence are at far greater risk of incompetence to stand trial than are adults, enough so that per se rules (e.g., presuming incompetence below age 13) could be supported by current research data..."

³ The ABA's 2011 Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings contains the following provision: "[STATES MAY CONSIDER INSERTING THE FOLLOWING TWO SENTENCES:] [Under this subsection a child shall be presumed to be capable of directing representation at the age of _____. The presumption of diminished capacity is rebutted if, in the sole discretion of the lawyer, the child is deemed capable of directing representation.]" (American Bar Association, 2011, Section 7(e)).

⁴ See First Star and the Child Advocacy Institute (2018) for a description of each states' rules and/or legislation governing the role of the child's representative in child protection proceedings.

“request the appointment of a separate GAL after unsuccessful attempts at counseling the child, when the child’s wishes are considered to be seriously injurious to the child” (National Association of Counsel for Children, 2001, p. 10).

In 2011 the American Bar Association (ABA) adopted the Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (American Bar Association, 2011). The model act makes clear that it is the lawyer’s duty to determine “whether the child understands the nature and purpose of the proceeding and the risks and benefits of a desired position” and the lawyer “should continue to assess the child’s capacity as it may change over time” and may depend upon the type of issues on which the child is called upon to direct the representation (American Bar Association, 2011, p. 12). The lawyer is the sole determinant of the client’s diminished capacity (American Bar Association, 2011, Section 7(d); Khoury, 2012).

In this policy paper, APSAC does not attempt to resolve the debate about the role of the child’s attorney- “best interests” vs. “client directed.” Rather, we think the best approach is that taken by Donald Duquette and colleagues (2016) who view the two positions as having some commonality in that both roles require the attorney for the child to:

- 1) Understand the child in the context of his or her family and community (e.g., school and faith communities, etc.),⁵ get to know the child, listen to the child’s preferences, understand the child’s reasoning, look at the totality of the child’s circumstances and interview the child using developmentally appropriate interviewing techniques; and
- 2) Make a determination about the child’s capacity to direct the objectives of the representation.

This policy paper aims to offer guidance as to how attorneys are to fulfill both responsibilities.

The ABA’s 2011 Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings sets forth criteria for determining diminished capacity including: “the child’s developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child’s decisions, strength of wishes and the opinions of others, including social workers, therapists, teachers, family members or a hired expert” (American Bar Association, 2011, p. 11). This is similar to the position taken by the Working Group on Determining the Child’s Capacity to Make Decisions at the Fordham Law School conference in 1996. According to that group, the question children’s attorneys must ask is “whether the child is able to articulate a rational, independent choice, with a true

⁵ Some use the phrase “enter the child’s world” to express this concept. See Duquette, D.N., Orlebeke, B., Zinn, A, Pott, R, Skyles, A, & Zhou, X. (2016). Children’s Justice: How to Improve Legal Representation of Children in the Child Welfare System at 65-94. This phrasing may be problematic in multidisciplinary settings. APSAC is currently working on preparing recommendations describing ways to ensure that individual, confidential meetings between adults and children are safe.

understanding of the consequences” (Working Group on Determining the Child’s Capacity to Make Decisions, 1996, p. 1346).

In order to address these factors, attorneys need to understand the growing body of research on child development and the impact of trauma. While the National Child Traumatic Stress Network (NCTSN) and the ABA have offered tips for attorneys and courts on implementing trauma-informed practices (American Bar Association, Approved February 10, 2014; National Child Traumatic Stress Network (NCTSN)), these national organizations have not offered guidance on determining the impact of trauma on a child’s decision-making capacity in the context of child protection proceedings.

The American Professional Society on the Abuse of Children (APSAC) is uniquely positioned to fill that gap given its members’ extensive expertise and experience with children’s cognitive, social and emotional development, particularly where child maltreatment is involved. At what age and developmental stage is a child capable of understanding the consequences of decisions made at various hearings in child protection proceedings? Under what circumstances is a child capable of making a rational decision about the objectives of the litigation? When is it psychologically damaging to ask a traumatized child to make a choice?

THE SCIENCE OF CHILD DEVELOPMENT

Emerging Consensus

Determining a child’s decision-making capacity requires that lawyers be aware of the research about child development. A general consensus about child development has emerged over the years and may be divided into the following categories: neurological, intellectual, and emotional/psycho-social development.

Neurological Development

Brain stem: The brain stem is an important area of neurological development in childhood. It is well developed in utero and ready to function in a healthy, fully gestated child. It controls the human body’s most basic functions including heart rate and blood pressure, breathing, digestion and waste removal, and levels of arousal (highly responsive or lack of response to stimuli). It also controls automatic and reflexive behaviors, such as sweating or shivering, vomiting, and swallowing, and coordinates with the limbic system to produce the fight/flight/freeze response. Even the most basic functions of the brain stem have important implications for healthy vs. pathological development in childhood. Environmental risks in utero such as stress, domestic violence, lack of prenatal care, malnutrition, drug exposure, and preterm birth can all cause pathology in brain stem development. Severe childhood trauma after birth can also cause dysregulation in the brain stem function.

Limbic system: The limbic system is the brain structure that controls emotional regulation and reactivity, autobiographical memory (including emotional memory), and the ability to evaluate other's facial expressions and trustworthiness. The limbic system is the area of the brain that initiates the fight/flight/freeze response and triggers the brain stem to respond also in coordination to possible threats. The limbic system's emotional regulation functions include both self-regulation and co-regulation with others, which is a key aspect of early infant-mother bonding and healthy attachment. While development of the limbic system begins at birth (and possibly even in utero), when the child creates their first emotional memories, "[t]he structural and functional maturation of the limbic system is typically incomplete until mid-adolescence" (Lamb, Malloy, Hershkowitz & La Rooy, 2015, p. 6).

Pre-frontal cortex: It is well-documented that one of the last areas of the brain to develop is the prefrontal cortex. This brain structure is the center for executive cognitive functioning- planning, thinking about possible consequences of any course of action and delaying impulsive and emotional reactions. Neurological development of the prefrontal cortex continues at least until age 25. Thus, one does not generally see until early to mid-adolescence the kinds of basic information processing skills, deductive reasoning, and abstract thinking which is essential for thinking about hypothetical (future) circumstances (Grisso, 2005; *Roper v. Simmons*, 543 U.S. 551 (2005)).

Intellectual and Cognitive Development

Children's cognitive and intellectual development begins in utero and continues throughout the lifespan, with the first three years of life being the time of most rapid development. By 36 months old, 80% of brain development and intellectual capacity is complete (Sternberg, 2000). Psychologists have developed multiple theories of intellectual development, including Piaget's groundbreaking and foundational cognitive-developmental theory, also sociocultural theory (Vygotsky, 1978), core-knowledge theories, and information-processing theories (Chen & Siegler, 2000). Piaget posited that children are intrinsically motivated to learn, learn many things on their own without adult intervention, and construct their own knowledge from experimenting on the world. (Opfer). Children age 0-2 learn through sensory-motor exploration and within a caregiving context. As the hippocampus matures and verbal language advances, typically developing children 2-7 begin to create mental symbols for objects and ideas, children 7-12 begin to reason about concrete ideas and concepts, and children 12 and older begin to reason abstractly and understand hypotheticals (Opfer). Vygotsky argued that child development occurs within unique sociocultural contexts, which influence and explain diverse developmental trajectories.

Attachment theory, which is most often associated with emotional development, also has implications for cognitive development. Attachment theory demonstrates that children must feel safe and secure in their attachment to a primary caregiver before they will feel safe to go out and explore their environment and learn (Bowlby, 1998). They must have a healthy and attuned caregiver as a "secure base" from which to explore, and be able to reconnect with that caregiver when they feel stressed or overwhelmed by the learning environment (Bowlby, 1998).

Attorneys for children need to develop an understanding of the cognitive abilities of children at each stage of cognitive development, and to be able to anticipate that a traumatized child may be a full stage behind in intellectual ability.

Moreover, attorneys for children need to understand that it is questionable whether children or even some adolescents can engage in a traditional attorney / client relationship. Even Emily Buss (1996:1752, 1999), a self-described advocate for child empowerment, acknowledges that where the role of the attorney cannot be understood by a child, “it is probably inappropriate for the lawyer to assume the traditional attorney role, for the child who cannot understand his lawyer’s role (or his own role in the relationship) will never be in a position to truly direct the representation.” Buss (1999) concedes that her earlier (1996) assertion that children should have the developmental capacity to understand their lawyer’s role by age 7 or 8 failed to take into account the impact of maltreatment on the child’s understanding of the “unfamiliar and unusual role of the lawyer” (Buss, 1999, ftn 117)(But see Davis, Hartfeld & Weichel, (2019: 167, ftn. 54) who choose “age seven as a demarcation point between a major and minor restriction based on the position of some advocates that a particular age is an appropriate separation between the need for a client-directed”).

In the context of criminal and delinquency proceedings, a necessary component of a defendant’s legal competence to stand trial is having “the necessary factual and rational understanding and capacities to consult with a lawyer” (Godinez v. Moran, US Sup. Ct., 1993). Surely the rights and interests at stake in a child abuse and neglect proceedings are entitled to the same protection as those in criminal and delinquency proceedings. One would not expect a youth determined to be legally incompetent to stand trial to be capable of directing his or her attorney in child protection proceedings where competing interests of safety and family preservation are at stake. Determining what is in the best interests of the child in these cases is complex even for the experts and professionals involved in the case.

Thomas Grisso, a psychologist and widely acknowledged expert in juvenile development, has studied at what ages 1) juveniles are capable of making knowing, intelligent and voluntary waivers of Miranda rights; and 2) juveniles are competent to stand trial in criminal and delinquency proceedings. As noted above, legal competence to stand trial (CST) requires an ability to collaborate with legal counsel. In defining CST, Grisso states that the juvenile “must be able to communicate important facts to the lawyer and work with the lawyer as an independent decision-maker in arriving at choices about his or her defense” (Grisso, 2005, p.335). Grisso’s findings are clearly germane to any determination of a child’s decision-making capacity in abuse and neglect proceedings.

In the MacArthur Juvenile Adjudicative Competence Study (Grisso et al., 2003:335), Grisso and colleagues point out that the standard used for determining CST is whether the youth possesses “a basic comprehension of the purpose and nature of the trial process (understanding), the capacity to provide relevant information to counsel and to

process information (reasoning) and the ability to apply information to one's own situation in a manner that is neither distorted nor irrational (appreciation). The MacArthur study used a sample of 927 youth, ages 11-17 and a comparison group of 466 young people ages 18-24. Some of the youth were in jails and detention centers and some were in the community with no court involvement. Grisso and colleagues found that more than one half of youth with IQs between 60 and 74 and more than one third of youth with IQs between 75-89 were significantly impaired in the necessary capacities associated with CST. Among 14- to 15-year-olds, about 40% of those with IQs between 60 and 74 and more than 25% of those with IQs between 75-89 were so impaired. About two thirds of detained youth less than 15 years old were associated with significant risk of not being CST. These study findings were made while controlling for gender, ethnicity, detained vs. community status, IQ, and socio-economic status. Grisso and colleagues (2003: 356) concluded: "Our results indicate that juveniles aged 15 and younger are significantly more likely than older adolescents and young adults to be impaired in ways that compromise" their CST.

Cognitive development is necessarily affected by the range of a child's experience in life. This is particularly true in cases of child maltreatment. Cloitre and colleagues (2006:72) point out, children's

reference points for evaluating the relative degree of life hardship are their immediate environments, particularly their families. Only through the exploration of the larger social world, via school and peer relationships in the preteen to early teen years, do abused children actually begin to realize that their home lives deviate from those of other youth.

As Lamb et al., (2015:12) explains,

many of the legal decisions children are being asked to make involve the calculation of risk and/or the evaluation of alternative scenarios, and the ability to engage in such complex decision making does not develop until adolescence.

Lamb et al. (2015:13) goes on to point out:

Older adolescents are better able than children and younger adolescents to appraise the future consequences of their behavior and to perform other complex executive functions although these skills do not fully develop until late adolescence and early adulthood, probably because they depend on the structural and functional maturation of the prefrontal cortex. Legal decision making and legal reasoning abilities improve with age although inadequate safeguards are in place for youth with emergent decision-making skills. Immature reasoning may be even more common among youth involved in the justice system, who are disproportionately affected by mental health issues and impairments in intellectual ability (citations deleted).

See, also, King (2006: 101, 110) (“juveniles as a group lack the psychosocial maturity and cognitive capacity to waive Miranda rights,” arguing that children do not think and reason like adults because “they are physiologically incapable to doing so.”)

Emotional and psychosocial development

Children’s attorneys must also have a basic understanding of children’s emotional/ psychosocial development. Attachment theory is the leading conceptual framework for talking about children’s emotional development. Developed in the 1950’s by the pioneering Dr. John Bowlby, lead consultant to the World Health Organization, attachment theory posits that children develop normally due to the presence of a warm, nurturing, consistent, reliable primary caregiver. Beginning from the moment of birth, babies must have a caregiver that is highly attuned to their mood, level of arousal, and physical and emotional needs. The caregiver must be both highly attuned and highly responsive in meeting those needs, including feeding the child, changing their diaper, and holding and soothing them in a rhythmic, coordinated, predictable manner. This teaches the child that the world is a safe place where their needs matter and their needs will be met, and also teaches the child that other people are a source of safety and love. Throughout infancy, the child must be able to engage with their caregiver in mutual attunement, reciprocity, co-regulation, and shared intersubjective meaning (Bowlby, 1969, 1983).

Research has repeatedly shown that adolescents are 1) more susceptible to peer and parental influences; 2) more likely to focus on immediate rather than long-term consequences; and 3) more inclined to make riskier choices than adults. It is essential for lawyers to “check on undue influences” and “take into account emotional reactions that may be clouding rational decision-making” (Mlyniec, 1996, p. 1912).

Grisso and colleagues (2003: 335) state: “Differences between adolescents and adults are not only cognitive but also involve aspects of psychosocial maturation that include progress toward greater future orientation, better risk perception and less susceptibility to peer [and parental] influence.”

At least until adolescence, children are very influenced by their parents. Grisso (2005: 12, 22) explains that “competence is contextual.” And given children’s emotional, physical and legal dependence, a child’s caregivers or parents are a constant “psychological presence” and “an ever-present part of the social context in which youths live and function.”

In abuse and neglect cases especially, parents are an integral part of that context. Vandervort (2015:70) states: “Children will often underreport their exposure to abuse or neglect...[and] may minimize their experiences to protect family members or because they’ve been instructed not to disclose information to people outside the family.”⁶

⁶ Commentary to B-4(3) of the ABA Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases (1996) notes the many reasons behind children’s expressed preference for returning home:

Similarly, Kraemer & Patten (Part 1, 2014:199) advise attorneys that “[y]outh may be hesitant to share their experiences because adults have told them not to talk about their traumas, or...rejected their accounts as untrue.” They may also keep quiet out of shame, feelings that they bear responsibility, or loyalty to family. “Research shows the cognitive, developmental and psychosocial impacts of trauma can affect how the youth perceives and interacts with [his or her attorney] and her ability to engage with and participate in her legal case” (Kraemer and Patten, Part 2, 2014, conclusion). Studies have shown that children are more likely to recant allegations of abuse made against a parent or caregiver compared to others who may be implicated, especially where the non-offending caregiver has not reacted in a supportive manner to the disclosure of abuse (Lamb et al., 2015). Children’s “primary relationships [with parents or caregivers] are often perceived as essential for survival and they need their parents’ love and acceptance even in the presence of maltreatment” (Black-Pond & Henry, 2008, p. 19). This will affect their willingness to disclose maltreatment by a parent.

Buss (1999:944) points out:

Children's emotional and psychological development renders them uniquely dependent upon their parents, which undermines their ability to experience the exercise of control over decisions negatively affecting either parent as a good. This consideration also raises a different kind of developmental issue: to what extent does imposing the empowerment experience on children interfere with their emotional and psychological development in a way that actually causes them significant harm?”

Impact of Trauma

The above discussion of child development focuses on research involving average children but children involved in the child welfare system are not “average.” These children are far more likely to have suffered multiple and chronic traumas, and different types of maltreatment, with higher frequency, duration, and severity than the average child population. The NCTSN estimates that 80-90% of children involved in the child protection system have suffered at least one traumatic event. One study found that over 70% of children in foster care who were being treated at National Child Traumatic Stress Network (NCTSN) sites experienced complex trauma, suffering at least two traumas (Klain, 2014). Child maltreatment scholars and practitioners are just now coming to understand and research the phenomenon of Child Torture- the most severe form of child maltreatment, causing the most severe consequences for child victims (Knox, Starling, Feldman, Kellogg, Frasier & Tiapula, 2016; Miller, 2018, 2019).

A child may desire to live in a dangerous situation because it is all he or she knows, because of a feeling of blame or of responsibility to take care of the parents or because of threats. The child may choose to deal with a known situation rather than risk the unknown world of a foster home or other out-of-home placement.

As one psychologist puts it, “children are under tremendous pressure to misidentify and/or misarticulate their own interests.” Their stated wishes may be based on threats or bribes or motivated by fear, guilt, a desire to protect their parents or a lack of experience with alternatives. (Piper, 1998, p. 27 citing Buss (1996) and Clawar (1983).

Traumatized children tend to lag behind their peers in many areas of development (De Bellis, 2001, 2005; Delima & Vimpani, 2011; Jaffee & Christian, 2013; Perry, Pollard, Blakley, Baker & Vigilante, 1996; Perry & Szalavitz, 2006; Shonkoff & Garner, 2012; Van der Kolk, 2014) and thus are even less likely than their peers to have the capacities needed to direct their representation by attorneys. In addition, among children who have experienced very early and chronic experiences of trauma, all areas of brain functioning and domains of development are potentially affected, which has substantial and pervasive long-term impact on overall functioning (Van der Kolk, 2014). Exposure to child abuse and neglect can have a negative impact on all parts of the brain. This includes the brain stem, limbic system, and cortex (Perry & Szalavitz, 2006). Dysregulation at the brain stem level can cause problems with arousal and basic bodily functions. Dysregulation at the limbic system level causes problems with emotional regulation, attachment, and “amygdala hijack” which means going into fight/flight mode too easily. Dysregulation at the cortex levels disrupts learning, both concrete and abstract thinking, and sophisticated executive functions like planning for the future, delaying gratification, and calculating risk. Perry & Szalavitz (2006) have documented that the most severe traumas cause dysregulation in all 3 parts of the brain, while mild-to-moderate traumas may only impact the limbic system and cortex, and mild traumas may only impact the cortex.

Neurological impact

Brain imaging has revealed the long-lasting effects of child maltreatment on the central nervous system. As Nemeroff (2016: 899) explains: “Emerging data are all congruent in demonstrating persistent structural and functional consequences of ELS [early life stress] on specific CNS [central nervous system] structures and circuits.”

Brain stem/limbic system: Children who have been traumatized often have an “overreactive” limbic system that has become highly sensitized due to repeated situations of threat. This often causes them to react with the fight/flight/freeze response to minimal amounts of stress that would not seem threatening to a normally developing child. A lack of early infant-mother bonding, with no opportunity for co-regulation, will often cause a traumatized child to grow up with underdeveloped self-regulation skills (Perry & Szalavitz, 2006).

The NCTSN points out that court hearings may trigger or re-traumatize the child. As a result, the child may exhibit a “flight-or-fight” response that could result in a client not listening or not being able to process information accurately, refusing to talk, dissociating (looking spaced out or appearing to have “gone somewhere else”) or simply agreeing in order to leave (National Child Traumatic Stress Network).

Dissociating is an involuntary symptom of post-traumatic stress disorder (PTSD). Dissociating can involve either derealization- where everything seems foggy or dreamlike- or depersonalization- where the person feels they are not really present in the situation, they feel they are either somewhere else, or may be watching themselves from a distance. This symptom occurs when a person with PTSD or trauma history

finds themselves overwhelmed with fear or distress. The dissociation puts some emotional/psychological distance between themselves and the stressful situation (De Bellis, Woolley & Hooper, 2013; Diagnostic Statistical Manual V, American Psychiatric Association, 2013).

Pre-frontal cortex: Exposure to child abuse and neglect can have a negative impact on the parts of the brain regulating learning and self-control (Henry, Sloane & Black-Pond, 2007; Klain, 2014). Maltreated children are frequently at a significant disadvantage compared to their peers in terms of maturity, impulse control, susceptibility to influence and understanding of long-term consequences (Institute of Medicine (IOM) & National Research Council (NRC), 2013; Persyn, 2016).

Damage done to the prefrontal cortex extends well into the adolescent period (Black-Pond & Henry, 2008; Institute of Medicine (IOM) & National Research Council (NRC), 2013;). Executive functions are precisely those most likely to be compromised by childhood neglect, abuse and trauma.

Children's attorneys should be aware of the neurological consequences of childhood trauma so they can make informed decisions about representation, and can serve as advocates for child clients to receive evidence-based trauma treatment.

Impact on intellectual and cognitive development

Perry's Neuro-Sequential Model of Therapeutics demonstrates why traumatized children lag behind their peers in cognitive/intellectual development. The physical site of advanced cognition is the cortex, the outermost layer of the brain. This part of the brain not only contains executive function as previously discussed, it also contains the ability to learn language skills, engage in quantitative reasoning and mathematical learning, and engage in both concrete and abstract critical reasoning. The cortex is also the first part of the brain to be damaged by trauma. Even mild trauma can cause dysregulation in the cortex, making it impossible for children to learn. When trauma is moderate or severe, dysregulation in the limbic system or brain stem puts the child in fight/flight/freeze response, during which all energy is directed at survival, and the cortex is "offline" according to Perry's theory, which is well supported by neuroscientific findings (Perry & Szalavitz, 2006).

Maltreated children are frequently at a significant disadvantage compared to their peers in terms of maturity, impulse control, susceptibility to influence and understanding of long-term consequences (De Bellis, 2001, 2005; Delima & Vimpani, 2011; Perry et al., 1996; Perry & Szalavitz, 2006; Persyn, 2016; Van der Kolk, 2014). Numerous studies have demonstrated that abused or, especially, neglected children do not avidly explore, experiment, and learn, and their cognitive development lags behind normally developing children (Perry & Szalavitz, 2006; Perry & Marcellus, 1997).

Impact on emotional and psychosocial development

Beyond the neurobiological and cognitive impact of maltreatment, attorneys must consider the impact of abuse and neglect on children's psychosocial and emotional

functioning. As noted above, if attachment processes occur normally, the child will grow up feeling safe and secure, playful and happy, and curious to explore and grow. If a child has an insecure or disorganized attachment to their caregiver, they may fail to physically grow and meet developmental milestones, may lag behind in cognitive skills, and may have deficient abilities to regulate their emotions and relate to other children and adults- what lay persons may call “emotional problems”. They may have significant behavioral problems in childhood and trouble forming anything more than superficial relationships into their teen and adult years. The poorer the quality of attachment, the more likely the child is to develop an attachment disorder and other mental health problems which persist into adulthood. In the most troubling cases of severely neglected children, a child may have no attachment at all to any preferred caregiver. These children are typically diagnosed with severe Reactive Attachment Disorder which is characterized by withdrawn and non-responsive behavior toward adults and often go on to develop conduct disorders and personality disorders in adulthood (Bowlby, 1969, 1983). Attorneys for children must be able to anticipate that a child who has been abused or neglected may have delayed or pathological emotional development due to the quality of attachment to their parents.

As Buss (1999:943) states:

Children's intense emotional attachment to their parents starts in infancy and is relied upon by children to ground and organize much of their development. Children's dependence on parents to meet basic physical needs, such as food, clothing, and shelter increases the intensity of the attachment and may make children particularly loath to put the relationship in jeopardy. Moreover, until children reach adolescence, their parents, who both define right and wrong and control enforcement, shape children's moral universe to a considerable degree. Even when children understand that they have an opportunity to oppose their parents through their direction of counsel, they may resist this opportunity for fear of being alienated from this defining authority.

Most children, no matter how badly abused, are attached to their parents, even if that attachment is disorganized or insecure (Baker & Schneiderman, 2018; Lamb et al., 2015). Most maltreated children who are removed from their parents will initially say they want to go home, especially if they have not yet had the opportunity to bond with nurturing relative caregivers or foster parents. Many of these traumatized children try to idealize their parents and blame themselves for the abuse (Baker& Schneiderman , 2018). In one meta-analysis, researchers reviewed 27 studies involving interviews with foster children. “In 16 of the studies, children made comments about why they were in care. In all but one, the comments reflected self-blame and/or minimization of the harm” (Baker& Schneiderman , 2018, p. 44). Reviewing memoirs written by adult survivors of child maltreatment, researchers found that the “common thread among the memoirs was the child’s desire to be loved and approved of by the parent, no matter how cruel, unavailable or irresponsible that parent was” (Baker& Schneiderman , 2018, p. 49; Black-Pond and Henry, 2008). These cognitive distortions dramatically affect the child’s view of self and others. Many abused and neglected children grow up with a view of self as

evil, unlovable, and incapable of loving. Significant amounts of shame and self-loathing often lead to self-harm, suicidal gestures, and suicide attempts (Herman, 1992). As Baker & Schneiderman (2018: 49) states: “[T]he evolutionary advantage of having a caretaking adult is so powerful that the attachment is preserved regardless of the quality of the parenting provided to the child.”

The greatest need of children is that they want to be loved by their parents. This is always a factor that needs to be considered as it distorts their perception of self and relationships. The trauma bond between maltreated children and their parents means that many of these children survive by taking care of their parents.

In determining a child’s decision-making capacity, rationality is not the right term for their thought processes. Based on their perceived relational survival, they are making emotional decisions. Children haven’t reached maturity regarding their perception of self, which depends on when children can separate their concept of self from their parents. Their brains have not matured enough to do the processes that prepare them for adult action. What their families want and need is dominant in children’s decision-making.

In short, the abusive family is a toxic relational environment that profoundly impacts the development of the abused child (Cicchetti & Toth, 2005).

Overall impact on decision-making capacity

Assessment of safety and risk: Many of these children are not able to understand the consequences of returning to an unsafe home. They believe that they caused the maltreatment because they did something wrong, e.g., feeling that if I had been good, my mom wouldn’t be using drugs (Baker & Schneiderman, 2018). This is a common distortion that traumatized children believe and it supersedes the rational thought “I won’t be safe if I return home.”

Adults define safety differently than children define safety. Children will define safety by what they know and have experienced. Moreover, typically-developing children are not capable of identifying long-term consequences into adulthood. Maltreated children can’t anticipate how living in a traumatic situation is going to affect them into the future. Because they often have developed the ability to dissociate as an extreme coping mechanism, they may think they can just maintain. They are not able to forego their need for their parent to love them. They don’t have the ability to understand the long-term impact because they are so affected by the immediacy of that relational need. It compromises functioning in numerous parts of the brain, including emotional reactivity interfering with executive functioning.

Moreover, maltreatment often affects a child’s ability to make decisions involving risk. One study by Weller and Fisher (2013) compared maltreated children (n=25) and non-maltreated children (n=112), ages 9-12, regarding their abilities to make decisions under conditions of risk. The study found that maltreated children showed decision-making impairments in that maltreated children were more likely than non-maltreated children

to take a risk to avoid loss. The results suggested that maltreated children tended to make riskier choices.

Attorney/client relationship: Children’s attorneys should be aware that “trauma can affect the most fundamental aspects to the attorney-client relationship”, including difficulties with information processing, receptive and expressive language, self-regulation, hyperarousal, dissociation and trust. (Kraemer & Patten, Part 1, 2014, p. 1). In order to work effectively with their traumatized clients, attorneys must understand the impact of trauma on their clients’ ability to communicate and to form a trusting relationship (Reitman, 2011).

DETERMINING CAPACITY IN THE CONTEXT OF CHILD PROTECTION PROCEEDINGS

Stages of the Proceedings

Temporary Care Hearings

At this hearing, the first obligation of the child’s attorney is to assess the child’s capacity to understand that he or she may be in danger. These hearings are often a time of increased stress for children (and parents), being held shortly after first disclosure or discovery of maltreatment and removal from the home. Moreover, at this stage of the proceedings, attorneys appointed for children have little access to information about the case beyond what is contained in the state’s petition. Seldom do attorneys have adequate time to get to know the child before the hearing. As Vandervort (2015: 73) points out, “often, in child welfare cases, children’s lawyers must make crucial decisions about the case early in the process when they have the least information about the child and parents.”

These crucial decisions by attorneys must often be made in an informational vacuum at a time when the child is most stressed and therefore least likely to have the capacity to engage in a meaningful attorney/client relationship. Stress can cause emotional and behavioral dysregulation. Stress can reduce a traumatized 15-year old to the level of a 7-year old in terms of developmental functioning (socially and emotionally) when experiencing guilt or shame.

The attorney must ask-what is the youth’s developmental capacity at that moment when stress is high? As the ABA standards and model act acknowledge, capacity fluctuates and is issue-specific. The issue at stake at these hearings is whether the child will be safe if returned home, with certain conditions imposed if need be. Attorneys must explain to their clients: “The judge has to decide today if you’re going to be hurt if you have to go to your parent’s house tonight. What do you think about that? Tell me why that is.” Maltreated children often have developed coping mechanisms which may cause them to believe that they will be safe if returned home. Children may offer a more accurate

picture of the risks involved if the attorney asks about the child's siblings- if they are worried about the safety of their siblings.

Hearings on the merits of the petition

Child protection hearings are adversarial proceedings. At merits hearings, the state must prove the allegations of abuse or neglect. If the state fails to do so at the final merits hearing, the case is dismissed, the child is returned home and the court loses jurisdiction to issue any further orders to protect the child and to monitor the child's safety. There is much at stake for children and parents at this stage of the proceedings.

The Working Group on Determining the Child's Capacity to Make Decisions issued recommendations as a result of the 1996 Fordham Law School Conference. The group recommended that the weight given to factors in determining capacity may vary depending on the issue or nature of the proceedings. They advised that in some circumstances, the lawyer would need to "intensify her level of scrutiny of the child's decision, as the risk of harm and duration of the decision's effect on the child's life increases" (Working Group on Determining the Child's Capacity to Make Decisions, 1996, p. 1344).

Tools that attorneys can use in assessing a child's decision-making capacity at this stage of the proceedings are the trauma screenings and assessments that are being increasingly conducted in child welfare cases. In response to federal law (Child and Family Services Improvement and Innovation Act, Pub. L. 112-34, sec. 101(b)(1), § 422(b)(15)(A)(ii), 125 Stat. 369, 369 (2011); *see*, American Bar Association, 2014), many child welfare agencies have established protocols for trauma screening and assessments for any child who comes into foster care. It is essential that attorneys be familiar with these protocols and seek access to the results as soon as possible (Vandervort, 2015).

Obtaining key information about the merits of the case from the child is a complex issue. As Buss (1999:915) points out:

[A] child's understanding of how the adults will use the information he provides will affect the nature and scope of the information provided. This understanding will affect whether the child is truthful, intentionally deceptive, or unwittingly led, whether he is expansive or reserved in the provision of supporting facts, whether he is specific or vague about what he wants, whether he is consistent from question to question and interview to interview, and whether he seeks out the listener to keep her updated when facts and viewpoints change.

A judge's decision on the merits of the state's petition is only as good as the information placed before the court by the parties to the proceedings. In the absence of exceptions to evidentiary rules, the state may have difficulty sustaining its burden of proof without the cooperation of the child and the child's attorney. According to First Star and the Children's Advocacy Institute (2018: 5), "[t]he child is the person who knows best what has been taking place in his family, and, in a system that is not functioning well, may be the only person who can convey that critical information to the court." Nonetheless,

children's ability to communicate what is happening may be significantly compromised by their need for their parent's acceptance and love.

"Expressed wishes" attorneys may be directed by their child clients to oppose the state's petition at the merits hearings. If a child's attorney fights the state's attempts to prove the allegations of the petition, there is a risk that the lawyer may prevail and the child may again be subjected to abuse and neglect. This risk may be particularly prevalent in cases where "the evidentiary presentation by the [other] parties [may] be incomplete, distorted, or otherwise inadequate" (Atwood, 2008, p. 87) (addressing circumstances when the appointment of counsel for the child is especially important). Continued abuse and neglect can result in a lifetime of adverse consequences to the child (Felitti et al., 1998; Stevens, 2012), including repeated physical and mental injury or even death, severe psychiatric disorders, and devastating medical problems (Felitti et al., 1998; Herman, 1992; Perry & Szalavitz, 2006; Van der Kolk, 2001, 2005, 2014).

Both the ABA Model Act (2011) and the NACC standards address the obligations of the child's attorney when there is a risk of substantial injury to the child. Commentary to Section B-4(3) of the ABA's 1996 Standards states that "[w]here the child is in grave danger of serious injury or death, the child's safety must be the paramount concern."

If the child's safety is indeed the paramount concern, the question arises as to which model of representation is more likely to result in a full presentation of the evidence. Consider the difference in models when it comes to a case where the child says she or he wants to go home but the attorney knows that is not likely to happen if the state sustains its burden of proof. Suppose, too, that, given the child's interest in safety, it would not be in the best interests of that child to return home. If the child's testimony is necessary to proving the allegations in the petition, the "best interests" attorney would need to prepare the child to testify and seek accommodations such as allowing the child to testify by closed circuit TV (See the recommendations of Pantell and the American Academy of Pediatrics, 2017). What if the attorney uncovered evidence in the course of his or her investigation that supported the child's allegations that other parties might not be aware of? The "best interests" lawyer would present that evidence to the court. Would the client-directed attorney be allowed to do so? Section B-4 (3) of the ABA Standards (1996:5) states that

If the child's attorney determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the lawyer may request appointment of a separate guardian ad litem and continue to represent the child's expressed preference, unless the child's position is prohibited by law or without any factual foundation. The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child's position (American Bar Association, 1996).

Surely, as the commentary suggests, this is "one of the most difficult ethical issues for lawyers representing children."

The ABA Model Act (2011) allows the attorney for the child to take protective action when the lawyer determines that the child has diminished capacity and is at risk of substantial harm.

Section 7(d) of the Act states:

During a temporary period or on a particular issue where a normal client-lawyer relationship is not reasonably possible to maintain, the child's lawyer shall make a substituted judgment determination. A substituted judgment determination includes determining what the child would decide if he or she were capable of making an adequately considered decision, and representing the child in accordance with that determination.

Commentary to Section 7(d) notes: "A child may be able to direct the lawyer with respect to a particular issue at one time but not another. Similarly, a child may be able to determine some positions in the case, but not others." For example, a child may be competent to make decisions about sibling and kinship visits or school choice.

The ABA Model Act (2011) sets forth criteria for determining diminished capacity to include:

the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and the opinions of others, including social workers, therapists, teachers, family members or a hired expert. (p. 11, Section 7(e))

Many states have enacted legislation to deal with the issues presented in the Model Act, and incorporate various strategies for keeping children safe from their own judgment while also upholding their right to be heard on decisions where they have the greatest interest at stake. In California, the statute governing children's attorneys states that "[c]ounsel for the child shall not advocate for the return of the child if, to the best of his or her knowledge, that return conflicts with the protection and safety of the child" (Cal. Wel. & Inst. Code Section 317(e)). It states further that "[a] primary responsibility of any counsel appointed to represent a child...shall be to advocate for the protection, safety, and physical and emotional well-being of the child" (Cal. Wel. & Inst. Code Section 317(c)) (First Star, 2018, pp. 33-34). In Ohio, the state legislature has determined that an Attorney-GAL appointed for a child serves as *both* GAL (advocating for best interests) and counsel for the child (advocating for child's wishes). If a conflict arises between these two positions (the child wish's put her safety at risk and /or are not in her best interests), the court shall appoint a new GAL and the original attorney shall continue as counsel for the child. Ohio Revised Code 2151.281(H).

It is not easy to resolve these questions: Where do we want the weight of the evidence to fall? Should attorneys hold back on presenting evidence necessary to make an accurate

determination of safety in order to achieve the objectives of the representation chosen by a child who has no understanding of the consequences?

Disposition Hearings

At disposition hearings, the primary issues to be decided include where the child should live, who should have custody of the child, under what conditions, and whether the court should adopt the proposed case plan. Regarding placement and custody issues, the attorney for the child must assess whether the child is capable of understanding the consequences of returning to their parents or living with a foster family or relative. How has maltreatment affected a child's capacity in that regard? As Cloitre and colleagues (2006: 67-68) point out,

Children who are physically and/or sexually abused often believe that these events are expressions of their own intrinsic "badness." This occurs for several reasons. First, explicit statements of the children's inherent badness, inferiority and worthlessness are frequently made by those who are inflicting abuse. The children are identified as the cause of these events (e.g., "Look what you made me do") ... In addition, the perpetrators are aided by children's cognitive predisposition to interpret experience in a self-referential way. When bad things happened, children tend to view themselves as the cause of the problem... [The event] is absorbed by a child as part of his or her identity: The child is bad for being involved in something bad. In contrast, adult crime victims have the cognitive abilities to differentiate between internal and external causes of events and can engage in a cognitive reevaluation that delineates the difference between events that made them feel inadequate and being inadequate persons. This type of analysis is not typical of children and may not even be possible for younger children.

Cases of neglect present a different set of problems. Neglect is harder for children to understand. Their standard of normalcy is what they have experienced. In many neglect cases, parents are unable to provide proper care for their children due to mental illness, substance abuse or domestic violence. Some lawyers believe a family's deep poverty and scarce resource can exacerbate neglect, resulting in the child's removal based solely on the family's poverty. Neglect cases make up the vast majority of CPS cases, with physical and sexual abuse constituting a minority of cases. More children die of neglect than abuse. Moreover, "chronic and or severe neglect may be more detrimental to a child's health and development than physical or sexual abuse" (Wald, 2015, p. 50).

Attorneys for children need to understand the full spectrum of family dynamics when determining whether to represent children's expressed wishes vs. their best interests. Can children truly understand the consequences of returning to an abusive or neglectful environment when 1) they cannot understand that it is the adult who needs to change and not them; or 2) they don't know or can't imagine an alternative or are afraid of unknown alternatives?

Permanency Planning Hearings

Certainly, this hearing may be where the child's voice is most important. Children may have important information to share about whether court-ordered visitation and treatment is occurring and having a positive impact. Often, children are in the best position to describe their experiences in out-of-home placements.

RECOMMENDATIONS

Importance of the Child's Voice

APSAC does not dispute the principle that children should be heard when decisions affecting their life are made. How children's voices should be heard depends on their age, development, trauma history and the nature of the decision being made. No matter the role, attorneys for children must familiarize themselves with every aspect of the child's world. As noted above, both the "expressed wishes" and "best interests" roles require attorneys for the child to **understand the child in the context of his or her family and community and:**

get to know the child, listen to the child's preferences, understand the child's reasoning, look at the totality of the child's circumstances and interview the child using developmentally appropriate interviewing techniques.

In addition, APSAC agrees with Mlyniec (1996) that even young children can display extraordinary moments of insight at times. Children's representatives need to listen to those insights.

Many states require that "best interests" attorneys inform the court about the child's expressed wishes, e.g. Arkansas, Colorado, Delaware, District of Columbia, Florida, Hawaii, Kansas, Maine, Michigan, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, Wyoming (First Star, 2018; Piper, 1998).

Clearly, a determination of the child's wishes should inform any decision about the child's best interests as long as decision-makers understand the countervailing pressures of family loyalty and traumatic bonding (Duquette et al., 2016).

Trauma Screening and Assessments

In most jurisdictions, child welfare agencies have put in place protocols for the screening, assessment and treatment of trauma. Attorneys for children need to advocate for these practices and access any trauma screenings or assessments that have been done for their clients. (ABA Policy on Trauma-Informed Advocacy for Children and Youth ,2014; Vandervort, 2015). Federal law now requires states to screen for and treat emotional trauma associated with maltreatment and removal of children in foster care (Section 422(b)(14)(A)(ii) of the Social Security Act as amended, 2012).

The ABA has advocated integrating knowledge about trauma into daily legal practice, noting that about 80-90% of children involved in the child welfare system have suffered at least one traumatic event. However, as noted by the NCTSN (2014), “many children do not immediately disclose traumatic events...Collaboration with other parties [and, APSAC would add, an extensive review of existing child protective services (CPS), school, medical, court and law enforcement records] is key to determining whether another assessment might be warranted.” These records may “provide a more accurate understanding of the physical and emotional impact of abuse and neglect than the children’s account (Vandervort, 2015, p. 70). Most often, the allegations in the petition are “only the tip of the iceberg rather than a detailed history of the child’s experience” (Vandervort, 2015, p. 73). Research has shown that “children exposed to one form of violence are more likely to have had multiple exposures to violence” and “children entering foster care are more likely to be victims of complex trauma and poly-victimization” (Klain,& White, 2013, p. 2). *See, also*, Greeson et al., (2011)(reporting a study conducted by the NCTSN finding that over 70% of sampled foster children referred for treatment at NCTSN sites reported experiencing at least 2 types of complex traumas (defined as sexual abuse, physical abuse, emotional abuse, neglect and domestic violence) while 11.7% reported experiencing all 5 types of trauma. (See, also, Pilnik & Kendall, 2012).

Interviewing the Child

The National Child Traumatic Stress Network has issued recommendations for trauma-informed practices by children’s attorneys. These recommendations include resisting practices that may re-traumatize the child, and interviewing children in a quiet space “outside the presence of other persons who may contribute to the client feeling threatened” (National Child Traumatic Stress Network).

Respecting the Child’s Desire to Remain Neutral

Commentary to Section B-4(2) to the ABA Standards of Practice for Lawyers who represent children in Abuse and Neglect Cases (1996):

[T]he child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the other parties. The lawyer should clarify with the child whether the child wants the lawyer to take a position or remain silent with respect to that issue or wants the preference expressed only if the parent or other party is out of the courtroom.

APSAC agrees with this recommendation.

Mandatory Pre-Service and In-Service Training for Children’s Attorneys

Court rules should require attorneys for children to develop some expertise about child development and the impact of trauma among other topics.

CONCLUSIONS ON THE ETHICS OF REPRESENTING CHILDREN

Determination of Capacity Must Not be Made Through the Prism of a Lawyer's Ideological Biases For or Against State Intervention

For attorneys with a bias against state intervention into the lives of private citizens, it is hypocritical for them to argue that juveniles under the age of 15 lack the competency to stand trial or to waive their Miranda rights while, at the same time, claiming that a four-year-old child has the capacity to direct an attorney's advocacy in child protection proceedings. For attorneys with a bias in favor of state intervention, it is all too easy for them to slide into the passive role of rubber stamping the state's position without making any effort to conduct an independent investigation or to truly understand the child.

Children are Children

There have always been laws "that protect minors from full legal responsibility for their conduct because of their presumed lack of [decision-making] capacity" "based on the premise that children should be protected against the long-term implications of their decisions made at a time when they lack sufficient capacity and experience to be held to a standard of adult responsibility" (Atwood, 2003, p. 659). Society imposes age limitations on the right to drive, to buy alcohol, to enter into legally binding contracts, to work, to marry, to exercise their First Amendment rights and to consent to medical treatment. These norms recognize that children need to be protected from their own decisions.

As Piper (1998:25) points out:

Most of us accept without question the assumption that children are different than adults. We assume that by their very nature children lack the maturity and experience to make decisions about what is best for them and therefore require the protection and supervision of adult caretakers. Generally, laws dealing with children's rights tend to focus on protecting their opportunities for healthy growth and development in order to keep open their options as future adults. With the exception of delinquency proceedings, laws do not presuppose that children have the same rights to self-determination as adults.

The U.S. Supreme Court has stated:

Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. (*Schall v. Martin*, 467 U.S. 253, 265 (1984) (citations omitted).

In 1995 Justice Scalia reiterated the limited nature of children's rights:

Traditionally at common law and still today, unemancipated minors lack some of the most fundamental rights of self-determination They are subject, even as to their physical freedom, to the control of their parents or guardians (*Veronica Sch. Dist. v. Acton*, 115 S.Ct. 2386, 2391(1995)).

Nature of Children's Rights Protection vs. Autonomy

APSAC agrees with advocates for child empowerment that children's personal autonomy should be recognized and respected. However, to advocate for a choice made by an incompetent child when that child is not capable of understanding the consequences of the choice is not empowerment. Children also have a legitimate claim to physical and emotional health and safety. The foremost consideration must be whether children's basic needs will be met (National Association of Counsel for Children, 2001, pp. 2, 7). Protection of that right must be the paramount concern of any lawyer for the child.

FURTHER RESEARCH IS NEEDED

Safety is Paramount

There is a pressing need for research that looks at how the attorney's role relates to safety outcomes such as dismissal of the state's petition due to lack of sufficient evidence, re-reporting of the family to CPS and re-entry into foster care after reunification.

Correlation Between Foster Care Re-Entry Rates and Client-Directed Representation

Using data from the Adoption and Foster Care Analysis and Reporting System (AFCARS) (US Department of Health and Human Services, Children's Bureau, 2016) and the ratings of states on "client-directed counsel" criterion by First Star and the Children's Advocacy Institute (2018), eleven states with the highest score in client-directed advocacy had rates of re-entry into foster care after reunification that were greater than the overall national average of 7.625 %. Further research is needed to determine whether any correlation exists when controlling for correlates of re-entry such as the child's age, prior Child Protective Services (CPS) involvement, family risk factors, and post-reunification supports.

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