RECOGNIZING THE EXPERTISE OF CHILDREN AND FAMILIES

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I. INTRODUCTION

Attorneys who represent children represent clients who come from families. Whether or not those children ever return to their families, they will carry with them the context from which they came. Part of understanding children is understanding their families, not just the abuse or neglect that may have brought them into the child welfare system. This approach is consistent with Susan Brooks' five basic principles of best practices in representing children:

> (1) respect the dignity of all individuals and families; (2) approach every child as a member of a family system; (3) respect individual, family, and cultural differences; (4) adopt a non-judgmental posture that focuses on identifying strengths and empowering families; and (5) appreciate that families are not replaceable.[1]

As attorneys for children, we need to recognize and value the expertise that can be found within our own clients and their families. Indeed, we need to view children and families as experts on themselves.

Rule 702 of the Federal Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

While I do not argue that children and families are technically "experts" within the meaning of evidentiary rules, and while the provisions relating to "principles and methods" are clearly inapplicable, it is interesting to note that experts can be qualified based on knowledge and experience. Children and their families certainly have knowledge of and experience with their own lives, including their history, attachments, emotions, priorities, perspective, resources, and social support network. They may have varying degrees of insight and ability to access the information and utilize the resources that they possess, but we need to listen to and consider carefully the "specialized knowledge" that they have.

As attorneys for children, we need to develop methods for obtaining that knowledge and bringing it to bear on our legal decision-making process and representation. Taking cues from developments in social work, juvenile courts, and family-based legislation, attorneys for children should consider strength-

[1] Susan L. Brooks, *Representing Children in Families*, 6 NEV. L.J. 724 (2006). These principles are also recognized in the *Report of the Working Group on the Role of the Family*, 6 NEV. L.J. 616 (2006).

based case plans, family group conferencing, client-directed representation, and the value of families as experts on themselves.

II. "STRENGTH-BASED" ASSESSMENTS AND CASE PLANS

The modern child protection system has evolved around looking at family *problems* to the exclusion of focusing on family *strengths*. Even so, the family preservation and reunification provisions[2] of the Adoption and Safe Families Act ("ASFA")[3] require agencies to work toward the goal of having children raised by their families under most circumstances, recognizing that the child's safety is paramount. To balance concern with family dysfunction against an interest in family preservation, many social workers have re-oriented their thinking. The modern trend is to focus on strength-based family practice in contrast to an emphasis on identifying dysfunctions and disorders.[4] Caseworkers using strength-based assessments and case plans involve family members in a positive way.

Strength-based approaches respect and listen to the family and, thereby, draw upon all of the family's resources in addressing the circumstances that caused the family to come into the child welfare system. There is a focus on effective reunification as an interest of the child client. "Focusing on a family's strengths does not imply that problems, such as the perpetrator's abusive and controlling behavior, are to be ignored or minimized. Rather, strength-based practice promotes use of a family's coping and adaptive patterns, their natural support networks, and other available resources."[5] One of the strongest predictors of a child's resilience is the existence of a caring adult, not necessarily a parent, in the child's life.[6] Therefore, identifying those caring adults and ensuring that they continue to have a meaningful relationship with the child are very important tasks within the child welfare process. The child and family are the most likely people through whom such existing resources can be identified.

The Role of Family Group at this conference endorsed the importance of strength-based and individualized services.[7] A strength-based perspective lays the groundwork for viewing families as possessing expertise about themselves and their preexisting support network.

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[2] 42 U.S.C. § 671(15)(B) (2000).

[3] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

[4] *See generally* STRENGTHS PERSPECTIVE IN SOCIAL WORK PRACTICE (Dennis Saleebey, ed., 4th ed.2005); BALANCING FAMILY-CENTERED SERVICES AND CHILD WELL-BEING: EXPLORING ISSUES IN POLICY, PRACTICE, THEORY AND RESEARCH (Elaine Walton et al. eds., 2001); HANDBOOK FOR CHILD PROTECTION PRACTICE (Howard Dubowitz & Diane DePanfilis, eds. 1999); National Association of Public Child Welfare Administrators, *CPS Guidelines* (1999).

[5] H. LIEN BRAGG, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD PROTECTION IN FAMILIES EXPERIENCING DOMESTIC VIOLENCE 52 (2003).

[6] *See, e.g.*, RESILIENCE AND VULNERABILITY: ADAPTATION IN THE CONTEXT OF CHILDHOOD ADVERSITIES (Suniya S. Luthar ed., 2003); EMMY E. WERNER & RUTH S. SMITH, OVERCOMING THE ODDS: HIGH RISK CHILDREN FROM BIRTH TO ADULTHOOD (1992).

[7] Report of the Working Group on the Rule of the Family, *supra* note 1, at 621.

III. FAMILY GROUP CONFERENCING

Juvenile courts and child welfare agencies have begun to offer greater opportunities for children and families to participate in the creation and implementation of case plans in meaningful ways. Indeed, ASFA requires that parents and guardians be involved with the caseworker in developing their own case plans.[8] More courts are recognizing that children have the right to be present at all substantive court hearings.[9] Courts and agencies may offer such collaborative services as family group conferencing, which was developed from the Maori tradition in New Zealand.[10]

Family group conferencing involves not only the parents and children, but also the extended family and friends, in the decision-making process and in developing solutions to the family's problems.[11] Programs such as family

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[8] *See* 45 C.F.R. §1356.21(g)(1) (2005). The Working Group on the Role of the Family recommended that "[t]here should be a presumption that parents and children will participate in the process of creating these plans." *Report of the Working Group on the Role of the Family*, *supra* note 1, at 621.

[9] *See, e.g.*, Neumann v. Melgar, 16 Cal. Rptr.3d 754 (2004) (where statute requires the court to hear from the child in chambers and to inform a child ten years old or older of the child's right to attend the hearing, the failure to interview the child was reversible error); Lovejoy v. Cuyahoga City. Dep't. of Human Services., 602 N.E.2d 405 (1991) (the role of the guardian *ad litem* includes ensuring that the child attends the hearing, which is a statutory right, but here the failure was harmless error). AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 11 (1996) ("In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify"). The Pew Commission on Children in Foster Care found that children, their parents, and their caregivers all benefit from active participation in court proceedings. *See* PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 42 (2004). The National Association of Counsel for Children recommends that the child be physically present early in the proceedings and the opportunity to present at all hearings. *See* NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES 8 (2001). While the United States (alone in the world except for Somalia, which does not have a functioning government) has not yet ratified it, the 1989 United Nations Convention on the Rights of the Child provides in Article 12 that countries "shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child" and, therefore, that the child "shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly , or through a representative or an appropriate body." UNITED NATIONS, CONVENTION ON THE RIGHTS OF THE CHILD 4 (1989).

[10] *See generally*, Mark Hardin et al., FAMILY GROUP CONFERENCES IN CHILD ABUSE AND NEGLECT CASES: LEARNING FROM THE EXPERIENCE OF NEW ZEALAND (1996).

[11] *See, e.g.*, Dana E. Prescott, *Child Protection: Kinship and Family Group Conferencing*, 19 ME. B.J. 140 (2004); Susan M. Chandler & Marilou Giovannecci, *Family Group Conferences: Transforming Traditional Child Welfare Policy in Practice*, 42 FAM. CT. REV. 216 (2004); Paul Adams & Susan M. Chandler, *Building Partnerships to Protect Children: A Blended Model of Family Group Conferencing*, 40 FAM. CT. REV. 503 (2002). The National Council of Juvenile and Family Court Judges lists family group conferencing as among best practices. *See* NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES (2000). Although family group conferencing is used in programs in a number of states, including Arizona, District of Columbia, Hawaii, Kansas, Minnesota, Oregon, and Utah, it is specifically established through legislation for child welfare cases, as opposed to juvenile justice cases, in only a few states. *See, e.g.*,OKL. ST. ANN. 10, §22.1(E)(14) (West

group conferencing further the statements of principle articulated by the Working Group on the Role of Family that attorneys "should strive to work collaboratively with those who have the information and expertise that are necessary to aid in decisions, including families [and] children" and that "[they] should involve [families] in defining the problems that [they] [face] and helping [them] address those problems."[12]

Family group conferencing and other similar collaborations not only afford parents, children, and the extended family the dignity of participation, but they also recognize the value of what children and families themselves contribute to the process of addressing their own needs.

IV. CLIENT-DIRECTED REPRESENTATION

The client-directed model of child representation sees the child as having at least some capacity to understand the legal process and formulate the objectives of representation, albeit with the counseling assistance of the attorney. This recognition of capacity presupposes that the client can know what he or she wants to do within the context of the litigation. Even a substituted judgment model of representation seeks to understand the child's situation through the child's eyes, considering the child's perspective in how decisions will impact the child's life.

The American Bar Association *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* ("Abuse and Neglect Standards") require attorneys to establish and maintain a relationship with their child clients, irrespective of the client's age.[13] While the Abuse and Neglect Standards adopt a client-directed model of child representation, a subsequent set of standards, *Standards of Practice for Lawyers Representing Children in Custody Cases,* ("Custody Standards") also creates the role of "best interests attorney," who is not bound by the child's directives.[14] The Custody Standards also require attorneys to establish and maintain a relationship with their child clients, whether acting as a child's attorney or as a best interests attorney.[15] The National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* provides that the child's attorney, regardless of role, must engage in regular and meaningful communication with the child.[16] The *Fordham Conference on Ethical Issues in the Legal Representation of Children* ("*Fordham Conference*") recommended

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2006); OKL. ST. ANN. 10, §22.2(H)(12) (West 2006); TEX. FAM. CODE ANN. §264.2015 (Vernon 2002); TEX. HUM. RES. CODE ANN. §45.102(8) (Vernon 2002).

[12] *Report of the Working Group on the Role of the Family, supra* note 1, at 619-20.

[13] *See* AMERICAN BAR ASSOCIATION, *supra* note 9, at 7.

[14] *See* AMERICAN BAR ASSOCIATION, AMERICAN BAR ASSOCIATION SECTION OF FAMILY LAW STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES 3 (2003).

[15] *Id.*, at 11. *See also id.* at 18 (requiring the child's attorney to meet with the child "upon appointment, before court hearings, when apprised of emergencies or significant events affecting the child, and at other times as needed"); *See also id.* at 18 (indicating that for the best interests attorney "[m]eetings with the children and all parties are among the most important elements of a competent investigation").

[16] *See* NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, *supra* note 9, at 7.

that the attorney should meet with the child often enough to maintain and develop the lawyer-client relationship.[17]

While one reason for meeting with the child client is to keep the child informed about the proceedings, the primary purpose is to get to know the child and gain information from the child, whether or not the child's directives bind the attorney.[18] In other words, these rules recognize that the child has some information and wisdom to impart to the attorney, thereby, the system. Children have a great deal to "tell" us, even without words, if we know how to "listen."[19]

Jean Koh Peters emphasizes the importance of the "child-in-context," which requires us to get to know our child clients in depth.[20] This is true even for the preverbal child, who "evinces a personality, a level of health, physical characteristics, a gestation and birth history, and a family context and history which distinguishes her from the next newborn client."[21] Despite the requirement to get know the client in depth, Peters also cautions that we not disrupt the rest of the child's important long-term relationships by what will be our relatively limited involvement in the child's life.[22] Peters' model for child representation is one that inherently recognizes the child as an expert on his or her own life. Part of the individualized inquiry that the child's attorney must engage in is "[u]nderstanding how this client speaks, how this client sees the world, what this client values, and what shows this client respect."[23] That information necessarily comes from the child and, perhaps, the child's family.

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[17] *See Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1303 (1996), *reprinted in* 6 NEV. L.J. 1408 (2006).

[18] It is generally agreed that whether or not an attorney or guardian *ad litem* is bound by the child's directives, unless the child objects, the representative must inform the court of the child's expressed wishes. *See, e.g.*, American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, Standard V(F)(3) (2003); *See also* NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, *supra* note 9, at 7 ("[t]he system of representation must provide the child with an opportunity for his/her needs and wishes to be expressed to the court").

[19] *See generally* JAMES GARBARINO & FRANCES M. STOTT, WHAT CHILDREN CAN TELL US: ELICITING, INTERPRETING, AND EVALUATING CRITICAL INFORMATION FROM CHILDREN (1992).

[20] *See, e.g.*, JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001). Professor Peters introduced this terminology to the Fordham Conference, which adopted it in its recommendations. *See Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, *supra* note 17, at 1309.

[21] *See* PETERS, *supra* note 20, at 65.

[22] For example, Peters writes that "it is critical that the lawyer, in performing that important short-term, but ephemeral function, does not disrupt far more important long-term relationships that affect the client's day-to-day happiness and long-term well-being." *Id.* at 76. Susan Brooks echoes this in cautioning that the child's guardian *ad litem* "may inadvertently undermine the child's real parents' immediate efforts at rehabilitation, and ultimately, the effective functioning of the child's own family system." *See also* Brooks, *supra* note 1.

[23] PETERS, *supra* note 20, at 258.

V. VIEWING CHILDREN AS EXPERTS

While there is clearly recognition that children's representatives must meet their clients and get to know them well enough to advocate for them, we need to go one-step further and recognize the children's expertise. Twenty years ago we were debating whether a child's attorney had to even *meet* the child. Ten years ago we were debating whether a child's attorney had to follow the child's directives. Now we have to approach our advocacy with the humility we have earned and recognize that beyond having the capacity to direct representation, children have unique and vitally important expertise about themselves that we need to honor.

Children have their own worldview. They alone know what is of greatest subjective importance to them. They know what relationships matter to them. They know what activities with which they want to remain involved. They can often provide valuable information on family interactions and other family resources. If we really listen to them, we may be surprised at the insights they have about what does and does not work in their families.

This argument clearly applies to out-of-home placements, but it also applies to various services which the agency may offer the family but which may conflict with other important elements of the fabric of the family's life. For example, counseling appointments that cost the breadwinner his or her job, or visitation schedules that deprive the child of favorite extracurricular activities, may satisfy agency convenience at the expense of what the family needs and what the child considers important. "Routine" services that are not offered based on an individualized need for them may discourage family members and lead to non-compliance.

We need to go beyond finding out *what* children want and explore their *reasons* for what they want, which may lead the attorney-client partnership in an entirely different direction. Further, we need to consider how alternative proposed placements will feel from the child's perspective. The "cure" may be worse for the child than the family dysfunction from which we seek to extricate the child. If we have nothing better to offer the child, then we have no conscionable basis upon which to intervene. We need to think about proportionality of responses in light of the impact on the entire life of the child and family, beyond our assumptions about the intended benefits. We can get beyond those assumptions only with the advice of the client.

VI. VIEWING FAMILIES AS EXPERTS

Children need family relationships.[24] As Susan Brooks discussed, family systems theory recognizes that in order to understand an individual, including the child, the family, as a whole, must be studied.[25] We need to recognize that in "studying" the family, the family itself possesses an often-overlooked expertise. The family members may not understand the underlying dynamics of their

[24] *See, e.g.*, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, *supra* note 9, at 9 (the attorney must "advocate for continuation of appropriate familial relationships and family preservation services where appropriate").

[25] *See* Brooks, *supra* note 1.

interactions in a "professional" sense, but they have important observations and explanations for the way their family works, where each member fits in, and how circumstances have affected their family life. They can identify family and other social resources. They can explain their priorities.

In a busy and overburdened child welfare system, the recognized "experts" in the case may make assumptions about a particular family and a particular child based on generalized assumptions from other families and children who appear to be similarly situated, giving scant attention to the actual situation of the family at hand. Child advocates are often at an even greater disadvantage, having neither the specialized training, time, nor financial resources to make an individualized determination of what is happening with the child. Too often the system fails to look to the family itself for the expertise they can provide on who they are, how they work, what they need, and what resources they have. Every family is an expert on itself. We, as representatives of a child, from within the context of a family, need to tap into that expertise.

VII. CONCLUSION

Terrible things can and do happen to children in families. However, the state is, at best, a neglectful parent to the children in its own care. It takes a village to raise a child, but a bureaucracy is not a village. Villages are made up of relationships, interconnections, and individual wisdom and talents. The child's attorney must pay attention to the expertise found within the child's village, including the expertise of the child client and his or her family. We do not always correctly assess what is going on and how to fix the problems. We are not always aware of the ramifications of our interventions, including a host of unintended consequences. Our client's well-being should not become part of the collateral damage in our war against child maltreatment. By thinking seriously about the expertise that the child and family bring to bear on their own circumstances, we not only respect our clients more, but we serve them better.