


PRACTICE MANUAL FOR CHILD ABUSE AND NEGLECT CASES IN THE DISTRICT OF COLUMBIA

Third Edition – 2008



Founded in Washington, DC, in January 1982, the Council for Court Excellence is a nonprofit, nonpartisan civic organization that works to improve the administration of justice in the local and federal courts and related agencies in the Washington metropolitan area. Improving outcomes for children who are touched by court processes has been a priority of the Council for Court Excellence since its founding.

Third Edition

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INTRODUCTION and ACKNOWLEDGEMENTS

I take great pleasure in introducing this Third Edition of the *Practice Manual for Child Abuse and Neglect Cases in the District of Columbia*. The publication has been a long time coming, and I hope readers will agree that the final product is well worth the wait.

Statutory and case law, case-management procedures, and attorney qualification and practice standards all have changed substantially since the 1996 Second Edition of the *Manual* was published. The Third Edition of the *Practice Manual* incorporates those changes. Its sixteen chapters and thirteen appendices provide a comprehensive reference to help both attorneys and judicial officers provide excellent service and sound decision-making to the vulnerable children, parents, extended families, and other caretakers who become involved in District of Columbia Family Court proceedings.

The Third Edition builds on the strong foundation laid by the original 1988 *Practice Manual* and the 1996 Second Edition, and I acknowledge and thank all who participated in producing those two editions. Many people have played important roles in producing this Third Edition, and I want to name and thank all of them.

The *Practice Manual* has been a project overseen by the Children in the Courts Committee of the Council for Court Excellence, and I sincerely thank Deborah Luxenberg, who has chaired that committee throughout the long process. The editors of the *Manual* are Joanne Schamest and Leslie Susskind, who signed on back in 2003 to manage this project for us, recruited the authors, and reviewed and edited all content at two different stages to ensure that it is as accurate and comprehensive as we can make it. I thank them for their expertise, for their steadfast dedication to this project, and for their many years devoted to child neglect practice in the District of Columbia.

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Once the manuscript was ready for review by persons not involved in its preparation, the Council for Court Excellence convened a Practice Manual Advisory Committee under the leadership of Deborah Luxenberg. One or more members of the committee read each chapter and appendix and, like the

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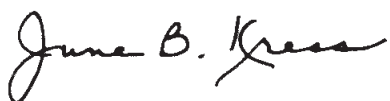
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Finally, I can't emphasize enough that helping children and families in need stabilize their lives is among the most important work the District of Columbia's government does, both in the short term and for the future well-being of the city. Those attorneys, social workers, judicial officers, and support staff who devote their lives to this work deserve the heartfelt thanks of the whole community. I am pleased to present this *Practice Manual* as a support to their quality work.



June B. Kress
Executive Director
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AN OVERVIEW OF NEGLECT PROCEEDINGS

The D.C. Superior Court maintains a branch within the Family Court, the Counsel for Child Abuse and Neglect Office (CCAN), to assist the court and the Bar in matters relating to child abuse and neglect cases. This Manual is intended to familiarize and assist lawyers who take cases from CCAN and others who lack background on the District of Columbia's laws and court procedures involving child abuse and neglect. The CCAN Office is located at D.C. Superior Court, 500 Indiana Avenue, N.W., Room 4415, Washington, D.C. 20001, (202) 879-1406. CCAN Office staff members are available to provide additional information. The CCAN Office maintains a resource library of materials regarding child abuse and neglect law which includes case summaries, treatises, and sample pleadings.

I. Statutes and Standards Governing Child Abuse and Neglect Cases

The major local statutes that the child neglect practitioner should be familiar with are: (1) the Prevention of Child Abuse and Neglect Act (PCANA), (2) the Adoption and Safe Families Amendment Act of 2000 (ASFA), (3) the District of Columbia Family Court Act of 2001, (4) the Improved Child Abuse Investigations Amendment Act of 2002, and (5) the Child in Need of Protection Amendment Act of 2004. These laws are codified in several sections of the D.C. Code, primarily in Titles 4, 11, and 16 as described below and throughout the Manual in more detail.

In particular, the most important statutory sections for practitioners to review are:

- D.C. Code §§16-2301 through 2339, which govern the conduct of child neglect proceedings, are the first laws a practitioner will need to review.
- D.C. Code §§4-1301 through 1371.14 govern the reporting of neglect and abuse, multidisciplinary investigation teams, the Child Protection Register, the establishment and duties of the Child and Family Services Agency (CFSA), child

fatality disclosure and review rules, and required criminal record checks.

- D.C. Code §§ 4-1401 through 1424 cover laws on placing children in homes, relinquishment of parental rights, and the Interstate Compact on the Placement of Children.
- Judicial termination of parental rights proceedings are covered in D.C. Code §§16-2351 through 2365.
- D.C. Code Title 11 contains Family Court Act provisions in §§11-902, 11-908A, 11-1101 through 1106, 11-1732, and 11-1732A.
- D.C. Code §§16-301 *et seq.* cover adoption proceedings. See also the Rules Governing Adoption Proceedings in Volume 2 of D.C. Court Rules.
- D.C. Code §§16-2381 *et seq.* cover permanent guardianship for neglected children.
- D.C. Code §16-914 and §§16-4601.01 *et seq.* (Uniform Child Custody Jurisdiction and Enforcement Act) govern domestic relations child custody actions.
- D.C. Code §§16-1001 *et seq.* govern intrafamily proceedings involving domestic violence.

This list is not meant to be exhaustive but rather to serve as a starting point for the practi-

tioner who needs to review the local statutes relating to child abuse and neglect cases. Practitioners will also need some familiarity with local adoption, guardianship, and legal custody laws. In addition to the laws described above, practitioners will need to be familiar with Superior Court Rules Governing Neglect Proceedings, and the Superior Court Child Abuse and Neglect Attorney Practice Standards promulgated by Administrative Order 03-07 on February 28, 2003. Federal laws relating to child abuse and neglect are not covered in this overview.

A. Prevention of Child Abuse and Neglect Act (PCANA)

The originally enacted Prevention of Child Abuse and Neglect Act (PCANA) in 1977 charged the District of Columbia with two broad responsibilities: (1) protecting children endangered by neglect or abuse and (2) preserving and reuniting, when possible, families splintered by child abuse and neglect. Even though its provisions seemed to be sound, the law as implemented did not always meet the needs of families and children in child abuse and neglect cases. Thus, since its initial passage, child abuse and neglect law in the District of Columbia has undergone many changes. These changes reflect the requirements imposed by federal law, new trends in addressing child abuse and neglect, the implementation of the Family Court Act of 2001, and additional oversight mandated by the *LaShawn A. v. Dixon* case.¹

Weaknesses in the D.C. child welfare system led the American Civil Liberties Union to bring the *LaShawn* case in 1989. *LaShawn* was a class action brought in the U.S. District Court for D.C. against the District of Columbia, alleging that the District was not in compliance with statutory and constitutional requirements in child welfare cases. The case was initially resolved with the District's entering into a Remedial Order in which the city agreed to improve its performance in these cases. An Implementation Plan followed with a detailed description of what the District had to do. When the

District did not comply with the requirements imposed, the child welfare system was placed in a federal court receivership. This receivership controlled the system until sufficient improvements were made. The city regained control, first on a probationary basis and then permanently in January 2003. The federal court Monitor, however, still reviews the performance of the city and periodically reports to the federal court.

B. Adoption and Safe Families Act of 2000 (ASFA)

National policy makers who studied the child welfare system over the years concluded that too much time was being spent in trying to reunite families while children grew up without permanent homes. Known as "foster care drift," this problem was addressed nationally with the passage of the federal Adoption and Safe Families Act (ASFA) in 1997 and locally with the D.C. version of ASFA in 2000. ASFA holds parents and the city to strict timelines in making efforts to reunify families. Once the applicable time limits have passed, the government must move to terminate parental rights and to establish a permanency plan placing the child in another permanent home rather than letting children languish in foster care while waiting for their parents to be ready for reunification. While it is too soon to know what the ultimate results of the ASFA changes will be, some practitioners believe that the new law may have gone too far in the direction of terminating parental rights without giving parents enough time to correct the problems that brought them to the court's attention. Others believe the law is working well.

C. District of Columbia Family Court Act of 2001

The passage by Congress of the District of Columbia Family Court Act of 2001 made further major changes to the court system regarding child abuse and neglect cases. This Act established a Family Court within the D.C. Superior Court that is staffed with magistrate judges and associate judges who have family law experience and who

¹ 762 F.Supp. 959 (D.D.C.1991) aff'd and remanded *sub nom*, *LaShawn A. by Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993).

have also made a commitment to hearing family cases for a minimum period of four years (magistrate judges) or five years (associate judges), with the exception of already-sitting associate judges who commit to three years. With a few exceptions, all child abuse and neglect cases have been transferred to the Family Court. The judicial officers in the Family Court operate under a one family/one judge system so that the same judge is assigned to a case from the day it comes in to court until the case is closed. The longer terms for the Family Court judicial officers, along with the one family/one judge rule, bring continuity to these cases and allow the judges to become familiar with the history of each case and family. In addition to these changes, the Family Court Act provides: (1) for the use of alternative dispute resolution (mediation), (2) standards of practice for attorneys appointed in Family Court cases, (3) interdisciplinary training for judicial officers, attorneys and other appropriate personnel, (4) establishment of family-friendly accessible space for family proceedings, (5) computerized case tracking, (6) onsite location of certain social service representatives, (7) a liaison between the Family Court and the District government, (8) annual reports to Congress, and (9) expedited appeals in some Family Court actions.

D. Improved Child Abuse Investigations Amendment Act of 2002

Major statutory changes in local child abuse and neglect law came with the enactment of the Improved Child Abuse Investigations Amendment Act of 2002. This Act added three additional grounds upon which a court can base a finding of neglect and re-numbered the statutory definitions of neglect. The new grounds deal with children who are born addicted to a controlled substance or are exposed later to illegal drugs or drug-related activity. The Act also extends the reach of cases in which it is alleged that a child is in imminent danger of being abused so that this protection applies to all children living in the same household with an abused child, rather than limiting the protection to siblings of the abused child.

The law also added new definitions of “abused,” “physical injury,” “mental injury,” “sexual abuse,” and related terms. The Act also amends the Child Protection Register provisions making it more difficult for a parent to get his or her name expunged from the Register. Multidisciplinary investigation team provisions were also added.

E. Child in Need of Protection Amendment Act of 2004

The most recent local statutory change has been the enactment of the Child in Need of Protection Amendment Act of 2004. This act changes the time limit for commencing a shelter care hearing from 24 hours to 72 hours from the time of the child's removal from the home and provides for the appointment of a guardian *ad litem* (GAL) within 24 hours of removal. The act authorizes family team meetings during the 72 hours before the shelter care hearing and requires that parents, family members, caregivers, and the guardian *ad litem* be invited to the family team meeting. Other provisions of the act include those regarding: agency reporting and investigation of neglect and abuse cases, the requirement of a single telephone number for reporting abuse and neglect, protection for the confidentiality of the records of the Children's Advocacy Center (where children are questioned about abuse allegations), additional responsibilities for CFSA, the creation of a Citizen's Review Panel for independent oversight of the child welfare system, and expanded requirements for criminal records checks of prospective caregivers.

F. Attorney Practice Standards, Attorney Panels, and Family Treatment Court

Other recent initiatives affecting child abuse and neglect cases in D.C. Superior Court include the establishment of Child Abuse and Neglect Attorney Practice Standards, Family Court attorney panels, and Family Treatment Court.

The Superior Court Child Abuse and Neglect Attorney Practice Standards set guidelines for attorneys acting as guardians *ad litem* for children,

and for attorneys representing parents, caretakers, and the government in child abuse and neglect cases. Superior Court Administrative Order 03-07, issued on February 28, 2003, promulgated the standards, which can be found on the court's website at http://www.dccourts.gov/dccourts/docs/practice_standards.pdf. The standards detail the expectations for attorneys at each stage of a neglect case.

The Family Court attorney panel process requires attorneys who want to represent parties in child abuse and neglect cases to apply to the court for inclusion on one or more panels of attorneys to represent children (guardian *ad litem* panel), parents and caretakers (CCAN panel), families with children needing educational advocates (special education advocates panel), and juvenile delinquents (juvenile panel). Attorneys on the guardian *ad litem* and CCAN panels are subject to the requirements of the Child Abuse and Neglect Attorney Practice Standards and are required to take 16 hours of continuing legal education each year in the area of child welfare law. In addition to attorneys on these panels, attorneys from the Children's Law Center represent children in Superior Court child abuse and neglect cases.

Family Treatment Court is a joint project of the court and city agencies that provides a 12 to 18 month drug treatment program consisting of approximately nine months of inpatient treatment and nine months of outpatient aftercare to mothers whose children are brought into the neglect system because of the mother's drug addiction. After a period of adjustment to the residential facility, these mothers are allowed to have their children with them in the treatment facility, which makes reunification more likely. Mothers who want to go into Family Treatment Court must first stipulate to the neglect allegations that brought their case into court and must also go through the court's screening process.

II. The Stages of a Neglect Case

The discussion that follows provides an overview of the provisions governing the principal court proceedings in neglect and related cases. They are described in greater detail in the chapters that follow:

- Pre-petition (Chapter 2)
- Initial hearing/Further Initial Hearing (Chapter 3)
- Pretrial (Chapter 4)
- Mediation/Stipulation (Chapter 5)
- Trial (Fact-Finding Hearing) (Chapter 7)
- Disposition (Chapter 8)
- Post-Disposition to Permanency (Chapter 9)
- Termination of Parental Rights/Adoption (Chapters 10, 11)
- Guardianship/ Legal Custody (Chapters 12, 13)
- Case Closure

A. Pre-petition

When the government removes a child from the home as a result of alleged neglect or abuse, D.C. Code §16-2312, as amended by the Child in Need of Protection Amendment Act of 2004, requires that a shelter care hearing must be commenced within 72 hours of the child's removal. The shelter care hearing takes place as part of the court's initial hearing. The court must appoint a guardian *ad litem* (GAL) within 24 hours (excluding Sundays) of the child's removal. During the 72 hours before the shelter care/initial hearing, CFSA may convene a family team meeting to solicit input from family members and others concerned with the welfare of the child and to develop a safety plan. The agency must invite the parents, relatives, caregivers, community representative, service providers, and the GAL to attend the family team meeting. The safety plan developed at the meeting is distributed to all attendees. The court expects the GAL to attend the family team meeting, meet with the child, and start investigating the case before the shelter care/initial court hearing. Attorneys for the parents are not appointed until the day of the shelter care/initial hearing and are not invited to attend family team meetings held be-

fore the initial hearing. If the government decides not to file a petition after the GAL has been appointed, the court requires that the GAL file a report stating whether he or she agrees with the government's decision not to petition the case and the reasons for his or her position.

If the agency decides to bring a petition to court but does not remove the child from the home there is no requirement to appoint a GAL before the initial hearing, and there is no provision for a family team meeting. The parents' attorneys and the GAL may be appointed on the day of the initial hearing or a few days before the initial hearing.

B. Initial Hearings²

The first D.C. Superior Court hearing in a child neglect case is known as the Initial Hearing which consists of (1) the initial appearance and (2) the shelter care/probable cause hearing to determine where the child should live pending trial of the case. The Initial Hearing is also when the court will schedule dates for mediation, pretrial, and trial, set a discovery schedule, a motions deadline, and a case plan deadline. The Court will also address visitation and services needed by the child and parents. A Further Initial Hearing may also be set if additional preliminary issues need to be addressed, for example, placement of the child. If a Further Initial Hearing is not needed, the next court proceeding is mediation.

1. INITIAL APPEARANCE

The purpose of the initial appearance is to put the parents or other persons acting *in loco parentis* on notice that the petition has been filed, to give the parents an opportunity to respond to the petition (usually parents will enter a general denial at this point), and to make decisions concerning placement of the child pending further hearings. If the parent has not been served with a summons and a copy of the petition prior to a hearing at which the child is ordered to be held in shelter care, that parent has a right to request reconsideration of the court's decision after he or she has notice.

If a child has been removed from home, as often happens at the beginning of a neglect case, the initial appearance must take place within 72 hours, excluding Sundays. D.C. Code §16-2312. When the child has not been removed from home, the case will be set down for a hearing and attorneys assigned in advance. Such non-removal cases are often referred to as community cases. The initial appearance in non-removal cases must be held within 5 days of the filing of the petition. D.C. Code §16-2308.

2. PROBABLE CAUSE/SHELTER CARE

When the government seeks placement of a child outside of the home, it asks the court for a shelter care order. D.C. Code §16-2312. If the parent opposes shelter care, he or she is entitled to a determination by the court that there is probable cause to believe the allegations in the neglect petition are true. If the parent does not oppose shelter care, he or she can waive the right to a probable cause hearing and will be asked to sign a form acknowledging that waiver.

If the government needs more time to investigate to determine whether a petition should be filed, it may request a "5 day hold." D.C. Code §16-2312(g). If the government is seeking shelter care, however, a probable cause/shelter care determination cannot be postponed unless the parent agrees. Parties may consent to shelter care for a brief period in order to allow the government more time to investigate the factual allegations or to look into placement options. A consensual shelter care order has the advantage of avoiding a contested hearing that may impede further efforts to have the child returned promptly once any necessary safeguards are in place. Postponing the hearing for a few days also allows the social worker, the GAL, parents' attorneys, and the parents to try to make suitable arrangements for the return of the child or to find a relative or family friend to act as a placement resource.

The decision to consent to shelter care belongs to the parents and if they are opposed,

² D.C. Code §§16-2305 and 2306 govern the filing and serving of the petition. §§16-2308 through 2312 cover the initial hearing stage of the proceeding.

after being apprised of the pertinent considerations, then the parents' attorneys must request a probable cause/shelter care hearing. A finding of probable cause is not equivalent to a determination that shelter care is necessary. The parent can still argue for the child to remain in the home, often with conditions to protect the child.

The probable cause standard applies to the allegations in the petition, not to whether the child should be placed in shelter care. If there is probable cause to support the allegations in the petition, the court then must determine whether shelter care is required by applying the criteria in D.C. Code §16-2312 and SCR-Neglect 13. Evidence that is not competent (roughly equivalent to hearsay) is admissible in the shelter care hearing. To order a child into shelter care, the court must find that the child cannot be protected in the home and that there are no alternative resources that would permit the child to be protected in the home. If the court orders shelter care, the parent is entitled to at least weekly visitation, unless it is shown that the visitation would cause imminent danger or be detrimental to the child's well being. D.C. Code §16-2310(d).

3. PROCEDURE AT INITIAL HEARING

A magistrate judge usually will preside at the initial hearing, and the case will then remain for all further proceedings either with that magistrate judge or with the associate judge with whom the magistrate judge is paired. If the case involves a family which already has an open neglect case in the Family Court, the case will go to the judge hearing the related case. At the Initial Hearing, the government attorney, known as the Assistant Attorney General (AAG), will ask the court to make findings stating that reasonable efforts were made to prevent removal from the home and that it is contrary to the welfare of the child to remain in the home. Parents' attorneys and the GAL should consider contesting these findings if there was a lack of government effort to provide the services needed to keep the child safely in the home.

This step is important because, in order for the District of Columbia to receive federal reimbursement for foster care costs, the court must make a written finding that reasonable efforts were made to prevent the child's removal from the home and that it is "contrary to the welfare of the child" to return the child home. The contrary to the welfare finding must be made at the Initial Hearing or federal reimbursement to D.C. for foster care costs will be forfeited for the duration of the child's stay in foster care. The agency has 60 days from the removal to demonstrate to the court that it did make reasonable efforts to prevent the removal. The agency should make a showing of reasonable efforts at the Initial Hearing to avoid the possibility of losing funding by failing to address that issue later.

4. PARENTS' PRESENCE AT THE INITIAL HEARING

If either parent is not present at the Initial Hearing the judge will inquire about service. When a parent has not been served, the court will not have authority to issue orders which would affect that parent. The judge will also inquire about any potential paternity issues. If paternity is in doubt the judge will order paternity testing. The court emphasizes locating the parents and establishing paternity at an early stage of the case so that the social workers can start working with the parents early on and avoid delay in permanent placement of the child. Finding potential placements with relatives is also explored so that a child can remain with biological family when possible.

5. PHYSICAL AND MENTAL EXAMINATIONS

A physical or mental examination of the child, pursuant to D.C. Code §16-2315, may be requested at the Initial Hearing or any time thereafter. Generally, testing for the child can be obtained at any time following the filing of a petition. Requests for the physical or mental examination of parents are more restrictive; to have an examination ordered prior to trial, the petition must allege that the parent's inability to care for the child is based on a mental or physical incapacity, pursuant to D.C. Code §16-2301(9)(A)(iii), and there must be a showing of

good cause. Following an adjudication, an examination of the parent can be ordered by request of a party or on the court's own motion.

C. Mediation/Stipulation

All new cases must be mediated within 30 days of the Initial Hearing. Attorneys, parties, and social workers are required to attend mediation, which is held in the Superior Court's Multi-Door Dispute Resolution Division. The purpose of mediation is to afford all parties the opportunity to discuss the case openly in an attempt to resolve issues, such as placement of the child, visitation, and services for the parent or child. Mediation may include developing a case plan and negotiating a possible stipulation. If a stipulation is reached, the case will be heard by a judge later that same day. An approved stipulation is the equivalent of a neglect adjudication. If there is no stipulation agreed to and approved, the next court date will be the previously scheduled pretrial hearing.

The stipulation is like any negotiated agreement, and it is therefore possible to arrive at a stipulation that omits some of the allegations in the petition. Attorneys for either the parent or the child may draft a proposed stipulation and circulate that draft for review by the other parties. See SCR-Neglect 18.

D. Pretrial

A pretrial hearing date will be set at the initial hearing. At the pretrial, the court will inquire whether a stipulation is possible or whether the case will be going to trial. Stipulation will have already been discussed at mediation. If the parent did not appear at mediation, this is another opportunity to discuss a stipulation.

If no stipulation is reached, the court will address any remaining pretrial issues and a joint pre-trial statement will be filed. The pretrial hearing may also be used to discuss other issues, such as placement of the child, visitation, and services for parent or child.

E. Trial

The trial, which is called a fact-finding hearing in the statute, is the proceeding at which the government puts on its case to prove the allegations of neglect by a preponderance of the evidence. Attorneys may consider asking the judge who heard the shelter care hearing to recuse himself from the trial. D.C. Code §16-2312. Under the Family Court Act's one family/one judge rule, the same judge will usually preside over all hearings for each family, absent a request for recusal.

Before the trial can proceed, the parent must be served, either personally or by alternative means. There can be no neglect finding by default; the government must prove its case even if the parent is not physically present. D.C. law requires that a fact-finding hearing must be held in every case within 45 days of the petition being filed if the child is not removed from the home, and within 45 days of entry into foster care if the child has been removed from the home. Entry into foster care is defined as 60 days after removal from the home, so the actual time limit for holding a fact finding hearing for children removed from the home is within 105 days of the removal. D.C. Code § 6-2316.01 outlines these time limits.

If a finding of neglect, also called a neglect adjudication, is made, the case goes on to disposition which may occur on the same day or at a later date. If there is no finding of neglect, the case is dismissed.

F. Disposition³

The dispositional hearing is the hearing at which the court determines the placement of the child and sets the conditions for that placement. Disposition can occur on the same day as the fact-finding hearing or stipulation or it can be continued for an additional 15 days for good cause shown. However, the disposition hearing cannot be held later than the deadline imposed for the fact-finding hearing. D.C. Code §16-2319 requires that a pre-disposition study and report be done by

³ D.C. Code §16-2320 governs dispositions.

the agency with case responsibility and provided to counsel five days before the trial. However, that report shall not be furnished to the court until completion of the fact-finding hearing.

The report is to contain:

- The specific harms intervention is designed to alleviate;
- Plans for alleviating the harms, including the services and their proposed providers and what the parents must do to alleviate the harms;
- Estimated time in which intervention will be accomplished or when it may be known that the goals may not be achieved;
- Criteria to be used to determine when intervention is no longer necessary; and
- If removal of the child is recommended, the report must include: the recommended type of placement; why the child cannot be protected at home; the likely harm the child will suffer as a result of the separation and the steps necessary to minimize that harm; and the plans for maintaining contact between parent and child.

A report that contains all of these elements can be very helpful in setting out the respective responsibilities of the parents and the social service agencies. It should, in many ways, mirror the case plan that the agency has already prepared for the family. The more specific the report, the better the court and parties can gauge the progress of the case at further court hearings. If the report does not contain all of the statutorily required factors, counsel should consider requesting a continuance with specific reasons why the information is needed.

At the disposition, the court will determine where the child shall be placed. The choices are: return home to parent, generally with certain conditions (protective supervision); placement with relative or friend (third party placement); or commitment to the care of Child and Family Services Agency (CFSA). Commitment places the child in the legal custody of the CFSA. In all instances, however, the child and family continue to be subject to the jurisdiction of the court. D.C. Code §16-2320 gives the court broad authority to fashion a dispositional order that is in the child's best inter-

est, including the authority to order public agencies or private agencies receiving public funds to provide needed services.

At the disposition, if the child has not been returned, the court should set forth the requirements or conditions that the parent must meet in order to regain custody. The issue of visitation should also be addressed. At this hearing, as at all others, issues concerning the child's needs should be addressed, e.g., therapy, special education needs, etc. The court will also schedule a review/permanency hearing. Dispositional orders remain in effect two years (commitment) or one year (protective supervision). Orders may terminate early or be extended for one year at a time until the child's 21st birthday.

G. Review and Permanency Hearings

After disposition, the statute requires that review and permanency hearings be held periodically. D.C. Code §16-2323. These hearings provide the means for the court to monitor the case and ensure that the agency is moving toward a permanent home for the child. In cases where the child is in an out-of-home placement, review hearings are held at least every six months, and a permanency hearing must be held within 12 months of a child's entry into foster care, and at least every six months thereafter. "Entry into foster care" is defined as 60 days after removal. If the court has determined that reasonable efforts to reunify the family need not be made, then a permanency hearing must be held within 30 days of that finding and at least every six months thereafter. Rules for Review and Permanency hearings are found at SCR-Neglect 28 through 34.

At the first permanency hearing the Court will establish a goal for the child's permanent placement and a timetable for achieving it. ASFA, as adopted by the District in D.C. Code §16-2323(c), sets forth the permanency options: return to the parent, adoption, legal custody or guardianship, and another planned permanent living arrangement (APPLA). APPLA is a permitted option only if there are compelling circumstances to support it rather

than one of the other options. That permanency goal will be reviewed, along with progress made toward the goal, at all subsequent hearings. In practice the review and permanency hearings tend to be merged, with the court's emphasis being on permanency at all post-disposition hearings.

Ten days before the court's review or permanency hearing, the social services agency supervising the case must submit a report detailing, among other things: the services offered or provided to the child and parent; evidence of amelioration of neglectful conditions; new problems that might adversely affect the child; level of parental cooperation; the visitation pattern and an estimated time for the child to return home (if the goal is reunification); or a recommendation that proceedings to terminate parental rights commence. The court, with the assistance of the social worker's court report and information provided by other parties, assesses whether the family is being offered appropriate services, and whether the parent is visiting and otherwise complying with conditions set down at earlier hearings, which can lead to reunification and the end of court supervision.

If the case is not moving towards reunification, the social worker and the child's attorney should make and implement alternative plans for a permanent home for the child.

H. Termination of Parental Rights/Adoption⁴

D.C. Code §16-2354, requires the government to file a motion to terminate parental rights (TPR) if a child has been in foster care for 15 of the last 22 months, the child has been abandoned, or the parent committed one of the enumerated acts. TPRs are also required in cases in which the court has approved the permanency goal of adoption. The 15-month deadline is a maximum, not a minimum, so a TPR may be filed before the 15-month mark, depending on the circumstances of the case. The guardian *ad litem* may also file the TPR motion.

Grounds for terminating parental rights must be proven by clear and convincing evidence. The con-

trolling consideration is the best interests of the child, and the statute sets out the factors that the court must consider in making this determination. If there are prospective adoptive parents who have filed an adoption petition, the TPR motion will be consolidated with the adoption. Parents may want to consent to an adoption rather than having their parental rights involuntarily terminated. By consenting, parents may have some control in determining who will raise their child. Also by consenting, parents can avoid the negative consequences of involuntary termination should a sibling later come into the neglect system, since the law allows the court to make a finding that reasonable efforts to reunify the family are not required if a parent's rights have been previously involuntarily terminated. D.C. Code §4-1301.09a.

Adoptions are filed as separate cases. The presiding judge of the adoption calendar designates specific procedures and forms that must be used in filing adoptions. These procedural guidelines and forms are available from the adoption clerk. Once the adoption case is filed, it will be consolidated with the neglect case and any pending TPR. The attorneys representing the parties in the neglect case will continue to represent them in the consolidated adoption case. Since an adoption that is granted will result in the termination of parental rights, a TPR need not be filed along with an adoption case. Some caretakers prefer that a TPR be completed first, so that they will be assured that the child is free for adoption before proceeding with an adoption petition.

After an adoption case is filed, the judge schedules a show cause hearing to deal with the issue of parental consent. Since a parent's consent to an adoption is required unless the court waives this requirement, the hearing requires the parents to show cause why their right to withhold their consent should not be waived. The grounds for waiving consent are abandonment or a finding that the parent is withholding consent contrary to the best interests of the child. (D.C. Code §16-304.)

⁴ D.C. Code §§16-2351 *et seq.* govern termination proceedings. D.C. Code §§16-301 *et seq.* govern adoption.

Adoptions by foster parents are often subsidized so that the foster parent can continue to receive a monthly payment after the adoption. The purpose of the subsidy is to encourage the adoption of special needs and hard to place children.

I. Guardianship/Legal Custody⁵

Guardianship and legal custody are two additional permanency options that can bring a neglect case to closure when the child is not able to reunify with the parents. Both require a new case to be initiated. These options differ from adoption in that parental rights will not be terminated and the parents can retain visitation rights and other parental rights.

The Foster Children's Guardianship Act of 2000 was passed by D.C. Council to address the situations of "kinship care" - foster parents who care for the children of relatives but are unwilling to adopt. Since many of these relatives are unable to care for the children without a subsidy, the guardianship law allows relatives who are licensed kinship care providers to seek guardianship, which can be subsidized. Once guardianship is granted,

the neglect case is closed, although it may be reopened if there is a substantial change in the child's circumstances.

Legal custody is an action brought in the Domestic Relations Branch of the Family Court. It is not limited to neglected children. It is not subsidized unless the legal custodian is a grandparent or other qualified relative who applies and qualifies for a grandparent subsidy recently enacted by D.C. Council. The custodians may also seek child support from the parents or public assistance to help them care for the child. As with guardianship, once legal custody of a neglected child is granted to a responsible caretaker, the neglect case is closed, but in the case of legal custody the neglect case cannot be re-opened.

The case of *W.D. v. C.S.M.*, 906 A.2d 317 (D.C. 2006), had caused considerable debate over whether non-parents could file for legal custody of children. In response to this case, the D.C. Council passed The Safe and Stable Homes for Children and Youth Act of 2007 to authorize third parties to file for legal custody. The new law is codified at D.C. Code §§16-801 through 16-813. ■

⁵ D.C. Code §§16-2381 *et seq.* covers permanent guardianship for neglected children. D.C. Code §16-914 and §§16-4601.01 *et seq.* (Uniform Child Custody Jurisdiction and Enforcement Act) govern domestic relations child custody actions.

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PRE-PETITIONING ISSUES

The Mayor has designated the Child and Family Services Agency (hereinafter “CFSA”) as the governmental agency authorized to oversee the investigation, case management, and care of neglected and abused children in the District of Columbia, pursuant to authority vested in the D.C. Code §§4- 1303.03 and 16-2301 *et seq.*

I. Initial Report of Abuse or Neglect

CFSA requires that all reports of suspected child neglect or abuse must come through a single telephone reporting line, called the hotline. CFSA is required to maintain operation of this 24-hours-a-day 7-day-per-week hotline number, (202) 671-SAFE, and to investigate allegations of abuse and neglect in a timely manner. Reports of abuse and/or neglect may be made by a concerned citizen or relative or by a mandatory reporter. A report may be made anonymously.

D.C. Code §4-1321.02(b) designates certain professionals as mandated reporters of abuse and/or neglect. These professionals are physicians, psychologists, medical examiners, dentists, chiropractors, registered nurses, licensed practical nurses, persons involved in the treatment of patients, law-enforcement officers, school officials, teachers, social service workers, day care workers and mental health professionals. Employees of hospitals, schools and social service institutions are likewise required to report suspected abuse or neglect to the person in charge of the institution in which they are employed. The D.C. Code provides a criminal penalty if a mandated reporter fails to make a report of abuse/neglect to CFSA or the Metropolitan Police Department (MPD) if they know or have reasonable cause to know that a child is being abused and/or neglected as defined by the D.C. Code. Persons reporting abuse and neglect are immune from civil or criminal liability

for any report made in good faith.

CFSA and/or MPD investigate all reports. After a report has been made, there are certain steps in the investigation that each agency must take. These steps may vary based on the character of the conduct alleged and which agency receives the initial report.

II. Investigations

CFSA and MPD have prioritized certain types of cases to ensure an immediate response when it is necessary to safeguard the child’s welfare. All reports made to the hotline must have an initial investigation within 24 hours. Some reports require immediate action. Such emergencies include cases of children left alone or left in dangerous or deplorable conditions, serious physical abuse, or sexual abuse. When a child is allegedly abused, the primary responsibility of investigation is with MPD’s Youth Investigations Branch (formerly called the Youth and Preventive Services Division), and when a child is allegedly neglected the primary responsibility is with CFSA. D.C. Code §4-1301.06(a). CFSA and MPD must work collaboratively to investigate every allegation of abuse or neglect regardless of which agency receives the initial report or which agency is primarily responsible for the investigation. The purpose of the initial investigation is to determine the nature, extent, and cause of the abuse or neglect;

the identity of the person(s) responsible for the abuse or neglect; the identity of the child; the identity of all children living in the home; whether another child in the home is abused or in danger of being abused; and whether any child should be removed from the home. D.C. Code §4-1301.06(b). See section IV.B. of this chapter for a discussion of the role played by the Children's Advocacy Center when the allegations involve physical or sexual abuse of a child.

A. Agency Investigations

CFSA maintains an intake and investigations staff on a 24-hour basis to ensure timely response to allegations. Once a hotline call is received, the CFSA hotline worker will take the necessary information and input the information into the agency's database. CFSA is to conduct a thorough investigation of a report of suspected child abuse or neglect to protect the health and safety of the child or children. D.C. Code §4-1301.04(a), as amended by the Child in Need of Protection Amendment Act of 2004.

If a case involves "neglect"¹ and "abuse,"² the Agency must investigate the report immediately upon receiving a report for cases where child's safety or health is in immediate danger and within 24 hours for all other reports. All investigations must be completed within 30 days of the receipt of the report.

The hotline call is assigned to an intake investigations social worker who must investigate the allegations reported. The investigations social worker will determine whether or not an abuse/neglect report made is: (1) substantiated with credible evidence; (2) unfounded, as having no basis for the report; or (3) inconclusive, as it can neither be substantiated nor unfounded based on lack of information.

A substantiated case does not automatically result in a court case. However, each substantiated report of abuse or neglect does result in

an entry into the Child Protection Registry, which is discussed in detail below.

Upon receipt of a report that a child is born addicted or exposed to a controlled substance, or if there is a controlled substance in the child's body as a result of the parent's action or inaction, or if the child is exposed to drug-related activity, CFSA shall commence an investigation to determine whether the child may safely remain in the home. D.C. Code §4-1301.06a. If this initial investigation results in a substantiated report, the agency shall prepare a social report, in accordance with D.C. Code §4-1301.09(b), to include a plan for each child and family in need of continuing services beyond an emergency basis.

The Agency's social report shall ensure the protection of the child, and the preservation, rehabilitation, and if possible reunification of the family. Steps to achieve these goals may include referrals for services, classes, treatment, financial assistance, community assistance, and making specific arrangements for the case management of each case when child protective services are required.

B. MPD Investigations

If the police receive the initial report of child abuse or neglect, they shall commence an investigation immediately. If a child is reported to be neglected and not abused, MPD shall inform CFSA as soon as possible and provide the agency with any information gathered or steps that have been taken. D.C. Code §4-1301.05(a). If the child is reported to be abused, the police may inform the agency of the allegation as soon as possible, but they must inform the agency as soon as the report of abuse is substantiated. D.C. Code §4-1301.05(a)(b). If the police receive a report of an abused child or a child in immediate danger of being abused, they shall commence an investigation immediately. If the police receive a report that a child is without adequate supervision, they shall safeguard the child until the agency arrives, or after waiting a reasonable period of time for the

¹ Neglect is defined by D.C. Code §16-2301(9).

² Abuse is defined by D.C. Code at §16-2301(23)(A) & (B).

agency to arrive, they may transport the child to the agency. D.C. Code §4-1301.05(e)

MPD takes the lead in investigating serious physical abuse and sexual abuse cases and CFSA determines whether the child must be removed based on safety concerns presented. An MPD investigator is assigned to such cases to determine if a crime has been committed. After the MPD responds to a sexual abuse and/or serious physical abuse/injury allegation, they shall forward a copy of the complaint to either the Youth Investigations Branch or CFSA, depending on which is appropriate. As MPD responds to a call, they shall contact CFSA before they leave the building to arrange a joint investigation with the social worker. Often there are companion criminal cases based on the abuse inflicted upon the child by the parents, caretakers or custodians (CFSA/MPD Joint Investigations Memorandum of Understanding – Duties and Responsibilities).

III. Subsequent Actions

In every case, CFSA makes a safety assessment to determine if a child should be removed from their home based on the information verified. If the initial investigation results in a case being substantiated, CFSA's options include: (1) removing the child from the home and requesting the Office of the Attorney General (OAG) to petition the case in Family Court; (2) requesting an assignment of CFSA's supportive services social worker for further services without court intervention; (3) requesting the OAG to petition the case at a later time, if CFSA determines that court intervention is necessary to ensure the safety and well-being of the child (the placement of the child may or may not continue in the home); or (4) requesting community-based neighborhood collaborative support without court intervention (later court intervention remains available if necessary).

A. Removal and Petition

If a child is neglected and/or abused, CFSA must decide whether the child can be protected by serv-

ices in the home, or whether the child should be removed from the home. If MPD conducts the initial investigation and determines that the child is not in immediate danger, they contact CFSA so that the agency can determine whether services will enable the child to remain in the home. In cases where MPD determines that the child is in immediate danger of being harmed, MPD shall remove the child and then immediately contact CFSA so that the agency can investigate alternative placements for the child. D.C. Code §4-1301.07(c) and D.C. Code §16-2309.

If a child is removed from the home, the responsible party (CFSA or MPD) must present the Office of the Attorney General's Child Protection Section with a complaint report to petition the matter. The papering Assistant Attorney General (AAG) will review the information contained in the complaint report and discuss the facts gathered in the investigatory process to determine if the case is legally sufficient to petition. Within a day of the child's removal (excluding Sundays), the Family Court must appoint a guardian *ad litem* (GAL) for the child. If the AAG determines that the case will be petitioned, the case will be presented in court within 72 hours of the removal (excluding Sundays). If the government decides not to file a petition after the GAL has been appointed, the court requires that the GAL file a report stating whether he or she agrees with the government's decision not to petition the case and the reasons for his or her position.

B. Family Team Meetings

Beginning in October 2004, CFSA has held a Family Team Meeting (FTM) on all new cases where a removal has occurred. FTMs are held within 72 hours of the removal of the child, if possible. The CFSA FTM coordinator works with family members and other interested parties, including the child's newly appointed GAL, to hold a meeting as soon as feasible. The Family Court expects the GAL to attend the FTM, meet with the child, and begin investigating the case before the Initial Hearing.

A facilitator guides the parties through the FTM, which usually lasts about three hours. During this time, the parties discuss matters in a structured but open forum to devise a plan for the child involved. Family members may volunteer during the meeting to be a placement resource for the child, and if so, CFSA works with them to license their home.³ FTMs conclude with a plan developed by all present, with persons agreeing to assist the family with specific tasks designed to achieve goals identified by participants.

Family Team Meetings are designed to engage families early in the child protection process and to achieve better outcomes for the children and families. The information gathered during the meeting and the plan developed as a result can make the initial Family Court hearing more productive.

C. Petition Without Removal

If CFSA and OAG decide to bring a petition to court but CFSA does not remove the child from the home, there is no requirement to appoint a GAL before the initial hearing, and there is no provision for a family team meeting. The parents' attorneys and the GAL may be appointed on the day of the initial hearing or a few days before the initial hearing.

D. Substantiate and Request Supportive Services without Court Intervention (Agency Case)

If the investigation finds a child to be abused and/or neglected, but CFSA determines that removal from the home is not necessary or that the parent has made an alternate arrangement to keep the child safe, CFSA should attempt to secure the parent or caretaker's full cooperation and assistance in the entire rehabilitative process.

Providing on-going services to a neglected child and his/her family without court intervention is known as an agency case. An agency case can succeed only if the family is willing to participate and

to accept offered services. The family is free to reject agency involvement. CFSA will make efforts to offer services to the family through neighborhood collaborative services. However, if the family rejects services, the social worker may refer the case for court intervention by requesting that the AAG petition the matter before the Family Court (known as community papering).

IV. Additional Information

A. Child Protection Register

In addition to intake and investigation, CFSA is required to maintain a confidential "Child Protection Register" containing information concerning each report of abuse or neglect. The following persons (or their agents) have access to this register, pursuant to D.C. Code §4-1302.03(a): police officers; Office of the Attorney General; CFSA; Guardian *ad litem* (GAL); each person identified in a report as a person responsible for the neglect or that person's attorney; the parent, guardian or custodian of the child who is the subject of the report or that person's attorney; a child placing agency licensed in D.C. It may be useful for counsel to request Child Protection Register information through discovery requests to the government. The staff that maintains the confidential register may not reveal any information which identifies the source of the report or witnesses without the permission of the source or witnesses. D.C. Code §4-1302.03(d).

B. Children's Advocacy Center – Safe Shores

If a report of physical or sexual abuse is made, CFSA works with D.C.'s Children's Advocacy Center, Safe Shores, to oversee the interview process of the child. Safe Shores is a non-profit organization that works with the District's child protection system to minimize the trauma of interviews on child victims and witnesses and to prepare the child victims and witnesses for court. Safe Shores

³ CFSA promulgated a regulation authorizing temporary licensing of relatives or significant persons until their official license can be issued. D.C. Municipal Regulation Title 29, Chapter 60 as amended by adding a new section §6027.

is a part of the multidisciplinary team working with children. The multidisciplinary team consists of the United States Attorney's Office for the District of Columbia, the Office of the D.C. Attorney General, the Metropolitan Police Department, the Child and Family Services Agency, and Children's National Medical Center.

The interview takes place at the Children's Advocacy Center, and the above-mentioned parties may attend to witness it. In most instances, the

case has not yet entered the court system and therefore a GAL has not been appointed. However, if the child has already been assigned one, the GAL will be notified by Safe Shores about the interview. This multidisciplinary system allows for all agencies involved to come together in one place and exchange information as well as have the same general understanding of what has occurred, while minimizing trauma to the child which would be caused by multiple interviews. ■

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INITIAL HEARINGS

Court proceedings must be initiated within certain time limits if the child has been taken into custody or a neglect petition filed. The first court hearing is known as the “initial hearing.” If a child is taken into custody and not released, there must be a hearing begun no later than seventy-two hours (excluding Sundays) after the child has been taken into custody. D.C. Code §16-2312(a)(1)(B). If the child is not taken into custody but a petition is filed, the initial hearing must take place no later than five days after the petition has been filed. SCR-Neglect 5.

I. Preliminary Matters

A. Family Team Meetings

When a child has been taken into custody due to allegations of abuse or neglect, a guardian *ad litem* (GAL) must be appointed within twenty-four hours of the removal. D.C. Code §16-2312(a)(1)(A). The District of Columbia has seventy-two hours after removal to bring the matter to court, and the Child and Family Services Agency (CFSA) may convene a family team meeting (FTM) within that timeframe.

If possible, CFSA holds these meetings in the interval before the initial hearing. The meeting is intended to develop a safety plan for the child. The meeting brings together the parents and extended family, CFSA representatives, community representatives, service providers and the GAL in an attempt to identify possible resources for the family, potential ways for the children to avoid foster care and to determine the needs of the child. The parents may bring attorneys to the meetings, but because the court does not appoint parents’ counsel until the time of the initial hearing, the parents are often unrepresented at this meeting. The meeting is confidential and all parties are required to sign an agreement

not to use the information from the meeting outside of the meeting.

At the end of the meeting, CFSA is to summarize the discussion and record the safety plan and distribute a copy of the plan to all participants of the family team meeting. The safety plan shall clearly outline the roles and responsibilities of each participant and the target dates for each action set forth in the plan. D.C. Code §16-2312. The plan should be filed in the child’s social file and should be distributed to all parties and attorneys.

The Child in Need of Protection Amendment Act of 2004 set the 72-hour-after-removal deadline for initial hearings and authorized CFSA to convene FTMs within that period. The statute has raised several concerns that appointed counsel must be aware of.

The first concern is the effect that the FTM will have on the relationship between the parents and their counsel. Counsel for each parent is appointed only when the case comes into court, not when the GAL is appointed in removal cases. When parents attend the family team meeting, they are unrepresented. This raises a practical problem for the attorneys appointed later to represent the parents. The parents have already attended a meeting with the GAL and the social

workers and developed a safety plan. They may now view their appointed attorneys as an unnecessary interference, making it difficult for the attorney to develop a working relationship with the parent. For example, if after the parent agreed to a plan that requires the parent to drug test, the parent's attorney may have a difficult task explaining that there is no legal basis for requiring drug testing.

The second concern is the role of the GAL at the family team meeting. The GAL is charged with representing the best interests of the child. Most likely, the GAL will be the only attorney at the meeting. Therefore, the GAL must be diligent in following the D.C. rules of professional conduct. Rule 4.3 states that a lawyer shall not:

- (a) Give advice to the unrepresented person other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client;
- (b) State or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment 1 to Rule 4.3 states:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer will provide disinterested advice concerning the law even when the lawyer represents a client. In dealing personally with any unrepresented third party on behalf of the lawyer's client, a lawyer must take great care not to exploit these assumptions.

The third concern is the issue of confidentiality. At the family team meeting, the participants are requested to sign a confidentiality statement. The confidentiality form is merely a CFSA form. It is not required by the statute. The impact of that statement or what would occur if a party refused to sign the statement has not been determined. The neglect confidentiality statute, D.C. Code §16-

2336, does not apply to family team meetings, as they are held prior to the matter being brought before the court.

The fourth concern is what happens to the plan developed at the family team meeting. What occurs when a plan is reached and a parent objects to it, or counsel advises the client to object to it after having consented at the meeting?

The fifth concern is whether the appointment of a GAL for the child and not attorneys for the parents raises constitutional equal protection issues.

B. Notice of Petition

When OAG files a petition, the court sets a date and time for the initial hearing and issues summonses for that hearing. The summons and a copy of the petition are to be served on the parents, guardian or custodian of the child named in the petition. D.C. Code §16-2306; SCR-Neglect 11. The court may also direct service of summonses upon other persons "when appropriate to the proper disposition of the case."

A summons may be served by a U.S. Marshal or by any person empowered to serve a summons in a civil action. See SCR-Civil 4. A summons may be served at any place in the District of Columbia. SCR-Neglect 11. Service on a person outside the District of Columbia must be effected in accordance with D.C. Code §16-4601.07.

The summons is to be personally served upon the parents, guardian or custodian or, if personal service cannot be made, substitute service may be made by delivery of the summons to a person of suitable age and discretion then residing at the dwelling, house or usual place of abode of the party named in the summons. SCR Neglect 11.

Service should be made in advance of the hearing, preferably at least 48 hours, so that reasonable opportunity is afforded to arrange to attend and participate. In practice, however, service is frequently made at the initial hearing.

If neither personal nor substitute service can be made, the court may authorize constructive serv-

ice by certified mail to the party's last known address or by such other form of notice as the judge may authorize. SCR-Neglect 11(i) sets forth the required contents of the notice when constructive service is used.

SCR-Neglect 11(j) provides that "[o]ral notification by a judge of the [Family]Court during a judicial hearing or written notification given in person by an authorized representative of the [Family] Division to any person present shall constitute legal notice in lieu of service."

Notice is an integral component of due process and counsel should ensure that proper notice is given. It is difficult to conceive of any case in which it would be appropriate for counsel to waive notice requirements, or consent to constructive service in the absence of specific evidence showing that there at least have been reasonable efforts made to locate the parent and effect personal service. If alternative service is authorized by the court, the question remains whether the person has actually been served. Accordingly, counsel should continue to make efforts to locate his or her client. Oral motions for permission for constructive service should be discouraged. Counsel for a parent who has not been served by personal or substitute service should request a written motion, affidavits detailing what efforts have been made to find and serve the parents, and a hearing if necessary. The fact that a parent may be difficult to locate or serve should not relieve the government of the obligation to attempt to provide actual notice of the proceedings.

The assistant attorney general (AAG) has the discretion not to petition a case; this is referred to as "no-papering." If the case is no-papered, the child is returned home and the court case is closed. A case may be no-papered over the objection of a GAL. When a case is no-papered, it is the court's practice to have the GAL file a report stating whether the GAL agrees with that decision. The GAL report form may be obtained from the CCAN office.

C. Initial Investigation

Counsel should gather as much information as possible before the initial hearing in order to be able to advise their client effectively, negotiate with the social worker and other counsel, and identify contested issues. Probably the most important question that will be decided at the initial hearing is the child's placement pending further proceedings in the case. Counsel's initial investigation efforts will therefore be directed primarily at determining the basis for the allegation of the petition, the likelihood that the child would be at risk of harm if remaining or returned home, what alternative non-foster care placements can be proposed to the court if necessary, and what services can be proposed as an alternative to removal.

The GAL and the parents' attorneys will develop much of the same information. They will want to interview anyone available who is "officially" involved with the case: social workers, police officers, and examining physicians. They should talk to anyone who may have relevant information about the allegations of the petition and about the family, such as immediate family members, relatives, and friends. Attorneys may want to contact teachers, physicians, day care staff, and others who know the family to try to get information about the care of the child, generally, and about the specific allegations in the petition.

Attorneys should review any available documents, including social service reports, medico-legal forms, and other medical reports. If the circumstances warrant, school records should be obtained.

Parents' attorneys need to locate their clients in order to advise them of the case and obtain instructions. However, for purposes of proper service, the government needs to locate them as well. It is sometimes beneficial to let the whereabouts of your client be unknown until the government has located and properly served them. If your client has been located and/or served before the initial hearing, the social worker or police officer may know if the client has arrived at the courthouse. If the client has not arrived, the social worker or police officer should know what kind of

notice, if any, was given to the parent. They may also be able to provide additional information as to where and how the parents might be contacted, as well as the names and telephone numbers of relatives, neighbors or friends, and school and day care information.

Parents' attorneys should not assume that their clients have previously been given any meaningful explanation about what is taking place. Counsel should thoroughly explain the nature of the proceedings, what has already happened, and what is going to happen. It is useful to explain at the outset that the neglect case is a child protection and custody proceeding, not a criminal proceeding (although criminal charges could be brought separately); that the proceedings are closed to the general public and are to a certain extent confidential; and the nature of the attorney-client privilege. If there is time, counsel should present the client with an authorization for release of records, explain it, and ask the client to sign it. Many attorneys make it a practice to carry medical and school release forms with them at each initial hearing.

The client needs to know what is going to take place at the initial hearing, what decisions will need to be made, and the range of probable alternatives. If the government is requesting shelter care (removal of the child into CFSA care) pending further proceedings, a parent's counsel should explain the client's right to a shelter care hearing (also known as a probable cause hearing) and ascertain whether the client wishes to contest the shelter care request. The standard of proof at a shelter care hearing is whether there is probable cause to remove the child from the parent/custodian's care pending a further hearing. Because the standard is a low one, it is very difficult to be successful at a probable cause hearing. It is important to inform your client of the low standard and the likelihood for success, so that they may be able to determine whether they would like to proceed with the shelter care hearing. Many clients will wish to avoid the emotional difficulty of enduring such a hearing. On the other hand, counsel may wish to advise a client to proceed with a hearing in order to obtain information from the social

worker, under oath, for potential future use in the case. If your client does not wish to contest the placement, they will be asked to sign a waiver of probable cause. As with any legal document, counsel should review the language with your client prior to their signing the waiver.

If the government is not requesting shelter care, parents' counsel should explain the placement arrangement and conditions the government is proposing and determine whether the client wishes to consent or object. If necessary, counsel should ask if the client can suggest any friends or relatives who might be willing to offer assistance or care for the child and try to contact them in the event that the court will not return the child or allow the child to remain in the home.

The guardian *ad litem*, GAL, is the attorney appointed for the child. The GAL needs to ascertain if the child is at court and, if not, where the child can be reached. The social worker or police officer may know the child's whereabouts. If the child was taken into custody, the CFSA intake worker will have a record of where the child was placed and the telephone number.

The GAL is required to advise the court at the initial hearing of the GAL's view of what is best for the child, which may differ from what the child wants. The GAL should, in most cases, explain to the child, in age-appropriate terms, what is going on, what the attorney's role is, what decisions are going to be made, and by whom. Many of the same things that should be explained to adult clients, such as the attorney-client privilege and the closed nature of the proceedings, should also be explained to children. It may be advisable to explain that an attorney has been appointed not because the child has done anything wrong, but so that the child will have someone to explain the court process and to speak on his/her behalf to other people involved in the case.

Ultimately, counsel for both parents and children will want to ascertain from the Assistant Attorney General what its position will be at the initial hearing. If appropriate, counsel may want to try to negotiate a consent order that is acceptable to all parties.

II. Your Client

A. The Initial Meeting

First impressions are lasting. Whether you represent parents or children, your conduct of the first meeting is important. While techniques vary, you should strive to leave the meeting with the client believing he/she is lucky to have you as a lawyer.

As indicated earlier, clients frequently do not understand what is going on in the neglect system and do not understand the roles of various people in the case. By taking the time to clarify the roles of the various parties and to explain the procedures, especially those at the initial hearing, you will begin to establish rapport with your client and to put him/her more at ease. Especially when your client feels that “everybody is against me,” it is very difficult to get complete and accurate information. One can only hope to establish sufficient trust and candor over time.

However, some matters must be developed at the initial hearing. At the end of your first client meeting, you need to have established sufficient “control,” so that your client will take seriously the advice you have given. For example, if you see a realistic possibility of criminal prosecution, you *must* instruct your client adequately about the consequences of making statements relating to the event.

On occasion, after advising your client of the probable result, you may press for the relief your client wants, even though you know from experience that it is practically impossible to obtain. That way, you demonstrate to your client that you take seriously what the client wants and will fight for him/her. It is also frequently advisable to stress to your client that you work for the client, not for the District of Columbia, even though you are appointed and paid by the court.

You need to make full and complete arrangements for talking with your client between the initial hearing and mediation or next court hearing. Many clients do not have phones, so it is impera-

tive that you get information about how to contact your client and be sure that the client knows how to reach you.

B. Follow-up

If your client is working with you in the period following the initial hearing, you have a much better chance of getting a favorable resolution. Parents’ attorneys, especially, need to determine how much their client can do to help posture the case as well as possible for trial. By following up with the client after the initial hearing, you help to establish a trusting relationship and can frequently head off potentially damaging developments. You can also determine whether the client is willing and able to follow your advice with respect to matters such as talking with the social worker, attending parenting classes, visiting at the appointed times, etc.

C. The Unresponsive or Hostile Client

Particularly when you represent a parent who is alleged to have abused his/her child, you are likely to encounter a hostile client. In what seems to be a defensive reaction, the alleged abuser often assumes the offensive against everyone involved in the case. One of the more challenging assignments is to represent such a hostile client. In those cases, it is essential to gain sufficient credibility in your client’s eyes, so that you can keep him/her from exacerbating the situation. You might explain to your client that some people might treat him/her badly because at this early stage many people are assuming that the allegations are true. By not condemning the client yourself and by observing that such a generalized assumption should not be taken personally, you can sometimes work wonders toward gaining the trust and cooperation of your client.

The unresponsive client presents a different challenge. A mother who is charged with neglecting her children because of drug use, for example, and who has had a series of bitter disappointments from dealing with “the system” may well come into court and assume an extremely passive

role. Instead of pressing you to have her children returned to her, she may try to turn any request for instructions regarding her position back on you. She is ready to give up before the case even begins. If you sense this, you must be very cautious at the initial hearing. The client may well change her mind or attitude after the shock of the initial court involvement wears off. To the extent that you can, you should protect her from making irrevocable decisions or harmful admissions.

D. The Absent Parent

When you cannot reach a client prior to the initial hearing, you are placed in an awkward position. You have no instructions, so it is difficult, if even possible, to take a position on anything. It is particularly important to seek as much information as you can and to enlist help to locate and contact your client.

At the hearing, you cannot actively participate – both because you have no instructions and because you do not have the benefit of information from your client to help you develop facts that might be relevant. You should not presume that you know what instructions would be given if your client were present. If you can get on the record at the initial hearing an admission by the government that the client was neither notified nor served, you have done about all you can.

Three mistakes that attorneys sometimes make at the initial hearing are requesting probable cause for an absent client, agreeing to alternative service based on representations about the unavailability of the client, and not opposing court orders directing the parent to do or not do something. The first mistake runs the risk that there will be a probable cause hearing in the absence of your client that will bind your client. If the client later appears, you cannot then demand a second probable cause hearing. Agreeing to alternative service is simply bad practice, because you need to be certain that efforts were made to locate your

client. The established procedure is for the government to file a motion with affidavits specifying the efforts made to locate your client. Without service on the parent, the court has not obtained jurisdiction over the parent and consequently does not have the authority to issue an order requiring the parent to act or refrain from acting. Often the government will ask the court to order the parent to take drug tests or have a psychological evaluation when there has not been service. The parent's attorney should oppose such requests or orders.

See Chapter 16 on ethics for further discussion of representing an absent parent.

E. The Older Child

The GAL has every bit as much reason to seek out and talk with his/her client before the initial hearing as does the parent's attorney. If the GAL has not spoken with or seen his/her client, participation in the initial hearing is of minimal value to the judicial officer.

When a child has reached sufficient age, the child's opinion is entitled to significant weight in determination of placement. The child may well know something about a proposed custodian that is highly relevant to the decision. It is the child's counsel's job to ascertain that information.

Teenagers are certainly old enough to have significant input in a proceeding, and judges are usually not reluctant to solicit their opinions. Especially when a parent claims, as one often will, that the real source of the problem is an uncontrollable teenager, conferring with the child prior to walking into the courtroom is critical.

At the outset, when representing a teenage respondent, it is a good idea to explain counsel's dual role as both GAL and advocate. This enables the respondent to be aware of the option of splitting the roles if an irreconcilable conflict emerges. These roles should be reiterated as the case proceeds.

III. Strategy for the Initial Hearing

A. Making Allies and Negotiating

Counsel for a child frequently follows the government's lead at initial hearings. Certainly, it is appropriate for a child's counsel to seek a safe placement for the child. It does not follow, however, that the GAL will never be persuaded that the child should return home in cases where the social worker initially recommends removal. When the child wants to go home, the GAL might seek to work out appropriate safeguards and services with the parent's counsel, the social worker, and the Assistant Attorney General. It would be a mistake to assume that the Assistant Attorney General and the social worker cannot be persuaded to change their recommendation just because the initial removal was thought necessary. For the parent's counsel, it is important to seek the GAL's support in obtaining the relief the parent wants, especially if the government is seeking removal of the child. By making an ally of the GAL, other parties, and/or the social worker, you have a better chance of preventing removal.

It cannot be said too often that breaking up a family, or even just subjecting a family to the ordeal of a neglect proceeding, is a radical remedy to be avoided if at all possible. In some cases, there has been prior intervention by CFSA without court involvement that has not remedied a bad home situation. If the parent will agree to accept services and allow significant safeguards to be put in place, return of the child to the home is the preferred alternative.

From the point of view of the family, it is desirable to reach an accommodation at the initial hearing to avoid having testimony in which one family member, usually a parent, is pitted against another, usually the child. Only in the rare case will the government be unable to make sufficient evidentiary showing to establish probable cause. For both of these reasons, a parent may wish to consent to an order removing the child, rather than forcing the court to hold a hearing. However, see below for discussion of the rare situation when you

will want to force a probable cause hearing.

If you have no contact with or instructions from your client, you must not take any position except to reserve all rights. Those rights include proper service, notice of the hearing, and the right to a hearing.

B. Obtaining Witnesses and Evidence

When it becomes obvious that a probable cause hearing may be held at the initial hearing, it is important to determine whether you should or can develop evidence for the hearing. The child's counsel should participate fully in developing the evidence and preparing witnesses. While the child's position will usually be identical to the government's, it is still important for the GAL to interview potential witnesses and review the documents in order to assist in obtaining the placement the child wants or that is best for the child.

The parent's attorney is usually the one who must develop evidence that may defeat probable cause. Since hearsay is admissible at the hearing, you can anticipate that the government will call police officers or social workers whose knowledge of the case is derived in large measure from hearsay. Your evidence may be based on hearsay also, but it must go to the heart of the probable cause or it will be totally ineffectual. Credible friends and relatives, particularly if they witnessed or were told contemporaneously of the alleged events, may come to court on short notice.

The practical point here is to suggest that you may be able to develop a defense even in an extremely short time. Not only may you get witnesses, but you can often get help from the CCAN Office or colleagues. You may desperately need to have someone interview a witness and testify about the results of that interview at the probable cause hearing.

Both the child's attorney and the parent's attorney generally attempt to avoid having their client testify. Usually you want to avoid the trauma to the child of having to testify in court against a parent. A parent not only has to face the same trauma

of testifying but, more importantly, may not be sufficiently prepared to withstand cross examination, which may doom the defense at trial.

It is important to ask about the prior history between the complainant and the parent or guardian of the child. You may find that there is a history of controversy between the parties that has previously come to the attention of the court. There may very well be documents in court files which could help one or another party in the proceeding.

C. Initial Appearance

Initial hearings are held in the courtroom of the magistrate judge who is assigned to initial hearings that week. If you are not sure which magistrate judge is hearing initial hearings, you can get that information from the CCAN Office.

If counsel's preparation has not been completed when the case is called, counsel should request that the case be "passed" and recalled later. The importance of the placement decision at the initial hearing can hardly be stressed too much. Particularly in those cases where the government seeks to remove a child, and you oppose removal, it is critically important to develop a legal theory and factual support to present to the court on the issue of probable cause. Potential alternative placements may take time to identify and contact.

At the initial hearing, all parties must be given a copy of the petition. D.C. Code §§ 16-2308, 16-2312. The parents, guardian or custodian will be called upon to admit or deny the allegations of the petition. Parent's counsel customarily will indicate receipt of the petition, waive a formal reading and enter a general denial on the client's behalf. Parent's counsel whose clients are not present usually enter a general denial and request a reservation of rights. Counsel seek to reserve whatever procedural and substantive rights they can. It is not entirely clear that there are any rights to be reserved for a client who was not properly notified of the hearing.

The court will usually hear from the Assistant Attorney General first to determine what place-

ment is requested. The court will ascertain the positions of the other parties, and should then hear any evidence that is to be presented and the arguments of counsel on any issue in dispute.

It is not necessary for the AAG to establish at the initial hearing that there is probable cause to believe that the allegations in the petition are true unless shelter care is being requested. D.C. Code § 16-2308. If, in the context of a shelter care hearing, the government is unable to establish probable cause, the petition is not dismissed, but the court may not order shelter care and the child must be released. D.C. Code § 16-2312(f).

D. Minimizing Damage

In those situations where a parent's attorney realizes that there is no realistic possibility of prevailing at a probable cause hearing, it is usually highly prudent to move directly into placement discussions and waive probable cause. When your client is extremely volatile or under the influence, or if the facts that would come out at the probable cause hearing are worse than the facts contained in the petition and supporting documentation, you run the risk of having more stringent conditions placed on your client by having a hearing than by waiving probable cause.

Once the hearing has begun, you can still minimize potential damage to your client somewhat by objecting to the introduction of any evidence that does not relate to the specific allegations contained in the petition itself. For illustration, if the sole allegation in the petition is recent sexual abuse of a child by the step-father, and the government seeks to introduce evidence of past drug use by the mother, counsel for the mother should strenuously object. If the court finds probable cause, you still can minimize damage in a couple of different ways. First, you can push for placement with the parent or, failing that, with a third party acceptable to your client.

E. Trying for a Win

In those cases where you have sought a probable cause hearing, it only makes sense to press

hard to win the hearing – even if you had other motives for having the hearing. From time to time, the government’s case will simply fall apart under pressure, as when a lying complainant is exposed. Since you know so little about the government’s case before the hearing starts, it is difficult to plan as you would for trial. The only rule is to follow up on any apparent inconsistencies, suspicion of bias, or unreliability of the witness testifying. Naturally, in the usual case where the government is calling a single witness whose information is mostly hearsay, be sure that the government has established probable cause on direct before you ask any questions on cross. If the government has not made its case on direct, you should never risk asking any questions.

The purpose of a probable cause hearing is to give the court authority to remove a child from the custody of a parent or other custodian. If the person opposing removal successfully defeats the government’s showing of probable cause, the court cannot remove the child. However, even if probable cause is found, the court does not always automatically remove a child. The fallback position is that, even though probable cause was found, there are sufficient reasons to leave the child in his/her current residence. In determining whether or not you “won” the hearing, the placement of the child is the major criterion.

Any party can request that the judge who heard the probable cause hearing be recused from presiding at the fact-finding hearing. D.C. Code § 16-2312(j). The request for recusal must be made in the joint pre-trial statement. SCR-Neg 17(c).

IV. Five-Day Hold

Under D.C. Code § 16-2312(g), the government may, at the time of the initial hearing, postpone filing the petition for a period not to exceed five days. This is called a request for a five-day hold. The purpose usually given for a five-day hold request is that the government needs additional time to investigate the case in order to decide whether to file a petition and to prepare it.

Notwithstanding the fact that the government may postpone filing the petition, it can still request placement of the child in shelter care, but a shelter care hearing must be held. D.C. Code § 16-2312(g). However, “good cause” must be demonstrated before the court can grant the five-day hold. The Court of Appeals in *In the Matter of T.G.T.*, 515 A.2d 1086 (D.C. 1986) ruled the government could postpone the filing of a juvenile delinquency petition for up to five days, and at the same time order detention or shelter care, “but only if the government makes a clear showing of a legitimate state objective to be served by the postponement and if the juvenile is given reasonably specific notice of the nature of the charge.” The ruling in *T.G.T.* is probably applicable in neglect cases. Counsel could still argue that the government has failed to meet the standard set forth in *T.G.T.* for permission to postpone the filing of the petition or has failed to provide “reasonably specific notice of the nature of the charge.” Additionally, since the ruling in *T.G.T.*, the neglect statute has been amended to give the government a longer period of time between removing the child and bringing the case before the court. D.C. Code § 16-2312(a)(1)(B) gives the government 72 hours after removal to bring a case to court and, arguably, this increase in time should obviate the need for many five-day holds.

Counsel could argue that the government has had sufficient time to investigate the matter, further bolstering the argument that there is not a sufficient basis for the five-day hold. Counsel should be aware that the government may choose not to file a petition if the court allows the requested five-day hold, and that prevailing on an argument opposing a five-day hold could result in the filing of a petition that otherwise might not be filed.

The government may request counsel to agree to an extension of the five-day hold period. The statute does not seem to permit such an extension, and counsel should carefully consider whether delay serves their client’s interest. A further initial hearing may serve the same purpose as an extended five-day hold: an incentive to prompt efforts toward returning the child home or to

some other agreed-upon placement and perhaps even dismissing the case. On the other hand, once the government has filed a petition, it may be reluctant to dismiss it quickly thereafter.

If a five-day hold request is granted, a “return date” will be set for a “further initial hearing.” If a shelter care hearing has already been held, it is unclear whether counsel would be entitled to a new shelter care hearing when the petition is filed if the government requests a continuation of shelter care. Counsel requesting a second shelter care hearing should, in addition to any legal arguments, be prepared to proffer to the court what new information is available on the question of placement that differs from or adds to what the court has already heard.

Counsel may be willing to agree to shelter care pending the further initial hearing if the right to a shelter care hearing is reserved by agreement or by the court. Although the child will be in foster care until the next hearing, a brief delay – whether a few days or a few weeks – may enable counsel better to prepare for a contested hearing and to make arrangements that will strengthen the case against shelter care. For example, counsel may be able to contact or arrange for the appearance of relatives, friends or other persons who can provide sufficient information, offer assistance, and perhaps provide alternative placements; arrange for support services; visit the home (parental or other), preferably with another person who can subsequently testify; take photographs; obtain affidavits; or obtain school or other relevant records. As a result of such efforts, counsel may succeed in negotiating a consent order.

Before consenting to or having a five-day hold granted, the parties should discuss how visits between the child and the parents are to be structured during the hiatus in court proceedings. It is important that visits occur during this time. D.C. Code §16-2310 (d) and SCR-Neglect 15(b)(4) require that there be “at least weekly visitation of the child with the parent” when the child is placed outside the home. The only reason that weekly visitation can be denied is when it can be shown that it

“would create imminent danger or be detrimental to the well-being of the child.” When the government does not have enough information to file the petition, it most likely would not have sufficient information to deny the parents weekly visitation.

V. Orders From the Initial Hearing

A. Release to Parents

The parties may agree, subject to court approval, to release the child to the parents pending trial, or the court may order release to the parents if the criteria for shelter care are not met. This is known as “conditional release.” Even if probable cause is found, the court may release the child to a parent. Although such a release seems to contradict the direction in D.C. Code §16-2312(f) to place the child in care if probable cause is found, support for the release is found in §16-2310(b), which specifies the requirements for placing a child in shelter care.

Counsel opposing the imposition of conditions on the parents can argue that if probable cause is not shown or the shelter care criteria are not met, then the court has no authority to place any conditions on the parents as a prerequisite for releasing the child. Counsel may be able to persuade the court that before conditions can be imposed over the parents’ objection, some evidentiary showing of probable cause or genuine necessity for the condition must be made on the theory that the parents’ constitutional right to family integrity is being infringed. The statute is unclear on this question. D.C. Code §16-2312(d) suggests that conditions can be imposed, although D.C. Code §16-2312(d) (2)(C) requires that the condition be reasonably necessary to ensure the appearance of the child at the fact finding hearing or his or her protection from harm.

Conditions commonly requested include ensuring that the child is properly supervised, ensuring no or only supervised contact with an alleged abuser, residing at a specified place with a specified person, drug testing, and stay away orders. In the

absence of explicit statutory authority, it is unclear whether the court may order the parents to move out of a residence in which those parents have possessory interest. *Cf.* D.C. Code §16-1001 *et seq.* The more burdensome or intrusive the condition, the more counsel may be able successfully to insist that some basis must be shown to believe that the allegations in the petition are true, that the condition is actually necessary to protect the child from harm, and that some less restrictive condition will not suffice. Coercive intervention by the state should be carefully limited and allowed only when justified by a compelling state interest. *See, In Re Juvenile Appeal*, 455 A.2d 1313 (Conn. 1983).

If a non-custodial parent seeks custody of the child, the government may take the position that the agency must first investigate that parent to determine if the parent is a suitable caretaker. Counsel can argue that the court has no choice but to release the child to that parent because the government cannot meet its burden of proof under the shelter care criteria, particularly if there are no allegations against that parent. To make parents prove fitness would impermissibly shift the burden under both the statute and the Constitution.

B. Release to Third Party

The court appears to have the authority under D.C. Code §16-2312(d)(2)(A) to release a child to a third party other than the parents. CFSA takes the position that all out of home placements must be licensed before the court can order a child placed there. Therefore, in almost all cases the parents have a right to a probable cause hearing. Some judges may not require the third party residing in D.C. to be licensed prior to placement but that does not impact the right to a probable cause hearing. Counsel can argue that there is no statutory requirement that the agency complete an evaluation of the prospective custodian prior to the court ordering placement.

With some exceptions for temporary placements, the Interstate Compact on the Placement of Children, D.C. Code §§32-1042, *et seq.*, requires notification of and approval by the “receiving

state” when interstate placements are being made, whether by court order or by CFSA. The result of these licensing and ICPC concerns is that it can take weeks or months to get approval for a child to go to a non-D.C. relative’s home even when it appears that that placement is desirable and in the child’s best interest.

The court may consider ordering release to a third party living in the parent’s home as an alternative to removal. Such placement can sometimes satisfy all parties. If the adult living in the same home as the child and parent is a responsible person, the child can be protected without the disruption of a change of residence.

C. Shelter Care

Shelter care is defined as “the temporary care of a child in physically unrestricting facilities, designated by the Division, pending a final disposition of a petition.” D.C. Code §16-2301(14). While shelter care is not defined as the temporary transfer of legal custody (as defined in D.C. Code §16-2301(21)), it is generally treated as such for all practical purposes. *Cf.* D.C. Code §4-1303.05. Counsel may want to challenge any exercise of custodial authority by CFSA which the parents consider improper or excessive.

Permissible shelter care placements are described in D.C. Code §16-2313. There are restrictions on the commingling of neglect respondents and juvenile respondents.

Parents and children are entitled to a hearing before an order is entered placing a child in shelter care. D.C. Code §16-2312. In order to place a child in shelter care the court must:

- (1) find that there is probable cause to believe that the allegations in the petition are true (D.C. Code §16-2312(e) and (f)) and that
- (2) shelter care is required (a) to protect the person of the child, or (b) because the child has no parents, guardian, custodian or other person or agency able to provide supervision and care for him, and the child appears unable to care for himself and that (c) no alternative resources or arrangements are available to the family that

would adequately safeguard the child without requiring removal. D.C. Code §16-2310(b). (Note that D.C. Code §16-2310(b)(3) is customarily read to apply to both (b)(1) and (2)). SCR-Neglect 13 sets forth guidelines for determining whether shelter care is required under the statute.

The court must make a two-tier inquiry; two distinct and separate findings are required before shelter care may be ordered. D.C. Code §16-2312 provides that the shelter care determination be made first, then the probable cause determination. In practice, if shelter care is requested, the court will first take evidence on the question of probable cause. In fact, all the testimony on both probable cause and shelter care is usually presented at the same time. After testimony is completed, the court may rule on probable cause and then hear argument on shelter care; or the court may hear argument on both issues before ruling.

All parties have the right to present evidence and argument. D.C. Code §16-2312(c) and (e); SCR-Neglect 14. The government has the burden of establishing probable cause and the necessity for shelter care.

As a general rule, the government's only witness will be the investigating police officer or the CFSA social worker. Counsel will have to decide whether the client should testify. Attorneys are often reluctant to allow clients to testify because they will be examined and cross-examined without adequate preparation and their testimony can be used against them at a later time. On the other hand, the client may be an important or possibly the only source of information to challenge the government's case at the initial hearing. In lieu of having the client testify, counsel may be able to proffer information to the court or may be willing to allow the court to make direct inquiry of the client concerning matters related directly to the question of placement, which may limit the scope of the client's statements compared to what would be elicited in testimony. Ultimately, the only safe course is to have no testimony from the client.

In some cases, counsel may wish to waive prob-

able cause but contest shelter care. By taking this approach, counsel may be able to avoid detailed testimony which counsel is unprepared to rebut; on the other hand, in the absence of testimony, counsel may lose the opportunity to expose the government's inability to substantiate its claims and the court may accept the allegations of the petition at face value.

Hearsay is routinely admitted in probable cause/shelter care hearings. D.C. Code §16-2316(b). Counsel can nevertheless examine a witness as to the foundation for and reliability of testimony that may be based on hearsay. The foundation may be weak enough for counsel to argue that hearsay rules are not strictly applicable but the proof is nevertheless flawed for the reasons that underlie hearsay rules. Counsel should also make any other appropriate evidentiary objection; for example, failure to lay a proper foundation for expert or opinion testimony, relevance, or leading questions.

Counsel opposing shelter care might want to urge that the government needs to show at least a reasonable likelihood of immediate and serious danger or harm to the child in order to justify shelter care. Counsel may argue that only such a showing would establish the compelling state interest that is constitutionally required before the state can be permitted to interfere with the fundamental right to family integrity. *See, In Re Juvenile Appeal*, 455 A.2d 1313 (Conn. 1983).

The language of the statute strongly suggests that shelter care was intended to be an option of last resort, recognizing the harm that even temporary removal of a child can cause. SCR-Neglect 13 (e)(1)(2) and (3). D.C. Code §§4-1301.04, 4-1301.07, 4-1301.09 and 4-1303.01(a). It is important to remember that the statutory standard for removal is not "the best interest of the child," as such a standard would probably not be constitutionally permissible. The statute does not require ideal parenting, only minimally adequate parenting. Even a finding of probable cause does not automatically result in removal of the child from the home, just as an adjudication of neglect does not

require placement outside the home. Counsel should stress the importance of not overreacting to problems in family relationships, deficiencies in parenting abilities, and difficulties associated with the family's financial status that stop short of posing a substantial risk to the child's safety. "The love and attention not only of parents, but also of siblings, which is available in the home environment, cannot be provided by the state . . . Even where the parent-child relationship is 'marginal' it is usually in the best interest of the child to remain at home and still benefit from a family environment." *In re Juvenile Appeal*, 455 A.2d 1313, 1319 (Conn. 1983). D.C. Code §16-2320(a) (even after adjudication, it is presumed that it is preferable for a child to remain at home.)

When challenging probable cause or shelter care, it can be useful to apply the same kind of analysis as might be used at trial. For example, does the evidence presented show (1) a likelihood of serious harm to the child, (2) neglectful or abusive parental conduct, and (3) a causal nexus between the two? If one of these elements is missing, the government may not have made an adequate showing of either probable cause or risk sufficient to justify shelter care.

Counsel opposing shelter care may need to emphasize the problems that can be created by removing a child from parents, family and home:

Even when placed in good environments, which is not often the case [children] suffer anxiety and depression from being separated from their parents; they are forced to deal with new caretakers, playmates, school teachers, etc. As a result, they often suffer emotional damage and their development is delayed.¹

Counsel can emphasize the importance of provision of services as an alternative to placement of the child. The explicit purpose for the enactment of the Adoption and Safe Families Act was to protect the child. It may be best to leave the child at home with services and not risk the possibility of

emotionally harming the child by placing him/her in shelter care. It may also be useful to point out that the cost of services may be more than offset by the expenses of the foster care placement. If shelter care is ordered, counsel may want to request specific directives regarding, placement; for example, that siblings be placed together, or that a child be placed in a foster home rather than a group home.

If the government seeks to impose conditions on the parents when removal of the child has been ordered, counsel may want to avoid a court order. While the parents may wish to do what is being requested in order to facilitate reunification, voluntary action is a very different matter from the requirements of a court order.

If the court does not find probable cause, it is foreclosed from ordering shelter care, but the petition is not dismissed. D.C. Code §16-2308.

D. Visitation

Visitation is a critical issue in neglect cases. The parties must agree or the court must determine who may visit, when and how often, and conditions of visitation (unsupervised or supervised; supervised by CFSA, or a third party; day visits, overnight visits, weekend visits or longer; transportation arrangements; pick up, drop-off and visiting locations); or any other special conditions.

The statute explicitly favors a maximization of visitation and sets a high standard for restricting visitation. D.C. Code §16-2310(d) provides:

Whenever a child has been placed in shelter care, the child's parent, guardian or custodian shall be permitted visitation *at least weekly* unless it appears to the judge that such visitation rights would create an imminent danger to or be detrimental to the well-being of the child, in which case, the judge shall either prescribe a schedule of visitation rights or order that visitation rights not be allowed. [emphasis added].

¹ Wald, "Thinking About Public Policy Toward Abuse and Neglect of Children," 78 MICH.L.REV. 645, 662 (1980)

The party seeking to restrict visitation has the burden to show why it should be limited. Counsel should stress the substantial damage that can be done to the parent-child relationship and to the child's emotional well-being by not permitting contact between the parents and the child.

Counsel should attempt to anticipate any obstacle to visitation (e.g. distance, transportation, visiting hours at the social service agency, work and school schedules) so that they can be resolved without delay. Inconvenience and financial problems should not be obstacles to visitation. Because of the very nature of foster care, visitation frequently poses logistical problems, but these are the very problems that foster care agencies, by definition, should be equipped to address. It is the obligation of the agency, consistent with the clear intent of the statute, to facilitate visitation and to provide opportunities for visitation that do not impose unreasonable burdens on the parents.

E. Conditions Imposed on the Child

The government or the parents may seek an order imposing conditions on the child. D.C. Code §16-2312(d)(2)(B) and (C) may permit the imposition of conditions on a child who is released or not placed in shelter care. However, counsel can argue that such action is inappropriate in a neglect case, and that the overall tenor of the entire section suggests that those provisions are directed at juvenile respondents whom the court is releasing into the community rather than at neglect respondents.

The GAL should be particularly vigilant to prevent having court orders from the initial hearing that, by placing behavioral conditions on the child, will suggest to the trial court that the child is unreliable. Especially when the respondent is a teenager, a typical defense to the claim of parental neglect is to counter that the child is unmanageable.

F. Conditions Imposed on Parents

The court is often asked to impose conditions on parents, either to promote reunification or to protect the child. In practice, most parents are all

too willing to agree to accept conditions and limitations, which are frequently discussed at the end of the initial hearing. Counsel for a parent needs to be vigilant to avoid situations where conditions are placed upon the client without full discussion. For example, drug testing and/or psychological or psychiatric evaluations are frequently requested in cases where the petition does not allege drug use or psychological problems. The court can order drug testing or mental health evaluations of the parent, guardian or custodian, over objection, only in those cases where the petition alleges neglect under D.C. Code §16-2301(9)(ii), and "good cause" has been shown. D.C. Code §16-2315(e).

At a minimum, it is prudent to postpone decisions about agreeing to any requested testing until after you have had a full opportunity to discuss the import of a testing order with your client. When parents first come to court, they are sometimes intimidated and will agree to almost any request in order to get through the proceeding. Simply by insisting upon adequate time to discuss a requested testing order with your client, you can put the decision off until a later date.

VI. Reasonable Efforts Requirement Under the Adoption and Safe Families Act (ASFA)

In 1997, the federal government amended the laws that have required that courts make a specific finding in any child abuse or neglect case in which the child is in foster care or is being placed into foster care – a finding as to whether the government made reasonable efforts to prevent out-of-home placement of the child or to reunify the child with his/her family (if removal has already occurred). That legal finding is best understood in the context of its history.

A. History of the Reasonable Efforts Requirement

In 1960, there were fewer than 242,000 children in foster care in the United States. In 1971, there were over 330,000 children in foster care. By 1977,

half a million of the nations' children were in foster care. Children were entering foster care when service to the family could have prevented out-of-home placement, and children were staying in foster care without efforts towards reunification or, in cases in which reunification was not appropriate, without efforts towards termination of parental rights and adoption.

Congressional investigations into the causes of what had become known as “foster care drift” – children languishing in foster care without progress towards permanence – determined that federal child welfare policies (making payments to cover the costs of maintenance for each child in foster care) were at least partly to blame. The Adoption Assistance and Child Welfare Act of 1980 (commonly known as P.L. 96-272) was enacted to address this concern.

P.L. 96-272 includes several requirements: better data collection on children in the child welfare system, federal assistance for the development of service to children and families in crisis, case plans, dispositional hearings and periodic case reviews for each child in foster care, and the “reasonable efforts” requirement, 42 U.S.C. §§671 (a)(15) and 672 (a)(1).

Under that “reasonable efforts” provision, for the government child welfare agency to receive federal foster care matching funds for a given child, the court must determine on the record that the child welfare agency has made reasonable efforts to prevent placement of the child into foster care, or if the child is already in foster care, the court must determine that the child welfare agency has made reasonable efforts to reunify the child with his/her family, or, if that is not appropriate, reasonable efforts to ensure an alternative permanent placement (e.g. adoption).

Reasonable efforts are now determined under provisions of the Adoptions and Safe Families Act (ASFA), P.L. 105-89 (1997). In order to show reasonable efforts, the government must show that it has held the child's health and safety to be the paramount concern. It also must show that it has made efforts to keep the child at home prior to re-

moval. Failure to make such a showing would be grounds for the court to deny a finding of reasonable efforts. While the government would then have 30 days to remedy the failure, such a finding would have significant impact on the child's ability to be IV-E eligible for an adoption subsidy should the child eventually be put up for adoption. Additionally, should the court not make the reasonable efforts finding, the city would no longer be reimbursed for the costs of the child's stay in foster care.

B. How the “Reasonable Efforts” Requirement Works

The “reasonable efforts” finding is a case-by-case determination that must be made by the court for each child in an out-of-home placement through the child welfare system. It is a requirement that is ongoing for every child in foster care; whether the agency has made reasonable efforts should be investigated at every point in the neglect case, as long as the child remains in care.

The lack of a reasonable efforts finding results in the loss of the agency's federal foster care reimbursement for that child. But it will not affect the services or foster care payments on behalf of the child; they will simply need to be paid from local funds. As a practical matter, raising an objection to a reasonable efforts finding on a particular case could actually improve services to that child and family, because the government is likely to pay more attention to the case.

C. Reasonable Efforts Finding at the Initial Hearing

At an initial hearing when a child has been removed, the court is expected to make a finding that either (1) reasonable efforts were made in an attempt to preserve the family and prevent placement outside the home or (2) emergency conditions made such efforts unnecessary. Simply calling a situation an “emergency,” however, does not remove the reasonable efforts requirement. The urgency of the situation is considered in determining what was reasonable under the circumstances.

Counsel for the parents should consider opposing the government's request for a finding of reasonable efforts. Often the Assistant Attorney General will merely state to the court the efforts the agency made. Counsel should consider requesting that testimony be offered, giving counsel an opportunity to cross examine the social worker on the efforts that were made, when they were made, and how the services that were offered would have alleviated the neglect that the government is now alleging.

The reasonable efforts requirement is a tool that every attorney representing a child or a parent in a neglect case can use to put pressure on the government to provide needed service to the child and family. To use the tool effectively, the attorney needs to investigate, prior to the beginning of the hearing, exactly what the child and family needed in order to prevent the child's removal or to reunite the family and exactly what services were offered by the agency to meet those needs. If the attorney believes that reasonable efforts were not made, the attorney should be prepared to present evidence as to what services should have been offered, but were not. A finding of reasonable efforts is an affirmative finding, sought by the government. The government has the burden of showing that reasonable efforts were made. In any case, a brief (one or two day) continuance may be needed, to enable the attorney to gather relevant evidence.

Depending on the age of the child and the situation that brought the matter before the court, the GAL should also consider whether to oppose a finding of reasonable efforts.

If the court does not make the reasonable efforts finding at the initial hearing, it has sixty days from the removal to make the finding, or the agency will lose federal reimbursement of foster care costs for the child.

D. What Constitutes Reasonable Efforts

The U.S. Supreme Court has held the reasonable effort requirement to be too ambiguous to confer any enforceable private cause of action against the state. Rather, the reasonable efforts

requirement is a "rather generalized duty on the state, to be enforced not by private individual, but the Secretary of the Department of Health and Human Services," *Suter v. Artist M.*, 503 U.S. 347, 363. (1992).

The federal statute, regulations, and case law provide little guidance on what constitutes reasonable efforts. The types of efforts which may be "reasonable" in a particular case include:

- Family-based social worker services (including intensive family preservation services)
- Cash payment to meet emergency needs
- Assistance in meeting ongoing financial needs (TANF or child support enforcement)
- Non-cash services to meet basic needs (food, clothing, housing, energy assistance)
- Visitation between a child in foster care and the child's family
- Facilitative services (transportation); and case services to address specific problems
- Out-of-home respite care
- Child daycare
- Medical care
- Substance abuse treatment
- Psychological treatment for abusers and victims
- Family planning
- Parenting training
- Household management assistance (including homemakers).

E. Questions to Guide Attorneys on Reasonable Efforts

Counsel should seek answers to a variety of questions that relate to a reasonable efforts determination, including:

- When did the agency first have contact with the family?
- What family problems did the agency identify that led to out-of-home placement?
- What services and assistance were considered appropriate to address the problems?
- What services/assistance did the family request?
- What services/assistance did the agency offer to the family and when was it offered?
- Were the services/assistance offered of sufficient frequency, intensity and duration?

- Were the services/assistance offered linguistically and culturally appropriate?
- Did the family accept the services/assistance?
- Did the services/assistance address the problems identified? If not, why not?
- What other services/assistance could have been offered to address the problems?
- Why were those services/assistance not offered?
- Was there an emergency situation in which the child could not be protected without removal from home prior to providing service/assistance?

In order to answer those questions, counsel will need to review all the available records and interview all available witnesses.

VII. Contrary to the Welfare Finding

The second finding the court must make at the time of the initial removal of a child from home is that “[c]ontinuation in the home would be contrary to the welfare” of the child. This finding must also be made at a later hearing if a child is removed from a parent or a third party who has had the child for six months or more. 45 C.F.R. 1356.21(c); SCR- Neg 14(e). Although not required by the federal regulations or the rules, the court often makes contrary to the welfare findings at other hearings.

If the court fails to make this “contrary to the welfare” finding at the first opportunity after a removal, CFSA forfeits eligibility for federal reimbursement of foster care costs for that child. Unlike the “reasonable efforts” finding, the failure to make the “contrary to the welfare” finding cannot be cured.

VIII. Miscellaneous Issues

A number of collateral matters will usually arise in connection with any placement decision made at the initial hearing. It is usually helpful to try to anticipate as many of these as possible, and resolve them with the assistance of the court if necessary, before the parties disband after the hearing.

It is important to review the order, which will usually have been drafted by the Assistant Attorney General, before the order is presented to the judge, to ensure an agreed-upon provision has not been omitted. If the order does not correctly reflect what was ordered, you may have to seek the clerk’s assistance to have the order amended, or have the case recalled for the purpose of correcting the order. While time pressure may often interfere with your ability to wait in the courtroom to get a copy of the order, you may actually save time by obtaining and reviewing it promptly. Other practical considerations should be addressed and/or anticipated. For example:

1. If a child taken into custody is ordered released, counsel should ensure that the parents or custodian are told precisely when and where to pick up the child (usually the same day or the next day, depending on how late in the day the hearing concluded), and should be given a copy of the court order.
2. It should be clear who is responsible for doing what prior to the next court hearing.
3. If services are to be provided, it should be made clear when they will begin, by whom they will be provided, how they will be funded, and who is responsible for making any necessary arrangements.
4. A third-party custodian should understand what, if any, financial assistance is available, when it can begin, and what the custodian will have to do in order to obtain that assistance.
5. Transportation and day care arrangements (in connection with school, therapy, evaluation, visitation, etc.) should be clarified.
6. If a child is being placed elsewhere than at home, school transfer enrollment should be arranged (e.g., records transfer, immunization records).
7. Visiting arrangements and conditions should be made clear (frequency; how visits are to be arranged; who is to provide supervision and transportation).
8. Transfer of clothing and personal belongings should be arranged immediately.
9. Children’s medical needs or health problems should be identified.

Attorneys should be aware that parents may lose their benefits (TANF, apartment) when the children are removed; that children placed with third parties may lose Medicaid coverage at least temporarily; and that it may be several months before a third party custodian who applies for public assistance on behalf of a child actually begins to receive it.

IX. Interlocutory Appeals

Any order that is “final” is appealable by right. D.C. Code §11-721. The neglect statute creates a special category of appeals by right. D.C. Code §16-2328 provides:

- (a) A child who has been ordered . . . detained or placed in shelter care or subjected to conditions of release under D.C. Code §16-2312, may within two days of the date of entry of the Division's order, file a notice of interlocutory appeal.

Under this provision, the child has the right to appeal a shelter care order and, although the statutory language is somewhat unclear, it also appears to grant the child the right to appeal a conditional release order (for example, an order imposing conditions in conjunction with release to the parents or an order releasing a child to a third party).

D.C. Code §16-2328(b) and D.C. Court of Appeals Rule 4(c) set forth the procedures of interlocutory appeals, which are usually filed as motions for summary reversal. Counsel taking an appeal under D.C. Code §16-2328 should contact the Court of Appeals Clerk's office immediately concerning transcripts, briefing, argument scheduling, and other procedural matters.

Parties who are eligible for court-appointed counsel, including children, are automatically entitled to proceed in *forma pauperis*.

Although the Office of the D.C. Attorney General has an appellate section, interlocutory appeals will probably be briefed and argued by the assigned AAG in the neglect section.

D.C. Code §16-2328 does not grant parents the right to an interlocutory appeal. *In re S.J.*, 632 A.2d 112 (D.C. 1993). However, the parents may have the right to appeal a shelter care or conditional release order as a “final” order. In *In re M.L. DeJ.*, 310 A.2d 834 (D.C. 1973), the D.C. Court of Appeals ruled that an order denying reconsideration of an order for pretrial detention of a juvenile was a “final” order and therefore appealable by right without regard to the requirements of the statutory interlocutory appeal provision. ■

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PRETRIAL ISSUES

At the conclusion of the initial hearing or further initial hearing, the court will set a schedule that will govern the pretrial portion of the case. SCR-Neglect 14(f) & 15. In addition to setting a discovery schedule, the court will also schedule mediation, a pretrial conference and the trial. SCR- Neglect 14(g)(3). During this pretrial period, attorneys for parents will have to protect the parents' interest in not assisting the government to prove the allegations. At the same time, while case planning and provision of necessary services should begin as soon as a case is opened, (D.C. Code §§4-1301.09 and 4-1304.04(a)), attorneys for parents should advise them to address problems that will stand in the way of eventual reunification, for example, consenting to a mental health evaluation or enrolling in parenting classes, family counseling, or a drug or alcohol treatment program. This practice has assumed even greater importance under the Adoption and Safe Families Act (ASFA) time-lines related to permanency planning. Participating in all of these endeavors, however, puts parents at risk for the development of additional evidence by the government, including statements parents make to social workers, therapists and others.

Even though the social worker may be the government's main, or only, witness at trial and therefore the parent's adversary, the worker and the parent must work together at this time to address the problems that brought the case into court, and to develop alternative placements or secure services which will allow a child in shelter care to be with a relative or returned home pending trial. These efforts may result in changed circumstances that warrant a motion requesting change in legal status, placement or visitation. See Section II.B. below. If the placement of a child in shelter care is changed by the agency, notice must be given to the parent and guardian *ad litem* (GAL). D.C. Code §16-2313(f).

I. Assignment of Social Worker

Between the initial hearing and the next scheduled hearing, the Child and Family Services Agency (CFSA) will transfer the case from their intake units to another social worker who will have responsibility for the ongoing case. If the child has been removed from the home, the case is transferred to an out-of-home unit. Although CFSA policy requires prompt assignment of a case to an ongoing worker by the supervisor of the

receiving branch, the original worker retains responsibility for 30 days, and may be the one to appear at a subsequent hearing. Counsel should keep informed of who the assigned social worker is, and make sure the new worker contacts the client without delay so that there is no gap in case planning and services, particularly the scheduling of visits. If the child is placed in the foster home of a private agency under contract to CFSA, a social worker from that agency will be responsible for the care of the child.

II. Pretrial Motions

While a case is pending trial, counsel frequently find it necessary to request court action for a variety of reasons, such as to request services, a change in placement or a modification or enforcement of visitation provisions. SCR-Neglect 43 governs motions practice, with some exceptions noted below. A motion other than one made during a fact-finding hearing must be in writing, unless the court allows it to be made orally. The movant should request a hearing on the desired motion. SCR-Neglect 43(a). All motions should be served on all counsel of record and any unrepresented party. SCR-Neglect 43(b).

Pretrial motions must be filed no later than 15 days prior to the pretrial conference, unless leave of the court is obtained for a later filing. It is always good practice to consult with the Assistant Attorney General (AAG) and other attorneys to obtain their consent, if possible. Should consent or lack of objection to the motion be obtained, it should be noted in the motion, because this may obviate a need for an evidentiary hearing or the court's awaiting a response. When filing late, the movant should file a separate motion for leave to file the principal motion, filing and serving the two motions together.

Any opposition to the motion is due within 10 days. If such opposition is not timely filed, the court may treat the motion as conceded. The 10-day period for response does not include Saturdays, Sundays, or holidays, and it is enlarged by three days if the motion has been served by mail. SCR-Civil 6; SCR-Neglect 1.

Motions are filed at the Family Court Central Intake on the JM level of the courthouse. A courtesy copy of the motion (or opposition) should be sent to the judicial officer on whose calendar the case is set. That judicial officer will hear and rule on the motion. Counsel should not hesitate to request an emergency hearing on the motion if necessary. A proposed order must be submitted with the motion.

A. Motion to Amend the Petition

The AAG or GAL may file a Motion for Leave to Amend the Petition. D.C. Code §16-2305(e) and SCR-Neglect 9(c) permits this to be done at any time prior to conclusion of the fact-finding hearing. Notice and additional time to prepare, if necessary, must be given to parties.

The government or GAL may also file a Motion to Revoke Conditional Release or a Motion to Modify the Terms of Conditional Release, premised on (1) if the child or sibling is taken into custody, (2) there are grounds for taking the child into custody as a neglected child, or (3) there is new evidence of neglect. SCR-Neglect 16(b).

B. Changes in Pretrial Orders

1. MOTION TO REVOKE CONDITIONAL RELEASE OR TO MODIFY THE TERMS OF CONDITIONAL RELEASE

If a child has been conditionally released to the parents or a third party pending trial and the government becomes dissatisfied with that placement, it may seek to modify or impose additional conditions on the custodian, change custodians, or place the child in shelter care. SCR-Neglect 16 sets forth the circumstances wherein the government or the GAL/counsel for the child may file a Motion to Revoke Conditional Release or a Motion to Modify the Terms of Conditional Release. In addition to the three factors permitting motions to amend the petition (see Section II.A., above), the Rule also permits the government and GAL to seek pretrial modifications of a release order if the parent, guardian or custodian has violated the terms of the conditional release order. SCR-Neglect 16(a)(4). Pursuant to SCR-Neglect 13, the court may modify the release or place the child in shelter care. If the child is removed, the parent is entitled to a probable cause hearing on the new allegations contained in the motion. If probable cause was not heard at the initial hearing, the court may want testimony that supports the initial petition as well.

Counsel opposing change to the Conditional Release Order should argue that the motion be in writing, that time be allowed for investigation and a thoughtful response, and that an evidentiary hearing be held. If the allegations upon which shelter care is sought are not new, counsel can argue that the government has had its day in court on the issue of pretrial placement. If the problems are chronic, they should be carefully analyzed to determine if they pose such a serious risk of harm that they justify the child's removal.

The burden of proof is on the movant to prove a basis for granting the motion. Grounds most frequently asserted by the government for revoking conditional release are that the parents or custodians have not complied with the order. If working with the client, social worker, and other attorneys does not resolve this issue, counsel can argue, emphasizing the statutory policy against removal, that proof of violation of conditions alone is not a basis for shelter care, and that the criteria for shelter care in the statute and rules must still be met. Removal should not be used as leverage against parents to coerce compliance with conditions that, while possibly desirable, are not essential to the child's health or safety.

2. MOTION TO VACATE SHELTER CARE ORDER OR TO CHANGE PLACEMENT

The statutory presumption against shelter care should not be forgotten after a child has been placed in foster care. If it is the client's wish, or in the client's interest, alternatives to shelter care should be vigorously pursued. If conditions that caused removal have improved, counsel should consider seeking to vacate a shelter care order, arguing that the government has a continuing burden to show the on-going necessity for shelter care.

3. MOTION FOR CHANGE IN VISITATION

Parties may wish to move for a change in the conditions or frequency of visitation. Perhaps

circumstances have changed since the order was issued or another person capable of supervising visitation has been identified. If a new supervisor of visitation is proposed, the court may want to hear from that person or the social worker on the potential supervisor's willingness and ability to perform those duties.

C. Contempt

Contempt is available as a remedy against any party, including the District of Columbia, for violation of a court order in neglect proceedings, although not for violation of a statute or the failure to fulfill a legal or statutory obligation. D.C. Code §11-944. Any party has the right to move the court for an order directing another party to show cause why that other party should not be held in contempt. Contempt hearings are open to the public. D.C. Code §16-2316(e).

There are three forms of contempt: civil (parties are entitled to notice and a hearing; purpose of sanction is to compel compliance with court order); criminal (parties are entitled to notice and a hearing; purpose of sanction is punitive); and summary (notice and hearing not required if contempt is committed in the presence of the court.)

Contempt is a drastic measure to take against an individual in a process that is designed to be remedial rather than punitive. A parent opposing contempt should attempt to demonstrate the disruptive effect, both practical and psychological, that a finding of contempt would have on the family and the care of the child. Should violation of a visitation condition be proven, for example, counsel should stand ready to suggest other appropriate measures, such as supervision of visitation or another remedy designed to protect against repetition of the offensive behavior.

If there is a possibility that the client may be held in criminal contempt, counsel should consider requesting that a criminal attorney be appointed to insure that the client's rights are protected.

D. Evaluations

1. OF CHILDREN

Under D.C. Code §16-2315(a), the court may order a child examined to determine his or her physical or mental condition. The court may order an in-patient examination only after a psychiatrist has made a written finding that the child is in need of a mental health evaluation which cannot be performed on an out-patient basis. D.C. Code §16-2315(b).

2. OF PARENTS

Under D.C. Code §16-2315(e)(1), the court may, for good cause shown, order the mental or physical examination of any parent, guardian, or custodian whose ability to care for the child is at issue.

Presumably, ability to care for the child is at issue only when there is an allegation based upon D.C. Code §16-2301(9)(A)(iii) alleging physical or mental incapacity. However, if the government has made such an allegation, it should already have a good faith basis for doing so. A parent or custodian should not be ordered to undergo a physical or mental examination simply to help the government gather further evidence to meet its burden of proof at trial; this does not constitute "good cause." See *In re N.P.*, 882 A.2d 241 (D.C. 2005), holding that even where there was a (9)(C) (now (9)(iii)) allegation, the facts contained in the petition did not meet the statutory standard in D.C. Code §16-2315 (e) (4).

Parent's counsel may wish to have a full psychological or psychiatric evaluation conducted for their own purposes or to use at trial. Such an evaluation may focus on parenting skills, for example. A voucher should be submitted to the judge, along with an ex parte motion explaining the necessity for the evaluation. Even if the government has already obtained an evaluation, counsel may wish to seek a second opinion.

E. Motion for Waiver of Doctor-Patient Privilege

Frequently the government will move to waive a parent's doctor-patient privilege pursuant to D.C.

Code §4-1321.05, which provides:

Notwithstanding the provisions of Sections 14-306 and 14-307, neither the husband-wife privilege nor the physician-patient privilege shall be grounds for excluding evidence in any proceeding in the Family Court of the District of Columbia concerning the welfare of a neglected child; provided that a judicial officer of the Family Court of the Superior Court of the District of Columbia determines such privilege should be waived in the interest of justice.

The D.C. Court of Appeals has said that waiver of the physician-patient privilege pursuant to D.C. Code §2-1355 (now, §4-1321.05) "cannot be automatic." Rather, "it requires the judicious exercise of discretion...." *In re O.L.*, 584 A.2d 1230, 1233 (D.C. 1990).

When the government has failed to allege inability to care for the child because of mental incapacity pursuant to D.C. Code §16-2301(9)(A)(iii), counsel for the parents will want to oppose the motion, since the request for a waiver is no more than a fishing expedition. Counsel may argue that such a request is not in the interest of justice, particularly in light of D.C. Code §7-1201 *et seq.*, codifying the Mental Health Information Act of 1978. The presumption is that mental health information shall not be disclosed without authorization, with certain exceptions. D.C. Code §§7.12.03.01 through 7-1204.05. The statute even sets forth strict criteria for the form of authorization by the parent for release of information and limits authorized disclosure of existing information. D.C. Code §7-1202.2. If a client has already signed an authorization for release of information to the social worker or someone else, counsel should examine the release (which will be filed in the mental health chart) to see that it conforms to the requirements of D.C. Code §7-1202.2 and to HIPAA. It can reasonably be argued that public policy strongly mandates privacy of mental health records, absent an equally compelling interest favoring disclosure.

Even where mental incapacity has been alleged, the doctor-patient privilege should not be waived

when a less intrusive means of obtaining mental health information is available, such as a psychiatric or psychological evaluation pursuant to D.C. Code §16-2315(e) and SCR-Neglect 14(f). Because the issue at trial is the parent's present ability to care for the child, a current evaluation with up-to-date information is to be preferred. Counsel can argue that the language of D.C. Code §4-1321.05 and the evidentiary nature of the privilege require that the waiver be applied only in connection with formal discovery or actual testimony at trial. For further information regarding confidentiality, see the Appendix on Confidentiality.

F. Motion for a Bill of Particulars

SCR-Neglect 9(d) provides that a motion for a bill of particulars may be filed before the initial appearance, within seven days after the initial appearance, or at such later time as the court allows. This motion allows the parties to understand in greater detail the nature and basis of the allegations in the petition. As the comment to the predecessor Rule noted:

Provision for a bill of particulars is especially necessary in neglect cases where the allegations may be of a subjective nature or where psychologically damaging material may have been omitted from the petition.

G. Motion to Dismiss for Social Reasons

Often the parties in a neglect proceeding voluntarily will have sought and obtained the social services necessary to remedy the problems alleged in the petition well in advance of trial. If the child has never been removed or has been returned home, a strong case can be made that there is no further need for court involvement and the case should be dismissed for social reasons. Generally, this statutory provision has been used in delinquency cases and not neglect cases, but D.C. Code §16-2317(d), nevertheless provides an avenue to accomplish this. It says:

If the Division finds that the child is not in need of care or rehabilitation, it shall terminate the proceedings and discharge the child from detention, shelter care, or other restriction previously ordered.

In pursuing such a motion, counsel may want to point to the disruptive and counterproductive effects that social services and court intervention can produce, such as inability of the family to reach closure on the incident or situation that precipitated the petition. The case of a one-time, minor incident that has been addressed by informal counseling by the social worker may be appropriate for dismissal.

H. Motion for Special Order for Access to Court Social Records

SCR-Neglect 46 in conjunction with D.C. Code §§16-2331 and 16-2332 govern access to Family Court records. These records include all case records and social records made with respect to a child in any proceeding over which the Family Court has or previously had jurisdiction, including "preliminary inquiries, predisposition studies, and examination reports."

D.C. Code §16-2332(b)(2) provides for automatic right of access to the records by the child's attorney at any stage of the proceedings. Parents and their attorneys are not specifically granted such access, although subsection (b)(5) provides that "other persons having a professional interest in the protection, welfare, treatment, and rehabilitation of respondent or a member of his family" shall be permitted to inspect the records if authorized by court rule or a special order of the court. Subsection (c) provides that in dispositional proceedings after an adjudication, no item considered by the judge may be withheld from the attorney for the parents. If a parent's attorney needs pretrial access to the social record or post-trial access to records not included under D.C. Code §16-2332(c), the attorney may wish to file a motion for a special order for access, pursuant to SCR-Neglect 46(b). Some attorneys prefer to subpoena the records, and let CFSA move to quash. If alerted to the existence of the subpoena, the AAG may file the motion to quash.

Access to CFSA records can be negotiated. When the social worker does not allow the parent's attorney free access to all the records, the at-

torney may wish to subpoena the case file. Usually the AAG will review the copy of the file prepared in response to the subpoena and occasionally excise portions of the child's record on grounds that the parents have no right to them.

SCR-Neglect 46(b) enumerates the factors the court must consider in determining whether to grant access to neglect records. These include: potential importance to the justice system; purpose of the research; whether anonymity and confidentiality can be protected; whether the research will disrupt the clerk's office; type of records sought; and whether personal contact of persons listed in the records is intended. The court may set conditions on the scope of any inspection or copying allowed.

I. Motion to Dismiss for Lack of Jurisdiction (Nonparty)

The government may name as a party a person who does not consider himself or herself a parent, guardian or custodian, and who does not stand in *loco parentis* to the child. If that person does not wish to be involved in the proceedings and subject to court orders, or if one party does not want another party to have the right to participate in the proceedings, a motion to dismiss may be filed.

J. Services

Parties may wish to request that the court order that services be provided to the child or the family. Many of the same arguments that are advanced in support of such requests at and after disposition can be brought to bear before trial.

There is no statutory provision that clearly authorizes the court to order provision of services before disposition, analogous to the broad dispositional authority contained in D.C. Code §16-2320(a)(5). However, very strong language in the provisions of the "Prevention of Child Abuse and Neglect Act of 1977," codified in Title 4 of the D.C. Code and contained in the Neglect Rules, makes it clear that the responsible social services agency is obligated to provide services to children and families as soon as the agency concludes that there is a substantiated report of abuse or neglect. D.C.

Code §4-1303.01(a) provides:

If there is a substantiated report, the agency responsible for the social investigation shall, as soon as possible, prepare a plan for each child and family for whom services are required on more than an emergency basis and shall forthwith take such steps to ensure the protection of the child and the preservation, rehabilitation and, when safe and appropriate, reunification of the family as may be necessary to achieve the purposes of this subchapter. Such steps may include, but need not be limited to: (1) arranging for necessary protective, rehabilitative and financial services to be provided to the child and the child's family in a manner which maintains the child in his or her home; (2) referring the child and the child's family for placement in a family shelter or other appropriate facility; (3) securing services aimed at reuniting (with his or her family) a child taken into custody, including but not limited to parenting classes and family counseling; (4) providing or making specific arrangements for the case management of each case when child protective services are required; and (5) referring the family to drug treatment services in the event of neglect or abuse that results from drug-related activity. To the maximum extent possible, the resources of the community (public and private) shall be utilized for the provision of services and case management.

D.C. Code §4-1301(9)(a), which establishes a Child Protective Services Agency, provides that the Agency shall have as its "functions and purposes," *inter alia*, the following:

- (1) Providing services that prevent family dissolution or breakdown, to avoid the need for protective services or out-of-home placements;
- (7) Offering appropriate, adequate, and when needed, highly specialized diagnostic and treatment services and resources to children and families when there has been a supported finding of abuse or neglect.
- (9) Providing parenting classes or family counseling and other services on behalf of the child designed to help parents recognize and remedy the conditions harmful to the child and to fulfill their parenting roles more adequately.

- (10) Obtaining substitute care for a child whose parents are unable, even with available help, to meet the child's minimum needs and, where appropriate, providing services to the family of such a child that are aimed at safely reuniting the family as quickly as possible.

SCR-Neglect 7(b)(6), underscores this statutory service-oriented mandate and provides that the court report prepared for the first court hearing include a section describing the services, if any, offered or provided to the family to prevent placement out of the home. Subsection (9)(B) of Rule 7 also requires a description of the services that should be provided to the child or family prior to adjudication in those cases in which it is recommended that the child be returned home. Consistent with ASFA, SCR-Neglect 14 requires the judicial officer to make a finding as to whether the responsible agency made reasonable efforts to prevent or eliminate the need for the removal of the child. Two of the factors for consideration are whether appropriate services have been made available to the family on a timely basis, and the availability and accessibility of the services provided. See also D.C. Code §4-1303.03(a)(13) & (14) and (b)(1)-(4). *Cf. Turner v. D.C.*, 532 A.2d 662 (D.C. 1987).

Counsel requesting services should argue that these provisions be broadly interpreted in light of the statutory policy to provide prompt, ameliorative intervention to prevent removal of children, promote reunification of families when children have been removed, and provide for the physical and emotional welfare of children under the court's jurisdiction. The legislative history of the statute is replete with directives that the intent of the statute is to "address the need for provision of services to families and children by mandating the continual accountability of social services agencies to the court at each stage of the neglect proceedings." Report, Committee on the Judiciary (David A. Clarke, Chairperson), Council of the District of Columbia, March 29, 1977, p. 6.

There is clearly sufficient basis in the governing statutes and rules for parties to not only request services the party believes will be helpful for

achieving reunification or maintaining a child in the home, but also there is clearly sufficient basis for moving to hold the government in contempt for failing to provide such services in a timely manner.

III. Paternity

A child's paternity may become an issue at various stages of the proceedings, from initial hearing through termination of parental rights. The Supreme Court has held in a series of cases that the biological fathers of children born out of wedlock have constitutionally protected rights. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *Caban v. Mohammed*, 441 U.S. 380 (1979); and *Lehr v. Robertson*, 463 U.S. 248 (1983).

Under the new neglect rules, the court is now encouraged to raise the issue of paternity at the outset of the court case. SCR-Neglect 12(b). The court has prepared affidavit forms for the mother to name the father and to give any identifying information about him. The judicial officer is required to consider whether genetic testing should be ordered to determine paternity.

If a Complaint or Petition names a father, counsel will be appointed for a putative father and he will be considered a party in the absence of an objection. If a Complaint or Petition does not name a father, the judicial officer will decide whether to appoint an attorney for the unknown father. A party may also bring the existence of a putative father to the attention of the court, which may then order counsel to be appointed for that putative father.

In practice, if none of the parties disputes paternity, the named father will be treated as a party without the need to establish paternity legally if the child was born out of wedlock. The parties may also agree to the entry of an order adjudicating paternity, in which case counsel may want to request the court to hear from both parents under oath, with the order containing appropriate findings based upon their testimony. Attorneys should advise their clients of the ramifications of any adjudications of paternity, such as

liability for child support or the right of the non-custodial parent to visitation

If there is a dispute, the court may adjudicate paternity. D.C. Code §§16-909, 16-2343; SCR-Dom.Rel. 405. It is unclear whether the issue of paternity can be litigated as part of the neglect proceeding, even provided that parents are afforded their full procedural and substantive rights, or whether a separate petition to establish paternity must be filed.

If the father's name appears on the birth certificate, that may enable a paternal relative who is caring for a child readily to obtain public assistance for that child. A father's name may be added to the child's birth certificate by the Bureau of Vital Statistics without an adjudication of paternity. Both the mother's and father's consent are required for the amendment. In addition, it is also possible, to have the judge take an acknowledgment of paternity in open court so long as the putative father is present.

If there is a question of paternity, the court may order genetic testing paid for by court voucher. D.C. Code §16-2343. Mother, child, and putative father should all be tested.

IV. Pretrial Conference

SCR-Neglect 17 requires a pretrial conference in every contested case. The goal of the conference is to attempt to simplify the issues for trial and to produce a pretrial statement that should govern the conduct of the trial. The judicial officer may set the date for the pretrial conference at the initial hearing or following mediation. SCR-Neglect 17(b) requires that the attorney who will conduct the trial for each party and any unrepresented party meet prior to filing the pretrial statement. The Rule expressly permits such meeting to occur following mediation. However, in practice, pretrial conferences are rarely held in person and communication is via e-mail.

SCR-Neglect 17(c) sets forth the required content of the pretrial statement that is to be filed no

later than two days prior to the pretrial conference and delivered to the presiding judicial officer. Generally, the AAG will prepare the initial draft of the pretrial statement. Practitioners must be prepared to review and provide such information as necessary to protect his/her client, as omission of documents and/or witnesses from the pretrial statement may be grounds for excluding important supporting evidence for your client.

At the pretrial conference, the judicial officer will attempt to resolve all pending disputes and will issue an order reciting the action taken. The pretrial order may set specific limits regarding the conduct of the trial, including time limits for opening statements and closing arguments, as well as the number of witnesses a party may call, and even the total amount of time each party may have for presentation of that party's case. SCR-Neglect 17(d). It is essential that the practitioner be prepared to address these matters at the conference.

SCR-Neglect 17(f) imposes a continuing obligation on each party to update information set forth in the pretrial statement and/or provided during the pretrial conference.

Finally, SCR-Neglect 17(e) offers the court and the parties an additional opportunity at the pretrial conference to address such issues as placement of the child, visitation, services, and other matters covered by the other rules, if not previously resolved at the shelter care or initial hearing.

V. Criminal Proceedings

Criminal offenses are set forth in D.C. Code Title 22 and criminal procedure in Title 23. The Criminal Practice Institute Trial Manual deals in detail with substantive and procedural matters relating to criminal trials.

Sometimes, not only will a neglect case be opened, but the parents will also be prosecuted criminally for the alleged acts of abuse or neglect. When that occurs, the neglect case may follow the criminal case so as not to prejudice the parent's criminal defense.

A child may be required to testify against the parent in the adult criminal proceeding. The child's attorney may wish to accompany the child to speak with the Assistant U.S. Attorney, and be available to advise the child during the grand jury process, although the attorney will not be allowed to accompany the child into the room during the grand jury testimony. ■

MEDIATION

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MEDIATION

Traditionally, mediation was done on a selected basis as a way to comply with the Adoption and Safe Families Act of 1997 (ASFA), to afford parties an early opportunity to settle the case. Mediation is referenced in Superior Court Rules Governing Neglect and Abuse Proceedings, Rule 15, Findings and Order at Initial Hearing. Specifically sections 15(a)(3) and 15(b)(8) provide for the order to specify a date and time for mediation.

I. Scheduling

Administrative Order (AO) No. 02-12 instituted the current requirements for mediation in neglect and abuse cases. Since AO No. 02-12 was promulgated, the model for mediation has changed. Now every case is set for mediation, which must be scheduled within 30 days of the initial hearing or further initial hearing. At the initial hearing, all parties sign an Agreement To Mediate. The Child Protection Mediation Scheduling Order sets forth the date and time of mediation and the obligations of the attorneys and parties. Parties are required to set aside at least three hours for mediation.

The Multi-Door Dispute Resolution Division operates the mediation program for Superior Court. Two days prior to mediation, all parties must submit their reports to Multi-Door. The attorneys are to submit a mediation statement; the guardian *ad litem*, a GAL report; the assistant attorney general, a proposed case resolution; and the social worker, six copies of a mediation report. Any other party may submit a report. Any reports may be faxed to Multi-Door at 202-879-4619. Multi-Door can be reached at 202-879-1549 for answers to questions concerning mediation.

If there is a continuance request, the mediation must be held before the next scheduled court appearance. The AO provides a procedure to follow if

any counsel or party becomes unavailable for the assigned mediation date. Counsel is to file a praecipe that is consented to and signed by all parties in order to reschedule the mediation to a date within 30 days of the original scheduled date. A copy is to be provided to the Child Protection Mediation Program Manager in the Multi-Door Division. If counsel is unable to obtain everyone's consent, a motion to continue the mediation needs to be filed. The AO further states that any attorney or party who fails to comply with any provision of the AO will be scheduled to appear at a special status conference before the Presiding Judge of the Family Court or a designee to determine whether sanctions should be imposed. The practice is that if neither parent has arrived thirty minutes after the scheduled time all parties may leave after they have completed a pretrial statement.

II. Role of the Mediator

Mediation is generally led by two mediators. The mediators, who may or may not be attorneys, have undergone Superior Court mediation training. The role of the mediators is that of facilitators and not parties to the process. As such, they have no stake in the outcome and cannot be called as a party to testify in court or to repeat any statements made in mediation in any court proceeding.

III. Confidentiality

All mediation is confidential. Prior to mediation beginning, the mediators will pass out an Agreement to Mediate form, which all parties must sign. This form delineates the parameters of the confidentiality. Any new allegation of child abuse or neglect or threat of bodily harm is not covered by the confidentiality agreement. Be aware that, despite the confidentiality of the procedure, information disclosed at mediation can be used by the government or social worker to investigate the previously unknown information. Also, frequently all parties take notes and rarely does anyone request that all parties destroy their notes.

IV. Role of the Attorney

Mediation begins by all parties introducing themselves, stating what issues they would like to discuss, and what they would like the outcome to be. Frequently during the mediation, the mediators may decide to meet individually with different parties. What is discussed in these caucus sessions remains confidential unless those parties agree that it may be shared with the other participants

It is obvious that in order for mediation to have a successful outcome, it is imperative that the parents be present and actively participate in mediation. Frequently, parents feel that mediation is the first opportunity they have to tell their side and have their opinions heard. Mediation affords the parents, along with their attorneys, the opportunity to have a discussion with the social worker. Prior to the mediation, parents' attorneys should stress the importance of the parents' attending mediation. The attorney should discuss what services they feel would be helpful to assist them in reunification.

Even if a parent is not present at mediation, a case plan may still be discussed. By the time of

mediation, the guardian *ad litem* should have met the child and may have additional thoughts on appropriate services. The GAL has the opportunity to advocate for any services not previously ordered. Likewise, parents' attorneys may want particular services for their clients. Visitation and placement can be discussed. Family members may be considered as placement resources and, provided there is no objection, may be present during mediation. There are no restrictions on what issues may be presented at mediation. Discussions can include case dismissal.

If your client has not been served at the time of mediation and there are no allegations of neglect or abuse against your client, there is still room for advocacy on your part. If the other parent is present, you can attempt to obtain information about your client, learn what involvement the parent has had with the child, and inquire if there are any family members of your client whom you can contact. If your client is the subject of the neglect or abuse allegations, and there has been no service, you can ask for services for your client once he or she is located if you deem it appropriate, or you can wait until your client is served to ascertain his or her wishes.

If a party is incarcerated at D.C. Jail and his or her attorney wants the client at mediation, the attorney should give the Quality Control Office located at JM-165 a completed Come Up Request Form. The form is available from the Juvenile & Neglect Clerk's office, from the Initial Hearing Courtroom, and from the Quality Control Office. This request should be filed no less than fourteen days before the scheduled mediation. The Multi-Door Case Manager should also be notified to arrange for a courtroom to hold the mediation. Call Multi-Door at 879-1549 to speak to the case manager. However, be aware that Multi-Door has found that, even when the incarcerated person is brought to court, most times there is not a marshal available and therefore the party cannot attend the mediation in person, and no telephone is

available in the lock-up area. Even notifying the assigned judge does not ensure that a marshal will be available. Therefore, as an alternative, the attorney for a party held at D.C. Jail should consider contacting the client's case manager at the Jail to arrange for the client to participate in the mediation by telephone from the Jail.

If the party is incarcerated outside the jurisdiction, the attorney should contact the client's case manager at the prison to arrange for the client to participate by telephone.

Attorneys should consider having clients who are hospitalized or in any in-patient program participate in the mediation by telephone.

V. Role of the Child

Child Protection Mediation Policy (CPM) 0002 addresses when children can participate in mediation. The policy excludes children except in the circumstances when the child's input is needed. The policy provides:

1. Children thirteen years and over may participate with prior consent of the GAL, social worker, and mediator, all of whom must agree that, based on the maturity of the child and the nature of the case, participating in mediation would not do the child further harm.
2. Children under the age of thirteen may participate in neglect mediation with prior written approval from the CPM program manager. Call Multi Door, and the CPM program manager will inform you of the procedure.
3. Under no circumstances will children directly participate in mediation which involves allegations of sex and/or extreme physical abuse.
4. In cases with extreme physical and/or sex abuse allegations, there is the option of conducting a separate session on a different date

for the child that includes the GAL and social worker. Separate session mediation for the child must have prior approval from the CPM program manager.

5. Children appearing for mediation without prior approval will not be allowed to participate.
6. Where written approval is needed, a request must be made to the CPM program manager within four business days of the mediation. The program manager will review the written request and contact the social worker, the GAL, and the mediators before a decision is made.

VI. Objectives

The government's primary objective at mediation is to obtain a stipulation. Prior to mediation, the government should have presented a proposed stipulation to the parties. Attorneys for parents can prepare their own stipulation and present it as an alternative. The stipulation is like any negotiated agreement, and it is therefore possible to arrive at a stipulation that omits some of the allegations in the petition. See SCR-Neglect 18. If a stipulation is reached at mediation, the parties usually appear later the same day before the judge who presided over the initial hearing. If no stipulation is reached, a pre-trial statement should be agreed upon by the parties.

Even if no stipulation is reached, the parties may still agree on a case plan. Attorneys for the parents should consider whether to advise their client to sign a case plan. A potential problem is that, if the party does not comply with the terms of the agreement, the government's lawyer may want to introduce it at trial. It is unclear whether that document is considered to be covered by the confidentiality of the mediation proceeding or whether the fact that it is signed by everyone means that the parties waive confidentiality. ■

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PREPARATION FOR TRIAL OR STIPULATION

When preparing for trial or stipulation, the neglect practitioner must sort out some important basic questions. At what point should the state interfere with the parents' right to care for a child? Should the state step in only when the parents willfully injure the child, or is the parents' negligence enough to warrant intervention? Should the state intervene if the parents negligently inflict a single, non-serious harm on the child or if there is no harm as yet but harm is predicted? Is a handicapped child neglected if the parents fail to provide the child with the best care? Is a child neglected if the parents are incarcerated and unable to care for the child but arrange to have a family member care for the child?

Attorneys attempting to answer these questions must be familiar not only with the D.C. child neglect statute and the appellate cases interpreting it, but also with U.S. Supreme Court decisions discussing constitutional limits on state intervention in the family.¹ Helpful, too, are appellate cases from states with similar statutory language. Finally, the passage of the federal Adoption and Safe Families Act of 1997 (ASFA) and its implementing statutes have had a significant effect on child abuse and neglect cases. The attorney may gain perspective by reading the recommendations of the many national advisory groups and commentators who have considered the parallel questions of how to protect the child and preserve the family. Counsel may find these publications helpful in analyzing the issues raised by abuse and neglect cases.²

¹ See, e.g., *De Shaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) (state has no constitutional duty under Fourteenth Amendment Due Process Clause to protect a young child from father's physical abuse).

² Although these reports and articles do not constitute legal precedent, even the U.S. Supreme Court has consulted secondary sources for their "informed opinion" on related issues. See *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

(a) Richard P. Barth, Fred Wulczyn, and Tom Crea, *From Anticipation to Evidence: Research on the Adoption and Safe Families Act*, 12 Va. J. Soc. Pol'y & L. 371 (2005) (presenting a statistical analysis of the effects of the ASFA on permanency for children of different ages); Kimberly Carpenter Emery, *Family Ties Dismissed: the Unintended Consequences of ASFA*, 12 Va. J. Soc. Pol'y & L. 400 (2005) (lending a child advocate's perspective to Barth, Wulczyn, and Crea's statistical analysis).

(b) Elizabeth Bartholet, *The Challenge of Children's Rights Advocacy: Problems and Progress in the Area of Child Abuse and Neglect*, 3 Whittier J. Child & Fam. Advoc. 215 (2004) (arguing that the government should intervene more aggressively in child abuse and neglect cases to provide early services to families and permanent placements for children when reunification is not a realistic goal).

(c) Howard A. Davidson, *Protecting America's Children: A Challenge*, 35 Trial 23 (1999) (proposing ways that attorneys in child abuse and neglect cases can improve the system to achieve better outcomes for endangered children).

(d) Kurtis A. Temper, *Construction and Application by State Courts of the Federal Adoption and Safe Families Act and Its Implementing State Statute*, 10 A.L.R. 6th 173 (2006) (providing an overview of the purpose and implementation of the Federal Adoption and Safe Families Act of 1997).

I. Defining Abuse and Neglect: What the Government Must Prove

A. The Definitions of Neglect and Abuse in the D.C. Code

The definition of neglect is found at D.C. Code §16-2301(9)(A) (i) – (x),³ which provides: The term “neglected child” means a child:

- (i) who has been abandoned or abused by his or her parent, guardian, or custodian, or whose parent, guardian, or custodian has failed to make reasonable efforts to prevent the infliction of abuse upon the child. For the purposes of this sub-subparagraph, the term “reasonable efforts” includes filing a petition for civil protection from intrafamily violence pursuant to §16-1003; (ii) who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or custodian; (iii) whose parent, guardian, or custodian is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity; (iv) whose parent, guardian, or custodian refuses or is unable to assume the responsibility for the child’s care, control, or subsistence and the person or institution which is providing for the child states an intention to discontinue such care; (v) who is in imminent danger of being abused and another child living in the same household or under the care of the same parent, guardian, or custodian has been abused; (vi) who has received negligent treatment or maltreatment from his or her parent, guardian, or custodian; (vii) who has resided in a hospital located in the District of Columbia for at least 10 calendar days following the birth of the child, despite a medical determination that the child is ready for discharge from the hospital, and the parent, guardian, or custodian of the child has not taken any action or made any effort to maintain a parental, guardianship, or custodial relationship

or contact with the child; or (viii) who is born addicted or dependent on a controlled substance or has a significant presence of a controlled substance in his or her system at birth; (ix) in whose body there is a controlled substance as a direct and foreseeable consequence of the acts or omissions of the child’s parent, guardian, or custodian; or (x) who is regularly exposed to illegal drug-related activity in the home.

Abuse is defined at D.C. Code §16-2301(23): The term “abused,” when used with reference to a child, means:

- (A)(i) infliction of physical or mental injury upon a child;
- (ii) sexual abuse or exploitation of a child; or
- (iii) negligent treatment or maltreatment of a child.
- (B)(i) The term “abused,” when used with reference to a child, does not include discipline administered by a parent, guardian or custodian to his or her child; provided, that the discipline is reasonable in manner and moderate in degree and otherwise does not constitute cruelty. For the purposes of this paragraph, the term “discipline” does not include:
 - (I) burning, biting, or cutting a child;
 - (II) striking a child with a closed fist;
 - (III) inflicting injury to a child by shaking, kicking, or throwing the child;
 - (IV) nonaccidental injury to a child under the age of 18 months;
 - (V) interfering with a child’s breathing; and (VI) threatening a child with a dangerous weapon or using such a weapon on a child. For purposes of this provision, the term “dangerous weapon” means a firearm, a knife, or any of the prohibited weapons described in § 22-4514
- (ii) The list in sub-subparagraph (i) of this subparagraph is illustrative of unacceptable discipline and is not intended to be exclusive or exhaustive.

D.C. Code §16-2301(24) defines the terms “negligent treatment” or “maltreatment” as: failure to provide adequate food, clothing, shelter, or medical care, which includes medical

³ The neglect statute was amended in 2002. The former subsections under §16-2301(9) were designated (A)-(G).

neglect, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or other custodian.

D.C. Code §16-2301(25) defines the term “sexual exploitation” as: a parent, guardian or other custodian allows a child to engage in prostitution as defined in section 2(1) of the Control of Prostitution and Sale of Controlled Substances in Public Places Criminal Control Act of 1981... or ...a parent, guardian, or other custodian engages a child or allows a child to engage in obscene or pornographic photography, filming, or other forms of illustrating or promoting sexual conduct as defined in section 2(5) of the District of Columbia Protection of Minors Act of 1982.

B. The Petition Alleges Abuse

1. THE GOVERNMENT’S CASE

D.C. Code §16-2301(9)(A)(i) sets out the elements which the government must prove in order to show that a child has been abused:

- (a) the parent, guardian, or custodian
- (b) inflicts or fails to make reasonable efforts to prevent the infliction
- (c) of physical or mental injury to the child.

a. Parent

To prove the first element, the government must show that the parent, guardian, or other custodian is responsible for injury to the child. The parent can be found to have abused or neglected the child regardless of whether the parent maintained physical custody. *In re B.C.*, 582 A.2d 1196 (D.C.1990). If the parent plausibly denies causing the injury, both the parent’s counsel and the guardian *ad litem* (GAL) should be concerned with whether the child’s injury could possibly have been self-inflicted, inflicted by a sibling, or inflicted by a person other than the parents. *In re S.L.E.*, 677 A.2d 514 (D.C. 1996) defines “*in loco parentis*.”

b. Inflicts or fails to make reasonable efforts to prevent the infliction (causation)

To make out a *prima facie* case, the government has only to prove that the parents, guardian, or custodian injured the child or

failed to make reasonable efforts to prevent the infliction of injury to the child. This language would seem to establish a three-part burden for the government: first, to show that the child was injured; second, that the injury was caused by an act or a failure to reasonably act; and three the act or failure to act was by one in a relationship of parent, guardian, or custodian.

The statute is broad enough to protect the child against injury intentionally inflicted by the parent as well as injury that is negligently inflicted. It is also broad enough to bring within the court’s supervision virtually every child accidentally injured by a parent. Since it seems clear that the legislature did not intend that result, attorneys for both children and parents must help the court distinguish those cases which warrant the court’s intervention.

The government must prove that the parent’s actions or failure to act caused the harm to the child. It is unclear under the amendments to D.C. Code §16-2301(9)(A) whether a parent will have to meet a higher standard than mere reasonableness when the injuries result from exposure to drug-related activities. The statute does, however, limit findings of abuse to drug-related activity “in the child’s home environment.” The word environment may expand the definition to include not merely the child’s normal residence, but the place at which a caretaker is exercising custody. Thus, evidence of a parent’s drug use or knowledge by the parent that a caretaker’s “home environment” was exposed to drug activities may be sufficient for a finding of abuse.

c. Injury

The government must prove physical or mental injury to the child. D.C. Code §16-2301(30) defines physical injury as “bodily harm greater than transient pain or minor temporary marks.” Mental injury is defined as “harm to a child’s psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly

aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.” D.C. Code § 16-2301(31).

The statute permits the judge to infer neglect when a child has an injury or illness while in the custody of a parent, guardian, or custodian who is unable to give a satisfactory explanation. D.C. Code § 16-2316(c); *In re L.E.J.*, 465 A.2d 374 (D.C. 1983); *In re C.C.J.*, 777 A.2d 265 (D.C. 2001).

2. DEFENSES TO ALLEGATIONS OF PHYSICAL ABUSE

a. Parent, guardian, or custodian

Counsel for the parent may be able to show that the injury was self-inflicted, inflicted by a sibling, or by a person other than the parents, guardian, or custodian. The parent must also be able to show that their actions or failure to act did not cause the child to be injured by a sibling or caretaker.

b. Inflicts or fails to make reasonable efforts to prevent the infliction

The parent who admits to having injured the child may nonetheless have defenses against the charge of abuse. A showing that the act of inflicting injury was involuntary should exculpate the parents. For example, if a parent while suffering a seizure injures a child, the injury is probably not abuse because it does not result from the parent's voluntary act. Similarly, if a parent who has been bitten by a child jerks his or her arm involun-

tarily and injures the child, absent other circumstances the injury is probably not abuse. When a parent is assaulted by an older child, self-defense, if limited to the requirements of apparent necessity and reasonable force, is probably a complete defense to the allegation of abuse.

If the parents injured the child but claim the injury was accidental, their actions will be tested against the statutory standard of “reasonable efforts to prevent the infliction of injury.”⁴ The defense in such a case is to prove that the parent acted as any reasonable parent would have in preventing injury to the child. Counsel for the parent may present evidence that, at the time of the injury, the parent was protecting the child from foreseeable harm. If the injury resulted from a single, isolated instance of neglect of parental duty, the parent's attorney may want to argue that a single instance of negligent care is insufficient to warrant the long term intervention of the court. *In re A.S.*, 643 A.2d 345 (D.C. 1994) (an infant missing one to three feedings was not sufficient for abuse).

When a sibling or custodian in whose care the parent left the child inflicts the injury, the parent should demonstrate that they neither knew nor had reason to know that the child would be in danger of abuse. In cases in which the child was abused by a caretaker, the parent's attorney should consider presenting evidence about the length of time the parent had known the caretaker, whether they knew or had reason to know that the caretaker was

⁴ Special problems may arise for the attorney representing developmentally disabled parents. As discussed by Professor Robert L. Hayman, most mentally handicapped parents are denied the right to parentage early in their child's life. See Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent* 103 Harv. L. Rev. 1201, 1216, 1217 (1990). He believes that state courts and judges are predisposed to rule against such parents. *Id.* In abuse cases, therefore, it may be important to establish the reasonableness of the parents' actions by showing that they have taken parenting classes and have followed those classes' guidance or have otherwise proven their parenting skills. See also Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 Temp. Pol. & Civ. Rts. L. Rev. 273 (2003); Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of Parental Rights of Individuals with Mental Disabilities*, 16 J. Contemp. Health L. & Pol'y 387 (2000); Karl A. Menninger, *Defense in Proceeding for Termination of Parental Rights on Ground of Mental Disability*, 46 Am. Jur. Proof of Facts 3d 231 (2005); Sherry S. Zimmerman, Annotation, *Parents' Mental Illness or Mental Deficiency as Ground for Termination of Parental Rights--Effect on Parenting Ability and Parental Rights*, 116 A.L.R.5th 559 (2004); Sherry S. Zimmerman, Annotation, *Parents' Mental Illness or Mental Deficiency as Ground for Termination of Parental Rights--Issues Concerning Rehabilitative and Reunification Services*, 12 A.L.R.6th 417 (2006).

inappropriate, what efforts they made to determine whether the caretaker was a suitable custodian for the child, and whether they attempted to discover this information prior to placing the child in the caretaker's custody. Other facts which may tend to prove that the parent exercised proper care include whether the parents sought proper treatment for the child after the injury was discovered, and whether steps have been taken to prevent future harm to the child. Often a showing that the parents did not cause the injury to the child can be made only with the testimony of expert witnesses.

c. Injury

Counsel for both parents and children will want to investigate whether the alleged injury is in fact a disease or other condition that mimics an injury. For example, the sores of bullous impetigo may be mistaken for inflicted cigarette burns.⁵

A great deal can be learned about how the injury was inflicted from the injury itself. A useful first source of information for counsel is *Child Abuse and Neglect: A Medical Reference*, Norman Ellerstein, ed., 1981. The work contains both pictures and discussion of a wide range of abusive injuries, from burns to sexual abuse. Additional research on a specific type of injury may be undertaken at the National Library of Medicine, which houses entire collections of specialized works in its main reference room. Counsel may do computerized searches of the library's holdings or order specialized computer searches of the *Medline* database for a fee.⁶

C. The Petition Alleges Excessive Corporal Punishment

I. THE GOVERNMENT'S CASE

An abuse or neglect petition may arise from an incident of corporal punishment. However, the statute exempts from the definition of abuse "discipline administered by a parent, guardian or custodian to his or her child; provided, that the discipline is reasonable in manner and moderate in degree and otherwise does not constitute cruelty." Although the line between acceptable parental discipline and unacceptable abuse is not absolute, the statute provides examples of the latter: "burning, biting, or cutting a child; striking a child with a closed fist; inflicting injury to a child by shaking, kicking, or throwing the child; non-accidental injury to a child under the age of 18 months; interfering with a child's breathing; and threatening a child with a dangerous weapon or using such a weapon on a child." D.C. Code §16-2301(23)(B).

The elements that must be proven by the government are:

- (a) the parent, guardian, or custodian
- (b) inflicts or fails to make reasonable efforts to prevent the infliction
- (c) of excessive or inappropriate corporal punishment and
- (d) injury to the child.

District of Columbia courts also judge the reasonableness of the punishment by the surrounding circumstances. The Court of Appeals has ruled that a parent with knowledge of her child's severe psychological problems had abused the child when the parent was aware of the child's sensitivities at the time of the beating. Although the parent's actions stemmed

⁵ ASSESSING CHILD MALTREATMENT REPORTS: THE PROBLEM OF FALSE ALLEGATIONS (Michael Robin, ed., Haworth Press 1991) (discussing the perspective of protection workers and problems that may arise with evaluation interviews); CHILD MALTREATMENT: A CLINICAL GUIDE AND REFERENCE (A. E. Brodeur and J. A. Monteleone, eds., 1994) (providing detailed photographs and descriptions of a variety of non-accidental injuries to children).

⁶ <http://www.nlm.nih.gov/medlineplus>

from the child setting fire to her bed and creating a potentially life threatening situation, the court held that the parent had abused the child. *In re S.K.*, 564 A.2d 1382 (D.C. 1989).

2. DEFENSES TO ALLEGATIONS OF EXCESSIVE CORPORAL PUNISHMENT

A parent may defend against the allegation of excessive corporal punishment by presenting evidence that tends to prove that the discipline was reasonable in manner, moderate in degree, and did not constitute cruelty. *In re Kya.B.*, 857 A.2d 465 (D.C. 2004); *In Re J.K.*, 794 A.2d 634 (D.C. 2002). The parent may wish to show that the discipline was for a serious offense, such as drug abuse or truancy, and thus proportionate to the behavior being corrected, that previous efforts using lesser forms of discipline had been unsuccessful, and that the parents meant only to correct the harmful behavior.

The defense may be more complicated if, during the punishment, the child moves or does something to exacerbate what would otherwise not have been a serious injury. For example, a child being punished may move to avoid even reasonable discipline and cause the parent to strike a more vulnerable portion of the child's anatomy, such as the head, or an eye, causing serious injury. Whether the risk of this intervening cause is foreseeable should be considered by the court. The parent's counsel may want to argue that it is nearly impossible for the parents to predict this type of intervening cause, or to gauge precisely the force exerted by a blow. The attorney may wish to argue that the statute does not require perfection of the parent, but only the degree of care that a reasonable parent would exercise.

D. The Petition Alleges Sexual Abuse or Exploitation

1. THE GOVERNMENT'S CASE

D.C. Code §6-2301(23) includes in the definition of abuse "sexual abuse or exploitation." In order to make a *prima facie* case of sexual abuse, the government must show the following:

- (a) the parent, guardian, or custodian
- (b) inflicted or failed to make reasonable efforts to prevent the infliction
- (c) of sexual abuse or exploitation which
- (d) injured the child.

a. Sexual Abuse

D.C. Code §16-2301(32) defines sexual abuse as engaging in or attempting to engage in a sexual act or contact with a child; or causing or attempting to cause a child to engage in or exposing a child to sexually explicit conduct. See D.C. Code §§16-2301(34) & (35).

The term "sexual exploitation" means a parent, guardian, or other custodian allows a child to engage in prostitution as defined in section 2(1) of the Control of Prostitution and Sale of Controlled Substances in Public Places Criminal Control Act of 1981, D.C. Code §22-2701.01, or means a parent, guardian, or other custodian engages a child or allows a child to engage in obscene or pornographic photography, filming, or other forms of illustrating or promoting sexual conduct as defined in section 2(5) of the District of Columbia Protection of Minors Act of 1982, D.C. Code §22-3101(5).

The United States Supreme Court has defined "obscene" to encompass a much broader range of conduct and materials when children are involved than when only adults are involved.

b. Injury

The government must prove not only the act of abuse or exploitation, but also that the child suffered an injury, whether physical or mental, as a result. Occasionally, when the child has sustained no demonstrable physical injury, the government will put on no proof of injury to the child, and ask the court to infer that the child has been injured.

2. DEFENSES TO ALLEGATIONS OF SEXUAL ABUSE OR EXPLOITATION

Sometimes the parent will claim that the events alleged never happened and were fabri-

cated by the child to cover other sexual activity or to “get back” at the parents for some alleged wrongdoing. The parent’s attorney may wish to produce evidence of the child’s sexual activity with persons other than the alleged abuser or evidence that the child has made other accusations or fabricated similar stories in other contexts. Similarly, experts for the parent may be able to establish that the child has been coaxed into the belief through suggestive questioning in assessment or counseling sessions.⁷

An attempt to preclude the testimony of the child witness on competency grounds would, in many instances, require the psychiatric examination of the child. D.C. courts recognize a presumption against compelling such examinations. To overcome this presumption, counsel must be prepared to offer the court some other evidence of psychological problems or mental illness. *Galdino v. United States*, 630 A.2d 202, 207 (D.C. 1993).

a. Abuse or exploitation

The parent may also defend on the basis that the acts complained of did not rise to the level of sexual abuse but were the normal demonstration of affection or family feeling for the child. Sometimes allegations arise when a child complains only of being “tickled” or kissed.

When the petition alleges that the child has been abused by a caretaker, the parent may attempt to show that they did not know or have reason to know that the child was in danger of being sexually abused. Such a showing combined with proof that the parent took steps to protect the child once the abuse was discovered, may preclude a finding of neglect.

b. Injury

The parent may raise a defense based on the premise that the child suffered no physical or mental injury as a result of the abuse. In many

cases, the government will be able to show some physical injury to the child. If there is no evidence of physical injury, the government may nonetheless be able to show that the child sustained a “mental” injury from an act of sexual abuse or exploitation. When the child is an infant or toddler, and there is no evidence of physical harm (as in “fondling” cases), the government may be unable to produce evidence of either physical or mental harm.

E. The Petition Alleges Abandonment

1. THE GOVERNMENT’S CASE

D.C. Code Ann. §16-2301(9)(A)(i) defines the term “neglected child” as one who has been abandoned by a parent, guardian, or custodian. Where the government contends that the parent has abandoned the child, proof of any one of the following conditions will support an inference of neglect. D.C. Code §16-2316(d).

A) The child is a foundling whose parents have made no efforts to maintain a parental relationship with the child and reasonable efforts have been made to identify the child and to locate the parents for a period of at least four weeks.

B) The child’s parents gave a false identity at the time of the child’s birth, and since that time have made no efforts to maintain a parental relationship and reasonable efforts to locate the parents have been made for at least four weeks since their disappearance.

C) The child’s parents, guardian, or custodian is known but has abandoned the child in that he or she has made no reasonable effort to maintain a parental relationship with the child for a period of at least four months.

D) The child has resided in a hospital located in the District of Columbia for at least 10 calendar days following the birth of the child, despite a medical determination that the child was ready for discharge from the hospital, and the parent, guardian, or custodian of the child did not undertake any action or make any effort to

⁷ See Brent G. Filbert, Annotation, *Admissibility of Expert Testimony as to Proper Techniques for Interviewing Children or Evaluating Techniques Employed in Particular Case*, 87 A.L.R.5th 693 (2005); Catherine M. Brooks & Medelyn S. Milchman, *Child Sexual Allegations During Custody Litigation: Conflicts between Mental Health Expert Witnesses and the Law*, 9 Behav. Sci. & Law 21, 22-24 (1991).

maintain a parental, guardianship, or custodial relationship or contact with the child.

In *In re B.B.P.*, 753 A.2d 1019 (D.C. 2000), the D.C. Court of Appeals held that where a parent fails to demonstrate an intention to establish and maintain a relationship with the child after more than ten days have passed since the child's birth, once the child is medically fit to be discharged, the requirements for filing a neglect petition have been satisfied. In each case, the government must show that it has made reasonable efforts to find the parents. However, the Code explicitly exempts the government from proving that the parents intended to abandon the child or that the parents have died. D.C. Code §16-2316(d)(2); *In re Je A.*, 793 A.2d 447 (D.C. 2002).

The government will occasionally amend a petition to include an allegation of abandonment when known parents fail to visit a child who has been placed in shelter care. However, merely leaving children with relatives and other baby-sitters for extended periods of time does not constitute neglect when the children receive adequate care and face no imminent danger. See, e.g., *In re B.R.*, 119 WLR 957 (Super. Ct. May 8, 1991) (neglect not established when mother left children with other caretakers for longer than anticipated time periods since others provided care for the children).

2. DEFENSES TO ALLEGATIONS OF ABANDONMENT

D.C. Code §16-2316(d)(2) provides that if the parents can provide a satisfactory explanation for the abandonment, the judge need not find neglect. However, there are no published cases in D.C. where the finding of abandonment has been overturned by the Court of Appeals.

F. The Petition Alleges Child Without Proper Parental Care or Control

1. THE GOVERNMENT'S CASE

D.C. Code §16-2301(9)(ii) defines a neglected

child as a child:

Who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian or other custodian.

The language of the statute requires that the government prove three elements:

- (a) the parents, guardians or custodians;
- (b) failed to provide proper parental care or control, subsistence, education as required by law or other care or control necessary for the child's physical, mental or emotional health; and
- (c) the failure was not due to their lack of financial means.

The government must establish that the alleged neglect was not the result of the parents' lack of financial means. See *In re T.G.*, 684 A.2d 786 (D.C. 1996). Particularly when the deprivation is caused in part by lack of financial means and in part by other factors, the government must prove that the neglect is not caused by lack of financial means. *In re A.H.*, 842 A.2d 674 (D.C. 2004). Accordingly, a lack of financial means can be advanced as an affirmative defense by parents. If the parent exposed the children to an unsafe and unsanitary home environment and thereby endangered the children's health, the children may be adjudicated neglected. If the parent could overcome the effects of poverty with reasonable efforts, the deprivation is not caused by lack of financial means. *Id.*

Significantly, the government need not establish that the parents caused the deprivation of their children. Beyond establishing paternity, no causative or "nexus" element exists because "the legal relationship [between the parent and child] is a nexus in and of itself." *In re B.C.*, 582 A.2d at 1199. Under D.C. Code §16-2301(9)(A)(ii), the court "only needs to find that the children are *without* the statutory requirements" of subsistence, education, and other

care. *Id.* at 1198 (emphasis in original). See also *In re N.P.*, 882 A.2d 241 (D.C. 2005) (finding that mother was neglectful under §16-2301(9)(A)(ii) when she failed to protect the children from physical abuse by the father and passively accepted an inappropriate relationship between one child and the father). The court need not find that the parent abused, abandoned, or mistreated his children. *In re B.C.*, 592 A.2d at 1198. As the B. C. court ruled, “the primary concern of the court ... must be the welfare of the neglected children.” *Id.*; See also *In re JJZ*, 630 A.2d 186, 191-192 (D.C. 1993) (“neglect proceedings are remedial and focus on the child”). Therefore, “[t]he relevant focus for the court under [§16-2301(9)(A)(ii)] is the children’s condition, not the [parents’] culpability.” *In re B.C.*, 582 A.2d at 1198. And, at least in cases where the neglect is completely unrelated to the parents’ financial status, the government can meet its burden of proving a lack of proper care and control without also providing an affirmative showing of the parent’s financial status. *In re Am.V.*, 833 A.2d 493, 498 n. 9 (D.C. 2003).

The government must establish the second element: that “proper parental care” in terms of subsistence, education, or other care did not exist. First, the child might lack subsistence. Second, the child might lack “education as required by law.” The District imposes an obligation on all parents to ensure their children attend school until age 18, or until high school graduation or its equivalent. D.C. Code. §38-202 (a). If the child is at least 17 years of age and maintains lawful employment, however, then the Superintendent of Schools may allow flexible hours. D.C. Code §38-202(c). Third, the child may not have “other care or control necessary for the child’s physical, mental or emotional health.” Taken together, these statutory elements describe care that is minimally adequate. Parents need not provide their children with the best possible care, *In re S. G.*, 581 A.2d 771, 778 (D.C. 1990), but they have an obligation to provide a child with food, clothing, healthcare, education and a safe environment. *In re De.S.*, 894 A.2d 448 (D.C. 2006).

Although not attempting to create an exclusive list, *In re A.J.*, 120 WLR 725, 730 n.11 (Super. Ct. 1992) cited a number of children’s “basic needs,” both physical and mental. Physical needs include “food, clothing, shelter, education, special medicinal needs, and protection from abusive or dangerous people or harmful environments.” Mental or emotional needs include “an acceptable place to live, love/affection/attention from the parent, and a parent/child relationship.” *Id.* The court also addressed “other non-tangible essentials,” such as:

the need not to be (1) left alone with respect to very young children; (2) left with an unwilling caretaker; (3) left with a caretaker who was unprepared to provide the minimum required care or left without adequate supplies necessary to provide proper care; or (4) left with a caretaker without prior notice of such an event to that caretaker (5) left with a caretaker without knowledge as to when care by another would cease. *Id.*

Whatever the exact mix of needs and alleged deficiencies, D.C. courts permit litigants to use evidence of pre-petition as well as post-petition events. Similarly, the D.C. Court of Appeals in *In re A.S.* reasoned that the court, “in determining whether a child’s welfare requires the intervention of the state, go beyond simply examining the most recent episode” of neglect or abuse, and instead apprise itself “of the entire mosaic.” *In re A.S.*, 643 A.2d 345, 347 (D.C. 1994) (citations and internal quotations omitted).

But how much evidence must the government present in order to prove that the child failed to have “proper parental care or control, subsistence, education as required by law or other care or control necessary for the child’s physical, mental or emotional ... health”? No two people will interpret the mandate to provide “proper parental care and control” in the same way. Interpretations will vary according to levels of income, cultural influences, and other factors. Within the broad range of care and control considered proper, such variations are accepted by

society. *But see, e.g., In re U.F.*, 118 WLR 541 (Super. Ct. 1990) (differences in disciplining children that are based on varying cultural or ethnic standards have no legitimate substantive role in the determination of whether corporal punishment is reasonable or excessive).

How then can the court determine when a parent's care varies too much from the norm and becomes improper, particularly in light of the statutory requirement that the parents provide not the best possible, but only minimally adequate care of the child? One way in which the government may attempt to establish that the parent has failed to meet the standard of minimally adequate care is by showing that the child has been harmed or placed at substantial risk of harm by failure to provide care. *See, In re A.S.*, 643 A.2d at 345 (reversing a trial court's finding of neglect where infant found to be dehydrated and without food for six hours since no record of repeated harm or improper care existed).

An explicit criterion of harm or substantial risk of harm to the child takes into account the District of Columbia's "repeated stress [of] the existence of a preference toward placing children with their natural parents." *In re L.J.T.*, 608 A.2d 1213, 1216 (D.C. 1992) (*per curiam*); *See also, In re N.H.*, 569 A.2d 1179, 1181-82 (D.C. 1990). A requirement of harm or a substantial risk of harm therefore should separate adequate care from inadequate care. This analysis requires that the government prove that:

- (a) the child
- (b) failed to have proper parental care or control, subsistence, education required by law, or other care or control necessary for a child's health which caused
- (c) harm or substantial risk of harm to the child.

When, for example, the government alleges that the parent failed to provide "subsistence," the government must prove that the children did not possess minimal food or shelter. Such proof must include a showing that being without food or shelter harmed the child or placed the child at substantial risk of harm. When it is

alleged that the parent failed to provide the child with "education as required by law," the government must prove that the child did not have the minimum education required by law, and that missing school caused actual or substantial risk of harm to the child. To prove that the parent failed to provide "proper parental care or control" or "other care or control necessary for the child's physical, mental or emotional health," the government must show that the alleged failure harmed or threatened substantial risk of harm to the child.

2. DEFENSES TO ALLEGATION OF IMPROPER PARENTAL CARE OR CONTROL

A parent may defend against the allegation by showing that the care provided was adequate and that failure to provide one of the enumerated elements neither harmed the child nor placed the child at substantial risk of harm. The parent's attorney should also recognize that a child's condition may simply co-exist with the deprivation. The deprivation may not have caused or even exacerbated the condition. Although the parent's actions need not have caused the deprivation, *In re B.C.*, 582 A.2d at 1199, the parent's attorney may argue that a nexus must exist between the child's condition and the deprivation.

a. Subsistence

Cases in which the government claims that a parent has failed to provide the child with subsistence vary widely, from situations in which a child was without food for six hours while the mother received emergency medical care (*See, e.g., In re A.S.*, 643 A.2d at 347-8), to situations in which a child arrives at school hungry on a regular basis. *In re A.M.*, 589 A.2d 1252, 1253 (D.C. 1991). Counsel defending the parent against the allegation of occasional failure to provide food may want to present evidence of the adequacy of the parent's overall care of the child, and of the child's own physical and emotional well-being. In some cases in which the parent claims overall adequate care, the government may attempt to

show that an unobligated third person cared for the child and that, as a result, the child was at risk. See, e.g., *In re A.J.*, 120 WLR *supra* at 730 (although the court ultimately terminated parental rights, it refused to do so on grounds that the mother had placed the child in the aunt's home on three separate occasions and with DHS four times over a five month period). Counsel should determine whether or not the parent may have arranged the third party care. If so, counsel can argue that the parent fulfilled their duty of care, albeit indirectly. See *id.* But see *In re W.T.L.*, 825 A.2d 892 (D.C. 2002) (holding that mother was neglectful even though she left the children with a willing caretaker when the caretaker later became unwilling to care for the children and turned them over to CFSA custody).

When non-organic failure-to-thrive syndrome is alleged, attorneys for parents and children should read the chapter on growth failure in Ellerstein's book or a similar treatment in a pediatrics textbook.⁸ Non-organic failure-to-thrive ("NOFTT") is a "well-recognized" condition in which a combination of nutritional and emotional deprivation lead to growth failure in an infant. Dr. R. Kim Oates, *Long-Term Effects of Non-organic Failure to Thrive*, 75 Pediatrics 36 (Jan. 1985) [hereinafter, *Long-Term Effects of NOFTT*].

Children with NOFTT may exhibit premature wrinkling of the skin around the joints and a marked loss of subcutaneous tissue due to malnourishment. Kerrie Marzo, *Anatomical Simulator of the Most Common Physical Signs of Child Abuse*, 1992 Pub. Health. Rep. 218 (Mar./April 1992). After diagnosis and treatment, most NOFTT children rapidly gain weight and achieve normal weight and growth patterns. *Long-Term Effects of NOFTT, supra* at 36. Although the long-term effects have proved difficult to isolate since most cases originate in low socioeconomic groups, stud-

ies suggest that significant percentages of former NOFTT children exhibit mental retardation, behavioral and psychological problems, decreased immunologic resistance, and diminished physical activity. Dr. Maureen M. Black, et al., *A Randomized Clinical Trial of Home Intervention for Children with Failure to Thrive*, 95 Pediatrics 807 (June 1995). For more information on failure to thrive, see Robert W. Block et al., *Failure to Thrive as a Manifestation of Child Neglect*, 116 PEDIATRICS 1234 (2005).

The parent's attorney may defend against a NOFTT allegation by establishing that the child suffers from some other illness or disease which may mimic failure-to-thrive syndrome. The treating physician will usually have considered, tested, and rejected other potential causes. See, e.g., Dr. Melanie M. Smith & Dr. Fima Lifshitz, *Excess Fruit Juice Consumption as a Contributing Factor in Non-Organic Failure to Thrive*, 93 Pediatrics 438 (1994). If the parent denies neglecting the child physically or emotionally, the parent's attorney should question the physician about other diagnoses she has considered and eliminated. Specifically, the attorney should ensure that the treating physician did not overlook HIV infection. Writing with other child care specialists in 1995, Dr. Samuel Grubman of St. Vincent's Hospital and Medical Center of New York has observed that "many pediatricians still do not recognize that HIV infection can [be] present in a previously healthy school[-]age child." Dr. Samuel Grubman, et al, *Older Children and Adolescents Living with Perinatally Acquired Human Immunodeficiency Virus Infection*, 95 Pediatrics 657 (May 1995); See also, Dr. Pamela Popola, Dr. Mayra Alvarez & Dr. Herbert J. Cohen, *Developmental and Service Needs of School Age Children with Human Immunodeficiency Virus Infection: a Descriptive Study*, 94 Pediatrics 914 (1994) (of 86 school-age children infected with HIV, 44 percent functioned in the low to average intelli-

¹ See generally, e.g., *Child Abuse and Neglect: A Medical Reference, supra* at 197.

gence range, 50 percent had “significant” language impairments, and 42 percent were formally diagnosed with emotional and behavioral disorders; it remains unclear whether HIV encephalopathy, intrauterine teratogen exposure, environmental factors, or a combination of these factors accounted for the disorders); Tracie L. Miller, *Maternal and Infant Factors Associated With Failure to Thrive in Children With Vertically Transmitted Human Immunodeficiency Virus-1 Infection*, 108 Pediatrics 1287 (2001) (children with HIV-1 fall below socioeconomically similar non-infected children in weight and length by six months of age). Despite common misperceptions about the incubation period for perinatal HIV infection, children with HIV frequently have a prolonged disease-free period. Medical professionals who diagnose children with symptoms of NOFTT should therefore rule out HIV infection. Counsel for the parent may wish to consult an independent expert physician.

b. Education as Required By Law

Excessive school tardiness and absences may indicate that a child is without education as required by law. See *In re D.B.*, 879 A.2d 682, 683 (2005) (court removed child from protective supervision in part because child was absent twenty-one times and tardy thirty-two times in one school year); *In re A.M.*, 589 A.2d at 1253 (mother stipulated to neglect when child was absent fifty-five times and tardy fifty-seven times in one school year). See also *In re Am.V.*, 833 A.2d 493 (finding mother neglectful in part because the children regularly arrived tardy to school). Where the allegation is based on educational neglect, the parent’s attorney may want to establish that the child was school-phobic and the parents chose not to force the child to attend school. In the case of the school-phobic child, the parent may fear inflicting additional trauma upon the child. See, e.g., *In re Kroll*, 43 A.2d 706 (D.C. 1945). A chronically truant child may simply be uncontrollable and more properly the sub-

ject of a Persons in Need of Supervision (PINS) petition. See D.C. Code §16-2301(8) (Supp. 2006) (defining “child in need of supervision”). The parent’s choice to keep a child home from school or to fail to force a truant child to attend school may not warrant judicial intervention if the government cannot establish harm or substantial risk of harm to the child. See, *Kroll*, *supra*, at 708.

c. Other Care or Control Necessary for the Child’s Physical, Mental, or Emotional Health

Attorneys and judges often treat this section of the statute as a catch-all under which they can group unrelated examples of less-than-perfect care. A single petition may contain allegations that the child was left alone on one occasion, had dirty clothes or smelled of urine on another, and that the social worker saw cockroaches in the house on a third. Occasionally, the government will petition cases alleging that the parent failed to provide necessary emotional or mental health or other treatment. The parent’s attorney should attempt to show that these occasional lapses have not caused mental, physical, or emotional harm to the child. Here too, whether or not the child is harmed or placed at substantial risk of harm because of the parents’ decision not to seek medical or other treatment often becomes an important issue.

In addition, the government may petition medical neglect cases pursuant to this section of the statute. What care must the parents of a child with special medical or other needs provide to that child? The government may argue that the parents of a child with special needs bear a greater burden in meeting those needs than do the parents of the normal child. If the special needs child has a lower threshold of harm than the normal child, the care that is minimally adequate for that child may be greater than the care which is minimally adequate for the normal child. See *In re P.S.*, 797 A.2d 1219, 1224 (D.C. 2001) (“[A]n individual who is able to parent a child with advanced or average skills may nevertheless be

unable to carry out the additional responsibilities required to raise a child with special needs.”) (quoting *Appeal of U.S.W.*, 541 A.2d 625, 626-27 (D.C. 1988). See, *In re L. W.*, 613 A.2d 350 (D.C. 1992) (court permitted foster parents, over the objections of the biological father, to adopt child suffering since birth from asthma and cognitive difficulties which required frequent hospitalizations and constant attention). When the parent does not harm their child, but merely fails to provide the best possible care, however, then arguably the court should not allow the government to interfere. This issue may arise in cases in which the government alleges that a child can receive adequate care only in a special residential facility.

G. The Petition Alleges Parental Inability to Care Because of Incarceration, Hospitalization, or Physical or Mental Incapacity

1. THE GOVERNMENT'S CASE

D.C. Code 16-2301(9)(A)(iii) provides that a child is neglected if the parents, guardian, or other custodian are unable to discharge their responsibilities to and for the child because of incarceration, hospitalization, or physical or mental incapacity.

In order to prove a child is neglected pursuant to this section of the statute, the government must show that:

- (a) the parents are incarcerated, hospitalized, physically or mentally incapacitated;
- (b) which causes them;
- (c) to be unable to care for the child.

Cases most frequently petitioned pursuant to this section include those in which the custodial parents are addicted to drugs or alcohol, incarcerated, hospitalized, or suffer from mental illness or mental retardation. See, e.g., *In re B.L.*, 824 A.2d 954 (D.C. 2003) (holding that mother's alcohol-induced mental illness was relevant factor in court's finding that she was unable to provide proper parental care); *In re C.A.S.*, 828 A.2d 184 (D.C. 2003) (holding that children were neg-

lected when incarcerated father made no efforts to arrange for their care during his incarceration) See, e.g., *In re A.J.*, 120 Wash.L.Rep. at 730 (mother who suffered from schizo-affective disorder manifesting itself in auditory hallucinations, suicidal tendencies, impaired judgment, crying spells, depression, loss of appetite, agitations, hyperactivity, manic behavior, and mood swings adjudged unable to discharge her responsibilities because of mental incapacity).

2. DEFENSES TO ALLEGATIONS OF INABILITY TO CARE BECAUSE OF INCARCERATION, HOSPITALIZATION, MENTAL OR PHYSICAL INCAPACITY

a. Incarceration or Hospitalization

In general, a parent may defend against an allegation of inability to care because of incarceration or hospitalization by showing that arrangements have been made for proper care of the child by a third party or by the non-custodial parent for the period of incapacity.

The parent's right to place a child with a relative or friend is constitutionally protected. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982). The parent's choice of caretaker should not be disrupted absent some showing by the government that the caretaker is unfit to care for the child.

An incarcerated parent's placement of a child with a fit caretaker without providing the caretaker with legal authority for the care of the child may not prevent a finding of neglect on the part of an incarcerated parent. *In Re T.T.C., T.C., V.T.C.*, 855 A.2d 1117 (D.C. 2004). However, even if a parent arranges for a willing caretaker to care for the children, if the caretaker later becomes unable or unwilling to care for the children and turns the children over to CFSA, the children may be adjudicated neglected based on the mother's failure to provide for their care. *In re W.T.L.*, 825 A.2d 892 (D.C. 2002).

The government sometimes uses the incarceration of one parent as a basis for a neglect petition, but a nexus must exist between the

parent's incarceration and the neglect. *In Re T.T.C.*, at 1120. The *T.T.C.* court noted that the father's failure to bestow legal custodial authority on his girlfriend when he left the children in her care was not neglect per se, but this fact became relevant as a result of subsequent events which caused the children to be neglected. *Id.* at 1121.

b. Physical or Mental Incapacity

i. Mental Retardation

In cases in which the parent is not hospitalized, but is alleged to be unable to care for the child because of mental retardation, the focus of the defense effort is to show that the parent is able to care for the child despite the handicapping condition. The most difficult cases are those in which the parent is not institutionalized but is unable adequately to care for herself. In such cases, counsel for a parent may be unsuccessful in fashioning an affirmative defense but must ensure that the government is put to its proof.

The parent's defense begins at the initial hearing. At that time, the parent may be asked to submit voluntarily to a psychological examination, or the government may request that the court order one pursuant to D.C. Code §16-2315 (e)(1). *See generally, In re O. L.*, 584 A.2d 1230 (D.C. 1989). The assistant attorney general (AAG) may request such an examination after observing in court that the parent is mentally retarded, despite the fact that the incident or incidents that brought the case to court were unrelated to the parent's condition. To any such request for an evaluation, parent's counsel may wish to argue to the court that, absent evidence that the incident in some way resulted from the parent's retardation, the request constitutes no more than a "fishing expedition" and does not provide

the requisite showing of good cause.

Whether or not the court orders an evaluation, the attorney for the parent may wish to seek an independent evaluation from a psychologist who has experience in working with the mentally retarded. A psychologist who also has experience in teaching parents to develop parenting skills is the ideal resource for this evaluation since it may be possible to persuade the parents to remedy voluntarily any parenting defects which the psychologist discovers.

Determining whether or not a person is mentally retarded involves a clinical judgment that accounts for both intellectual capacity and adaptive functioning (the ability to be personally independent and socially responsible). As a result, the parent's IQ scores are not the sole determinant of adequate functioning. Parents with good adaptive skills may not be considered retarded. The attorney defending on the ground that the parent is not mentally retarded will want to consult a diagnostic guide to retardation. *See, e.g., Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR) (4th ed., text revision 2000).

If the parent is retarded but self-sufficient and responsible, they may direct the attorney to defend on the basis that, despite retardation, they are capable of caring for the child. The evaluation of a psychologist experienced in dealing with mentally retarded parents proves critical here. The attorney should come prepared to demonstrate that parents can provide an acceptable level of care, and, if services such as day care or supplemental educational programs⁹ are necessary, that the parent can and will seek them out and provide them to the child.

⁹ Another related concern of the child welfare system is that even the child who is well cared for physically will not receive adequate stimulation to allow for normal intellectual development. The parent's attorney may wish to seek an expert opinion on this issue, discuss this issue with the parent, and, when appropriate, assist the parent to make arrangements for the child to participate in appropriate supplementary programs.

Perhaps most important, the attorney must remain ready to meet the often unspoken belief that a child will be better off anywhere other than with mentally retarded parents. The attorney must be prepared to argue that the parent was providing the minimally adequate care required by the statute and thus did not neglect the child.

ii. Mental Illness

When the government alleges inability to care based on mental illness, the parent's attorney may wish to challenge either the allegation that the parent is mentally ill, or the allegation that the parent is unable to care for the child, or both. The manner in which the allegation of mental illness is challenged depends in part on the facts that the government uses to make its allegations in the petition. Sometimes when an incident of alleged abuse or neglect brings the case to the attention of the child welfare system, the social worker, physician, or detective will observe that the parent is mentally ill. Based on information about possible prior psychiatric treatment or merely on reports that the parent is depressed, the District of Columbia may include allegations of mental incapacity in the petition. In such cases, the government may hope to obtain additional information about the parent's mental state through mental health evaluations or records. The parent's attorney may want to oppose any motion for waiver of doctor-patient privilege, as well as any oral request for an evaluation pursuant to D.C. Code §16-2315(e)(1) on grounds that the allegations in the petition are unsubstantiated and the motion is not supported by good cause.

If the allegation is based upon observed symptoms of mental illness, such as hallucinations, confusion, severe depression, extreme hostility, or paranoia, the parent's attorney should discuss with the client whether drug use may have caused the symptoms. Illegal controlled substances,

some prescription drugs, and even caffeine in quantity can cause effects similar to mental illness.

When witnesses have observed symptoms of true mental illness, or when there is other reliable evidence of an existing mental illness, the parent's attorney will have more difficulty opposing the government's request for mental evaluation based on the good cause requirement. *See, e.g., In re I. B.*, 631 A.2d 1225, 1229 (D.C. 1993) (psychologist found biological mother suffered from histrionic personality disorder resulting in neglect and verbal abuse of her children and rendering her unable to remain in one location long enough to keep her children in school). If it is likely that the court will order the evaluation, the attorney may wish to negotiate with the government about who will perform the evaluation. Although the court's forensic psychiatric division most often performs evaluations, it is possible for a non-court psychiatrist to evaluate the parent. If a party shows an evaluation to be inadequate, the court may order another. D.C. Code § 16-2315 (e)(3).

In any event, the parent's attorney will generally want to obtain a voucher for the services of an expert psychiatrist or psychologist of her own choosing in preparation for trial. The choice of the expert psychiatrist or psychologist is of the greatest importance. The attorney may wish to find someone who is not only expert in the diagnosis of mental illness, but also one who will consider treating the parent as well. Whenever possible, the psychiatrist or psychologist should be familiar with teaching parenting skills.

The parent's attorney must make certain that every expert who evaluates the client has as much information as possible about previous levels of functioning. The attorney should never assume that the expert will know what issues he should address and

should give the expert a list of “referral questions” to cover.

When the evaluation by the parent’s expert shows that the parent suffers from mental illness, the attorney must become familiar with the illness, its probable course, prospects for recovery, and the impact of the illness on the client’s ability to parent.¹⁰ An essential resource for learning about mental illness is *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR) (4th ed., text revision 2000).

The court’s finding of a mental illness is insufficient to establish neglect unless the court also finds a nexus between the illness and the existence of neglect. *In re E.H.*, 718 A.2d 162 (D.C. 1998). However, the trial court need not wait for actual incidents of neglect if there is evidence to support a finding of mental illness, along with the parent’s lack of insight, refusal to undergo treatment, probable deterioration, and likelihood of neglect without such treatment. *In re A.B.*, 486 A.2d 1167 (D.C. 1984). See also *In re B.L.*, 824 A.2d 954 (2003).

The issue at the neglect trial should be whether the parent currently suffers from a mental illness which currently prevents them from caring for the child. See, *EC. v. District of Columbia*, 589 A.2d 1245, 1250 (D.C. 1991) (“while mental illness is not itself an adequate ground for termination of parental rights, the trial judge could properly consider the effect of the [parent’s] mental condition on the welfare of the children”). In addition,

if the AAG and the social worker/probation officer become convinced prior to trial that the parents cannot raise the child, that belief may become a self-fulfilling prophecy. Both the child’s and the parents’ attorneys must work to implement the statutory scheme by ensuring that, following a trial in which the parents are found to have neglected the child, the best efforts of the child welfare and mental health systems are brought to bear to reunify the family.

iii. Drug Addiction or Alcoholism

Drug or alcohol use alone without proof of neglect caused by such abuse is insufficient to establish neglect under this section. *In re Am.V.*, 833 A.2d 493 (D.C. 2003). Even without the proof of a nexus between such substance abuse and neglect, the court may consider such substance abuse indicative of neglect when present with other incidents of neglect. *In the Matter of W.T.L.*, 825 A.2d 892 (D.C. 2002).

The court will not require expert evidence to establish drug or alcohol addiction, as long as there is sufficient lay evidence to support the finding. *In re B.L.*, 824 A.2d 954 (D.C. 2003)

H. The Petition Alleges the Parent Refuses or is Unable to Care for a Child Being Discharged From an Institution

Under D.C. Code §16-2301(9)(A)(iv), the government must show that the parents are unable or unwilling to assume responsibility for the

¹⁰ Articles which discuss the impact of mental illness on the parents’ ability to care for the child include, Eva Gochman, *Bipolar Mothering: Case Description, Mother Infant Interaction and Theoretical Implications*, *Child Psychiatry and Human Development*, Vol. 16(2) Winter 1985; Esther K. Chung et al., *Maternal Depressive Symptoms and Infant Health Practices Among Low-Income Women*, 113 *Pediatrics* 533 (2004); William R. Beardslee, *A Family-Based Approach to the Prevention of Depressive Symptoms in Children at Risk: Evidence of Parental and Child Change*, 112 *Pediatrics* 119 (2003). For information on the implications of parental mental illness on child abuse and neglect cases; see Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 *Temp. Pol. & Civ. Rts. L. Rev.* 273 (2003); Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of Parental Rights of Individuals with Mental Disabilities*, 16 *J. Contemp. Health L. & Pol’y* 387 (2000); Karl A. Menninger, *Defense in Proceeding for Termination of Parental Rights on Ground of Mental Disability*, 46 *Am. Jur. Proof of Facts* 3d 231 (2005); Sherry S. Zimmerman, *Annotation, Parents’ Mental Illness or Mental Deficiency as Ground for Termination of Parental Rights--Effect on Parenting Ability and Parental Rights*, 116 *A.L.R.5th* 559 (2004); Sherry S. Zimmerman, *Annotation, Parents’ Mental Illness or Mental Deficiency as Ground for Termination of Parental Rights--Issues Concerning Rehabilitative and Reunification Services*, 12 *A.L.R.6th* 417 (2006).

child's care when the child is discharged from a hospital or institution.

The parent's attorney should remain aware of the prohibition in D.C. Code §16-301(9)(A)(ii) against finding neglect when the deprivation stems from a lack of financial means, and may wish to defend on that basis.

I. The Petition Alleges the Child is in Imminent Danger of Abuse

The statute provides that a "neglected child" is a child "who is in imminent danger of being abused and another child living in the same household or under the care of the same parent, guardian, or custodian has been abused." D.C. Code §16-2301(9)(v) (1981). See also *In re Te.L.*, 844 A.2d 333 (D.C. 2004). However, a finding that one child in the household has been abused is not alone sufficient to prove that the other children in the household are in imminent danger of abuse. *Id.* at 342-44. The language of the statute makes it clear that the government must also prove that the danger to the child is truly imminent. *Id.*; *In Re Kya B.*, 857 A.2d 465 (D.C. 2004).

J. The Petition Alleges the Child Has Received Negligent Treatment or Maltreatment

D.C. Code §16-2301(9)(A)(vi) provides that a child who received negligent treatment or maltreatment from his or her parents, guardian, or other custodian is neglected. D.C. Code §16-2301(24) defines negligent treatment or maltreatment as a "failure to provide adequate food, clothing, shelter, or medical care, which includes medical neglect, and the deprivation is not due to the lack of financial means of his or her parents, guardian or custodian." It is not clear what, if anything, this section adds to the statute in light of the language in D.C. Code §16-2301(9)(A)(ii).

K. Healthy Newborn Infants

The Code also considers a healthy, newborn child to be a neglected child when, after at least

ten calendar days, the parent has not taken any action or made any effort to maintain a parental, guardianship, or custodial relationship or contact with the child. D.C. Code Ann. §16-2301(9)(A)(vii). See *In re B.B.P.*, 753 A.2d 1019 (D.C. 2000).

L. Drug-Exposed Child

D.C. Code §16-2301(9)(A)(viii) includes within the definition of neglect children who are exposed to illegal drugs by a parent, guardian, or custodian. Although the law does not include unborn children within the definitions of neglect, a child's mother will be found to have neglected her child if the child "is born addicted or dependent on a controlled substance or has a significant presence of a controlled substance in his or her system at birth."

Under D.C. Code §16-2301(9)(A)(ix), it is not necessary to show addiction on the part of a child in whose body there is a controlled substance as a direct and foreseeable consequence of the acts or omissions of the child's parent, guardian, or custodian. Even where the controlled substance has not been ingested or otherwise introduced into the child's body, he is a neglected child under D.C. Code §16-2301(9)(A)(x) if the child is regularly exposed to illegal drug-related activity in the home. See *In re De.S.*, 894 A.2d 448 (2006) (holding that child was properly found to be neglected when he was living in a home in which drugs were sold).

M. The Government's Use of Multiple Theories

Frequently, the petition alleges multiple types of neglect or abuse. For example, a parent's substance abuse may give rise to allegations of abandonment, earlier failure to provide proper parental care and control, and inability to care for the child based on mental incapacity. Alternatively, the government might charge a mentally ill parent with failure to provide proper parental control and inability to care for the child due to mental illness. A young child's ingestion of drugs may result in an abuse charge as well as failure to provide proper parental care and control. However, the older the child, the

more difficult government's proof that parental abuse caused the incident.

Counsel should analyze each basis for the government's case where multiple grounds are alleged, and hold the government to its burden of proving each ground.

II. Discovery: What the Government Can Prove

A. Informal Discovery; The Initial Hearing Phase

Attorneys should be aware that "informal discovery" may begin at the family team meeting or at the initial hearing. By the time the parents appear in court for the initial hearing, the intake social worker may already have requested that they sign an authorization for release of information about the child. Although the statute, at D.C. Code §16-2319(b), states that no information obtained through the social worker may be used to prove neglect or abuse, the government sometimes uses information obtained from social workers to amend the petition or to supplement its proof at trial. The parents' attorneys may want to consider whether to counsel the client to revoke the release after the initial hearing.

Moreover, the parent's attorney should be aware that, although D.C. Code §§16-2319(b) and 4-1301.09(c) appear to preclude the use of information obtained from the social worker to prove allegations of neglect or abuse, such information may be included in the petition, sometimes by way of a written amendment, or used at trial, with or without amendment of the petition, to bolster the government's case. Counsel should be alert to any attempt to use such information and prepare to move to strike from the petition any allegations so obtained.

Discovery begins at the initial hearing. When counsel is assigned to a case, Counsel for Child Abuse and Neglect (CCAN) will give the attorney a

cover sheet listing the attorneys' names and who they represent and one of two forms used by the government in petitioning the case. In abuse cases, a form showing the results of the investigation of the Youth and Family Services Division of the Metropolitan Police Department (MPD) will be attached. If neglect is alleged, a form prepared by the CFSA social worker who initiated the case will be attached.¹¹

In preparing for the initial hearing, the attorney will have interviewed the client and any other persons accompanying the client to court, and will have contacted by telephone potential witnesses or custodians, or both. If a probable cause or shelter care hearing is held, the preparations done for that hearing provide a great deal of information about the case. In abuse cases, the child may have already been seen by a physician, and all attorneys may have received a copy of the medical-legal report. If the detective took pictures of the injury, counsel may have had the opportunity to view them at the initial hearing.¹²

The parent's counsel may also have spoken with the Youth Division detective. In some cases, the detective may refuse to speak with the parent's attorney prior to the probable cause or shelter care hearing, but may be willing to talk after the hearing. If the detective refuses, the AAG can help appointed counsel by telling the detective that the government has no objection to such a conversation. However, the detective is still free to decline to speak.

If a shelter care or probable cause hearing is held, the parents' attorneys may wish to order a transcript for use as impeachment material at trial and for other purposes. Counsel should order the transcript immediately after the hearing. Regular service for transcripts from taped proceedings takes, at a minimum, six to eight weeks. To order a transcript, counsel must get a cost estimate from the Court Reporters' office on the 5th floor of the

¹¹ See, D.C. Code §4-1301.06 for division of responsibility between police and CFSA, as well as purpose of their investigations.

¹² D.C. Code §4-1301.08 authorizes persons responsible for investigations under §4-1301.06 to take photographs of each area of trauma of the child.

courthouse, and submit a voucher to the neglect trial judge. When the transcript voucher has been approved, counsel must take it to the Court Reporters' office. That office will telephone the attorney when the transcript is complete.

Occasionally, the AAG subpoenas the child's medical or mental health records, both privileged, without notice to or authorization from either parents or child. Both parents' and child's counsel should be aware that SCR-Civil 26 limits the scope of discovery to "any matter, not privileged,¹³ which is relevant to the subject matter involved in the pending action." Moreover, SCR-Civil 45 allows for the use of subpoenas (1) to require a person to attend and give testimony at trial or disposition or (2) to require a person to bring with him or her to trial or disposition documents or things. Use of subpoenas according to the rule gives ample opportunity for a party to assert any privileges applicable and bar access. The "Mental Health Information Act,"¹⁴ specifies whose authorizations are required to allow a third party to gain access to mental health records. For a more detailed discussion of medical and mental health records, see the Medical and Psychiatric Treatment Chapter and Confidentiality Appendix.

After the initial hearing, counsel should have their clients sign releases of information for school, medical and, when applicable, mental health information. If the child is old enough (arguably 18 years of age or older) to authorize release of school, medical, and other health records, the GAL may wish to obtain a signed authorization form. In cases in which the child is not yet 18, the parents' authorization for release of information is probably required. The GAL may wish to inquire of the parents' attorneys whether the parents will authorize access to the child's records. If access to records is refused, the GAL may wish to move the court for an order granting

access. Because such an order abrogates the parents' rights under the neglect and mental health information statutes, the parents should be served and offered an opportunity to respond to the motion.

B. Formal Discovery: The Civil Rules

SCR-Neglect 1 makes applicable in neglect cases SCR-Civil 6, 11, and 26 through 37, the court's civil discovery rules, "except where inconsistent with the provisions of these neglect rules." An order with respect to discovery may be entered at the initial hearing, SCR-Neglect 15(c); however, if no discovery order is issued, then counsel should follow the civil rules. After the initial hearing, counsel should analyze the provisions available and prepare a tentative discovery plan.

SCR-Civil 26 provides for discovery by depositions upon oral examination or written questions; written interrogatories; production of documents or things and entry upon land for inspection and other purposes; physical and mental examinations; and requests for admission.

Parties may obtain discovery of any matter that is not privileged and is relevant to the subject matter of the pending action. Any matter that is relevant to the subject matter of the proceeding or that relates to a claim or defense of the party seeking discovery or to a claim or defense of any other party may be discovered. The identity and location of persons with knowledge of any discoverable matter as well as the description, nature, custody, condition and location of books, documents or other tangible things are discoverable. SCR-Civil 26(b)(1).

SCR-Civil 26(d) governs the sequence and timing of discovery. Unless the court, upon motion, orders otherwise, discovery devices may be used in any sequence. Time limitations for completion of dis-

¹³ D.C. Code §14-307 details physician-patient privilege and disclosures of medical information.

¹⁴ D.C. Code §7-1201, *et seq.* Under D.C. Code §7-1201.02, disclosures of mental health records from a mental health facility or professional require the authorization of the client only if the client is 18 or older, the authorization of the client's parent or guardian if the client is less than 14, and the authorization of both the client and the client's parent or guardian if the client is between the ages of 14 and 18. Under D.C. Code § 6-2014, anyone who authorizes a disclosure may later revoke that disclosure by providing a written disclosure to the mental health facility or professional and to the recipient named in the initial authorization.

covery are set by court order. If the government amends the petition after the time for discovery has run, the attorney may negotiate an extension or move to extend the time for discovery in the manner set forth in SCR-Civil 26(d) and (e).

SCR-Civil 26(f) requires a party who has responded to a discovery request to supplement that response seasonably, if: 1) the discovery request dealt with the identity or location of persons with knowledge of discoverable matter, or the identity or location of expert witnesses; or 2) the responding party later learns the initial response was incorrect when made or has since become incorrect and failure to amend the response would constitute a knowing concealment.¹⁵

Although a settlement to most discovery problems can be negotiated among the parties' attorneys, SCR-Civil 26(g) provides that, upon motion by a party, the court may order a discovery conference. Should an attorney deem such a conference necessary in a neglect case, special judicial assignment may be appropriate and may be requested in advance of trial. However, SCR-Civil 26(i) mandates that any motion concerning discovery (with the exception of a motion pursuant to Rule 37(b)) must contain a certificate that the parties have met and made a good faith effort to resolve their discovery differences. Certain exceptions to this rule exist. Sanctions for failing to cooperate in discovery are governed by SCR-Civil 37.¹⁶

1. INTERROGATORIES TO PARTIES

The purpose of interrogatories is not only to obtain information, but to hold the witness to a response that may be later used for impeachment. SCR-Civil 33 governs interrogatories to parties. Interrogatories may be served only upon

a party. Party status in neglect cases is set forth in D.C. Code §16-2304. The government of the District of Columbia is designated a party in D.C. Code §16-2305(f).

When propounding interrogatories to the government, counsel should designate specifically to whom they are directed. Counsel may want to send interrogatories to each social worker involved pre-trial. Upon receipt of the answers, counsel should verify that the person to whom the interrogatories were directed actually signed them and under oath. Counsel should not accept responses signed only by the AAG.

SCR-Civil 26(b) sets out the permissible scope of interrogatories. A list of model interrogatories can be found in the Appendix to the Civil Rules. SCR-Civil 33 limits the total number of interrogatories that can be served on another party to 40, unless the parties agree to allow more, or the Court upon motion for good cause shown allows more.

The rule requires that a copy of the answers be served within 30 days after the service of the interrogatories. Because of the precise statutory deadlines between initial hearing and trial in neglect matters, these limits may or may not be entirely unworkable. Although SCR-Civil 29 provides that the parties may not extend the time limits set forth in the rule without the approval of the court, it would seem to allow the parties to agree to respond in a shorter time than the 30 days allowed by SCR-Civil 33.

Responding counsel should always scrutinize interrogatories for possible objections. Wright and Miller's *Federal Practice and Procedure* contains a discussion of objections to interrogatories.

¹⁵ See, *Williams v. Washington Hosp. Or.*, 601 A.2d 28 (D.C. 1991) (purpose of duty to supplement is to prevent unfair surprise and to narrow and define issues prior to trial). See also, *Corley v. BP Oil Corp.*, 402 A.2d 1258 (D.C. 1979) (duty of supplementation may be enforced through sanctions imposed by trial court, including exclusion of evidence).

¹⁶ The requirement of a meeting is waived if: 1) the motion concerns absolute failure to respond to Rule 33, 34, or 36 discovery request or failure to appear for a deposition or a physical or mental examination, or 2) the movant certifies that a letter was sent to the opposing party requesting a meeting, and two phone calls were made requesting the meeting, but the movant was unable to convene the meeting to resolve the discovery dispute. SCR-Civil 26(i).

2. DEPOSITIONS

Depositions may be used both for discovery and to preserve the testimony of a witness. They must be taken before an officer authorized to administer an oath. SCR-Civil 28(a) provides that no deposition may be taken before a relative, employee, attorney or counsel of any party, or a relative or employee of an attorney of party, or before anyone otherwise financially interested in the case. The attorney wishing to take depositions must obtain a voucher and submit to the judge for pre-approval in order to pay for a stenographer who can administer oaths, record the testimony, and prepare a transcript.

SCR-Civil 32 governs the use of depositions in court proceedings. The deposition of a witness may be used by any party for any purpose if the court finds that the witness is dead, is more than 25 miles from the place of trial, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition.

3. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION

SCR-Civil 34 governs production of documents and things and entry upon land for inspection. Any party may serve on another party a request to produce and permit inspection and copying of designated documents including photographs, or to sample or test any tangible thing which constitutes or contains matter within the scope of SCR-Civil 26(b). This procedure is available to obtain the agency's reports and social worker's running record.

4. REQUESTS FOR PHYSICAL AND MENTAL EXAMINATIONS OF PARTIES

Requests for physical and mental examinations of parties are governed in neglect cases by

D.C. Code § 16-2315. Either the AAG or the GAL may request a physical or mental examination of a child at any time following the filing of a petition. D.C. Code § 16-2315(b)(1) requires that, if possible, the examination be performed on an out-patient basis. In-patient examinations may be ordered only "after a psychiatrist has examined a child and makes a written finding that the child needs a mental health examination which cannot be effectively provided on an outpatient basis." D.C. Code § 16-2315(b). The statute provides that the in-patient examination shall not be for more than 21 days. An extended examination not to exceed an additional 21 days may be ordered only upon a showing of good cause. D.C. Code § 16-2315(b)(3).

The psychiatric examination of the parents or guardian whose ability to care for the child is at issue is governed by D.C. Code § 16-2315(e)(1). The statute, D.C. Code § 16-2315(e)(1) and (4), provide that the examination may be requested and used at trial only if the petition alleges neglect under the provisions of D.C. Code § 16-2301(9)(A)(iii). The court may order the examination at the request of any party, or on its own motion upon a showing of good cause.

A parent's attorney should be aware that the government sometimes requests mental examinations of parents when there is little or no evidence of present mental illness. For example, the AAG may request an examination of the parent even when the allegations in the petition are unrelated to any type of mental illness, if the parent has previously received mental health services. The petition may contain a mere conclusory allegation that the parent suffers from mental incapacity in an attempt to "bootstrap" an argument for a forensic evaluation or waiver of doctor-patient privilege that will provide evidence of mental incapacity.¹⁷ D.C. Code § 2-1355 provides that the doctor-patient privilege defined in D.C. Code

¹⁷ See, *In re O.L.*, 584 A.2d 1230 (D.C.1990) (a mental examination ordered under D.C. Code § 16-2315(e)(1) will include a review of records of past mental health treatment and the appointing order thus overcomes the doctor-patient privilege with respect to that treatment). See also, *N.H. v. District of Columbia*, 569 A.2d 1179 (D.C.1990) (the absence of a statutory physician-patient privilege in child neglect proceedings does not significantly infringe on any privacy right that a parent may have regarding medical information).

§14-307 will not be grounds for excluding evidence in any child neglect proceeding, provided the judge determines that the privilege should be waived in the interest of justice.

The parents' attorneys should force the government to show good cause for any request for a mental examination, since there often will be no other proof of mental incapacity as it affects the care of the child. The good cause requirement for a mental health evaluation of the parent is eliminated following an adjudication of neglect. D.C. Code §16-2315(e)(2). The results of such an examination are always admissible at disposition.

Even if a court-ordered examination is performed, the parent's attorney may want to seek an additional evaluation from a privately retained expert to prepare for trial. Once such an expert is identified, the parent's attorney may submit a voucher for the service to the neglect trial judge on an *ex parte* basis. Moreover, if there is reason to believe that the court-ordered examination is inadequate, counsel may request a voucher to obtain an examination by an independent expert if it can be shown that the earlier examination was inadequate. D.C. Code §16-2315(e)(3).

5. REQUEST FOR ADMISSIONS

Request for admissions, used in civil cases to narrow issues for trial, are available in neglect and abuse cases to establish uncontroverted facts.

6. ISSUANCE OF SUBPOENAS

The issuance of a subpoena is governed by SCR-Civil 45. Subpoenas may be issued to require a person to attend and give testimony at trial, or at a deposition, or to produce books, papers, or tangible things. A person who fails to comply with a validly issued subpoena may be found in contempt of court. SCR-Civil 45(b)(1) provides that a subpoena is served by delivery

to the person named and by tendering fees for a day's attendance at court plus mileage. However, in neglect cases where most clients are indigent, witness fees are paid by the court. Arguably, because of the requirement of SCR-Civil 45(b)(1) that fees be paid upon service, the subpoena should be marked "*in forma pauperis*." However, attorneys hold differing opinions as to whether this is necessary.

Following the witness' appearance, the attorney must complete a voucher form and give it to the witness, who presents it with a copy of the subpoena and two pieces of identification to the Financial Operations Office in the main D.C. Courthouse. A check will then be issued to the witness.

The U.S. Marshal does not serve subpoenas. Service may be made by any person who is not a party to the action, and who is at least 18 years of age. Service may also be by registered or certified mail. Subpoenas for trial may be served anywhere in D.C. or anywhere outside D.C. within 25 miles of the place of trial.

The white court copy of the subpoena should be completed by the process server and notarized before filing in the court jacket. The service copy of the subpoena is yellow.

A person served with a subpoena may move to quash the subpoena.

C. Preparing the Plan of Discovery

As a practical matter, preparation for trial or stipulation requires a combination of formal discovery and investigation. The strict statutory deadlines for trial in neglect and abuse cases require immediate attention to preparing and implementing the discovery plan. A parent's attorney may wish to serve interrogatories on the government requesting the names and addresses of all persons having knowledge of each allegation in the petition and requiring production of all reports by investigating police officers and social workers.

The government has 30 days (or the time set by the court) to respond to the interrogatories, during which time the parent's attorney can assign an investigator to take statements from known witnesses and to subpoena items such as police documents regarding the same or related incidents, and obtain all medical and social service records.

The attorney may also use the time to identify experts. Once the responses to the interrogatories are received, the attorney can interview or depose any additional person with knowledge of the incident and complete consultation with the identified experts.

D. Investigative Methods

Investigators can perform many necessary tasks including interviewing witnesses, recording their statements and serving subpoenas. Investigators generally are in short supply. The Court maintains a list of registered private investigators. This list is available through either the CCAN or Finance Office. An attorney's best source of information concerning investigators is likely to be other attorneys who have had experience dealing with the court's list, as the quality of investigators may vary.

The most important investigative tool is the witness statement. The investigator should interview the witness and then write up the statement using the witness' own words to the extent possible. The witness should sign the statement and initial each page and any changes made. Such statements may have to be produced under Rule 34 requests for documents.

The client, too, can be pressed into service investigating the case. The client can find witnesses, take photographs, and collect and preserve evidence.

1. PHOTOGRAPHS

When abuse is alleged, the MPD Youth Investigations Branch officer may have taken photographs of the injury, which the government routinely seeks to admit at trial. When the par-

ent's attorney anticipates use of an expert forensic pathologist or other person who may not be able to see the child immediately, or who may prefer to examine only photographs of the injury, it is essential that accurate photos of the injury be taken immediately. The photographer should be instructed to take at least one photo that includes the child's face to identify who is being photographed. Close-ups of the injury should include a ruler so that size of the injury can be accurately determined. When close-ups do not show the location of the injury, another photo should be taken at a greater distance so that the location of the injury is apparent. Lighting should minimize shadows.

2. OBTAINING MEDICAL AND OTHER RECORDS

None of the rights and responsibilities transferred when the child is removed from the parent's legal custody can be read to limit the parents' right to a child's medical or mental health records. Both parents' and children's attorneys should bring copies of a release of information form to the initial hearing. The form should conform to the requirements of the "Mental Health Information Act." The parent's attorney should have the client sign one copy authorizing access to the parent's own records and another copy authorizing access to the child's records.

Area hospitals may differ in their willingness to surrender a child's medical records to the parent. Hospitals may contend that access to those records is controlled by CFSA. Even when the child has been removed from the home, access to records is a residual right of the parents pursuant to D.C. Code §16-2301. In addition to the hospital records of the child, the attorney may wish to obtain other medical, educational and therapy records.

If counsel has subpoenaed the social worker's records, the AAG may review and edit them.

3. IDENTIFYING AND USING EXPERTS

Expert testimony can make or break a case. The child alleged to have been abused or neglected will have been examined by a physician who automatically becomes available to the government as an expert witness.¹⁸ The parent's attorney should be aware that the government's experts might be inclined to resolve doubtful cases by concluding that abuse or neglect has occurred. As a result, parent's counsel should seek to identify others willing to take a truly objective view. An attorney may be able to locate an expert in the metropolitan area.

In injury cases, once an expert has been iden-

tified, it is essential that the expert view not only the parent's attorney's photographs, but also the photographs made by the detective during the investigation. The police officer will not allow the photos to leave his or her possession, but the AAG can arrange to have the officer take the photos to the expert at a prearranged time. The government may require that the parent's attorney issue a subpoena *duces tecum* for the photographs.

Once the expert has agreed to do the work, counsel should write a letter explaining all fees to be charged, complete the voucher for prior approval, and submit it to the neglect trial judge. ■

¹⁸ Treating physicians do not have to be treated as expert witnesses. See, *District of Columbia v. Howard*, 588 A.2d 683 (D.C. 1991) (treating physicians may testify as to their opinions developed in the course of treating patients and do not have to be listed as Rule 26(b)(4) experts); *Gubbins v. Hurson*, 885 A.2d 269 (D.C. 2005). See also, *District of Columbia v. Mitchell*, 533 A.2d 629 (D.C. 1987) (Rule 26(b)(4) does not apply to professionals who acquire information and opinions as actors or viewers in the course of treating patients); *Adkins v. Morton*, 494 A.2d 652 (D.C. 1985) (treating physicians are not expert witnesses within the meaning of Rule 26(b)(4)).

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TRIAL OR STIPULATION

This chapter is written principally to guide counsel for a parent or caretaker charged with neglect or abuse, because that party is the principal subject of the trial. References to “parent(s)” should be read to include “caretaker(s)” whenever appropriate to your case.

The decision whether to go to trial is the client’s alone. In order to properly advise the client about the chances of prevailing in a contested proceeding, counsel for the parents must have thoroughly investigated the case and researched applicable law. The parents’ attorneys should be aware that the Child and Family Services Agency (CFSA) may be giving the client advice on whether or not to go to trial. Since social workers will frequently feel that the client needs services, they may urge the client to stipulate. In order to provide the client with a realistic assessment of the options, counsel must maintain frequent contact with the client throughout the preparation of the case.

I. Introduction

Attorneys should be aware that there are significant differences between neglect litigation and litigation in the civil or criminal divisions. First, the Superior Court of the District of Columbia Family Court Rules Governing Neglect and Abuse Proceedings significantly limit the time available to counsel to prepare for trial. Reflecting the deadlines set in the DC Adoption and Safe Families Act, SCR-Neglect 19(a) provides,

When a child is in shelter care, the fact-finding hearing shall be held within **105 days** following the date of removal from the child’s home or within such shorter period of time as may be specified by Administrative Order. When a child has not been removed from his or her home, the fact-finding hearing shall be held no later than **45 days** after the filing of the petition. (Emphasis added.)

Second, the standard of proof required to sup-

port a finding of neglect is preponderance of the evidence. SCR-Neglect 19(c).

Finally, SCR-Neglect 19(d) provides that the law of evidence governing civil proceedings in the Superior Court shall apply to neglect proceedings.

II. Preparation

Well before trial, attorneys should try to observe a neglect trial if possible, preferably one with similar issues. It is also helpful to speak with attorneys involved in similar matters. Counsel may want to attend a trial conducted by the judge who will be hearing your case.

Attorneys new to trial practice should consider purchasing or reviewing one of the many excellent trial handbooks available. Thomas A. Mauet’s *Fundamentals of Trial Techniques* (Little Brown and Company, 3rd ed. 1992) (hereinafter Mauet,

Fundamentals) is available in paperback and contains helpful general information and techniques. There is also an updated hardback edition that contains much of the same information, Thomas A. Mauet's *Trial Techniques* (Aspen Law and Business, 6th ed. 2002). *The Deborah T. Creek Criminal Practice Institute Trial Manual* (hereinafter *CPM*) published by the D.C. Public Defender Service is also an excellent trial preparation handbook that is useful to both experienced and inexperienced trial counsel. Although the CPM's main focus is on adult criminal proceedings in the District of Columbia, much of what is included in the trial volume can be used as a starting point for thinking about parallel problems presented by neglect proceedings. Both books contain several sections that will help counsel prepare for trial, including:

- (a) Opening Statements
- (b) Direct Examination
- (c) Exhibits
- (d) Cross-Examination
- (e) Closing arguments
- (f) Objections

Another resource is *Federal Rules of Evidence with Objections* (National Institute for Trial Advocacy, 5th ed. 2000).

III. Discovery

The Preparation for Trial or Stipulation chapter contains a thorough discussion of the discovery process. This section highlights admissions made pursuant to SCR-Civil Rules 33 and 36, as admissions can limit the issues to be resolved in a fact-finding hearing.

SCR-Neg 1(b) states that the Superior Court Rules of Civil Procedure governing discovery, SCR-Civil 26-37, are applicable to neglect proceedings. Thus, in theory, counsel can take advantage of the full range of discovery tools in neglect proceedings, including depositions and requests for admissions. In practice, the most frequent types of discovery used in neglect cases are an exchange of interrogatories, requests for production of documents and witness lists. This practice ignores the

fact that requests for admissions can be a very useful discovery tool. SCR-Civil 36(a) provides that a matter is admitted unless, within 30 days after service of the request, the party to whom the request is directed serves a written answer or objection. Stated simply, any request for admission that is not answered or denied within 30 days is deemed admitted.

SCR-Civil 33(b) requires that answers to interrogatories be made under oath. Rule 33(b)(2) requires that the answers be signed by the person making them and the objections be signed by the attorney. This requirement is important to keep in mind when interrogatories are propounded to the social worker. In addition, SCR-Civil 33(b) provides that answers to interrogatories "may be used to the extent permitted by the Rules of Evidence." This means that when answers to interrogatories are supplied by a party, the answers are admissible under the "admissions by party opponent" exception to the hearsay rule. See, *HT Continental Banking Co., v. Ellison*, 370 A.2d 1353 (D.C. 1977); *In re TY.B.*, 878 A.2d 1255 (D.C. 2005).

IV. The Theory of the Case

Based upon a review of the discovery materials, neglect petition, applicable law, and discussions with the client, counsel should develop a theory of the case. A theory of the case is your side's version of "what really happened." It should incorporate all the uncontested facts as well as your side's version of the disputed facts. It must be logical, fit the legal requirements of the allegations or defenses, be simple to understand and be consistent with common sense.

Once counsel has developed a theory of the case, two related tasks remain. The first task is to decide how to prove the case using the witnesses and exhibits that have been designated in the pre-trial statement. The second task is to try to anticipate the other side's theory of the case. Counsel should then outline the contentions of all parties and realistically assess the strength of each contention. Once the outline is developed, counsel may be able

to determine the source of the information that the other side needs to prove its contentions.

V. Trial or Stipulation?

After counsel has received discovery materials from opposing counsel (including witness lists, documents, and answers to interrogatories and admissions) and developed a theory of the case, counsel should have another discussion with the client about the neglect petition, the applicable law, discovery materials, and the impact of being placed on the child abuse registry. It is counsel's job to give the client a realistic assessment of the possibility of prevailing at trial. It is the client who must make the decision whether or not to go to trial.

VI. Stipulation

Stipulations are addressed in SCR-Neg 18. In a neglect case, a stipulation is an agreement among the parties to a set of facts and, in most cases, to the resulting adjudication of a child as neglected. It is the functional equivalent of a guilty plea; parties can stipulate if they do not contest the adjudication and therefore do not want to take the case to trial.

In addition to agreeing to the neglect adjudication, the parties may also agree to the entry of a dispositional order. See "Disposition," *infra*. If the parties go to disposition at the time of stipulation, they and counsel should ensure that appropriate dispositional planning has been done pursuant to D.C. Code §16-2319.

If the parties wish to stipulate to neglect but do not agree to a dispositional plan, they can enter into a stipulation as to the adjudication and schedule a separate dispositional hearing. A stipulation is a written agreement. It is often prepared by the assistant attorney general (AAG), but it may be prepared by any party. The stipulation specifies the grounds for neglect and asks the judge to find neglect based on the stipulated facts.

A. When to Stipulate

The decision whether to stipulate is the client's. After investigating the case and developing a theory for the case, counsel should advise their clients about the likelihood of prevailing at trial and the potential advantages and disadvantages of stipulating rather than going to trial.

A finding of neglect may be entered pursuant to a stipulation signed by one parent and the government. It is not necessary for both identified parents to sign; nor is it necessary that the GAL sign. Neglect Rule 18(b) allows the court to accept a stipulation without the signature of the GAL provided it does not contain dispositional language.

Before accepting the stipulation, the court will inquire of the person admitting neglect to determine whether the stipulation was made voluntarily and knowingly and with a sufficient understanding of the nature of the proceeding. Neglect Rule 18(c). The client should be prepared well for the court's inquiry.

The court is not required to accept a stipulation and will sometimes refuse to do so. If the judge finds that the stipulation was not entered into voluntarily and knowingly, the judge will not accept the stipulation and will proceed with the case. To avoid stress on all concerned, it is much better practice to stipulate before the trial date.

If a judge has heard a proposed stipulation but decides not to accept it, counsel for the parties should consider whether the judge should be asked to recuse him/herself from the trial. In most cases, the judge will have heard some admissions from a parent that may well prejudice that parent.

It cannot be stressed too often that it is very important that the client understand all the consequences of stipulating and agree to the factual presentation in the stipulation. Counsel should explain that, once a stipulation is entered into, it cannot be changed, even if the client later regrets having stipulated. A parent who signs a stipulation may not appeal the stipulation. Signing a stipulation does not mean the end of court involvement; nor, if a child has been removed, does

it guarantee that the child will be returned. The nature of the various dispositional alternatives should be discussed so that the client understands what continued court jurisdiction and social services intervention may entail.

A stipulation is an admission. It may be used against a parent in future reviews in the neglect case, a termination of parental rights proceeding, and/or adoption hearing. It is therefore important for the future conduct of the case to limit the admissions made in a stipulation.

In some cases, counsel for a parent may have reason to believe the client suffers from emotional illness or limited mental capacity to such a degree that he/she may be incompetent to stipulate. This situation presents a dilemma. On the one hand, counsel would not want to allow a stipulation by an incompetent client. On the other hand, even counsel's request for a forensic evaluation to determine competence to stipulate is likely to prejudice the client in future proceedings, regardless of the forensic determination. It may be possible to obtain a voucher for a mental health evaluation without divulging the reason and without having the report provided to the court and other counsel. If a forensic examination is sought, the inquiry should be specifically directed to the client's competency. Currently, there is no case law explaining the terms "knowingly and voluntarily," as used in Neglect Rule 18(c). Counsel may want to review juvenile and criminal law with respect to the meaning of "knowingly and voluntarily" waiving rights.

There are benefits to stipulating. A stipulation avoids the need for a trial which may be stressful, divisive, and which could exacerbate any existing family problems. In addition, the parties may be able to agree to facts or grounds for neglect that are less egregious than what the government might have proven at trial.

On the other hand, the less rigorous evidentiary requirements and the "best interests" standard applicable to disposition and review hearings may lessen the value of a stipulation which moderates the allegations in the petition. In spite of the stip-

ulation, the government may succeed at disposition or subsequent hearings in raising concerns related to matters not included in the stipulation.

B. Contents of Stipulation

In complicated cases, especially where the client admits to a limited portion of some of the allegations and is concerned about referencing other allegations or facts in the case, it is advisable for defense counsel to draft the stipulation. Stipulations should be carefully drafted. Stipulated facts are admissions and non-compliance with agreed upon conditions may be difficult to justify.

Stipulations are not form orders but generally follow a standard format. They contain a recital of the facts that the parties have agreed to, followed by the conclusion of law that the child is neglected pursuant to the applicable provision(s) of D.C. Code § 16-2301. If the case is not going to immediate disposition, the stipulation may make provision for the child's placement pending further proceedings, as well as any conditions the parents have agreed to.

Frequently, the major incentive for a parent to stipulate is some agreement concerning the placement of the child. For example, the government may agree to return the child to the parent following the stipulation. Any such agreement provides a strong impetus for the parent to agree to the stipulation. Particularly in such situations, the parent's attorney needs to confer with the client sufficiently to know that the client has paid careful attention to the facts contained in the stipulation and is not simply agreeing to "anything" in order to get the promised placement.

The GAL should be sufficiently familiar with the facts of the case to have a view about the appropriate placement of the child following the stipulation. It is appropriate for the child's attorney to be most concerned about placement, visitation, and such issues. There is, in addition, an interest on the GAL's part to make sure the facts contained in the stipulation reflect the true nature of the neglect or abuse that must be remedied. On some occasions, the proposed stipulation will reflect

only one allegation in the petition. The GAL should be sure the stipulation reflects the reality of neglect or abuse sufficiently to guide the court in future proceedings. The stipulation should be sufficiently comprehensive to meet future needs.

C. Procedure for Stipulation

Stipulations may be presented at any point in the pre-trial proceedings, conceivably even at the initial hearing. More frequently, they are presented to the court following mediation, at the pre-trial hearing, or on the day set for trial.

If the client is incarcerated, he or she can be brought to court by means of a “come-up” (if the parent is in the custody of the D.C. Department of Corrections) or a writ of *habeas corpus ad prosequendum* or *ad testificandum* (if the parent is incarcerated elsewhere).

D. Miscellaneous Stipulations

1. FACTS ONLY

On occasion the client will be willing to stipulate to the facts but cannot agree that he/she was neglectful. In that situation, you can stipulate to the facts and let the judge draw the conclusion whether the stipulated facts constitute neglect. For example, a client may agree that she spanked the child with a belt in the manner alleged in the petition but not concede that her actions constituted excessive discipline or justify a finding of neglect. In reality, stipulating to the facts without the conclusion is a stipulated trial. You have simply reduced all of the testimony to writing and presented it to the judge for decision.

2. ONE-PARENT STIPULATION

Frequently, the government allows one parent to stipulate without requiring the other to do so. The rationale is that the court obtains jurisdiction over the child through the stipulation of one parent; thus a trial against a second parent would not increase the court's power and is not necessary to protect the child. See *In Re L.J.T. & T.T.*, 608 A.2d 1213 (D.C. 1992).

3. ALFORD STIPULATION

An Alford stipulation is one in which the party admits sufficient evidence to provide the court with a legal basis upon which to find neglect, although not admitting any responsibility. This stipulation is based on the criminal case of *North Carolina v. Alford*, 400 U.S. 25 (1970).

VII. Evidentiary Foundations and Objections

If the case will not be resolved through stipulation, at trial each side will have to prove its contentions using exhibits and testimony. There will undoubtedly be questions about admitting certain exhibits and presenting certain testimony in evidence. To the extent that counsel can anticipate controversy over the admissibility of certain evidence, counsel should prepare in advance to overcome (or take advantage of) these controversies at trial. Counsel should photocopy and bring to trial the proper procedures (foundations) for getting controversial exhibits into evidence. For example, business records, social workers' case notes and hospital records are among the most common documentary evidence introduced in neglect trials. They are also hearsay. Federal Rule of Evidence 803(6) permits the introduction of business records in evidence provided the evidentiary foundation is properly laid.

A most helpful synopsis of the statutes and case law controlling many D.C. evidentiary issues is Graae and Fitzpatrick, *The Law of Evidence in the District of Columbia*, (Lexis Nexis, Matthew Bender 2002). It is also helpful to bring to trial a list of standard evidentiary objections. The CPM, Chapter 26, “Examination & Impeachment,” contains a short list of evidentiary objections. This list of one-word evidentiary objections can be very helpful when counsel knows that something is not right but needs time to determine the proper objection. An objection to evidence may be waived if the objection is not timely and specific. Fed. Rule Evid. 103. A “cheat sheet” can buy counsel time to identify the appropriate objection.

VIII. Trial Day Logistics

Subpoenas may be readily obtained from the Neglect Clerk's Office. Since most neglect cases involve indigent clients, witnesses for the indigent client are entitled to witness pay vouchers.

Counsel should have experts and other witnesses under subpoena. In short trials, it is customary to subpoena all of the witnesses to come to court and be present at the time the case is to be called on the trial calendar. When it is anticipated that the trial will last several days, it is general practice not to require all of the witnesses to be present at the time the case is called. To avoid requiring witnesses to wait in the courthouse, they may be placed on 30 to 45 minute call. The attorney should obtain a telephone number where the witness can definitely be reached on the day of trial. Witnesses must be instructed to arrive at court within the allotted lead time. If you have any doubt that the witness will be reachable by phone, it is better practice to require him/her to wait through the proceedings until needed. Some judges are relatively lenient with counsel and will accommodate occasional witness-scheduling problems. Other judges are much more likely to require you to continue with the trial in the absence of your witness.

Counsel may face a dilemma when subpoenaed witnesses do not appear at the scheduled time. You may ask the judge to direct the marshal to bring the witness to court. Usually, if you make such a request, the judge will ascertain whether the subpoena appears to have been properly served and, if so, will instruct the marshal to bring in the witness. The obvious problem is that a witness who is thus forced to come to court is unlikely to be favorably inclined toward your client. There is no absolute rule for deciding how to handle such a situation. About the only practical advice is to consider whether the witness's testimony is essential and whether some other means can be used to get the witness to come in

voluntarily. Since many witnesses are friends or acquaintances of the parties, it is especially important to confer with your client with respect to those witnesses before deciding what to do. If you can reach the witness by phone, you may find that the witness simply needs a ride, which you may be able to provide. Of course, the marshal would provide transportation.

Once it starts, the trial takes precedence over such other matters as neglect reviews. If you have conflicting matters, be sure to advise the court promptly, so that the court can determine whether to set its schedule to accommodate you and the judges to whom your other matters are assigned. Attorneys should call the daily Conflicts List at 202-879-1674 to alert the court of any scheduling conflicts.

Before either party begins opening statements, the "rule on witnesses" should be invoked. This rule requires all persons who might be called as witnesses and who are not parties to the proceeding to wait outside the courtroom until they are called to testify. The purpose of this rule is to prevent their testimony from being tainted by the testimony of the witnesses who have preceded them.

Usually, the court will ask for preliminary matters and then proceed to opening statements. The attorneys representing parties who are defending against the claim of neglect have the option of making an opening statement at the beginning of the trial or reserving their opening statement to the beginning of their case. There is no hard and fast rule for deciding whether to reserve your opening statement. In general, however, the scholars are agreed that the defense's opening statement should usually be made immediately after the government's.

After a witness begins to testify, the court usually tries to continue with that witness until his/her testimony is completed. If there is a break in the trial, you can expect the judge to instruct the witness not to discuss his or her testimony with anyone until the testimony is complete.

IX. Opening Statements

An opening statement informs the judge what counsel expects to prove at trial. The opening statement should present counsel's case chronologically and draw a picture of the case that will make a good impression. It should not be suggested that counsel will prove facts that will have no supporting evidence. As counsel must often prove the case in small bits of testimony from different witnesses, an opening statement will give the fact finder the big picture. Opening statements should rarely be waived.

X. The Government's Case

After each party has made an opening statement, the government, having the burden of proof, presents its evidence first. This means that the government must present sufficient proof on each element of each allegation in the neglect petition. There are four possible sources of proof; witnesses, exhibits, stipulations, and judicial notice.

XI. Direct Examination of Witnesses

During the examination, counsel may find it helpful to take notes of both opposing counsel's questions and the witness's answers. These notes should help identify areas to be covered during cross-examination, counsel's own case and closing argument. Some attorneys may find note taking to be distracting. In any event, counsel should listen to the form of each question. Whenever there is a long statement or convoluted question from a lawyer during direct examination, consider objecting. The lawyer is probably either testifying or leading the witness.

As suggested above, counsel should have a short list of evidentiary foundations and objections to refer to during opposing counsel's case. A series of effective and legitimate objections can sometimes throw the opposing attorney off balance or cause him/her to fail to prove a critical

element of the alleged neglect. Do not be embarrassed to refer to your list openly and often.

The goal of direct examination is to tell a story. Effective direct examination follows certain rules. These rules are:

- (a) Keep it simple – emphasize what is important to the elements of the case, leave out the rest
- (b) Organize logically – usually this means chronologically
- (c) Introduce the witness and the witness's background
- (d) Elicit visual descriptions of locations and events
- (e) Use transitional questions when a witness is testifying on several different topics
- (f) Use simple language
- (g) Have witness explain technical jargon
- (h) Ask non-leading, open ended questions
- (i) Use exhibits to highlight and summarize facts
- (j) Listen to your witness's answers
- (k) Volunteer weaknesses in your case
- (l) Practice with the witness

With respect to the final rule, Mauet, *Fundamentals* at §4.3.15 suggests that direct examinations fall flat in the courtroom when the lawyer has only discussed the planned direct examination with the witness. He concludes that it is important to actually run through planned questions with a witness and see how the witness answers them. Practice the direct examination with the witness until you feel comfortable with the way that the witness responds and is comfortable with your questions. If the witness is important, take the witness to the courtroom where the trial will be and practice the direct examination in that or another empty courtroom.

On direct examination, let your witness tell the story, but keep your witness under control. It is usually important to keep your witness's answers relatively short and clearly responsive to your questions. While most attorneys in neglect cases do not object to questions that elicit a long narrative answer, such questions are objectionable.

Novice attorneys sometimes think that they can prevail by pointing out inconsistencies and weaknesses in the testimony of the opposing parties'

witnesses, but experience teaches that it is extremely difficult to make an affirmative case through adverse witnesses. Counsel should develop testimony through his or her own witness.

XII. Cross-Examination of Witnesses

After the government finishes its direct examination of the witness, other counsel will be given an opportunity to cross-examine the witness. The judge will offer the guardian *ad litem* as well as parents' attorneys an opportunity to cross-examine the witness.

Resist the urge to cross-examine just for the sake of cross-examining. Cross-examination can be risky. A witness may simply repeat or even amplify damaging evidence. If the witness merely repeats his direct testimony on cross-examination, then counsel risks emphasizing the strengths of the government's case. Before counsel conducts a cross-examination, Mauet, *Fundamentals* at §6.10, recommends that counsel ask himself or herself the following questions:

1. *Must I cross-examine this witness?*
 - a. Has the witness hurt my case?
 - b. Is the witness important?
 - c. What are my reasonable expectations?
 - d. What risks do I need to take?
2. *What favorable testimony can I elicit?*
 - a. What parts of the direct helped me?
 - b. What parts of my case can he corroborate?
 - c. What must the witness admit?
 - d. What should the witness admit?
3. *What discrediting cross-examination can I conduct?*
 - a. Can I discredit the testimony?
 - i. perception
 - ii. memory
 - iii. communication
4. *What impeachment can I use?*
 - a. Can I show bias and interest?
 - b. Can I use prior convictions?
 - c. Can I use prior bad acts?
 - d. Can I use prior inconsistent statements?
 - e. Can I show contradictory facts?

- f. Can I show bad reputation or opinion for truthfulness?
- g. Can I use treatises?
- h. How will I prove up the impeachment if necessary?

In preparing to cross-examine a witness, it is helpful to think of cross-examination as counsel's chance to testify. Remember, leading questions are permissible on cross-examination. Instead of asking, "What color was the ball?" counsel should ask, "The ball was red, wasn't it?"

In this jurisdiction, counsel can only cross-examine a witness on the limited areas that the witness addressed during direct examination. There is an exception to this rule: counsel may ask follow up questions if the witness raises a new area of inquiry during cross-examination.

During cross-examination of counsel's own witness, it is important that counsel defend the witness from badgering by a party or even the judge. The judge may and often will ask clarifying questions, but should not ask questions in an improper form or take over the questioning of the witness. Do not hesitate to object if the judge or opposing counsel is intimidating your witness during testimony.

XIII. Specific Witnesses

A. The Government's Expert

When counsel receives notice that an expert will testify at trial, counsel should be especially wary. Judges tend to credit testimony from an expert witness. That makes it important to limit the scope of an adverse expert's testimony as much as possible and to have an expert of your own to rebut the opposition's expert.

A social worker can be qualified as an expert. The general test for an expert witness's qualifications is that the witness have sufficient skill, knowledge, or experience in the field as to make it appear that his opinion will probably aid the trier of fact in his search for truth. *Harris v. District of*

Columbia, 601 A.2d 21 (D.C. 1991). The area in which the testimony is offered must be so distinctively related to some science or profession as to be beyond the ken of the average layman, and the state of the pertinent knowledge in the field must permit a reasonable opinion to be offered by an expert. *Id.* For illustrations of cases dealing with social workers testifying as experts, see *Leary v. Leary*, 627 A.2d 30 (Md. Ct. Spec. App., 1993), prohibiting expert testimony from a social worker, and *Sloan v. Sloan*, 522 A.2d 1364 (Md. Ct. Spec. App., 1987), allowing a social worker to testify as an expert on child abuse.

Another line of cases provides a second potential for preventing most social workers who have been involved with the case from testifying as expert witnesses. While there is no D.C. Court of Appeals case involving social workers which deals with the prohibition against testifying simultaneously as a fact witness and expert witness, it has been held that it was error to allow a police officer to testify as both a fact witness and an expert. *Beach v. United States*, 466 A.2d 862 (D.C. 1983). A similar principle was applied in *Bell v. Jones*, 523 A.2d 1982 (D.C. 1986). While *Beach* was a jury trial, *Bell* was not. Nevertheless, the rationale for prohibiting the dual role is a potential prejudice occasioned by the additional credibility that may be accorded the expert's fact testimony. Trial judges are presumed capable of separating such matters and giving appropriate weight to the testimony to a greater extent than are juries. See, *In re S.G., B.G.*, 581 A.2d 771 at 775 (D.C. 1990).

The time to limit the scope of an expert witness's testimony is on *voir dire*, when the witness is first offered as an expert. When a witness has sufficient education, experience or a professional license, it is usually fruitless to argue that the person is not an expert. What counsel can do, with a good chance of success, is argue for limitation of the area of expertise. To the extent that the purported expert witness has limited experience or training in the precise area about which the expert will be asked to testify, counsel may point out those limitations to minimize the weight given to the witness's opinions.

If at all possible, get your own expert. Ask your expert to review the opposing expert's credentials before the trial. Your expert may be able to help you prepare *voir dire* questions regarding the adverse expert's qualifications and experience. Similarly, your expert may help you to prepare your cross-examination of the adverse expert. Your expert is permitted to listen to the opposition's expert testify even when the court has excluded lay witnesses from the proceeding. See, *Garmon v. U.S.*, 684 A.2d 327 (D.C. 1996).

There are many ways to narrow a purported expert's field of expertise. An expert's resume will usually include a list of the expert's publications. If there are no publications in the precise area about which testimony will be elicited, counsel will want to point that out on the record. (If a physician's resume does not reflect publications, counsel can search the medical literature on the computerized search system at the National Library of Medicine to determine whether the physician has written anything relevant to the subject matter of the case.) A lack of experience treating a particular condition (e.g., hot water burns) may allow you to argue that the witness may not be accepted as an expert in that particular field. While you may not succeed in obtaining a ruling that the purported expert may not offer an opinion, you may significantly diminish the opinion's weight.

Counsel should review the expert's credentials and try to interview the expert before trial. Often the government will call the physician who examined a child in the emergency room. This physician may be an intern or resident without experience in identifying abuse and neglect. The doctor may not have a strong foundation for his or her opinion or be unable to clearly and consistently articulate it. As a result, the expert may be vulnerable to careful cross-examination.

Experts are particularly threatening because they are permitted to base their opinions on hearsay of various sorts. The first time that there is testimony of a hearsay-based fact, object. Counsel cannot keep out of the record hearsay of the type routinely used by experts in the field in de-

veloping their opinions. However, you may obtain a ruling that the hearsay is admitted for the limited purpose of explaining the basis for the expert's opinion. If the hearsay-based fact will be repeated, make a continuing objection for the record.

If you are unable to obtain an expert of your own and must rely on your trial skills to limit damage done by the opposition's expert, you can point the court to the decision in *Montgomery County Department of Social Services v. Sanders*, 381 A.2d 1154 (Md. Ct. Spec. App. 1977). In that case, the Court of Special Appeals noted that caution in heeding an expert opinion is particularly appropriate when one party is unable to match the resources of the other.

B. Lay Witnesses

1. CHILD WITNESSES

Child witnesses always are problematic, whether the government wants to call them to prove the neglect or the parents want to call the child as a defense witness. Several cases have addressed children as witnesses in termination of parental rights cases. *In re Jam.J.*, 825 A.2d 902 (D.C. 2003) addresses children as witnesses in abuse and neglect cases. The court discusses the circumstances under which a trial court may deny a request to call a child as a witness and sets forth a three-part balancing test for the trial court's consideration. Before a trial court can refuse to allow a child to testify, the court must find on the record 1) that testifying would create a risk of serious harm to the child, 2) whether the risk of serious harm can be alleviated by means short of prohibiting the testimony altogether, and 3) after considering parts one and two, the court must evaluate the probative value of the child's testimony and the parent's concomitant need for it.

The government may use the testimony of a child against the parent. In an effort to minimize the trauma to the child, it may be proposed that testimony be taken in chambers with only attorneys present. The child's attorney should not assume that the child will be more comfortable in a smaller, more intimate situation, where prox-

imity to the judge may prove more unnerving than the courtroom. The attorney for the parent should be prepared to object to any proposal which would exclude the client from being present during the child's testimony, arguing by analogy to the Sixth Amendment that the parents have the right to confront the witnesses testifying against them.

When a child is to be a witness, the GAL should bring the child to the courthouse sometime prior to the trial date. Arrangements should be made to permit the child to go into the courtroom and sit in the witness chair so as to become familiar with the setting.

Very young children have been allowed to testify. The basic question is whether the child knows the difference between the truth and a lie and understands that serious consequences can flow from telling a lie. In general the proponent of a child witness must demonstrate that the child has the capacity to observe accurately, to remember the observations, to relate those observations, and to recognize the duty to tell the truth in the proceeding. See *Criminal Practice Manual*, Chapter 28.3-4.

2. PARENT/CUSTODIAN

If your client is a parent or custodian charged with abuse, counsel should carefully prepare your client to testify at trial. Even in those cases where you have decided not to call your client as a witness, there is the possibility that an adverse party will call your client. Unless you want your client to testify, you should try to avoid having your client called by the other parties. One argument could be that your client was not listed as a witness on the adverse party's witness list.

If you are concerned that the government may call your client as a witness, you should consider filing a motion *in limine* arguing that the client's testimony would infringe on her/his Fifth Amendment rights. D.C. Code §22-1102 is a criminal misdemeanor statute whose language closely follows that of the neglect statute in D.C. Code §16-2301(9)(ii). The criminal statute reads:

Any person within the District of Columbia, of sufficient financial ability, who shall refuse or neglect to provide for any child under the age of 14 years, of which he or she shall be the parent or guardian, such food, clothing, and shelter as will prevent the suffering and secure the safety of such child, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subjected to punishment by a fine of not more than \$110, or by imprisonment in the Workhouse of the District of Columbia for not more than 3 months, or both such fine and imprisonment.

The Fifth Amendment to the Constitution protects the client from testifying, “where the answers might incriminate him in future criminal proceedings.” *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). If there is a possibility of future prosecution, the privilege against self-incrimination should be sustained. *Carter v. United States*, 684 A.2d 331 (D.C. 1996). The government need not file criminal charges against your client; the mere fact that they could is sufficient to invoke the privilege against self-incrimination.

In those cases where you plan to call your client as a witness, it is very important to be sure that, in addition to the usual preparation concerning the facts about which the witness will testify, you explore possible areas of impeachment. For example, your client may have criminal convictions and may have given statements to the police or social workers that are inconsistent with what he or she may plan to say at trial. Be alert for situations in which there is no direct contradiction in the prior and proposed statements, but significant facts were omitted from the prior statements. In those situations, your client may face impeachment by omission.

3. NON-PARTY WITNESS

The non-party witness could be a social worker, a policeman, a witness to the alleged event, a neighbor, or a character witness. Each presents a slightly different set of challenges to counsel.

Most police officers have testified in numer-

ous proceedings and are “professional witnesses.” In view of their experience in testifying, you should be particularly careful not to ask open-ended questions that will allow the police officer to add facts harmful to your client. Particularly with “professional witnesses,” you should heed the adage that you never ask a question on cross-examination if you don’t know the answer. Resist the urge to cross-examine just for the sake of cross-examining.

While social workers may not be as experienced at testifying as most police officers, before you challenge a social worker, try to find out how often that worker has testified. Also remember that even social workers whose direct testimony is very damaging to your client will often have a few positive things that they are willing to say on cross. You might consider asking questions to elicit the good things and stop while you are ahead. Do not let the social worker get away with expressing opinions if the worker has not been qualified as an expert.

Neighbors are from time to time brought in to testify about the conditions they have observed. It is particularly important to be vigilant for hearsay that is damaging to your client. A neighbor may well be biased against your client and be in court to repeat gossip that the neighbor has heard that, in the neighbor’s mind, proves how bad your client is. By strictly limiting the testimony to what the neighbor knows firsthand, you may be able to avoid or limit unfavorable testimony. If you are able to establish bias, you can minimize the weight to be given to the adverse testimony you can not eliminate.

In neglect practice, it is unusual to have character witnesses called at the trial. When you represent an alleged abuser, it may be desirable to call witnesses on your client’s behalf who can say that your client is known to be a truth-loving peaceable person. As a category, these witnesses are sometimes called “good mother” witnesses, because their testimony is usually that the parent is a good mother whose reputation in the community makes it unlikely that she

would have done the dastardly deed. This type of testimony is usually accorded little weight.

XIV. Motions to Dismiss

As soon as the government has completed its case, counsel should move to dismiss the government's case. There is considerable confusion as to the nature of the motion to dismiss in neglect proceedings. In the general course of matters, it is usually called a "motion for directed verdict." By so labeling the motion, however, the movant is subjected to the requirement that the evidence be viewed in the light most favorable to the government. The proper standard is that the motion, which is actually a "motion for judgment on partial findings," requires the court to "weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies." 9A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure Civil 2d*, Section 2533 (1995). This motion, unlike a motion for directed verdict, "does not compel the trial court to consider the plaintiff's [government's] evidence as true." *Kearns v. HAM Bros. Moving & Storage Co.*, 509 A.2d 1132, 1135 (D.C. 1986).

Counsel should argue that the government has failed to meet its burden to prove each element of the neglect petition. The government must prove each element of the alleged abuse or neglect by a preponderance of the evidence. D.C. Code §16-2317(b)(2). The motion to dismiss should be renewed at the end of the defense case as well.

Two areas frequently offer potential for motions to dismiss. Under D.C. Code §16-2301(9)(ii), the government must establish that the neglect, if it is of a type that could be caused by poverty, is not the result of a lack of financial means. *See, In re D.C.*, 561 A.2d 477 (D.C. 1989). The government must also, under §16-2301(9)(iii), establish that there is a nexus between the incapacity alleged and neglect. Even when the government has established drug usage, for example, it frequently is unable to show the nexus between the drug usage and the alleged neglect. *In Re Am.V.*, 833 A.2d 493 (D.C. 2003).

Since the petition in a neglect case is filed when social workers and government attorneys agree that there is a need for government intervention to protect a child, there is an understandable reluctance on the part of judges to dismiss a case over the government's objection. One of the ways to overcome that is to make an ally of the GAL, who can somewhat counter the presumption that the child needs the benefits derived from a neglect adjudication. Since the GAL is presumed to advocate for the best interest of the child, a joint motion for dismissal, or at least acquiescence of the GAL to a parent's motion for dismissal, will lessen the impact of the government's opposition to dismissal.

XV. Closing Argument

Closing argument is different from opening statement. Whereas opening statement focused on the facts in the case, closing argument focuses on the application of the evidence to the law. Counsel should argue his or her theory of the case and show how the facts support that theory.

XVI. Preserving Issues for Appeal

Try your case to win before the trial court. On occasion you may make a conscious decision not to press an issue that might be interesting to the Court of Appeals but that you know will not win at the trial court and will detract from your presentation at trial.

Counsel will want to ensure by the proper use of motions and objections that the record preserved for appeal clearly documents trial court error. Preserving the record consists of many different things. For example, counsel should make certain that the record reflects all non-verbal responses by witnesses. If an answer is given to an objectionable question, you should move to strike the answer. When you make an objection, try to be sure that the record reflects your position and, whenever possible, reflects the harm that would be done to

your client's presentation by the testimony or ruling to which you object. Particularly, if the court is going to exclude certain evidence that you want in the record, make a proffer of what the evidence would be, so that the appellate court can see the significance of the exclusion of that evidence.

If the parents do not prevail at trial, counsel for the parents should discuss the right to appeal. Counsel should inform the client that filing the appeal must await entry of a final disposition order.

Trial counsel's responsibility includes the timely filing of an appeal. The time to note an appeal differs depending on whether the trial was before a judge or a magistrate judge. If the trial was before a magistrate judge counsel only has 10 days excluding weekends and holidays in which to file an appeal under SCR-General Family D. Appeals from magistrate judges are filed with the presiding judge of the Family Court. Appeals from judges are made directly to the Court of Appeals and must be made within thirty days of the docketing of the disposition order. ■

DISPOSITION

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DISPOSITION

At disposition, the court determines who will be vested with care and control of the child while the child is under the court's jurisdiction and what types of services are needed to help ameliorate the concerns that resulted in governmental intervention. Disposition is essentially a crossroads where the question of what occurred in the child's past fully converts into the question of what needs to occur in the child's future. It is important to come fully prepared to this hearing. A parent's attorney and the guardian *ad litem* (GAL) must be able to address questions from the court pertaining to visitation, placement, services and the agency's case plan.

In 1997, Congress passed the Adoption and Safe Families Act (ASFA), which amends Titles IV-B and IV-E of the Social Security Act, which govern federally funded child protection efforts by states, including the District of Columbia. These efforts include the provision of social services, the removal of children, the placement of children into adoptive homes and foster placements, and the termination of parental rights. The legislative history of ASFA indicates the national average of a child's stay in foster care was at least three years. Congress viewed such protracted stays in foster care as psychologically detrimental to the children. As a result, the achievement of permanency for foster care children became a central focus of ASFA.

I. Dispositional Hearings

DC and federal law now require that the court in a child abuse or neglect case hold a "permanency hearing" no later than twelve months after a child's entry into foster care. Under D.C. and federal law, entry into foster care is defined as sixty days after the date of the child's removal from home. At the permanency hearing, the court determines the child's "permanency plan," that is, whether and when the child can return home or whether the child must be placed for adoption, or in another permanent living arrangement such as guardianship or custody with a relative. In addition, the child welfare agency must demonstrate that it has made reasonable efforts to finalize the permanency plan.

If the parents or other custodians have not made

significant, measurable progress towards reunification by the date of the permanency hearing, the government must endorse a plan other than reunification. As a result, it is extremely important for parents' attorneys and GALs to zealously advocate on behalf of their client(s) at the disposition hearing. Such advocacy may include identifying services for the family that will best promote a return of the child to his or her parent(s) or custodian(s). For example, an attorney may request that referrals be made for parenting and anger management classes, individual and family therapy, tutoring, mentoring, etc.

If the parties have entered into a stipulation, a disposition may be incorporated into it. If the case goes to trial, however, or if there is a disagreement between the parties as to dispositional alterna-

tives, particularly on important questions such as the return of the child to the home, the parties have a right to a separate dispositional hearing.

For the parent's counsel, preparation for the dispositional hearing may mean marshaling every piece of evidence available to persuade the court that the child should return home. Parents' attorneys often suggest that their clients participate in remedial programs of therapy, family counseling or other services after the case is petitioned, or when the case is pending disposition after adjudication. Such an approach can improve the chances of an early return of the child to the home. If such a suggestion is made, however, counsel should be wary of any aspect of such a program that could compromise the parents' position at trial. Attorneys should explore and, as appropriate, suggest a range of services that would protect the child from abuse or neglect while in the home. At disposition, as at other stages in the proceedings, attorneys for each parent and for the child should keep in mind the legal basis for intervention. Conditions that would not provide a basis for removal or petitioning should not bar reunification. But see D.C. Code §16-2320 (a) (neglect court has authority to require parent or other caretaker's "full cooperation and assistance in the entire rehabilitative process").

A. Predisposition Report

After a child has been adjudicated neglected pursuant to D.C. Code §16-2317(c), a predisposition study and report must be prepared by the Child and Family Services Agency (CFSA) pursuant to D.C. Code §16-2319(c)(1), which specifies information that must be included in the report:

- (A) the specific harms that intervention is designed to alleviate;
- (B) the plans for alleviating these harms, including specific services, the proposed providers of the services recommended and the actions the parent, guardian, or custodian should take to alleviate these harms, including but not limited to parenting classes and family counseling if the Division orders either service;

- (C) the estimated time in which the goals of intervention may be achieved or in which it will be known that the goals may not be achieved;
- (D) the criteria to be used to determine that intervention is no longer necessary,

If removal of the child from home is recommended, the report also needs to include;

- (A) the recommended type of placement;
- (B) the reasons why the child cannot be protected in his or her home;
- (C) the likely harm the child will suffer as a result of the separation from his or her parent, guardian or custodian and recommended steps to be taken to minimize this harm;
- (D) the plans for maintaining contact between the parent and child through visitation rights in order to maximize the parent-child relationship consistent with the well-being of the child.

D.C. Code §16-2319(c)(2); .

In addition, SCR-Neg 22(i)(5) *inter alia* provides that if an out-of-home placement is recommended the report shall include the terms of visitation, including visitation with siblings and other relatives. If the recommendation is that visitation is to be supervised, suspended or prohibited, the reasons shall be specified in the report.

The legislative history of D.C. Code §16-2319 indicates that this statute was designed to promote reunification and to prevent foster care "drift." In fact, the statute intends for intensive planning and assistance to begin at the very outset of the case. D.C. Code §16-2319(b) and its companion section, D.C. Code §4-1301.09, provide that the investigation and plan that are to be prepared by the social services agency subsequent to a supported report of neglect can serve as the predisposition report.

Overall, counsel should use the requirement of early preparation of the predisposition report as an opportunity to focus CFSA's efforts on developing a meaningful services delivery plan for their clients. Planning, which should have begun long before disposition, should not be postponed beyond it.

Since the report is usually the only evidence submitted by the agency in support of its disposition plan, counsel should insist upon timely receipt. All counsel are entitled to the predisposition report at least five days prior to the fact-finding hearing. See D.C. Code §§16-2319(b) and 4-1301.09(c); SCR-Neg 20(a)(1).

Moreover, a judge may continue the disposition hearing if any party has had fewer than five days to consider the report and case plan. SCR-Neg 20(2). The report is not to be furnished to or considered by the court until the fact-finding hearing is completed. D.C. Code §16-2319(b); SCR-Neg 20(a).

B. Procedure

D.C. Code §16-2301(17)(B) defines the dispositional hearing as a hearing, after a finding of fact, to determine "what order of disposition should be made in a neglect case." See D.C. Code Section 2320; SCR-Neg 25. At disposition, the GAL may also submit a written report setting forth the factual results of his or her independent investigation and conclusions regarding what action should be taken in the child's best interests. Other counsel may also submit reports they deem necessary. GAL and other counsel reports are to be filed at least five days prior to the hearing. The judicial officer who conducts the fact finding hearing shall not consider the contents of any disposition reports until after he or she has made findings of fact and conclusions of law at the conclusion of the fact finding hearing. Notice of the hearing must be given to the child and to the parents, if the parents can be found. D.C. Code §16-2317(e)(2).

1. TIMING OF HEARING

If the case proceeded to adjudication by way of trial, the judge who heard the trial may hear the disposition immediately after the fact-finding hearing, if at least five days prior to adjudication the disposition report, meeting the requirements of SCR-Neglect 21 and 22 was filed and all parties agree to go forward with the

disposition hearing. If not, the judge must schedule the disposition hearing within 45 days after the child's entry into foster care.¹

If the case proceeded to adjudication by way of stipulation, the judge who heard the stipulation as part of the neglect trial calendar will, at the time of stipulation, set the date for the dispositional hearing. D.C. Code §§16-2316.01; 16-2317(c)(2).

2. STIPULATED DISPOSITION.

A stipulated disposition may be used to determine the disposition of the case following either the fact finding hearing or the stipulation in lieu of fact-finding hearing pursuant to SCR-Neg 18, provided all requirements of SCR-Neglect 18 through SCR-Neg 20 regarding notice and the filing of disposition reports have been satisfied. If so, SCR-Neg 23 requires the stipulation to be signed by all counsel, including the GAL or counsel for the child, by the parent, guardian or custodian who is party to the agreement, and by the representative of the agency providing supervision and services.

Before accepting a stipulation of disposition, the court must determine that the parties understand the contents of the stipulation and its consequences, and that they voluntarily consent to its terms.

If the court approves a stipulation containing a stipulated disposition, findings shall be made as required by SCR-Neg 14 (c)-(e) regarding reasonable efforts, whether continuation in the home is contrary to the welfare of the child, and the date of removal of the child from the home.

3. PREPARATION FOR THE HEARING

In light of ASFA permanency requirements referenced above, adequate and thoughtful preparation for the disposition hearing is crucial. At the hearing, the agency (through its social worker) will make a dispositional planning recommendation. Counsel are in no way bound by that recommendation and should

¹ Entry into foster care is defined as 60 days after removal from the home. Therefore, disposition must take place within 105 days of the child's removal.

come prepared to offer supporting evidence for their own dispositional plan. In addition to the predisposition report in which the agency makes its planning recommendation, counsel are also entitled to inspect any materials in the social file that are considered by the judge. D.C. Code §16-2332(c).

Under D.C. Code §16-2315(e)(Q), upon a showing of good cause following an adjudication of neglect, the court may, on its own motion or on the motion of any party, for good cause shown, order a mental or physical examination of the parents, guardian, or custodian whose ability to care for the child is at issue. The results of the examination are admissible at the disposition hearing. D.C. Code §16-2315(e)(5). Counsel opposing such a request should ensure that the "good cause" requirement is met and that the government establish that the parents' mental or physical condition is genuinely a central issue.

Counsel should consider using vouchers to obtain independent evaluations. Because vouchers are submitted on an *ex parte* basis, counsel should be able to avoid disclosing the existence of the evaluation.

4. EVIDENCE

At the disposition hearing, the judge may consider testimony or exhibits offered in evidence or contained in the predisposition report. At the judge's discretion, counsel may be permitted to examine the person who prepared the report. See also *Ziegler v. Ziegler*, 304 A.2d 13 (D.C. 1973) (denial of due process to prevent counsel in a custody case from cross-examining the writer of the report).

Evidence that is "material and relevant" shall be admissible at disposition hearings, in contrast to evidence at fact-finding hearings, which shall be admissible if it is "competent, material and relevant" D.C. Code §16-2316(b). This provision is generally interpreted to permit the admission of hearsay at disposition hearings. It may also be argued that the elimination of the "competence" requirement applies to other

evidentiary criteria in addition to hearsay (e.g., authentication).

Despite the admissibility of hearsay, counsel can nonetheless argue that the court should exclude specific testimony, materials, or information on the basis that the material or information is too unreliable or because counsel is unable to cross-examine the source of the information.

Counsel can also argue that the court should only consider evidence relating to the specific findings of fact and grounds for neglect on which the adjudication was based., because the government should not be able to take advantage of the lower evidentiary standards applicable at disposition to bring in evidence already rejected or found to be an insufficient basis for a finding of neglect.

5. STANDARD

Based on D.C. Code §16-2320(a), the standard for the dispositional decision is "best interests of the child." Counsel who are advocating for placement in the home should stress that this standard must be interpreted in light of the policy of the statute that children should remain in the home. That presumption is clearly stated in D.C. Code §16-2320(a)(3)(C):

[N]o child shall be ordered placed outside his or her home unless the Division finds the child cannot be protected in the home and there is an available placement likely to be less damaging to the child than the child's own home. It shall be presumed that it is generally preferable to leave a child in his or her own home.

Not only does this provision create a presumption in favor of placement at home, it recognizes that as much harm can be created by intervention as can be alleviated by it, and it requires the court to balance these considerations. See Initial Hearings Chapter, *infra*.

C. Dispositional Alternatives

D.C. Code §16-2320(a) authorizes the court to make whichever of certain dispositions it deter-

mines "will be in the best interests of the child."² The dispositions authorized can be categorized as: (1) placement with parents ("protective supervision"); (2) legal custody to a third party ("private placement"); (3) legal custody to the child welfare agency ("commitment"); and (4) in-patient commitment.

1. PLACEMENT WITH PARENTS

A child may be permitted to remain with (or be returned to) the parents, guardian, or custodian. If the child is permitted to remain with his or her parents pending the adjudication, the status is referred to as "conditional release." If the child is returned to his or her parents at disposition, this status is known as "protective supervision." Regardless of whether the placement occurs pre- or post-disposition, the court has the discretion to impose such conditions as it deems appropriate, including out-patient medical, psychiatric, or other treatment. Services should be ordered and provided that will permit the child to remain in the home. See D.C. Code §§4-1301.09; 16-2320(a) and 16-2323.³

If the parent fails to abide by all of the court ordered conditions of protective supervision, the government may properly file a motion to revoke protective supervision. If such a motion is filed, a revocation of protective supervision hearing will be held. If the court agrees with the government that revocation of protective supervision is warranted, the status of the child will change to that of committed. See SCR-Neg 26. Thereafter, it will be incumbent upon the parent's attorney to convince the fact finder that future reunification is not only in the child's best interest, but also possible to achieve.

2. PRIVATE PLACEMENT

A child may be placed in the legal custody of

a relative or other individual. D.C. Code §16-2320(a)(3)(C). This status is generally referred to as "private placement." See Section 3, *infra*. The statute makes no mention of conditions to be imposed on the person or relative assuming the care or custody of the child under this section. However, CFSA will not permit any child to be placed with someone until he or she has undergone sufficient agency scrutiny, to wit, their foster care licensure approval. This pre-placement licensure requirement is largely the result of *LaShawn A. v. Dixon*, 762 F.Supp. 959 (D.D.C. 1991) *aff'd and remanded sub nom, LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993).

It is also important to remember that if the relative resides out of state, the statutory requirements of the Interstate Compact on the Placement of Children (ICPC) apply. See D.C. Code §4-1422, *et seq.* As a result, if an out-of-state placement of the child is being proposed by any of the parties, the mandates of the ICPC must be fulfilled as a prerequisite to placement. It is therefore crucial for the child's parent(s) to identify to the assigned agency social worker all known potential private placement resources as early in the proceedings as possible. Early identification may result in the child being placed with the out-of-state private placement resource in advance of the disposition hearing date.

3. LEGAL CUSTODY TO CHILD WELFARE AGENCY

Legal custody may be transferred to a public agency responsible for the care of neglected children (CFSA) or a legally authorized child-placing or child-care agency.⁴ Children in the custody of CFSA are said to be "committed" to the agency and the order transferring custody to the agency is a commitment order. "Legal custody" is defined in D.C. Code §16-2301(21) as:

² If a child is found to be neglected, the court may order any of the enumerated dispositions; a finding of neglect need not first have been entered against a non-custodial parent before ordering a disposition over a parent's objection. *In re: SG., B.G.*, 581 A.2d 771 (D.C. 1990).

³ See D.C. Code §16-2301(19) for definition of protective supervision. D.C. Code § 16-2320(a)(1) and (a)(2) seem to create two separate types of custodial status, but the practice at this time is for all orders to be "protective supervision."

⁴ In practice, custody is invariably given to CFSA, which in turn may contract with a private licensing child-placing agency to provide foster care placements and services.

a legal status created by Division order which vests in a custodian the responsibility for the custody of a minor which includes:

- (a) physical custody and the determination of where and with whom the minor shall live;
- (b) the right and duty to protect, train, and discipline the minor; and
- (c) the responsibility to provide the minor with food, shelter, education, and ordinary medical care.

This statute also provides that an order of "legal custody" is subordinate to D.C. Code §16-2301(22) as: those rights and responsibilities remaining to the parents after transfer of legal custody or guardianship of the person, including (but not limited to) the right of visitation, consent to adoption, and determination of religious affiliation and the responsibility for support.

Whenever a child is placed outside the home, the dispositional order should clearly outline the parties' rights and responsibilities. Planning should be realistic and targeted toward the goal of adequate, not ideal, care for the child.

There is no mandatory minimum level of post-disposition parental visitation specified by the statute, but consistent with the strong overall statutory policy in favor of regular parental visitation, D.C. Code §16-2319(c) requires the pre-disposition report to include "the plans for maintaining contact between the parents and child through visitation rights in order to maximize the parent-child relationship consistent with the well-being of the child." See SCR-Neg 22(i)(5). *Cf.* D.C. Code §16-2310(d).

4. IN-PATIENT COMMITMENT

Although it is not frequently done, the court may commit a child to an appropriate facility on an in-patient basis for medical, psychiatric, or other treatment if, at the disposition hearing, the court finds that confinement is necessary for the treatment of the child. D.C. Code §16-2320(a)(4). *Cf.* D.C. Code §16-2321 (disposition of mentally ill or substantially retarded child). The use of the word "detained" suggests, however, that this provision was drafted with

juvenile respondents in mind.

Attorneys can oppose commitment under this subsection on constitutional grounds, particularly if the respondent is over 18. Because a clear liberty interest is at stake, a strong argument can be made that a person cannot be committed to an in-patient psychiatric facility without being accorded the full range of procedural and substantive due process rights provided under D.C. Code Title 21 or at a minimum those rights that are constitutionally required. See Medical & Psychiatric Chapter, *infra*.

D. Other Dispositional Issues

1. PROVISION OF SERVICES

An extremely important provision of the dispositional section of the statute is D.C. Code §16-2320(a)(5), which provides:

The Division may make such other disposition as is not prohibited by law and as the Division deems to be in the best interests of the child. The Division shall have the authority to (i) order any public agency of the District of Columbia to provide any service the Division determines is needed and which is within such agency's legal authority and (ii) order any private agency receiving public funds for services to families or children to provide any such services when the Division deems it is in the best interests of the child and within the scope of the legal obligations of the agency.

Citing D.C. Code §16-2320(a)(5), counsel for parents and children have secured court orders for, among others, funding for school tuition and residential placements; tutoring; medical or psychiatric treatment; in-home services; day care; housing for committed wards; transportation money for visitation; clothing money for wards; and special services and equipment for handicapped wards.

In the past, attorneys have attempted to have public housing ordered as a "service" within the meaning of the statute for the purpose of reunifying parents and children or, in the alternative, the

payment of sufficient funds to enable a family to obtain rental housing. However, the D.C. Court of Appeals in *In re G.G. Jr.*, 667 A.2d 1331 (D.C. 1995) ruled that the provision of immediate public housing to a child's family was not a "service" within the meaning of the statute which allows the family court to order a public agency to provide a neglected child with needed services.

2. COMMINGLING

Unless also found to be delinquent, a child found to be neglected shall not be committed to or confined in an institution for delinquent children. D.C. Code § 16-2320(b). This section has not yet been interpreted to include residential treatment facilities, where both adjudicated neglected and delinquent children are placed.

3. CHANGE OF PLACEMENT

A custodial agency must give oral notice of any change in a child's placement to the parents, the foster parents, and the GAL at least ten days prior to the proposed change, except that in an emergency notice is to be given no later than 24 hours (excluding Saturdays, Sundays and legal holidays) after the change. Any person entitled to notice of change in placement may request an administrative hearing which, except in the case of an emergency change of placement, must be held prior to a change being made. D.C. Code § 16-2320(g).

4. VISITATION

If at disposition the child is placed in the custody of someone other than a parent, the question of visitation will arise. Attorneys need to consider such key issues as the frequency of visitation and the structure of visitation (supervised or unsupervised, location of the visits). The issue of visitation is addressed both in the disposition report and in the case plan. The GAL should analyze the recommended level and structure of visitation to ensure what is being proposed is consistent with the child's best interest. The parent's attorney should consult with their client prior to the disposition hearing to learn what, if any, issues exist with regard to visitation. Parent's counsel should make certain

that the visitation proposed is both reasonable and realistic in light of their client's schedule and financial means.

There is no statutory provision governing post-disposition visitation comparable to D.C. Code § 16-2310(d) and SCR-Neg 15, which establish a standard for pre-disposition visitation. See Initial Hearings Chapter, *supra*. D.C. Code §§ 16-2319 and 16-2323 specify that visitation is an issue that must be considered at disposition and at subsequent reviews. The wording of § 16-2319 in particular suggests that parent-child contact should be maximized if possible, consistent with the child's well-being.

The statute provides little guidance as to when, if ever, the parents' visitation rights can be totally suspended. However, SCR-Neg 22(i)(5) provides that the child welfare agency shall provide in its disposition report the terms of visitation, including visitation with siblings and other relatives. If the recommendation is that visitation is to be supervised, suspended, or prohibited, the reasons shall be specified in the report. Additionally, under SCR-Neg 25(n), the disposition order must include an appropriate visitation plan and any reasons for prohibiting or severely restricting such visitation. D.C. Code § 16-2320(g), provides that notice of a change in the placement of a committed child need not be given to the parent when the court has determined that visitation would be detrimental to the child.

The D.C. Court of Appeals has held that a non-custodial parent has the right of visitation with the children and ought not to be denied that right unless by his or her conduct he or she has forfeited the right, or unless the exercise of the right would injuriously affect the welfare of the children. See, *In re K.O.W.*, 774 A.2d 296 (D.C. 2001).

Although parents' interest in visitation is substantial and cognizable, a court must act in the child's best interest and may not expose the child to serious risk of harm. That is not to say that the Court of Appeals has found visitation

may be completely suspended or prohibited on the basis of an unsubstantiated proffer by the agency or opposing counsel. The D.C. Court of Appeals in *In re K.O.W.* determined that the trial court improperly denied a father's visitation on the basis of an allegation that the father had sexually abused his eldest son, absent a factual inquiry and finding by the trial court as to whether the alleged sexual abuse had actually occurred.

If the government or other party seeks to terminate a parent's visitation rights with the child, the parent's counsel should request that the moving party file a written motion to that effect and should ask that an evidentiary hearing be held on the motion. See *In re J.W.*, 806 A.2d 1232 (D.C. 2002). At the hearing, the moving party/government must show proof that continued visitation with the parent would be detrimental or harmful to the child or otherwise is not in the child's best interests. This level of proof usually requires testimony from the child's therapist. Parent's counsel can cross-examine the moving party's witnesses and present witnesses on the parent's behalf at the evidentiary hearing. If the court grants the motion and terminates the visits, the decision is immediately appealable. *In Re D.M.*, 771 A.2d 360,370 (D.C.2001).

The Court of Appeals further elaborated on what evidence is required to deny visits. In *In re T.L.*, 859 A.2d 1087 (D.C. 2004) the Court of Appeals held that a goal of adoption is not a basis on which a denial of visitation can be predicated.

5. SUPPORT OBLIGATIONS

Parents have a legal duty to provide for the support and maintenance of their children. The neglect court may enter an order requiring parents who can afford to pay all or part of a child's support to do so. In these cases, proper notice

must be served on the parent being required to pay support. In *In re X.B.*, 637 A.2d 1144 (D.C. 1994), the court held that simply notifying a parent's attorney of the availability of a predisposition report recommending that the parent pay support does not satisfy notice requirements under the D.C. child support statute.

6. PERMANENCY PLANNING

As discussed previously in this chapter, the advent of D.C. and federal legislation requiring prompt permanency decisions has made thoughtful pre- and post-disposition permanency planning essential. Thus far, the discussion has focused on situations where the parent or other custodian is available to participate in the proceedings. From time to time, however, attorneys will represent parents of a child who has been abandoned, left as "boarder babies,"⁵ or whose parents cannot be located for three months prior to a fact finding hearing of the termination of parental rights. A GAL for such a child may want to consider whether a petition to terminate parental rights should be filed so that the child can be available to be adopted. Concurrently, it is advisable to work with the assigned social worker to locate prospective adoptive families. See Post-Disposition to Permanency, Chapter 9, for additional discussion of permanency planning.

Even for those children whose status as a neglected child requires the GAL to wait the requisite six months, see D.C. Code §16-2354(b), or in the event the government files the termination motion when statutorily permitted (when the child has been in court ordered custody for fifteen of the most recent twenty two months), the GAL should not delay considering how to maximize stability for the child by encouraging the assigned social worker to develop an appropriate case plan, including how to effectively identify appropriate potential pre-adoptive placement resources.

⁵ Defined in D.C. Code §16-2301 as a child who resides in a hospital in the District of Columbia for at least 10 calendar days following its birth and is ready for discharge but no parent, guardian or custodian of the child has made an effort or action to maintain a relationship or contact with the child.

Similarly, attorneys for parents should attempt with the approval of their clients to develop a plan to achieve reunification for their clients with the child. Attorneys for the parents should also impress on their clients the importance of early identification of relatives to serve as custodians, in the event that the goal of reunification is not achieved or fails.

II. Appeals

The time for appeal of a disposition order depends on whether the presiding judicial officer is a magistrate judge. If a magistrate judge is presiding, prior to the filing of an appeal, a motion for review must first be timely filed by parent's counsel, consistent with the applicable rules. See SCR-General Family Rule D(e). If the presiding judicial officer is an associate judge or senior judge, then trial or appellate counsel will follow the D.C. Superior Court rules governing appeals to ensure timely and proper filing. ■

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POST-DISPOSITION TO PERMANENCY

I. Purpose of Post-Disposition Hearings

The period from disposition to permanency may be the most important stage of the neglect proceeding. It is here that critical decisions concerning the child's continued placement are made. The quality of advocacy, both in and out of court, during this period may determine whether the child is returned home, or finds a permanent home with relatives or a new family.

II. Role of Parent's Attorney

In this chapter, parent is meant to include custodians or guardians from whom the children have been removed. Since typically the goal at disposition is reunification with a parent, the parent's attorney will need to stay in close contact with the parent to encourage frequent visitation and active compliance with offered services. The post-disposition period focuses upon achieving the disposition goal. The parent is expected to complete the services and other matters identified in the disposition order and in the case plan. The parent's attorney should review the case plan and advocate with the social worker for reasonably prompt provision of quality services.

It is especially important for the parent's attorney to be familiar with ASFA guidelines, in order to counsel the parent about the timeline requirements for reunification and the various other permanency options.

Often the parent is overwhelmed and may be tempted to withdraw rather than participate. The parent may need the encouragement of the attorney to navigate the challenging bureaucracy. The attorney may need to be creative in suggesting

alternative ways to address the court's concerns. It is not uncommon for a parent to be ordered to participate in the following: parenting classes, anger management classes, individual psychotherapy, visitation with the child, family treatment team meetings, and court hearings. This may be an unrealistically demanding schedule. If the parent works full-time and relies on public transportation, the schedule may set the parent up for failure. The parent's attorney may want to propose a reasonable modification, such as sequencing the requirements or combining them. For example, the attorney could suggest that the parent be allowed to complete the parenting classes before beginning anger management or that the therapist ensure that anger management will be addressed in therapy so that those two items could be combined.

The parent's attorney may also play a role as public relations spokesperson for the parent, making sure the social worker understands the efforts made by the parent and that the court report accurately reflects the parent's efforts. It may be useful at some points to request a meeting among the social worker, the parent, and the parent's attorney to review and find solutions to any problem in compliance with the court's order. If the parent has been attending therapy, the attorney may want to request a report from the therapist documenting compliance.

When the goal is reunification, the parent's attorney may want to object to a "reasonable efforts" finding, if sufficient services have not been afforded the parent to achieve reunification. The parent's attorney may want to object to a "contrary to the welfare" determination as well. Although the statutes, rules, and federal regulations do not require such a determination, nevertheless, the court often will make a "contrary to the welfare" finding.

III. Role of Guardian *ad Litem*

The guardian *ad litem's* (GAL) post-disposition role requires careful monitoring of the case plan to ensure that quality services are timely delivered. The post-disposition period is a crucial time in which the child may benefit from many services. The GAL will need to monitor the child regularly during this period by talking with social workers, foster parents, other caretakers, teachers, therapists and other family members who may be involved with the child. In addition the GAL should visit the children to interview and observe them. To the extent possible, the GAL also should monitor and ensure that the parent receives the court-ordered services as well. This has the effect of preventing the child from remaining in foster care longer than necessary.

The GAL should be alert to any special needs, such as serious behavior issues, developmental delays, or school problems that may need to be addressed. The GAL may need to file a motion for appointment of an educational advocate in cases where the school is not meeting the child's educational needs. Similarly, the GAL may need to file motions requesting services if advocacy with the social worker is unsuccessful. Such services may include developmental evaluations for younger children, psychological assessment, psychiatric assessment, medication assessment, or psycho-educational assessment for school age children. Other services available are psychotherapy, family therapy, a clothing allowance, mentoring, tutoring, appointment of Court Appointed Special Advocates (CASA) or Volunteer Advocates, and appropriate home placement. Similarly, if a service has been court ordered, the GAL must monitor to ensure that the service is delivered. If the Child and Family Services Agency (CFSA) fails to deliver a court-ordered service, and thus is out of compliance, after giving a reasonable period of time to correct the problem, the GAL should notify the Assistant Attorney General (AAG), and, if necessary, file a motion for CFSA to show cause as to why it should not be held in contempt for failure to obey a court order.

The GAL should also assure that family visits are occurring and monitor the frequency and quality of such visits. The GAL should insist on sibling contact as frequently as possible if children are not placed together.

The GAL should come to the permanency hearing ready to argue for an appropriate permanency goal. If the goal is not reunification, the GAL should know the date on which the goal was first changed from reunification and the efforts that were made to achieve that goal. When the goal is adoption, the GAL should be aware of how much time has passed since setting that goal. If significant time has elapsed without an adoptive home being identified, the GAL may request that the adoption recruitment worker personally report to the court on adoption recruitment efforts. If CFSA's efforts are inadequate, the GAL and other attorneys can object to a reasonable efforts finding. Attorneys can also request an interim report regarding these efforts, or a hearing in the near future specifically to address the recruitment steps that have been taken by CFSA for the child.

The GAL recommends to the court what is in the best interests of the child, taking into consideration the desires of the child. The weight given to the child's wishes varies with the age and maturity of the child. Along with this factor, the GAL must also weigh the progress the parent has made, along with the extent of the efforts made by the agency to promote reunification or another permanency goal. Doing so requires the GAL to monitor services such as family therapy, family preservation programs, and drug treatment referrals. The GAL can obtain drug test results of the parent if the parent is being tested at the court. In some cases, if a child disagrees with the GAL's recommendation, it may be appropriate to request the appointment of an attorney for the child to avoid a conflict of interest. Rule A-6, Conflict Situations, of the Superior Court Child Abuse Attorney Practice Standards states that the GAL is to notify the court when the GAL's assessment of the child's best interest conflicts with the views of the child. The court can then appoint an attorney to represent the child's views.

IV. ASFA Timelines

While the court sets reunification as the goal at disposition in almost every case, ASFA timeframes require early planning to identify alternatives to reunification in the event the parent does not meet the requirements for reunification and the child cannot safely return home.¹ When the court finds aggravated circumstances in a case, the court must hold a permanency hearing within 30 days of that determination that reasonable efforts are not required.² The court may also order the government to file the statutorily-required motion to terminate the parental rights (TPR).

In some cases, the court sets concurrent goals at disposition, for example, reunification and another goal. This would be the case where, for example, no parent has participated in court hearings or contacted the social worker before the disposition hearing, despite being served with the petition, but a willing family member is available. Such concurrent goals might be reunification or guardianship with a family member. Whenever concurrent goals are set, efforts must be made and services directed to achieve both goals. However, concurrent goals are permissible only before the first permanency hearing, at which a single goal must be chosen and a timetable set for achieving that goal.

Even where the sole goal is reunification, the parents' attorneys and the GAL may want to have a back-up plan in the event the permanency goal must be changed from reunification. The parents may be reluctant to provide information about family members who might be resources for the

children, and in fact may not even inform the family about the children's removal out of shame and fear. The parents' attorneys may be in a position to help the parents recognize the advantage of identifying family members acceptable to the parent who may be able to become caretakers. If the children can be placed permanently with a relative, the parental rights will usually remain intact. The GAL similarly should advocate for the social worker to continue to work with the parents to identify family members.

V. Review Hearings: Timing and Procedure

Timing: Review of disposition hearings are held as needed to follow up on any issues which arise regarding the dispositional plan adopted at the disposition hearing. Review hearings are required every 6 months if the child is out of the home or every year if the child is in the parent's home.³ A permanency hearing is a specific type of review hearing which has its own requirements.

Procedure: According to D.C. Code §16-2323(b), the purpose of a review hearing is for the court to determine 1) the safety of the child, 2) the continuing necessity for and appropriateness of the placement, 3) the extent of compliance with the case plan, 4) the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and 5) a date by which the child may be returned to and safely maintained in the home, or placed for adoption or other permanent placement. The comment to SCR-Neg 30 sets out additional issues to be addressed at review and permanency

¹ The court is not required to establish reunification as the goal at disposition in cases where it finds that aggravated circumstances exist. Aggravated circumstances exist when a court of competent jurisdiction has determined the child to be abandoned; or a court of competent jurisdiction has determined that the parent has: subjected a sibling or another child to cruelty, abandonment, torture, chronic abuse, or sexual abuse; committed murder of a child sibling or another child; aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or committed a felony assault that has resulted in serious bodily injury to the child who is the subject of the petition, a child sibling, or another child; or when the parent's parental rights have been terminated involuntarily with respect to a sibling. The statute requires that a motion to terminate parental rights be filed when aggravated circumstances exist. D.C. Code § 4-1301.09(a), and §16-2354.

² D.C. Code §16-2323(a)(3).

³ S.C.R. 28(a), D.C. Code § 16-2323(a).

hearings. These include the actions that should be taken by the parents to permit the return of the child if returning home continues to be the case objective; the parents' ability to contribute and previous financial contributions to the child's support; whether the environment in which the child is placed is the most family-like and appropriate setting for the child; and whether services, including sibling visitation, have been included to meet the child's special needs.

Review hearings usually are not formal evidentiary proceedings. The judge will discuss the recommendations and any proposed changes in the prior orders while addressing each of the factors required by statute. This is done without the social worker or the parent being placed under oath. If the attorney desires an evidentiary hearing, the attorney should request this at a prior hearing or notify chambers in advance so that sufficient time can be allotted, perhaps by rescheduling the hearing, if necessary.

The provision of appropriate services, as well as the effective use of those services by parents and families, is the linchpin for reunification. Similarly, if the goal has been changed to something other than reunification, effective services will almost always be necessary to achieve the new goal.

VI. Permanency Hearings: Timing and Procedure

Timing: Within 14 months of the initial hearing the first permanency hearing must be held to set a permanency goal and a timeline to achieve the goal, if the child has not been returned to the parent. The statute technically requires the permanency hearing to occur within 12 months of the child's "entry into foster care," which is defined as the adjudication date or 60 days after removal from the home, whichever is earlier.⁴ After the first permanency hearing, subsequent permanency hearings must be held at least every 6 months as long as a child remains in an out-of-home placement, with the purpose to achieve permanency for the child as promptly as possible.

Procedure: Permanency hearings include the same determinations required for review hearings. In addition, the permanency plan for the child is established at the hearing by choosing among three ASFA options: 1) reunification, 2) permanent placement with a relative via guardianship, or 3) adoption. If none of these goals is feasible, the court will hear a presentation about compelling reasons for considering another permanency goal, called "alternative planned permanent living arrangement" (APPLA). If the permanency goal selected is other than reunification, the order will specify why the goal chosen will meet the needs of the child, as well as the steps the parties must take to achieve the goal and a timetable for achieving the permanency goal selected. If the goal chosen is APPLA, the order must set forth the compelling reasons for making this choice. SCR-Neg 34 includes a list of items specific to each situation that should be addressed by the permanency hearing order. For example, if the court determines at the permanency hearing that the child should be returned home, the order must specify the conditions of protective supervision.

Reasonable Efforts: SCR-Neg 34 enumerates the findings and orders which are to ensue from a permanency hearing. At every permanency hearing, the judicial officer must make a finding about whether reasonable efforts have been made to achieve the permanency goal in the case.

Other Findings: In addition, at this hearing or at any subsequent hearing, if the child has been in foster care for 15 of the most recent 22 months, the judicial officer must make a finding about whether there is a compelling reason why termination of parental rights is not in the child's best interest. If the court finds a compelling reason, it must set forth the compelling reason. If the court finds no compelling reason, the government must promptly file a TPR motion.

Permanency hearings are similar to review hearings, in that they are usually informal proceedings. However, because of the significance of the decisions made at some permanency hearings, at times the parties may wish to introduce formal

⁴ D.C. Code §§16-2323(a)(4), and 16-2301(28).

testimony. The attorney should state this intention at the previous hearing, or notify the court in advance so that all parties can be prepared and enough time can be set aside for the hearing.

VII. Extension of Dispositional Orders

D.C. Code §16-2322 provides that dispositional orders shall be for limited periods of time only, subject to extensions:

Original Order	Extensions
Protective Supervision - 1 year	1 year each time
Third-party placement - 2 years	1 year each time
Commitment - 2 years	1 year each time

See *In the matter of H.M.*, 386 A.2d 707 (D.C. 1978). The standard for extensions of any dispositional order other than commitment is that an extension is found by the court to be necessary to protect the interests of the child. The standard for extensions of commitment is that the court finds the extension necessary to safeguard the child's welfare.

The court does not lose jurisdiction over the children on expiration of a commitment order. In one such case, *In the Matter of O.A., Y.A., and M.M.*, 548 A.2d. 499 (D.C. 1988), the D.C. Court of Appeals held that the trial court correctly entered a *nunc pro tunc* commitment order reaffirming the children's current placement with CFSA. Moreover, the court can *sua sponte* extend a commitment order before the order is scheduled to expire. In *Appeal of A.H.*, 590 A.2d 123 (D.C. 1991), the court extended the commitment order several days before its expiration, and did not lose subject matter jurisdiction over the child even when this second order expired.

VIII. Termination of Jurisdiction

D.C. Code §16-2322(a)(1) and (3) provide that a child may be released from commitment when it appears that the purpose of the dispositional order has been achieved; protective supervision

may also be terminated at any time when it appears that the purpose of the order has been achieved. Orders vesting legal custody of a child last the full term unless terminated earlier by the court. D.C. Code §16-2322(a)(2). D.C. Code §16-2322(a)(1) and (3) could be read to permit unilateral terminations of commitment and protective supervision by the social services agency without the necessity for court approval. However, at this time the consensus view continues to be that only the court may terminate jurisdiction in neglect cases prior to expiration of a dispositional order.

Cases may be appropriate for termination of jurisdiction if reunification has been successfully accomplished or if an alternative permanent plan has been implemented that does not require court supervision or ongoing agency intervention.

If the long-range plan is private placement, it may be advisable for the third-party custodian to petition independently for custody. Unlike conventional custody orders, dispositional orders in neglect cases are time-limited. It is the general view that legal custody reverts to the natural parent if the neglect case is closed or when a disposition order expires. In addition, without a custody order, the custodian may have problems in connection with the child's school enrollment, medical care, and public assistance. If the parties have reached an understanding and if the custodian does not anticipate any problems, it may be appropriate to close the case without securing an order for custody; however, many judges are reluctant to close cases without a transfer of legal custody. All dispositional orders must terminate when the child reaches 21 years of age. The government may seek termination of commitment even before a child becomes 21. The respondent may want to have the case closed; in fact, the respondent may be the party requesting termination while the agency seeks continued commitment.

If the government seeks termination of court jurisdiction over the objection of the GAL, the GAL can point to the clear statutory intent for jurisdiction to continue until the child reaches age twenty-one (21), notwithstanding the fact that

the age of majority in the District of Columbia is eighteen (18). It should be noted that D.C. Code §30-401 specifically preserves the right to child support until age 21. By analogy, counsel can argue that the custodial agency, acting *in loco parentis*, should continue to provide services and assistance to committed children as long as possible, particularly in light of the substantial problems and disadvantages facing many children who come of age in foster care. If the court is asked to terminate the child's commitment prior to his or her twenty-first birthday, it must first find that commitment is no longer necessary to safeguard the child's welfare and should frame that finding in conformity with the statute in terms of the child's best interest. *In re TRJ*, 661 A.2d 1086 (D.C. 1995).

IX. Report by CFSA

At least 10 days prior to each review or permanency hearing, CFSA (through the assigned social worker) is required to submit a report to the court.⁵ All attorneys in the case should also receive a copy of this report at the time of its filing. The report must address at least the following information:

- (1) The services provided or offered to the child and his parent, guardian or other custodian;
- (2) Any evidence of the amelioration of the condition which resulted in the finding of neglect and any evidence of new problems which would adversely affect the child;
- (3) An evaluation of the cooperation of the parent, guardian or custodian with the court or the agency or institution;
- (4) In those cases where the child is out of the home: the extent to which visitation has occurred; any reasons why visitation has not occurred or has been infrequent; the estimated time in which the child can be returned to the home; and whether the assistant attorney general (AAG) intends to file a TPR motion.

Amplifying the statute, SCR-Neg 29 requires the report to include additional information, such as contact information for the parties, the record of visitation, the situation of any siblings, the contacts between the social worker and the parent, and the progress toward implementing the case plan. Rule 29 also requires the report writer to make all reasonable efforts to attach all written reports upon which the writer relied in making any recommendations, such as psychological or therapist reports.

For the permanency hearing, SCR-Neg 33 sets forth additional requirements for the contents of the agency report. These include the matters required by Rule 29, a specific requirement of a recommendation for the permanency plan for the child, specific facts and circumstances supporting the plan, and steps for implementing the recommended plan.

X. Requirement of the Case Plan

The statute requires that CFSA shall assure that each child has a case plan, as part of the social investigation required after a substantiated report of abuse or neglect. The case plan is designed to achieve the child's placement in a safe setting that is the least restrictive and most appropriate setting available and that is consistent with the best interests and special needs of the child.⁶ The case plan is required to be submitted to all counsel five days prior to trial and is to be considered at each permanency hearing.

A. A "case plan" is a written document which includes at least the following:

1. A description of the type of home or institution in which the child is to be placed, including a discussion of the safety and appropriateness of the placement and how the agency that is responsible for the child

⁵ D.C. Code §16-2323(d).

⁶ D.C. Code §§ 4-1301.02 (3), 4-1301.09(d)(1) and SEC. 475 [42 U.S.C. 675].

plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child;

2. A plan for assuring that the child receives safe and proper care and that services are available to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his/her own safe home or to the child's permanent placement, and address the child's needs while a committed child, including the appropriateness of the services that have been provided to the child under the plan.

3. To the extent available and accessible, the child's health and education records;

4. Where appropriate, for a child age 16 or over, a written description of the programs and services which will help the child prepare for the transition from foster care to independent living.

5. If a child's permanent plan is adoption or placement in another permanent home, documentation of the steps (including child-specific recruitment efforts) taken to achieve the goal.

XI. Reasonable Efforts

The judicial officer is required to make a finding of reasonable efforts at every permanency hearing. The child's safety and health is the paramount concern in determining whether reasonable efforts have been made.⁷ All findings of reasonable efforts must be fact-specific.

A finding of reasonable efforts to prevent removal was required to be made at the time of the initial removal and in no event later than 60 days from the date of removal. CFSA is to make reasonable efforts to preserve and reunify the family except where reasonable efforts are determined to be inconsistent with the child's permanency plan.

In such a case, the agency shall make reasonable efforts to place the child in accordance with the child's permanency plan and to complete the necessary actions to finalize the child's permanent placement. The court must make a finding of reasonable efforts to reunify the family after placement outside the home when it adopts a change in permanency goal. A finding of reasonable efforts to arrange and finalize a new permanent home (after reunification is no longer a goal) needs to be made at the permanency hearing.

XII. Contrary to the Welfare Finding

At the time of the initial removal, the court was required to find that "[c]ontinuation in the home would be contrary to the welfare" of the child. This finding must also be made at a later hearing if a child is removed from protective supervision with a parent or a third party placement that has lasted for 6 months or more. Although not required, at permanency hearings the court usually will make a finding that it is contrary to the welfare of the child to return home at that time. As mentioned above, the parent's attorney may want to object to this unnecessary finding.

XIII. Failure to Make Reasonable Efforts Finding

Federal regulations require the court to make certain findings in order for CFSA to receive Title IV-E monies for foster care. A failure to make a finding about the reasonable efforts to prevent removal when required, or about the adequacy of the efforts themselves, will result in the city being ineligible for federal funds for that child for the duration of the child's stay in foster care for that foster care period. The ineligibility cannot be cured. Ineligibility may also impact the city's ability to receive federal reimbursement for an adoption subsidy for the child.

⁷ The definition of reasonable efforts can be found at D.C. Code §4-1301.09a(a), (b) and (c)

However, there is a less severe impact on federal funding if the court fails to make a timely determination regarding reasonable efforts to finalize a permanent placement. If that determination is not made at or near the time of the first permanency hearing, IV-E eligibility will be suspended until cured at the next permanency hearing. Failing to make this determination at the first permanency hearing is a violation of the State Plan, which has other financial consequences.⁸

XIV. Reports by the GAL and Other Attorneys

The GAL or another attorney may want to submit a report to the court in advance of a hearing. A GAL report will alert the judge and the parties to more detailed information than may be communicated orally and will provide the basis for the recommendations of the GAL. A GAL report can include attachments such as school or therapist reports.

SCR-Neg 28 and 31 permit the filing of such reports before review and permanency hearings in order to set forth the factual results of the counsel's independent investigation and conclusions about what action would be in the child's best interests. The reports must be filed at least 5 days before the hearing, with copies to all counsel and a courtesy copy to chambers.

XV. Frequent Issues at Review and Permanency Hearings

Issues which may be raised at review and permanency hearings include requests for unsupervised or therapeutically supervised parental visitation, requests for sibling visits, requests for the child to return home, requests for assistance from the social worker in obtaining housing or referral to transitional housing programs, and issues related to licensing of family members under kinship foster care. If the child is experiencing severe

emotional difficulties, issues related to special education or psychiatric hospitalization may arise.⁹ If the GAL has a disagreement with a child as to the child's best interests, it may be necessary to ask for appointment of an attorney for the child. See Child Abuse and Neglect Attorney Practice Standards.

In many instances, direct evidence is necessary for the court to act. For example, a therapist's testimony is necessary for the court to decide to reduce or suspend visitation. The parent's attorney may wish to bring a witness from the parent's inpatient drug treatment program to testify about the parent's good progress within the program or about the program's facilities for supervising visits.

XVI. Visitation

At post-disposition hearings, issues regarding visitation often arise. When the government seeks to terminate visitation with a parent, an evidentiary hearing may be held. For a discussion of the law regarding termination of visitation and the right to an evidentiary hearing, see Disposition Chapter, *infra*.

XVII. Services and Funding

Frequently-requested services include parenting classes, anger management classes, tutoring, therapy, and mentoring.

As a general rule, the court may order the parties in neglect matter to participate in almost any service the city or a private agency offers. D.C. Code §16-2320(a)(5) provides the court with the authority to order any public or private agency that receives public funds for services to families or children to provide such services that the court determines are necessary.

However, funding for services is sometimes a problem. Where the child is a ward of the District

⁸ 45 C.F.R. 1356.21(b)(2) and 45 C.F.R. 1356.21(d).

⁹ See D.C. Code §16-2315 discussing requirements for inpatient psychiatric assessments. The GAL may also wish to consult the mental health statute regarding involuntary hospitalization, D.C. Code §21-521.

of Columbia, the child has medical insurance coverage that can fund therapeutic services by approved providers. Other possible funding options are D.C. Code §16-2320(a)(5), the Crime Victims' Compensation Program (a program operated by an office of the court), which sometimes provides funding for services not available under medical assistance funding. Victims of child abuse and neglect and victims of domestic violence may be eligible for up to a lifetime maximum of \$6,000 in mental health benefits. To qualify for this assistance, there need not be a criminal case, but an application must be filed and the petition or domestic violence court paperwork must be attached. See Crime Victims Appendix.

In cases where the goal is adoption, there are services specifically designed to help the child and foster family adjust to the goal of adoption and to process feelings of grief and loss associated with turning away from the goal of reunification. If a child has participated in the "Wednesday's Child" adoption recruitment program, the Center for Adoption Support and Education (C.A.S.E.) offers free therapy.

Finally, the various Healthy Families/Thriving Communities Collaboratives are community-based social service programs available to assist reunified families achieve specific goals, such as housing, both while the neglect case is open and after the case has been closed.

XVIII. Motion for Contempt (Show-Cause Motion)

When court-ordered services are not provided, the attorneys for the parents or the GAL may find it necessary to file a motion for contempt for failure to comply with a court order. Before filing such a motion, the attorney should first attempt to work with the social worker and notify the AAG of the intent to file a motion for a show-cause hearing. If the non-compliance continues, the attorney should file a show-cause motion for contempt, including efforts to resolve the matter outside of court.

XIX. Motions to Revoke or Modify Protective Supervision

If a child has been returned to a parent under the legal status of protective supervision, the court order usually identifies certain conditions that the parent must adhere to in order for the status to continue. If the parent breaches these conditions, or if the parent neglects the child in some way, the government, GAL or counsel for the child may file a motion pursuant to SCR-Neg 26 to revoke or modify the protective supervision status. Additionally, the judicial officer may initiate revocation proceedings *sua sponte*. The standard of proof for revoking or modifying protective supervision is preponderance of the evidence. If removal of the child from the parent is sought, an evidentiary hearing on the motion must be held pursuant to SCR-Neg 4(b).

XX. Changes in Placement

D.C. Superior Court Administrative Order 00-04 requires a hearing prior to a change in the child's legal status, such as a child's return home. D.C. Code §16-2320(g) requires CFSA to notify all parties of any change in the placement of the child at least ten days prior to the change in placement, except in the case of emergency. In case of emergency, notice shall be given no later than twenty-four hours after the change. This notice may be oral and must be given to the parent, the GAL, and the child's foster parent. The requirement of notice to the parent is waived when the judge has determined that visitation would be detrimental to the child or that the parent should not be apprised of the child's location.

When a child's placement is on the verge of disruption, the social worker is required to make efforts to maintain the placement. If a disruption is unavoidable, the CFSA Policy Manual requires that within 2 hours of learning of the disruption, the social worker must advise the CFSA Office of Clinical Practice (OCP) of the situation. OCP is responsible for coordinating and facilitating a dis-

ruption staffing. The Policy Manual does not require OCP to invite the attorneys to the staffing; however, in practice, the GAL may be invited and should try to attend.

XXI. Practice Standards and the Role of Parents' Attorneys and Guardians *ad Litem*

The Family Court's Child Abuse and Neglect Attorney Practice Standards can be found in an appendix of this Manual. These standards provide guidance about the court's expectations with regard to appointed counsel performance on issues such as frequency of visits to the child and scope of representation. These standards are an excellent source of clarity on the various attorneys' roles.

XXII. Court-Appointed Advocates – Educational and Volunteer

The GAL or another attorney may request the appointment of an advocate for the child. Two court-sanctioned volunteer programs, Court Appointed Special Advocates and Volunteers for Abused and Neglected Children, serve under court appointment and provide volunteers who support and advocate for the child.

The court may also appoint an educational advocate for a child. An educational advocate is an attorney who is a member of a court panel qualified to advocate with the school system for appropriate evaluations, placements, and services for the child.

XXIII. Agency Reviews and Other Meetings

A. CFSA

CFSA has several different types of conferences which the GAL, attorneys, and parties should be invited to attend.

1. ADMINISTRATIVE REVIEWS.

In addition to court reviews, the neglect system provides for administrative reviews for children in foster care. These reviews are required to take place every 6 months and are held at CFSA. The purpose of the administrative review is to review and evaluate the continued appropriateness of the case plan, the permanency goal of the case, and the services that are being provided to the child and the family.

2. PERMANENCY STAFFINGS.

These address cases which are out of compliance with the permanency goal.

3. FAMILY TEAM MEETINGS.

FTMs attempt to bring extended family together and to identify placement and other resources within the family. They are also used to identify alternatives to residential treatment for children with mental health needs or to make decisions about residential placement, if necessary. Persons from various disciplines attend such a meeting, including the Department of Mental Health, the child, the family, the attorneys, the social worker, a representative at the child's placement (including group home, foster parent, or hospital), and other community advocates.

4. CLINICAL STAFFING MEETINGS.

These address challenging mental health situations and draw on the expertise of the clinical department of CFSA to find proposed solutions.

B. DCPS

The D.C. Public Schools convene Individual Educational Plan (IEP) meetings as part of the special education process. They are usually held at the child's school. The GAL and the parents' attorneys may want to attend these meetings to participate in decisions regarding the child's education.

XIV. Respondents Nearing Emancipation

By law, a respondent is emancipated upon his or her 21st birthday. It is important that the re-

spondent, the GAL, and the social worker begin working towards the child's emancipation as soon as practicable during the respondent's teenage years. Older teenagers are likely to have the goal of APPLA.¹⁰

Within a year of emancipation, the social worker should schedule emancipation conferences. These conferences focus the respondent on what is needed to prepare for emancipation. Topics that may be discussed include obtaining health care coverage for the respondent and assisting the respondent to obtain housing. It is important that the GAL learn as much as possible about the current programs offered by CFSA, the neighborhood Collaboratives, and the D.C. Housing Authority to assist the youth. If the youth has been assigned a case manager at a Collaborative, the case manager should be invited to the emancipation conferences. At times, the federal and the District of Columbia government offer various housing programs or other resources that are available to emancipating youth.

Housing: The District of Columbia government has allocated money for a Rapid Housing program, which pays rent or a portion of the rent for up to one year after a youth's emancipation. To be eligible for Rapid Housing, the youth must be working or in school.

Education: For youth who are attending college and/or a vocational program, a federal program (The Chafee Act) allows CFSA to provide up to \$5,000 per year for the youth's housing, school and vocation needs, and other expenses up to the youth's 23rd birthday, provided that funding is available. CFSA enters into a written agreement with the youth for this assistance; this agreement should be executed prior to the youth's emancipation. Similarly, CFSA's Keys for Life program can fund the youth's education and vocational expenses. Keys for Life may maintain a savings account for the youth as well; GALs should check on its current availability. At times, the youth is provided the funds prior to emancipation. All respondents should be encouraged to attend Keys for Life as soon and as often as possible. Respondents are eligible for the program at age 15 years 9 months.

Employment: The CFSA Keys for Life Program and the neighborhood Collaboratives can assist emancipating respondents with referrals for employment. It is important that the respondent has a job if not enrolled in school.

At times other programs are developed to assist respondents with preparing for emancipation. GALs should stay current on what programs are available and how to access them. ■

¹⁰ Before a court terminates jurisdiction of a child between the ages of 18 and 21 who is committed to CFSA, the court must find that commitment is no longer in the child's best interest and no longer necessary to safeguard the child's welfare. *In re T.R.J.*, 661 A.2d 1086 (D.C. 1995).

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TERMINATION OF PARENTAL RIGHTS

Motions to terminate parental rights are statutory causes of action governed by D.C. Code §16-2351 *et seq.* and Superior Court Neglect Rules 37 through 42.

A termination of parental rights motion (TPR) is sought when it is deemed that severance of the parent-child relationship is necessary in order to provide the child with an alternative permanent home. A TPR may be brought to “legally free” a child to make it easier to recruit an adoptive home. Motions to terminate parental rights may also be pursued where a pre-adoptive placement has either been identified or made, but the adoptive parent does not wish to become involved in contested proceedings with the birth parents.

A TPR is ordinarily instituted after it has been determined the parents currently are unable to resume care of the child despite rehabilitative efforts, and are unlikely to be able to resume care in the foreseeable future. Where the child’s permanency goal is guardianship or there are other long-term placement options not requiring termination of parental rights, a TPR ordinarily will not be pursued.

I. Introduction

A. Legal Consequences of Terminating Parental Rights

If a motion to terminate is granted, all parental rights and responsibilities to the child are severed. By statute, a termination order is not final until the time for appeal has passed or, where an appeal is pursued, until the appellate decision is issued. Once a final order terminating rights is entered, the child may be adopted without parental consent. The parents have no right to visit with the child or participate in any further proceedings concerning the child, regardless of whether an adoption petition is filed or granted. The right of a child to inherit from the parents, however, remains intact until and unless a final order of adoption is entered.

In determining whether to support a motion to

terminate parental rights, the guardian *ad litem* (GAL) should consider the legal consequences. This is of particular importance when the respondent is an older child who does not have an identified adoptive home or does not wish to have the parents’ rights terminated.

B. Who May File the Motion

D.C. Code §16-2354(a) provides that a motion for termination of parental rights may be filed by the District of Columbia government or by the child through his or her legal representative. It is well established under the case law and court rules that the GAL is the child’s legal representative within the meaning of the statute and thus may pursue a TPR motion. *In re L.H.*, 634 A.2d 1230, 1231 (D.C. 1993). However, since the enactment of the Adoption and Safe Families Act (ASFA), the government is required to file the TPR motions.

C. Timeframe for Filing the Motion

1. PERMISSIVE FILINGS

The statutory timeframe for filing a TPR is set forth in D.C. Code §16-2354. This jurisdictional section specifies that a TPR may be brought six months after a child has been adjudicated neglected and is in the custody of someone other than the parents. *In re Dom. L.S.*, 722 A.2d 343 (D.C. 1998). Two exceptions allow for earlier filings. A TPR may be filed immediately after the adjudication of neglect (1) where the adjudication was based on abandonment or (2) where the parents' whereabouts were unknown at the time of the neglect fact-finding hearing and during the three months before the hearing. In those circumstances, a TPR may be filed immediately after a finding of neglect.

2. MANDATORY FILINGS

The TPR statute was amended to comply with federal and local ASFA requirements regarding permanency. D.C. Code §16-2354 now requires the government to file a motion to terminate parental rights where (1) the child has been in foster care for 15 out of the past 22 months; (2) there has been a neglect adjudication based on abandonment; or (3) the parent has been convicted of certain serious crimes. The neglect court may waive mandatory filing requirements in individual cases where the child is living with an approved kinship care provider and adoption is not the case plan, there are other compelling reasons not to require a TPR, or the agency is required but has not made reasonable efforts to reunify the family by offering or providing services.

II. Initiating Termination Proceedings; Contents of Pleadings; Legal Standards

A. Instituting Termination Proceedings

TPR proceedings are instituted by the filing of a

Motion to Terminate Parental Rights, an accompanying Memorandum of Points and Authorities, and summons. Since the Motion is filed in connection with the underlying neglect case, service on all neglect counsel is required. Under current practice, the pleadings are filed in the Family Court Intake Center. It is not necessary to file a proposed Order with the initial pleadings, as the Court must enter Findings of Fact and Conclusions of Law after the adjudicatory hearing.¹ Under current practice, the TPR is assigned to the magistrate judge or judge handling the neglect case.

B. Content of Pleadings

D.C. Code §16-2354(d) sets forth specific information that must be included in the termination motion: (1) the name, sex, date and place of birth, and current placement of the child; (2) the name and title of the petitioner; (3) the name and address of the child's parent; (4) a plain and concise statement of the facts and opinions on which the termination of the parent and child relationship is sought; (5) a specification as to the health of the child; (6) a statement as to the general prospects for or the barriers, if any, to the adoption of the child; and (7) a statement as to the various efforts taken by the moving party to locate the parent of the child. The accompanying Motion of Points and Authorities will ordinarily contain a brief analysis of the case based on the legal factors the court must consider when ruling on the TPR motion.

C. Service and Notice Requirements

1. STATUTORY REQUIREMENTS

D.C. Code §16-2357 governs notice and service in TPR cases. Motions to terminate parental rights must be personally served upon the parents. Under current practice, the court forwards TPR motions to the Child and Family Services Diligent Search Unit, which is charged with locating and serving the parents with the motion

¹ D.C. Code §16-2362 requires that the Court issue a written order that includes findings of fact if termination is granted. Findings of fact, conclusions of law, and the order are thus prepared at the completion of the hearing. The judge may elect to prepare findings, or may request that counsel do so. Because the attorney will not know beforehand whether he or she will be asked to submit a proposed order, it is always advisable to take specific notes if the Court enters findings from the bench.

and summons. Pursuant to statutory requirements, the Unit will be required to file an affidavit with the court indicating whether service was accomplished and, if not, the efforts that were made.

Where personal service cannot be effectuated, the moving party may seek an order for constructive service. The TPR court will ordinarily allow constructive service by posting of the motion and summons in the Juvenile and Neglect Clerk's office. However, counsel for the parents will want to consider whether additional or alternative methods, such as publication, are warranted in a particular case.

Constructive service is appropriate where it is impossible to serve the parent personally or effectuate substitute service by leaving the motion with a person of suitable age and discretion residing in the parent's usual residence. A mere allegation of difficulty in effecting service should not be sufficient to support constructive service. Counsel for the parents will want to consider whether statutory requirements regarding service have been met and, absent contrary instructions from their clients, may determine that constructive service requests should be opposed. Personal service may be possible in many instances even where the parents are not active in the neglect case. Personal service is usually feasible if there is any information on a parent's whereabouts or activities. For example, the Diligent Search Unit can easily determine if a parent receives a public benefits check and can be present at the time and place that the parent ordinarily picks up the check.

2. CASE LAW REGARDING SERVICE AND NOTICE

The leading case in this jurisdiction on service in TPR proceedings is *In re E.S.N.* 446 A.2d 16 (D.C. 1982). *E.S.N.* discussed the types of efforts that must be exhausted before constructive service will be authorized. The *E.S.N.* court also affirmed the use of posting as an appropriate method of constructive service in TPR cases.

A second case, *In Re P.D. and D.D.*, 664 A.2d 337 (D.C. 1996), addressed a slightly different issue

regarding service in TPR cases: whether service of a new summons is required when the TPR trial date is continued. In *P.D.*, the D.C. Court of Appeals clarified that service of a new summons is not required in these circumstances, as long as the court ensures that the parent had notice of the new hearing.

D. Terminating the Rights of Unknown Fathers

In some TPR cases, the identity of the birth father will not be known. The moving party can seek an order for constructive service on the "unknown father." Once such service is effectuated, the TPR court has authority to fully and finally decide the termination motion with respect to all birth parents, including unknown fathers. *In re T.M.*, 665 A.2d 207 (D.C. 1995).

E. Written Opposition by Parents

There is no statutory requirement that a written opposition to a TPR be filed. If no opposition is filed, the motion is not deemed conceded and the court will set a date for a full fact-finding hearing. If the parent appears at trial, he or she is entitled to present a full defense whether or not a written opposition was filed. Further, the TPR statute does not provide for or contemplate default proceedings; thus, even if the parents do not appear, the moving party will be required to proceed with the case and present clear and convincing evidence that termination is in the child's best interests.

Notwithstanding the absence of a formal requirement for a responsive pleading, it may be wise for counsel to put the parents' opposition on record before the date of the termination hearing by filing a written opposition. The parents can at least respond by admitting or denying the factual allegations of the motion, and asserting that termination is not in the child's best interests. Counsel will also want to consider including specific defenses in the opposition. The written opposition presents the first opportunity for the parents to articulate a theory of the case, thereby providing the court with a two-sided picture of the termination proceeding.

F. Representing Absent Parents

It is not unusual for an attorney to represent a client who cannot be located for the TPR proceedings. The attorney may have had contact with the client at an earlier point or may never have known the client at all. In these cases, some parents' attorneys believe it is inappropriate or even an ethical violation to file a written opposition without instructions from the client -- or at least some indication of what the client's position may be. Other attorneys take the position that, as court-appointed counsel, they are present to protect the clients' rights, and that, even without specific instructions, they may file and mount an opposition. These attorneys believe they are obligated to argue vigorously against a ruling that would terminate their clients' constitutionally protected liberty interest in raising their child.

Both positions may have merit, and counsel for the parent must consider carefully what should be done when the client is not available. In making that determination the attorney will want to review the standards of practice promulgated by the court for neglect proceedings. The attorney should consider that even where a parent fails to appear for trial, the government or GAL is required to prove the case for termination by clear and convincing evidence. Consequently, most counsel agree that the parent's attorney must at least ensure that the parent's procedural rights are safeguarded. In so doing, counsel may want to use all possible procedural avenues in opposing the motion, since a significant substantive opposition cannot be mounted.

III. Pretrial Preparation

A. Discovery

Discovery, while not routine, is happening more frequently in TPR motions. It can be filed by any party and can include interrogatories, requests for admissions, or other standard discovery tools, including depositions.

The parent's attorney may be able to discover

the government's and child's witnesses informally, but should not hesitate to employ formal discovery if informal avenues prove unsuccessful. In addition, formal discovery routes leave open the possibility of sanctions at trial if all potential witnesses are not listed in response to a discovery request.

As an initial step in preparation, the parent's attorney should obtain access to and review the social worker's case notes. In addition, the parent's attorney should obtain a release from his or her client so as to be able to access any records concerning the parent.

B. Pretrial Motions Practice

1. MOTION TO WAIVE DOCTOR-PATIENT PRIVILEGE

The government attorney will frequently move to waive the parent's doctor-patient privilege in order to obtain evidence to prove the allegations in the TPR motion. D.C. Code §16-2359(e). This motion is particularly germane if the TPR is founded on allegations of the parent's mental or physical incapacity.

The parent has several grounds for opposing a motion to waive doctor-patient privilege. First, if the TPR motion contains no allegations regarding the parent's health, either physical or mental, a motion to waive the doctor-patient privilege is improper. Without such allegations, the records or information discovered pursuant to a waiver motion are not relevant to the TPR proceeding and do not justify an intrusion into a privileged area.

Second, the parent's attorney should suggest that the court order a mental or physical examination of the parents under D.C. Code §16-2315(e) in lieu of granting the waiver motion, thereby supplying the necessary information regarding the parent's physical and/or mental health without violating the parent's pre-existing confidential doctor-patient relationship. In some cases there may be examination reports from an earlier stage in the neglect proceeding that provide a relatively current picture of the parent's physical and/or mental health. How-

ever, the court may be unwilling to utilize these options if the government is seeking information on the parent's long-term health or mental condition in order to assist the judge in assessing the parent's current and future parenting abilities. Therefore, a single examination done directly before the termination hearing may not provide an adequate substitute for the data being sought under a waiver motion.

Even if information on the parent's physical and/or mental health is relevant to the TPR proceedings, counsel for the parents may seek to narrow the scope of the waiver motion. A blanket waiver of all doctor-patient privilege is rarely necessary. Medical records dating back several years may be stale and therefore insufficiently probative or relevant to justify waiver of this important privilege. In *In re M.M.M.*, 485 A.2d 180 (D.C. 1984), the court allowed testimony from a psychiatrist who had not treated the mother for three years. However, that decision was based in part on the belief that the diagnosis of the parent's chronic paranoid schizophrenia was valid even three years later because of the chronic nature of the condition.

Notwithstanding the waiver language contained in D.C. Code §16-2359(e), the parent's attorney can argue that the confidentiality of doctor-patient communications must be maintained because of the patient's constitutionally protected right to privacy. The justification for this protection differs from the justification for the protection of the doctor-patient privilege. The statutory privilege exists as a means to ensure proper and prompt treatment of a patient's health problems by allowing a physician or mental health professional to receive all necessary information for effective treatment while maintaining the patient's confidentiality.

Maintaining the patient's confidential information is the purpose of the constitutional right of privacy. However, in *In re N.H.*, 569 A.2d 1179 (D.C. 1990), the D.C. Court of Appeals, in an appeal

from an adjudication of neglect, held that the right of privacy is not absolute and that the government's interest in ensuring that the mother was mentally competent to raise her child was stronger than the mother's privacy rights.

Although the termination statute provides no definition of the term mental health professional, the term is likely to be interpreted broadly. While many state statutes restrict the doctor-patient privilege to psychologists, psychiatrists or psychotherapists, the phrase mental health professional would appear to cover more than those three types and arguably could be extended to persons with counseling degrees as well as social workers. However, states that extend the privilege to persons without M.D.s or Ph.D.s require that the health care professional be licensed in order for the privilege to apply. The lack of licensing laws in the District of Columbia for some of these health care professionals may prevent this requirement from being useful here. The court may instead look to the professional's educational and professional qualifications and hours of training in the relevant field in determining whether a particular person qualifies as a mental health professional under the termination statute.²

2. MOTION TO WAIVE CONFIDENTIALITY FOR THE PURPOSE OF ADOPTION PLACEMENT

In neglect proceedings, the parties' names and identifying information are confidential. However, the GAL may wish to obtain an order permitting the publication of information concerning the child in order to assist in recruiting adoptive parents. In such cases, the attorney must obtain permission from the court to waive the confidentiality of the neglect proceedings. The parent's counsel can object based on both the child's and the parent's rights to privacy. The parent's attorney also can argue that waiver of confidentiality is premature because the termination hearing is likely to occur shortly, thereby mooting the waiver issue. If the termination mo-

² The statute governing the rights of mentally retarded persons includes a definition for a "qualified mental retardation professional." Counsel may be able to incorporate some of those qualifications by analogy.

tion is denied, a search for an adoptive home may no longer be necessary. If the motion is granted, then the parents will no longer have standing to object. However, in *In re T.W.*, 732 A.2d 254 (D.C. 1999) the D.C. Court of Appeals upheld the trial judge's order based on *parens patriae* and permitted the child to be shown on "Wednesday's Child" over the father's objection.

There are two situations in which a termination decision would not be dispositive of the waiver issue. First, even if the termination motion is unsuccessful, the agency or the child's attorney may want to pursue an at-risk adoptive placement and may need a waiver in order to locate a prospective adoptive home. In that event, the parent's attorney should require, at a minimum, that the agency show that it has exhausted its own resources and has no alternative but to publish the child's information with adoption agencies or other appropriate referral agencies.

Second, if the parent appeals from an order terminating the parent-child relationship, thereby staying the effect of the decision, the GAL may want to continue the search for an adoptive home. See D.C. Code §16-2362(b). Because of the often considerable delay before an appellate decision is rendered, the GAL may argue that, if the appeal is unsuccessful, critical time in the search for an adoptive home will have been lost, thereby significantly decreasing the chance of the child's placement with adoptive parents.

If an adoptive home has been identified, and if an attorney can present positive evidence concerning this home at the termination proceeding, the attorney is more likely to prevail on the waiver issue, as such evidence satisfies the first statutory consideration in granting a TPR, that of timely integration into a stable and permanent home. D.C. Code §16-2353(b)(1). Consequently, the child's counsel may want to exhaust all avenues, including filing a motion to waive confidentiality, to locate an adoptive home before the termination hearing.

3. MOTION TO STRIKE

At times, the moving party will include hearsay evidence or other incompetent material in the termination motion that would not be admissible at the hearing. On occasion, the material will be so outrageous as to warrant a motion to strike. In these circumstances, the parent should file a motion to strike that material. Such a motion is predicated on D.C. Code §16-2359(d), which requires that "evidence which is relevant, material, and competent to the issues before the judge shall be admitted."

4. MOTION TO INSPECT RECORDS

The parent's attorney may have difficulty gaining access to the social worker's records. Often, these records will supply much of the basis for the testimony or evidence that will be presented at the termination hearing, and thus it is essential that the parent's attorney review them. Some social workers, perhaps with the guidance of the AAG, may allow the parent's attorney to review these records; others may permit the attorney to review only the parts of the record that relate exclusively to the parent but deny access to any portions that refer to the child.

At times, AAGs allow access to such records only pursuant to a court order. In such cases, the parent's attorney should argue that the social workers' case notes do not fall into the category of records protected by D.C. Code §16-2332. In support of that argument, the parent's attorney should state that access to those records is necessary to prepare the parent's case and that denial of access would impair the parent's ability to defend against the TPR motion. In addition, the parent's attorney should argue that the records are not covered by any privilege and therefore that the parent has a right to access to the records. Moreover, the parent's attorney should argue that the parent should have access to the child's records, regardless of confidentiality.

5. WITNESSES

The parent's attorney should prepare in two primary areas: (1) cross-examination of the government's and child's witnesses, and (2)

presentation of witnesses and evidence on the parent's behalf.

The witnesses for the government are fairly predictable. The primary witnesses will usually be the social workers involved in the case from initial intake to the present. The social workers may have some positive things to say about the parent, so it is important to speak with the social workers in advance of the trial regarding these positive views. It will be equally valuable to explore the basis for any of the social workers' negative testimony about the parent, as such views may not be based on personal observation or other similar grounds and thus may not constitute admissible evidence.

Of all the possible witnesses, the parent's attorney will probably find it easiest to speak with the social workers. The attorney previously will have discussed the case with the social workers in the context of earlier hearings. The social workers' willingness to discuss the case with the parent's attorney prior to trial may depend on several factors. For example, it is possible that the government attorney may have cautioned the social workers against talking to the parent's attorney. In addition, the relationship between the parent's attorney and the social workers may be adversarial based on previous interactions.

After assessing the elements of the case supporting termination, the parent's attorney should plan how best to rebut, impeach, or contradict such evidence. The parent's attorney may try to impeach witnesses on cross-examination by showing bias, or the parent may present affirmative evidence which contradicts that presented by the other attorneys.

In terms of affirmative evidence to be presented in support of the parent's position, it is unusual to find a social worker willing to testify on *behalf* of the parent; however, it is a possibility to be explored. The attorney should talk with the parent about social workers with whom the parent has had contact. Next, the attorney should contact those social workers individually to see if they are willing to testify, and to ascer-

tain what their testimony would be. Keep in mind that a social worker would likely be uncomfortable taking a position that opposes the position taken by the agency. However, it can be very effective testimony, as the court often gives great credence to social workers' testimony.

The parent often will have had contact with a mental health professional at some point during the proceedings, especially if some type of counseling or other service was ordered at stipulation or disposition. The attorney should talk to everyone with whom the parent has been involved. Generally a waiver signed by the parent will suffice to obtain these interviews. Some of these professionals may be able to testify on behalf of the parent. Others may be reluctant to testify, even if their testimony is favorable to the parent. If there is an ongoing professional relationship with the parent, the professional may view testifying, with its inevitable breach of confidentiality, as harmful to the therapeutic process. The parent's attorney should attempt to persuade these professionals to testify voluntarily if at all possible. A professional may be compelled by subpoena to testify, but voluntary testimony is generally preferable.

If the parent has been involved in a substance abuse or alcohol abuse program, it may be possible to get witnesses to testify to the parent's participation in such a program. Throughout the neglect proceeding, counsel should instruct the parent to verify participation in any program or activity which will reflect favorably on attempts to ameliorate any parenting problems.

Finally, friends or relatives may be willing to testify on the parent's behalf. Testimony elicited from these witnesses can take a variety of forms. A witness may have observed visitation and can testify about the relationship between the parent and the child. These persons may have knowledge regarding the parent's efforts to comply with any outstanding court orders or agency requirements. These persons may have assisted the parent in looking for appropriate housing, or may have accompanied the parent to counseling

or parenting classes. Be sure, however, to interview these witnesses carefully because they may have a wealth of negative information as well.

Not infrequently, the parent may be caring for other children at home. The parent may be able to secure school or clinic records demonstrating that the other children are cared for adequately. In addition, a friend or neighbor may be able to testify to the quality of care given to the children presently at home. The parent also may have friends who have solicited the parent's assistance in watching or caring for their children, thus demonstrating trust in the parent's abilities.

The parent may have trouble supplying the attorney with names of potential witnesses. Frequently, a presumably logical witness may turn out to be the friend or relative who initially reported the parent. Parents accused of neglect are often without support systems and may not have friends or relatives who are willing to testify. The attorney must be as persistent as possible in encouraging the parent to think of names of potential witnesses.

6. TESTIMONY OF THE PARENT

Convincing testimony by parents can win a TPR for the parent. Bad testimony can, of course, result in the loss of the TPR. The failure of available parents to testify can also lose the TPR. Accordingly, if the parent will be present at the TPR, the attorney should strongly consider calling him or her as witnesses. Having the parent testify may present obvious and significant drawbacks, but the alternative may be equally flawed. Parents who are present but do not testify on their own behalf will likely be damned by their silence.

To say that it may be good strategy for a parent to testify is not to say, however, that the parent should be given free rein in fashioning testimony. The attorney must help the parent address the appropriate issues and answer the questions as asked. The attorney also must help the parent to avoid appearing unreasonably hostile or angry. Perhaps the most difficult task that a parent's attorney faces at any stage in the

neglect proceeding is preparing the parent to testify. The parent may perceive the court-appointed attorney to be one of the many people on "the other side." This is especially true when the attorney tries to assist the parent in preparing testimony. Any efforts by the attorney to dissuade the parent from testifying as they believe appropriate may be viewed as an attempt to prevent the parent from testifying to the truth as they see it. The difficulty of this task underscores its importance. The judge will pay careful attention to the parent's testimony, as well as to their demeanor at counsel table. Notwithstanding the statutory focus on the child's welfare, it is the parent and his or her liabilities that are, in fact, on trial. Consequently, the value of reviewing testimony with the parent cannot be underestimated.

IV. Legal Standards and Criteria for Granting a Termination Motion

A. Statutory Factors and Standards

D.C. Code §16-2353 provides that a motion to terminate parental rights may not be granted unless it is established by clear and convincing evidence at a fact-finding hearing that termination is in the child's best interests. D.C. Code §16-2353 sets forth specific factors the court must take into consideration in determining whether termination of parental rights is in the child's best interests. These are:

- (1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;
- (2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child; the quality of the interaction and interrelationship of the child and his or her parent, siblings, relative and/or caretaker, including the foster parent;

(3) whether the child was left by his or her parent, guardian, or custodian in a hospital located in the District of Columbia for at least 10 calendar days following the birth of the child, despite a medical determination that the child was ready for discharge from the hospital, and the parent, guardian, or custodian of the child has not taken any action or made any effort to maintain a parental, guardianship, or custodial relationship or contact with the child;

(4) To the extent feasible, the child's opinion of his or her own best interests in the matter; and

(5) Evidence that drug-related activity continues to exist in a child's home environment after intervention and services have been provided.... Evidence of continued drug activity shall be given great weight.

These factors are not exclusive and the parties may introduce additional evidence relevant to the particular case. No one statutory factor is necessarily controlling. Rather, the decision to grant or deny a termination motion is based on the record as a whole and, ultimately, rests on a weighing by the trial judge of all of the relevant evidence. Some of the statutory factors are applicable in every TPR case, while others (such as abandonment at the hospital or continuing drug-related activity) may not be relevant to a particular case.

D.C. Code §16-2353(b)(4) provides that “to the extent feasible, the child's opinion as to his or best interests in the [TPR] matter” shall be considered. This provision leaves open a number of questions, including whether the court must hear from the child directly in a TPR proceeding; the extent to which evidence of the child's opinion can be introduced through other witnesses; the circumstances under which the court may grant a TPR without information about the child's opinion at all; and whether parents have a right to call the child as a witness over the objection of the government or the GAL. These questions impact on decisions the moving party must make about how to best present a TPR case. The questions are equally important to counsel for the parents as

they make decisions about litigation strategy, building the parent's defense, and preserving a record for appeal. The case law involving the role of the child as a witness can be complicated, and attorneys litigating a TPR motion – whether the GAL or counsel for the parents – should read the cases in full and have a strong working knowledge of them.

1. IS THE MOVING PARTY REQUIRED TO CALL THE CHILD AS A WITNESS?

In many if not most TPR cases, the moving party does not call the child at all. The GAL or government may believe the child is too young or too emotionally vulnerable to be involved in the litigation. The moving party may also decide the child's opinion will ultimately be irrelevant or of little weight in the proceedings. For example, the child may express a desire to return home, but the parent may be wholly unfit or otherwise unable to accommodate the child's wishes.

A number of appellate cases have addressed whether a TPR may be granted in the absence of direct testimony by the child as to his or her opinion. Decisions addressing the issue include *In re T.W.*, 623 A.2d 116 (1993), *In re I.B.*, 631 A.2d 1225 (1993), *In re A.R.*, 679 A.2d 470 (1996); *In re C.V.*, 719 A.2d 1246 (1998) and *In re J.L.*, 884 A.2d 470 (2005).³

As a general matter, these decisions hold that trial courts are not necessarily required to hear from the child directly before granting a motion terminating parental rights. For example, the trial court may properly determine that the child is too young to testify or to have a meaningful opinion of his or her interests at all. *In re A.R.*, *supra*.

The Court of Appeals has also affirmed TPR orders even where older children have not testified, as long as sufficient evidence of the child's opinion was admitted through other means (such as the testimony of social workers, foster parents, or therapists). *In re T.W.*, *supra*; *In re I.B.*,

³ *J.L.* was an adoption case decided using the “best interest” criteria of the TPR statute.

supra; *In re C.V.*, *supra*; *In re J.L.*, *supra*.⁴ The Court of Appeals has definitively rejected arguments that the TPR statute imposes an affirmative “duty” on the trial court to hear from the child directly, whether or not the moving party chooses to call the child as a witness.⁵

Despite these ruling that the TPR statute does not require the child to testify, the Court of Appeals has indicated in these cases a “preference” that trial judges consider the advantages of hearing from the child directly. The Court has noted that hearing from the child may, in many circumstances, be the best way to obtain evidence of the child’s views. The appellate court has noted various options short of excluding the child’s full testimony to address concerns about emotional trauma to the child, such as holding *in camera* interviews, restricting the type of questions that may be asked, or using procedures such as closed circuit television. *See, In re I.B.*, *supra*; *In re C.V.*, *supra*. In these same cases, the Court has also recognized, however, that out-of-court statements (such as those made to a trusted therapist) may be more reliable than testimony given by a child in the formal court setting.

2. PRESENTING EVIDENCE OF THE CHILD’S OPINION THROUGH OTHER WITNESSES

The moving party typically may seek to introduce evidence of the child’s opinion through social workers, therapists, foster parents, mental health experts, and others familiar with the child. Such testimony often includes, but is not necessarily limited to, information about statements the child has made (“I want to stay with my foster parents; I never want to see my mother again”); observations the witness has made about the child’s demeanor and conduct (“happy and satisfied with foster mother; angry and disruptive after visits with the parents”); and fact and opinion evidence presented by

treating professionals or mental health experts who have evaluated the child. Counsel for the parent may also seek to introduce evidence of the child’s views through third party witnesses whose testimony may be favorable to the parent’s position.

a. Out-of-Court Statements.

The trial courts are ordinarily lenient in TPR cases in allowing third parties to testify about statements the child has made related to the child’s opinion. If evidentiary objections are raised, the trial court may find the evidence admissible under any number of rationales: for example, that the testimony goes to the child’s state of mind, or that it falls within another exception to the hearsay rule such as excited utterances or statements made for medical diagnosis or treatment. The TPR cases that have gone to the Court of Appeals have not involved direct challenges to evidence on hearsay grounds. It should be noted that hearsay admitted without objection may be given full probative value. *In re C.V.*, *supra*.

Counsel should not necessarily assume that testimony of third parties regarding the child’s out-of-court statements is properly admissible. The moving party will want to carefully consider how the testimony will be used and how evidentiary objections will be met. Counsel for the parents will want to carefully monitor the evidence the moving party seeks to have admitted and, where in the parent’s interests, should make appropriate objections to have the evidence excluded and to preserve evidentiary issues for appeal.

b. Inferences Drawn from the Child’s Behavior.

The trial courts in TPR cases are also generally lenient about allowing third parties to testify about behavior – rather than direct

⁴ These cases did not address whether third party testimony had been properly admitted, as the issue either had not been raised below or was not pursued on appeal.

⁵ In the cases cited above, counsel for the parent had not sought to call the child as part of the defense’s case but had raised the child’s “absence” for the first time on appeal. None of these cases address whether the Court of Appeals would have affirmed the TPR if the parent had sought to call the child but had been precluded from doing so. This issue is discussed further below.

statements – that may be indicative of the child's views. Especially for younger children, the trial courts may draw inferences based on evidence regarding the child's adjustment in the foster home, "negative" behavior around the parents, and similar matters. *See, e.g. In re T.W.P.*, 756 A.2d 401 (D.C. 2000). Again, counsel for the parent will want to carefully monitor the moving party's use of such evidence and, when in the parent's interests, raise appropriate objections and arguments regarding admission of the evidence or the inferences drawn from it.

3. MAY A TPR BE GRANTED WITHOUT CONSIDERING THE CHILD'S VIEWS AT ALL?

The statutory requirement that the TPR judge consider the child's opinion, if feasible, raises an obvious issue: under what circumstances is it "not feasible" for the court to consider the child's opinion, thus allowing a TPR to be granted or denied without any information whatsoever about the child's opinion.

It is generally acknowledged that infants and other young children cannot have meaningful views of their own best interests in a TPR matter. Thus it is recognized that, where the respondent is very young, the trial court may necessarily have to make its decision without any evidence of the child's view. *In the matter of K.J.L.*, 434 A.2d 1004 (1991) (TPR for two-year-old child).

There is no "magic age" at which a child's opinion is deemed ascertainable, and the issue remains, in large part, within the trial judge's discretion. For example, in *In re A.R.*, *supra*, the Court of Appeals affirmed a TPR order entered without the trial court hearing evidence regarding the views of a six-year-old child. While the court assumed the child was old enough to have an opinion, the opinion would be merely "theroretical" because the father had "dropped out" of the child's life. In addition, in *In re Jam. J.*, 825 A.2d 902 (D.C. 2003) the Court of Appeals suggested that in a neglect trial a child as young as five might properly give testimony or otherwise be heard by the trial court. This case is dis-

cussed in more detail below. In a criminal case, *Galdino v. U.S.*, 630 A.2d 202 (D.C. 1993), the court found a three-year-old child competent to testify about events that had happened to her.

It should also be noted that there is no statutory "age of consent" in the TPR statute; this is in contrast to the adoption and guardianship statutes, which require the consent of children 14 or older.

Appellate decisions aside, the standard practice and wisdom in TPR cases is that the moving party should try to present as much credible information as possible to support the TPR motion. Likewise, counsel for the parent will want to carefully consider whether the child should be called as a witness where his or her views support the parent's defense and/or whether there is other evidence of the child's opinion tending to support denial of the TPR.

4. THE PARENT'S RIGHT TO CALL THE CHILD AS A WITNESS – THE *Jam. J.* TEST – AND THE GAL'S ROLE

In some cases, counsel for the parent will want to call the child as a witness. This strategy is employed most often where the child has stated a desire to maintain a relationship with the parent, has stated that he or she does not want to be adopted, or has other views supportive of the parent's defense against termination of rights. The parents may also want to call the child for cross-examination purposes, after evidence about the child's views has been admitted through other witnesses.

The Court of Appeals has not directly addressed whether parents have a right to call the child as a witness in a TPR proceeding over objection of the government or GAL. The court has addressed the issue in the related context of neglect proceedings, however.

In *In re Jam. J.*, 825 A.2d 902 (D.C. 2003), the Court of Appeals reversed a neglect adjudication where the trial judge had refused to allow the parents to call the children as witnesses. The case involved allegations that the two re-

spondents, ages five and seven, had been physically abused by the parents. The government did not call the children as witnesses, but instead built its case almost exclusively on out-of-court statements the children had made to third-party witnesses, including police investigators, social workers, and therapists. After the third-party testimony was allowed in over the parents' objection, counsel sought (among other reasons) to call the children for "cross-examination" purposes. The GAL objected, stating the children did not want to testify and would be traumatized if forced to do so. Relying on the GAL's representations, the trial court ruled that the children could not be called.

The Court of Appeals reversed the neglect adjudication, holding that the trial court should have independently assessed whether the harm to the child(ren) of testifying outweighed the need of the parent for the testimony. The Court of Appeals emphasized that other options, short of excluding all testimony, should also have been explored in determining whether to exclude the child's testimony; these might include the admissibility of out-of-court statements or stipulations; having the child testify outside the parent's presence; limiting the nature of the questioning; or even an informal *in camera* interview.

In remanding the *Jam. J.* case, the Court of Appeals described its "balancing test" as consisting of three parts: (1) an inquiry regarding whether testifying will create a risk of serious harm to the child; (2) an inquiry as to whether the risk of harm could be alleviated by measures short of excluding all testimony, and (3) an assessment of the probative value of the child's testimony and of the parent's need for the testimony in presenting a defense. The *Jam. J.* court also took the opportunity to make practical observations: first, that calling the child as a witness could well "backfire" on the parent; and second, that many parents would eschew calling the child as a witness – regardless of the parent's need for the testimony – out of concern for the child's well-being.

Significantly, in explaining its ruling in *Jam. J.*, the Court of Appeals gave considerable attention to its earlier TPR rulings regarding the role of the child's testimony. The court ultimately concluded that its ruling in *Jam. J.* was consistent with these earlier decisions. *Jam. J.* obviously has important implications for TPR cases; the *Jam. J.* decision is lengthy and complex and should be read in its entirety for a full understanding of the subject.

When parent's counsel indicates that the child will be called as a witness, the government and/or GAL will need to analyze carefully whether protective measures should be sought prior to trial. These measures may range from raising the issue in a pre-trial statement to a full-blown motion *in limine* or for protective order. Given the nature of the *Jam. J.* test, decisions about whether and how the child will testify realistically may not be made until after the moving party has presented his or her case.

V. Parental Defenses

Many TPR motions are ultimately granted and are upheld when an appeal is pursued. This occurs despite the high evidentiary standard (clear and convincing evidence) required to prevail, and notwithstanding that the Court of Appeals consistently describes TPRs as "drastic remedies" of last resort.

Some counsel attribute the high "success" rate of TPR cases to the overall framework of the neglect statutes. By the time a TPR is brought, in most instances the trial court has already rejected any motions or requests by the parent to resume or assume custody of the child, has already rejected placement with relatives or others identified by the parent, has changed the child's permanency goal from reunification to adoption,⁶ and in general is operating under a statute expressing a clear intent for permanency within a short time period for every child.

⁶ With the exception of orders regarding visitation, interim orders such as setting of permanency goals or denial of a parent's placement request are not appealable and will not have been "tested" during the course of the neglect proceeding. See, e.g., *In re K.M.T.*, 795 A.2d 688 (D.C. 2002).

Despite the challenges that may be faced in defending against a TPR, numerous issues can be explored and developed in mounting a defense on behalf of a parent. While the most common defenses are discussed below, counsel will obviously need to carefully analyze each individual case and may find that he or she is presented with opportunities to develop new defense theories and strategies.

A. Defenses Based on Fitness: Terminating the Rights of a Fit Parent; Terminating the Rights of a Parent Who is Raising Other Children; Terminating the Rights of a Parent Who Was Not Found to Have Neglected the Child

1. FITNESS AS A DEFENSE TO A TPR

– IN GENERAL

It is well established in this jurisdiction that trial courts may grant motions to terminate the parental rights of even a fit parent, where the evidence as a whole establishes that termination is in the child's best interests. *In re K.A.*, 484 A.2d 992 (D.C. 1984). The Court of Appeals has addressed similar issues in the context of contested adoption proceedings, finding that neither the statutes nor constitutional protections preclude the court from granting an adoption over the objection of a fit parent. *In re Baby Boy C.*, 581 A.2d 1141 (D.C. 1990).

As in any TPR case, however, parental fitness is a relevant factor to be considered and weighed by the court in evaluating where the child's best interests lie. The defense is most likely to succeed where the parent has overcome or is making steady progress to overcome the conditions that brought the case into the neglect system and where the child is not already placed in a pre-adoptive or other permanent home. See, e.g., *In re A.S.C.*, 671 A.2d 942 (1996). The issue of parental fitness may be much less compelling where the child has lived in a potential adoptive or other permanent placement for a substantial period of time before the parent was able to "change course."

2. SIBLINGS AT HOME

A defense based on parental fitness may seem

especially compelling where the parent is successfully raising other children. In these cases, counsel for the parent will ordinarily introduce as much positive information as possible regarding the parent's successful rearing of the other children in the home. School teachers, day care personnel, doctors or other professionals who are involved with the child, neighbors, and relatives are all sources to explore as potential witnesses.

As with virtually every other TPR defense, proving that the parent is successfully raising other children will not, standing alone, necessarily defeat the TPR. The trial court may find that on balance the parent's "track record" of adequately parenting siblings is not sufficient to warrant denial of the TPR. The court may find that the parent is not in a position to take on the "added stress" and responsibility of another child; or that a parent successfully raising a "normal" or "average" child may nevertheless be unable to adequately care for a "special needs" or medically fragile youngster. The Court of Appeals has endorsed the principle that a parent who is successfully raising one or more children may nevertheless have parental rights to another child terminated, where the record as a whole establishes that termination is in the child's best interests. For discussion of this issue, see, e.g., *In re P.S.*, 797 A.2d 1219 (D.C. 2001).

3. PARENTS WHO WERE NOT THE SUBJECT OF NEGLECT ADJUDICATIONS

Many parents who are the subject of TPR proceedings may never have been "charged" with neglect or abuse in the initial neglect case. The neglect adjudication may have been based solely on the conduct or omissions of the other parent and may not have mentioned the "non-offending" parent at all. In these situations, counsel for parents have argued that termination of parental rights is not authorized under the TPR statute, violates due process rights, and requires dismissal of the TPR motion as to the "non-offending" parent.

The argument that parental rights cannot be

terminated absent an underlying neglect adjudication involving the parent has been raised both by parents who can establish their “fitness” and by those who cannot. In either case the Court of Appeals has ruled that trial courts are not precluded from terminating the rights of a parent who was not “involved” in the underlying neglect action, as long as the record as a whole establishes by clear and convincing evidence that termination is in the child’s best interests. See, e.g., *In re J.M.C.*, 741 A.2d 418 (D.C. 1999). This does not mean, of course, that the trial court is free to ignore the parent’s history, conduct, or fitness. Rather, these considerations become part of the overall “best interest” determination.

4. ESTABLISHING FITNESS AT TRIAL

The moving party will often focus in large part on parental unfitness, incapacity, or unwillingness to provide a safe and suitable home for the child now or anytime in the foreseeable future. In evaluating how to defend against the TPR, therefore, counsel for the parent will need to carefully assess whether there is credible evidence to counter the moving party’s portrayal of the parent as unfit.

A defense that includes claims of parental fitness is unlikely to prevail based solely on cross-examination and/or impeachment of the moving party’s witnesses. Rather, counsel for the parent will ordinarily need to present a credible case that affirmatively shows the parent is fit and able to raise the respondent. At the least, the parent will need to show that the conditions that brought the case into the neglect system have been adequately remedied and that the parent is now fit and able to resume or assume care of the child.

A successful defense is unlikely to rest on the testimony of the parent alone, but will include as much independent evidence as possible from witnesses who can speak to all aspects of the parent’s life and strengths. This may include, but not necessarily be limited to, the parent’s current living conditions, successful rearing of other children in the home, access to and use of

supportive services such as aftercare drug treatment or therapy, successful employment and educational endeavors, successful completion of drug or mental health treatment programs, and involvement in religious, volunteer, or other community activities.

B. The Parent Visits and Has a Relationship with the Child

In defending against a TPR, counsel for the parent will frequently focus on the fact that visitation has been on-going and may argue that this is sufficient to foreclose termination of rights. Not surprisingly, the Court of Appeals has rejected this argument on the theory that no one statutory factor is controlling in the TPR decision. In some cases, the parent’s visitation will be viewed as “too little, too late” or insufficient “to result in a relationship of such quality as to warrant a finding that termination of parental rights [is] not in the child’s best interests.” *In re D.R.M.*, 570 A.2d 796 (D.C. 1990) (terminating parental rights, in context of contested adoption proceeding, where parent did not start visits until child 19 months old). Additionally, the Court of Appeals has established that parental rights may be terminated even in the face of frequent visitation – and even where the parent-child relationship is a positive one – as long as the record as whole supports that termination is in the child’s best interests. *In re H.B.*, 855 A.2d 1091 (D.C. 2004).

While the fact of visitation may not be sufficient, standing alone, to preclude termination of parental rights, evidence regarding visitation and a positive child-parent bond is a significant part of the TPR picture that may in proper circumstances tip the balance in the parent’s favor. This may be especially true in cases involving older children for whom no adoptive placement has been identified.

Where parent’s counsel intends to argue that there is a strong, on-going relationship between the child and parent that should weigh heavily in the court’s calculations, counsel will need to bring out as much evidence as possible to support the claim. Counsel for the parents will typically need

to aggressively cross-examine social workers and others who testify about visits, especially if the frequency or quality of visitation is downplayed during the direct examination.⁷ Likewise, the parent should be fully prepared to testify about the frequency of visitation and to credibly counter any inaccurate information presented by other witnesses. The parent should be fully prepared as well to provide a vivid picture of the parent-child relationship to the court and to provide as much detail as possible about it. Counsel may also want to present evidence or argument regarding the artificial setting of agency visits, together with steps taken by the parents to overcome the setting; the bureaucratic difficulties that may explain why visits have not been more frequent; restrictions that have hampered the visits; and any non-cooperation by other parties upon whom the visits depend. Counsel for the parent must be careful, however, not to blame others for parental shortcomings, as this strategy is not ordinarily a useful one.

C. Other Family Members Are Available to Assume Care and Custody of the Child

Parent's counsel will want to consider whether there are viable permanent placement options not requiring termination of parental rights. Typically, this will involve presenting evidence of a family member or friend willing and able to assume permanent care of the child. In these circumstances, counsel for the parent can argue that the goal of achieving a permanent home for the child can be fully and promptly met without taking what the Court of Appeals has consistently referred to as the "drastic step" of terminating parental rights. Counsel may also be able to take advantage of the

ruling in *In re T.M.J.*, 878 A.2d 1200 (D.C. 2005), a contested adoption case in which the Court of Appeals found that certain parents are entitled on due process grounds to have their choice of a suitable caretaker given "great weight."⁸

Parents have pursued the "available caretaker" defense both where the proposed family member or other caretaker has been rejected as a placement during the course of the neglect proceedings and where the family member "comes forward" for the first time after the TPR is brought.⁹ Counsel who considers presenting a defense based on the availability of a family member – and the moving party who must respond to such a defense – will need to carefully review the case law that has developed on the subject, including *In re J.A.*, 814 A.2d 923 (D.C. 2002); *In re C.T.*, 724 A.2d 590; (D.C.1999), *In re An. C.*, 722 A.2d 36; (D.C.1998), and *In re F.N.B.*, 706 A.2d 28 (D.C. 1998).

As in most TPR litigation, the success or failure of this defense (standing alone or in combination with other issues) will depend on the particular facts and circumstances of the individual case. Thus, the trial court may reject the availability of an alternative, fit, and suitable caretaker as a defense to the TPR, where the record as a whole supports that termination is in the child's best interests – ordinarily, because the child has already been integrated into a foster or other home where those parent(s) plan to or are pursuing adoption. *In re An. C.*, *supra*. On the other hand, strong evidence that there is a suitable family member committed to promptly assuming long-term care of a child – especially a child who has not been in a long-term, stable placement – may

⁷ It can be difficult to challenge a social worker's testimony regarding the number of visits, whether parents failed to schedule or show up for visits, and similar matters; under current agency policy and practice, this type of information is entered into the agency's computerized FACES data system and is readily available to the social worker to refresh recollection or for introduction as a business record.

⁸ In *T.J.*, the Court carved out a small class of parents entitled to have their custodial choice given great weight; i.e., parents who had not been adjudicated to have affirmatively neglected the child but who were unable to care for the child through no fault on the parent's part. For example, the mother in *T.J.* suffered from an intractable mental illness and neglect adjudication had been entered based solely on her incapacity.

⁹ Since the neglect court's rulings on the parent's placement request are not appealable at the time made, they do not preclude the parent from raising the issue again at the TPR. However, it can be difficult to mount a defense based on the availability of an alternative caretaker who comes forward on the eve of the TPR proceedings, especially where the child is younger and has already been integrated into a family that wishes to adopt. This argues strongly for making thorough efforts early in the case to identify all relatives, as one may become willing before the TPR stage to provide a permanent home.

be an influencing factor in the TPR decision. *In re F.N.B.*, 706 A.2d 28 (D.C. 1998) (although record as a whole supported TPR, case reversed and remanded with instructions to trial court to pursue more thoroughly whether child's maternal aunt was an appropriate permanent placement option).

D. The Agency Has Failed to Offer or Provide Reunification Services

In defending against termination of rights, parents often argue that the motion should not be granted because the agency did not meet its obligations to provide services and assistance to reunify the family. These arguments may be based on statutory grounds, due process claims, or both. Generally, such claims have not been successful. For example, the Court of Appeals has consistently ruled that omissions or failures of the agency do not preclude the trial court from granting a TPR that is otherwise in the child's best interests, although agency conduct is one of the relevant factors the trial court must take into account. *In re A.C.*, 597 A.2d 920,922 (D.C. 1991); *In re T.M.*, 665 A.2d 207 (D.C. 1995), *In re D.R.*, 673 A.2d 1259 (D.C. 1996). In short, if the agency is providing inadequate or ineffective services, termination proceedings may be too late to remedy that. The parent's attorney, however, may want to argue that since the agency did not fulfill the statutorily mandated attempt at reunification, termination is premature. In focusing attention on the agency's failure to act responsibly, however, the attorney must avoid the appearance of holding others culpable for the parent's shortcomings. A strategy of placing blame on everyone except the parent is not likely to be effective.

In pursuing lack of services as a defense, counsel for the parents will want to consider a wide range of evidence and argument. For example, counsel may want to show that goals set by the agency or court were unnecessary, impossible to attain, or otherwise not related to the parent's capacity to care for the child. Parents' attorneys should also be mindful not to allow financial inability and other economic issues to serve as a basis for termination. Poverty is statutorily ex-

cluded as a basis of neglect; hence, it should not be used as a ground for termination of rights. Likewise, although the parents may not have completely fulfilled each of the requirements contained in a stipulation, disposition order, or case plan, they may have accomplished enough to argue against termination of parental rights.

E. The Agency Has Not Found an Adoptive Home for the Child and/or Adoption is Unlikely

The Court of Appeals has ruled that identification of or placement in an adoptive home is not a prerequisite to the filing or granting of a motion to terminate parental rights. *In re A.W.*, 569 A.2d 168 (D.C. 1990). Further, the Court has found that the TPR statute does not necessarily require the moving party to present affirmative "...evidence supporting a presumption that termination would enhance the child's adoptability." *Id.* These rulings are not surprising, since the underlying purpose of the TPR statute is, *inter alia*, to "legally free" children so that potential adoptive parents will not be "scared off" by the prospect of accepting a child whose birth parents' rights remain intact. These rulings are also consistent with current statutory requirements calling for the mandatory filing of TPRs where reunification has not taken place within a "reasonable" time or where the parent's conduct is considered so egregious that reunification efforts need not be made.

Despite the general presumption favoring termination of parental rights where reunification has not succeeded or cannot succeed, counsel may be successful in defending against a TPR as premature or even futile under the particular circumstances of the individual case. Several appellate decisions reinforce this point. For example, in *In re A.B.E.*, 564 A.2d 751 (D.C. 1989) the Court of Appeals reversed a termination order for a 12-year-old emotionally disturbed boy whose prospects for adoption were slim and who retained some emotional connection to his birth father. The Court cautioned against severing family ties when there was little likelihood they would be replaced through adoption. *See, also, In re A.S.C.*, 671 A.2d 942 (D.C. 1996) (reversing TPR order for child hos-

pitalized since birth with multiple handicaps and with no adoptive prospects identified, where birth mother testified she had overcome her drug problems and was now committed to learning how to care for the child).¹⁰

In pursuing a defense based on lack of adoptability, counsel will ordinarily need to aggressively

cross-examine witnesses presented by the moving party who testify about the child's "adoptability" or about other factors related to the likelihood of a successful adoption. Counsel will also want to consider calling independent witnesses who can address the issue as well, such as independent experts in adoption recruitment and placement. ■

¹⁰ After the TPR was reversed, the child in fact was placed in an adoptive home and the parents never followed through on having the child placed with them. The child was ultimately adopted over the parent's objection. The case is reported in *In re P.S.*, 797 A.2d 1219 (D.C. 2001).

ADOPTION

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ADOPTION

A major consideration affecting all children and families involved in the foster care system is permanency planning – a desire to insure that all children eventually obtain a stable, nurturing permanent home. At the outset of a child's removal from his or her home, the court and social service agency must generally (but not always) make reasonable efforts at family reunification. Because of federal regulations that became effective in the year 2000, the court and social service agencies must now move quickly to consider other permanency alternatives should parental reunification not occur within the statutory timeframe. This requirement for permanent alternatives to reunification has resulted in a swelling of the number of foster care adoptions filed over the past several years. Therefore, all practitioners must have some familiarity with the law and practice of adoption.

I. Initiating a Case

Adoptions were unknown at common law, and the power of the court to decree an adoption is governed exclusively by statute. The District of Columbia adoption statute is codified at D.C. Code § 16-301, *et seq.*¹ Adoption proceedings are commenced by the filing of an adoption petition, a Child and Family Services Agency Vital Records Form for Adoption Proceedings, and an Adoption Information Sheet in the Family Court Central Intake Center on the JM level of the courthouse. By statute, there is no filing fee for adoption petitions involving a child with an active child abuse or neglect case. D.C. Code §15-719. Although the contents of the adoption petition are set forth in D.C. Code §16-305, it has been the practice of late for the presiding adoption judge to circulate through the Counsel for Child Abuse and Neglect (CCAN) office a preferred format. The Vital Records form requires both current information and information as of the date of birth of the prospective adoptee, and will be used to amend

the child's birth certificate should the adoption be granted. The Adoption Information Sheet provides information as to the ongoing child neglect proceedings associated with the prospective adoptee. The filing of these documents will result in the issuance of a series of orders and notices from the chambers of the presiding adoption judge. This will be discussed later in this chapter. For those who do not regularly represent petitioners in adoption proceedings, it may be helpful to check with the chambers of the presiding adoption judge to find out the present filing requirements.

For many years there was only one court rule addressing adoption. In 1997, a series of comprehensive rules were implemented. The rules address all aspects of the proceedings, including notice to the birth parents, requirements and contents of social service agency reports, motions and pre-trial procedures, discovery, conduct of trial, confidentiality issues, post-trial relief, and representation of counsel. Neither Civil Rules nor any other Superior Court Rules apply to adoption proceedings unless expressly provided for by rule.

¹ Adoption statutes vary substantially from state to state. If an adoption filed in a jurisdiction other than the District is being contemplated, that state's adoption statute must be carefully reviewed.

Although there are other laws that can affect adoptions (e.g. Paternity, D.C. Code §16-907, *et seq.*²; long-arm statute, D.C. Code §13-301, *et seq.*, voluntary relinquishment of parental rights, D.C. Code §32-1001 and D.C. Code §16-4601, *et seq.*, Uniform Child Custody Jurisdiction and Enforcement Act), the most significant is the Interstate Compact on the Placement of Children (ICPC), D.C. Code § 4-1421, *et seq.* The ICPC, among other things, prohibits the placement of a District of Columbia child in another jurisdiction without the approval of that jurisdiction; prohibits the District of Columbia from licensing a foster home outside the city; and requires the jurisdiction that receives the child to likewise approve of the adoption.

Note that a child can be subject to an adoption even though the child is not “free for adoption;” there need not be a termination of parental rights or relinquishment. An adoption that is filed when parental rights have not been terminated or relinquished is commonly known as a direct adoption, or a contested adoption. Once an adoption is granted, all rights and duties between the birth parent and adopted child are terminated as a matter of law. D.C. Code §16-312. Unlike an involuntarily termination of parental rights, which does not become effective until the time for noting an appeal has expired or until the date of the final disposition of any appeal so noted (see D.C. Code §16-2362 (b)), an adoption decree remains in effect even if an appeal is filed, unless a stay is granted pursuant to SCR-Adoption 62.

II. Jurisdiction

D.C. Code §16-301(b) sets forth the jurisdictional requirements for filing a petition for adoption in the District of Columbia. Jurisdiction attaches when any of the following circumstances exists:

(1) petitioner is a legal resident of the District;

(2) petitioner has actually resided in the District for at least one year next preceding the filing of the petition; or

(3) the child to be adopted is in the legal care, custody, or control of the Mayor or a child-placing agency licensed under the laws of the District.

Given the large number of wards residing in foster homes outside the District of Columbia, the third of these jurisdictional categories is of particular relevance in neglect cases, conferring jurisdiction when the adoptee is committed to Child and Family Services Agency (CFSA) in a neglect case, even if the adoptive parents (the petitioners) do not reside in the District. The court has even found jurisdiction pursuant to §16-301 (b)(3) for a non-committed child residing outside the District of Columbia under a theory that the “persuasive responsibilities...that the Court placed upon DHS [now CFSA] and the manner in which DHS exercised and characterized them brought about a situation in which DHS was exercising a substantial degree of ‘legal care, custody and control’” over the child sufficient to provide adoption jurisdiction under the unusual circumstances presented in the case. *In re: A.W.K.*, 778 A. 2d 314 (D.C. 2001). The Court “admonished all who participate in adoption proceedings to assure that the Court has jurisdiction pursuant to D.C. Code §16-301(b)” prior to filing, to avoid delay or dismissal. The statutes of other jurisdictions may create other venues for filing an adoption if the child or adoptive home is outside the District of Columbia.³ However, beware that filing for adoption outside the District of Columbia will affect the family’s eligibility for adoption incentive benefits under D.C. law, including adoption subsidy and college (or other post-secondary school) tuition.

Any person can file to adopt any other person. There is no requirement that the adoptee resides with the petitioner for any specific period of time, be in the legal or even physical custody of the pe-

² Counsel should be familiar in particular with D.C. Code §16-9009.01, which relates to establishment of paternity and paternity testing.

³ Even if the child is not committed under the neglect statute, non-residents of the District of Columbia can file to adopt a child in the District if the parental rights of either or both natural parents have been relinquished to a licensed child placing agency under D.C. Code §32-1007. However, see, *In re S.G.*, 663 A. 2d 1215 (D.C. 1995).

tioner, be adjudicated neglected, or be legally free for adoption (i.e. parental rights terminated or relinquished). Adults as well as children can be adopted, and unmarried persons can adopt. There is no statutory requirement of parental consent for adoption of a person who is eighteen years of age or over (D.C. Code §16-304). The investigation and report may be dispensed with if the person being adopted is eighteen years of age or older. In addition, many of the adoption incentives set forth in D.C. Code §4-341, *et seq.* are not available when the person being adopted is eighteen years of age or older, even though the prospective adoptee may still have an open neglect or abuse case and continue to be a committed ward of the District of Columbia.

If the adoption petitioner is married, the spouse must join the petition (unless the spouse is the birth parent of the adoptee). This can create a problem if the petitioner is married but separated, unwilling or unable to obtain a divorce, or unable to secure the spouse's cooperation in joining the petition. The language of the applicable statutory provision, D.C. Code §16-302, creates an absolute bar to consideration of the adoption petition by the court if spouses do not join the petition. Further, counsel representing married adoption petitioners must be mindful of ethical considerations should marital problems arise during the pendency of adoption proceedings, especially if both parties continue to state an interest in adopting the child. Should that occur, it may be best for counsel to withdraw his or her representation from both parties and let each obtain separate counsel.

The D.C. Court of Appeals has ruled that unrelated couples living together in a committed personal relationship can petition to adopt the same child. *In re: M.M.D.*, 662 A.2d 837 (D.C. 1995). This case involved two homosexual men living together who wanted to adopt the same child. After an extensive analysis of the relevant statutory language, legislative history, and the intent of adoption law in general, the court held that two unmarried, unrelated people of the same sex could adopt the same child and could therefore both be legal parents simultaneously.

III. Parties

The adoption statute does not define with particularity the parties to an adoption but refers to the various parties. D.C. Code §16-301(a), in discussing the jurisdiction of the court to hear adoption cases, provides that the court shall consider the "interests of the prospective adoptee, the natural parents, the petitioner and any other properly interested party." D.C. Code §16-306 directs that "due notice of pending adoption proceedings shall be given to each person whose consent is necessary. . . ." and §16-306(b) states, "A party who formally gives his consent to the proposed adoption . . . thereby waives the requirement of notice to him . . ." Section 16-304(b) lists the consents necessary when an adoptee is under eighteen years old: an adoptee, if fourteen years of age or older; any living parents; court-appointed guardian; and a licensed child-placing agency or the Mayor under certain circumstances.

SCR-Adoption 17 explicitly defines the parties to an adoption proceeding as the petitioner; birth parents who have not consented, relinquished parental rights, or had parental rights terminated; the child or the child's guardian; the Mayor, if the child is committed in an abuse or neglect case or a parent relinquished parental rights to the Mayor; and CFSA, if a parent has signed a relinquishment of their parental rights.

The assistant attorney general (AAG) often does not appear in court in an adoption case unless a specific issue necessitates such an appearance.

IV. Termination of Parental Rights (TPR) or Adoption

In years past, GALs usually filed TPR motions before adoptive parents filed adoption petitions. A TPR eliminated the need for any contest between birth parents and adoptive parents in adoption proceedings. If the court granted a TPR, the adoption process could be relatively uncomplicated because the birth parents could not be parties and, therefore, could not oppose the adoption

by withholding consents. However, TPR appeals eventually became routine and normally took years to be resolved, thus significantly delaying adoption proceedings. As a result, GALs rarely file TPRs, and petitioners routinely file adoptions while parental rights are still intact, thereby necessitating contested adoption trials.

ASFA requires the District of Columbia (via the Office of the Attorney General) to file TPRs for D.C. foster children who meet the statutory requirements (having been in foster care for 15 of the preceding 22 months). However, if prospective adoptive parents file an adoption petition prior to the TPR trial, the AAG will generally request that the TPR be consolidated with the adoption show cause hearing.

V. The Adoption Process

A. Service/Notice

If the parental rights of the birth parents have already been terminated or relinquished, or if the parents give formal consent to the adoption, the birth parents do not receive notice of the adoption proceeding and the adoption will be uncontested as to those parents. Otherwise, “due notice of pending adoption proceedings shall be given to each person whose consent is necessary thereto, immediately upon the filing of a petition”. D.C. Code §16-306. The statute states that the notice be “given by summons, by registered letter sent to the address only, or otherwise as ordered by the Court.” In practice, aside from the summons, the birth parent is served with a “Notice of Pending Adoption Proceeding and Order to Show Cause” which provides, among other information, the name, address and telephone number of the attorney for the birth parent, the date of the next adoption proceedings, and information pertaining to the birth parent’s substantive and procedural rights. The birth parent is not served with either the adoption petition or any other document which identifies the adoption petitioner by any-

thing other than his or her initials. Service on both parents is accomplished by the Diligent Search Unit of Child and Family Services Agency, which is forwarded the necessary service documents directly by the Court.⁴

If the father has not been identified, in addition to the Notice, the mother is served with an “Order to Biological Mother To Complete Affidavit Concerning Paternity Or To Appear In Court.” This order requires the mother to fully and accurately complete an affidavit of paternity or appear in court to do so. The order also states that failure to comply may result in the issuance of a warrant for her arrest.

If personal service upon the birth parent cannot be completed, the court, upon motion of the adoption petitioner, may order service by either posting or publication, provided the judge is convinced that the birth parent cannot be located despite diligent efforts to do so. SCR-Adoption 4-e.

Timely notice is an essential part of the adoption process. A non-custodial parent has a constitutionally protected “opportunity interest in developing a relationship with his or her child. Failing to use due diligence to locate a parent in order to provide timely service in adoption proceedings amounts to a violation of that parent’s right to procedural due process and will ultimately result in a remand by the Court of Appeals.⁵ See, *Stanley vs. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972); *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985 (1983); *In the Matter of Baby Boy C.*, 581 A.2d 1141 (D.C. 1990).

Petitioners proceeding on a “cannot be located” theory should ascertain that there are sworn affidavits on file sufficient to document diligent efforts to locate the missing parent. Those efforts must include a search in the jurisdiction in which the birth parent has recently resided. Counsel should be familiar with *Bearstop v. Bearstop*, 377 A.2d 405 (D.C. 1977) for the diligence required to attempt to locate missing persons.

⁴ The adoption petitioner is not prohibited from employing his or her own investigator/process server to locate and serve the birth parents.

⁵ See Chapter 3, Section I.B. regarding challenges to constructive service.

B. Parents' Right to Counsel

Birth parents do not have a constitutional or a statutory right to be appointed counsel by virtue of the filing of adoption proceedings. The Supreme Court has held in *Lassiter vs. Department of Social Services*, 452 U.S. 18 (1981) that due process does not require the appointment of counsel for indigent parents in every parental status-termination proceeding. Instead, courts are to determine on a case-by-case basis whether, under the circumstances of the given case, due process requires the appointment of counsel. Although there are no provisions in the D.C. adoption statute mandating the appointment of counsel for indigent parents in adoption proceedings, the statute provides that the court *may* appoint an attorney for a person financially unable to obtain adequate representation. (D.C. Code §16-316). Notwithstanding the lack of a legal entitlement, because of the gravity of the issue at stake, namely the permanent loss of all parental rights, the practice of the D.C. Superior Court is to make sure that an attorney is appointed for any indigent parent. This is accomplished by the *sue sponte* consolidation of the newly filed adoption petition with the ongoing child neglect proceedings shortly after the commencement of the adoption proceedings. This assures that the biological parents are represented in the adoption proceedings. The consolidation of ongoing child neglect proceedings with adoption (and any other Family Court proceedings) is not only authorized by SCR-Neglect 3, it is arguably mandated by the “one family, one judge” provisions of the Family Court Act. D.C. Code §11-1104 states, “[i]f an individual who is a party to an action or proceeding assigned to the Family Court becomes a party to another action or proceeding assigned to the Family Court, the individual's subsequent action or proceeding shall be assigned to the same judge or magistrate judge to whom the individual's initial action or proceeding is assigned to the greatest extent practicable and feasible.” Further, the Court of Appeals has ruled that, absent extraordinary circumstances, adop-

tions ought to be consolidated with any neglect/termination of parental rights proceedings. *In re Baby Girl D.S.*, 600 A.2d 1 (D.C. 1991). Absent such a consolidation, the neglect action is a proceeding entirely separate from the adoption, and the statutory right to counsel in neglect cases under D.C. Code §16-2304 has no bearing on adoption cases. If a party to the adoption proceedings was not appointed counsel in the neglect proceedings prior to the filing of the adoption petition, (generally an uninvolved or a previously unidentified putative father), counsel will be appointed once that person is named in the adoption case. Some judges will even appoint counsel for an unknown father or multiple persons who may have been named as putative father of the prospective adoptee. See, *Superior Court of the District of Columbia Abuse and Neglect Attorney Practice Standards*, Section A-6.

C. Order of Reference

As soon as the adoption petition is filed, it is referred by the Court by means of an “Order of Reference” to a social services agency (generally CFSA) that must investigate the case and make a report and recommendation on the adoption to the court. See, D.C. Code §16-307.⁶ In situations involving competing adoption petitions, separate (licensed for adoption) social service agencies will be required to investigate each petition. Over the past few years, the order of reference has evolved from a one-page form order in which the name of the reporting agency was simply filled in to one that now frequently exceeds ten pages. It schedules the first adoption hearing, consolidates newly filed adoption proceedings with the ongoing child neglect proceedings, and sets interim deadlines for the social service agency to report to the court on the status of potential dilatory factors such as home study referral, subsidy referral, criminal and child protective clearance status, whereabouts of the birth parents, positions of birth parents regarding paternity and consent, identification of other adoption impediments, and possible jurisdictional barriers.

⁶ The report and investigation may be waived if the prospective adoptee is an adult or the petitioner is the spouse of the natural parent and the natural parent has consented to or joined in the adoption. See D.C. Code §16-308.

The order of reference also mandates that CFSA shall provide the petitioner with a proposed adoption subsidy agreement twenty-one (21) days after the date set for submission of the interim report. It also requires the petitioner to respond to the proposed subsidy agreement within thirty days of receipt.

Counsel should be familiar with D.C. Code §§ 16-307 and 16-309, as well as Adoption Rule 7 for precise requirements of the adoption report. The final report and recommendation (which is not available to any of the parties, including the petitioner) is due within 90 days of the adoption petition, or such time as extended by the Court. See D.C. Code § 16-309. Because of the complexity of the reporting requirements, significant delays are typically encountered by the petitioners in obtaining criminal clearances (especially FBI) and ICPC approval (if the petitioner resides outside of the District of Columbia). It is virtually impossible to complete an adoption report and recommendation within the court-ordered 90-day period. The court recognizes this, but tries to adhere strictly to interim reporting deadlines so as to not cause unnecessary delays.

D. Discovery

SCR-Adoption 26 -37 govern discovery in adoption cases. Rule 26(a) permits discovery “only in the event that an adoption becomes contested” and defines an adoption as contested “upon the filing of a written challenge to the adoption by a party or upon the appearance of a party whose consent is necessary and who is withholding such consent.” See, SCR-Adoption 12.

The extent and nature of discoverable information can depend upon whether the case is contested between a birth parent and petitioner or whether there are competing adoption petitions. In the former situation, the court will usually limit the extent and nature of discovery concerning the petitioner to the relevant TPR factors, *see In re A.W.K.*, 778 A.2d 314 (D.C. 2001), but in the latter, the court will usually approve wide open discovery concerning each competing petitioner.

E. Show Cause Hearings

1. INITIAL SHOW CAUSE HEARING

The first show cause hearing in an adoption case is a status hearing to determine whether there are any paternity issues and how to resolve them, the status of service on identified birth parents, and whether the identified parents will consent. If the identified parents have not been served, the court usually sets a continued date to provide additional time for service. Thereafter, the court issues a new show cause order with a revised hearing date.

If the parents have been served and do not consent or if there are competing petitions, the court will issue a scheduling order detailing dates for discovery, motions and any other pre-trial matters. A trial date will also be selected.

2. TRIAL

a. Petitioner's Case

While the adoption statute does not explicitly refer to a “show cause” hearing, it authorizes the court to grant an adoption when consents are withheld if the birth parents, after such notice as the court directs, cannot be located, or have abandoned and failed to support the child, D.C. Code § 16-304(d), or “when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interest of the child.” D.C. Code § 16-304(e). SCR-Adoption 39(a)(3) lists the issues the court should determine at the show cause hearing.

The show cause order requires the parents to appear and show cause why their consents should not be waived. The grounds for waiver are that they have failed to provide financial assistance, care and nurturing for the child in the six-month period preceding the filing of the adoption petition pursuant to D.C. Code § 16-304(d) and/or that they are withholding their consents unreasonably, contrary to the best interest of the child pursuant to D.C. Code § 16-304(e).

SCR-Adoption 12 provides that any party may oppose an adoption by “(1) filing with the Court an opposition to the adoption within 20 days after being served with the notice of the adoption proceedings, or (2) by appearing at the hearing on the order to show cause and stating the party’s opposition to the adoption.”

On rare occasions, some judges, pursuant to 304(d), will not require the consent of parents if the parents, after such notice as the court directs (usually constructive service after diligent search fails), cannot be located. These judges simply make the finding at the initial show cause that the parents were served, cannot be located, and, therefore, their consents are not required.

If the parents have been properly served but one or both do not appear, some judges will proceed there and then to an *ex parte* waiver hearing on the absent parent(s), pursuant to D.C. Code §16-304(d) or (e) or both. Others will set a continued date for the *ex parte* hearing.

According to SCR-Adoption 16, a contested adoption should follow the procedures set forth therein. The rule refers to an “initial scheduling and status conference” that should be held “no later than 45 days after the case becomes contested” in order to set an event/discovery schedule for the case. In practice, the court often issues the scheduling order at the show cause hearing if there are no service or paternity issues. Both the *ex parte* hearing between non-consenting birth parents and petitioner(s) and the “contested” hearing between competing petitioners are contested hearings.

In the *ex parte* hearing between non-consenting birth parents and petitioner(s), petitioner’s counsel should be prepared to present clear and convincing evidence to justify a waiver under either D.C. Code §16-304(d) or (e) or both. Under §16-304(d), to establish abandonment and failure to sup-

port, the petitioner must establish either that the birth parent cannot be located **or** that the birth parent has abandoned the adoptee **and** failed to contribute to the child’s support for at least a six-month period immediately preceding the date of the filing of the adoption petition. Under §16-304(e) the petitioner must show by clear and convincing evidence that consent is being withheld contrary to the best interests of the child, and to do so should use the factors set forth in D.C. Code §16-2353 for granting a TPR. In *In re D.R.M.*, 570 A.2d 796 (D.C. 1990), the D.C. Court of Appeals permitted the trial court to consider the TPR factors when deciding adoptions cases under §16-304(e). To establish either a “d” or “e” or both, the petitioner may call the following as witnesses: social workers involved in the case, the petitioner, mental health professionals who have seen the child or the parent, the child (if of appropriate age⁷), the birth parents as adverse witnesses, and any other witness who can help prove the case.

In the contested hearing between competing adoption petitioners where the birth parent does not consent to either petition, the court must first determine by clear and convincing evidence that the consents of the birth parents are not required and/or that the consents are withheld contrary to the best interest of the child. If the court so finds, then the court must determine by a preponderance of the evidence that it is in the best interests of the child to be placed with one of the petitioners.

Where a birth parent consents to one of the competing petitioners, the court must first proceed as above with the non-consented-to party. If the trial court waives the consent as to the non-consented-to party, then the birth parent’s consent carries no further weight. The playing field is leveled and “the ultimate decision on which of the competing petitions serves the adoptee’s best interests is made by the preponderance of the evidence.” *In re J.D.W.*, 711 A.2d 826, 830 (D.C. 1998).

⁷ See Chapter 10, Termination of Parental Rights for a complete discussion of children as witnesses.

However, in a contested hearing between an adoption petition and a custody complaint or guardianship motion where the birth parent consents to the custody or guardianship, the court must give the parental preference great weight. In *In re T.J.*, 666 A.2d 1 (D.C. 1995), the Court of Appeals held that the trial court can override the parental preference only if it “finds by clear and convincing evidence that the placement by the parent is clearly not in the child’s best interest.”

In competing adoption petition cases, the court usually permits extensive discovery of the competing petitioners’ circumstances and backgrounds, including discovery of competing petitioners’ financial circumstances, educational backgrounds, quality of the competing homes and neighborhoods, quality of schooling for the adoptee, etc., and allows testimony regarding this information at trial. The degree of the adoptee’s attachment to the various competing petitioners is usually a critical factor for the court’s consideration. As a result, the court may order a study of attachment/bonding of the child to each of the petitioners by one court-designated attachment expert. In some cases, each competing party presents its own attachment expert. In addition to the attachment expert, the petitioners usually call witnesses who bolster their respective position, who present unfavorable information regarding competing petitioners, or who are the competing petitioners, called as adverse witnesses.

b. Parents’ Defense

A minor child may not be adopted without the consent of the birth parent except under the two circumstances discussed above, as set forth in D.C. Code §16-304(d) & (e).⁸ In determining whether consent should not be required, per section “d,” or waived, per section

“e,” the burden of proof at a waiver hearing is upon the petitioner. The evidentiary standard is “clear and convincing,” because a permanent termination of parental rights is at stake. *Santosky v. Kramer*, 455 U.S. 745 (1982).

In determining whether there has been abandonment, the court will consider the totality of the circumstances, including the degree of parental love, care and attention, to determine whether the parent’s conduct manifests an intention to be rid of all parental obligations and to forego all parental rights. *Petition of C.E.H.*, 391 A.2d 1370 (D.C. 1978). Where the parent is financially unable to render support and the failure to do so is not voluntary, such failure cannot constitute abandonment.

Defending the “e” allegations is extremely difficult because the determination of the child’s best interests is fact-specific as opposed to doctrinal. *In re L.W.*, 613 A.2d 350 (D.C. 1992). “[B]ecause of the inherent ‘elastic’ nature of the standard...” the court is permitted “to consider any factor which appears relevant under the circumstances to allow the judge to make an informed and rational judgment, free of bias and favor...” *In re D.R.M.*, 570 A.2d 796, 803 (D.C. 1990). A child’s best interest is a determination that is left to the sound discretion of the court and will not be set aside on appeal unless clearly erroneous. *In re J.D.W.*, 711 A.2d 826 (D.C. 1998); *In re L.L.*, 653 A.2d 873, 889 (D.C. 1995). A reversal requires a showing of abuse of discretion by the trial judge. *In re Baby Boy C.*, 630 A.2d 670 (D.C. 1993).

In a contested adoption, the best interests standard necessarily encompasses an inquiry into whether termination of the relationship between the child and the natural parents is in the best interest of the child; therefore, the court applies the criteria for terminating

⁸ D.C. Code §16-304(d) “When a parent whose consent is hereinbefore required, after such notice as the court directs, cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required”, or (e) “The court may grant a petition for adoption without any of the consents specified in this section, when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interest of the child.”

parental rights.⁹ *In re D.R.M.* 570 A.2d 796, 803 (D.C. 1990).

Counsel for birth parents should apply those factors that would be favorable. There are numerous areas the birth parent can pursue, and the following discussion is not intended to be exhaustive.

The birth parent may want to consider a bonding and attachment study which can address the psychological attachment between parent and child, as well as the potential negative ramifications should this relationship be permanently terminated through adoption. Use of a private expert, obtained through court voucher, is the preferred method to obtain the expert testimony of a psychologist or psychiatrist for this purpose. In addition to attachment issues, the evaluator can present testimony about the parent's mental and emotional health.

The child will need to be available for the bonding and attachment study. If any party objects to the child's participation in the evaluation, a motion may be filed pursuant to SCR -Adoption 35, Physical and Mental Examination of Persons, to allow for the evaluations.

The birth parent should consider calling the prospective adoptee's sibling to testify, especially if the sibling is still in the home of the parent. The sibling can testify to the quality of care he or she is receiving from the birth parent and frequently can provide very effective testimony pertaining to levels of attachment. The birth parent can call the prospective adoptee to testify as to any relevant issue.

See, *In re Jam.J. and Jas.J.*, 825 A.2d 902 (D.C. 2003), which sets a three-part analysis of when the court should issue a protective order prohibiting a child's testimony in a neglect trial: (1) there must be an evidentiary finding generally requiring expert testimony that testifying would create a risk of serious harm to the child; (2) is there a manner in which this risk can be alleviated by means short of prohibiting the testimony altogether, and (3) the court must weigh the probative value of the child's testimony against the parent's need for it. The court may apply this analysis in an adoption case.

Notwithstanding the court's holding in *In re A.W.K.*, 778 A.2d 314 (D.C. 2001), the D.C. termination of parental rights statute makes the physical, mental and emotional health of the foster parent a factor for the court to consider. Many jurisdictions make the age of the adoption petitioner a controlling factor in the case, especially if the petitioners cannot be expected to be in good health, or even alive, prior to the child's emancipation. *Sonet vs. Unknown Father of J.D.H.*, 797 S.W. 2d 1 (Tenn. 1990) (petitioner was 67 years old); *Adoption of Kelly*, 541 P.2d 1304 (Or. 1975) (petitioner was 56 years old trying to adopt a 2 year old boy); *Clark vs. Buttry* 174 S.E.2d 356 (Ga. 1970) (petitioners were 62 and 54 years old). The birth parent can argue the likelihood that the child will suffer the loss of the adoptive parent prior to emancipation; the ability of the adoptive parent to supply material needs for the child; the possible psychological burden on the child of having an adoptive parent old enough to be a grandparent; that advanced

⁹ DC Code §16-2353 (b): "In determining whether it is in the child's best interest that the parent and child relationship be terminated, a judge shall consider each of the following factors: (1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concepts of time of children of different ages; (2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child; (3) the quality of the interaction and the interrelationship of the child with his or her parent, siblings, relative, and/or caretakers, including the foster parent; (3A) the child was left by his or her parent, guardian, or custodian in a hospital located in the District of Columbia for at least 10 calendar days following the birth of the child, despite a medical determination that the child was ready for discharge from the hospital, and the parent, guardian or custodian of the child has not taken any action or made any effort to maintain a parental, guardianship or custodial relationship or contact with the child; (4) to the extent feasible the child's opinion of his or her best interests in the matter; and (5) evidence that drug related activity continues to exist in a child's home environment after intervention and services have been provided Evidence of continued drug-activity shall be given great weight.

age may limit the ability of the adoptive parent to have the physical energy to control a young and active child, or participate in various social and school activities of the child. However, in *In re Petition of A.C.G.*, 894 A.2d 436 (D.C. 2006) the D.C. Court of Appeals upheld the adoption of a child by her great-aunt who was seventy-seven years old. The adoption petitioner had arranged for two backup caretakers and engaged in financial planning to insure the child's future stability.

The physical health of the adoption petitioner, irrespective of age, is always a factor, as there must be a finding that "the petitioner is fit and able to give the prospective adoptee a proper home and education" prior to the entry of a final decree of adoption. D.C. Code §16-309(b)(2). The medical clearances required for CFSA approval of an adoption are generally little more than a basic form completed by the petitioner's own doctor. If the birth parent has a good faith belief that the petitioner suffers from health issues that would impact on his or her ability to care for the child through emancipation, an independent medical examination of the petitioner, again pursuant to SCR-Adoption 35, should be considered.

The birth parent may want to consider his or her own investigation of the adoption petitioner. All social service records should be subpoenaed to see if any child was ever removed from the adopting parent's home, for any reason. Court records of the petitioner, especially domestic relations records, should be checked as to whether there have been any allegations of domestic violence against the petitioner or whether the petitioner has been sued for failing to support a child.

So long as the adoption judge's finding is supported by substantial reasoning drawn

from a factual foundation in the record, then the decision of the trial court must be upheld. (D.R.M., *ibid*, at 803,804, citing *In re D.I.S.*, 494 A.2d 1316, 1323 (D.C. 1985) and *In re R.M.G.*, 454 A.2d 776, 790 (D.C. 1982).

A by-product of the "one family, one judge" provisions of the Family Court Act (D.C. Code §11-1104) has been the certification of an adoption case involving a child in the neglect system to the presiding neglect judge. This places the birth parents in the unenviable position of having to persuade the judge who has likely already established the permanency goal of "adoption" that the adoption is not in the child's best interests while giving that judge wide discretion in determining the factors to be considered. "One family, one judge," though, is not absolute but rather applicable "to the greatest extent practicable and feasible" and "subject to applicable standards of judicial ethics." The birth parents should always consider seeking the recusal of the neglect judge from the adoption trial.¹⁰

Further, the court may bifurcate the waiver hearing in a manner that would only address parental fitness as determinative of the §16-309(e) allegations without allowing the birth parents to challenge the suitability of the adoption petitioners, effectively turning the waiver hearing into a termination of parental rights hearing. *In re A.W.K.*, *supra*.

Perhaps the most effective adoption defense is the parent's right to choose their own caretaker for the child. Parents have a "fundamental liberty interest in the care, custody, and management of their children" which is not lost "simply because they have not been model parents or have lost temporary custody of their child.... Even when blood relations are strained, parents retain a vital interest in preventing the irretrievable destruction of

¹⁰ See Adoption Rule 63 (b), which allows for recusal based upon the personal bias or prejudice of the trial judge originating from sources outside of the court proceedings in either the pending or prior cases, or the discretionary recusal due to "a conflict of interest, personal knowledge of the facts of the case...or any other reason which a party reasonably believes might affect the neutrality of the judicial officer."

their family life.” *Santosky v. Kramer, supra*. The parents’ designated fit custodian for the child must be “given weighty consideration which can be overcome only by a showing, by clear and convincing evidence that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to the child’s best interest.” *In re T.J., supra*. The parent needs to identify a caretaker and CFSA must investigate that person while the court gives that person “weighty consideration.” This right is not absolute, as a parent cannot conclusively dictate the outcome of competing adoption proceedings simply by consenting to one party. For example, when a parent consented to a third party’s adoption petition as a means of lashing out at her aunt, who had likewise filed to adopt the child, the court did not have to accede to the mother’s wishes. *In re J.D.W.*, 711 A.2d 826 (D.C. 1998). Further, *T.J.* does not require that the court uproot a child from her home and family of three years and place the child with the mother’s designated caretaker, whom the child barely knew. *In re T.M.*, 665 A.2d 950 (D.C. 1995). Therefore, the parent should identify the alternative caretaker as soon as possible, even while reunification may remain the case goal. Failure of the social service agency and the court to consider this alternative caretaker will almost invariably result in a remand by the Court of Appeals.

A failed adoption defense may have ramifications to the birth parent beyond the permanent loss of the child who is the subject of the adoption. If the parent has another child who comes under the care of CFSA, that agency is no longer obligated to make reasonable efforts at reunification if the parent’s parental rights have been involuntarily terminated with regards to a sibling. D.C. Code §4-1301.09(a).

VI. Adoption Decree

The court may not enter a final decree of adoption unless the adoptee has been living with the petitioner for at least six months. Instead, the court will enter an interlocutory decree, which by its terms will convert into a final decree unless the decree is set aside for good cause shown during the interlocutory period. The petitioner does not have to take any action to convert the interlocutory decree into a final decree. The court also has the discretion to enter an interlocutory decree if it appears to be in the interest of the adoptee. D.C. Code §16-309.

VII. Appeal¹¹

The time for filing an appeal is determined by whether the adoption was heard by an associate judge or a magistrate judge. An appeal from an associate judge must be filed with the Court of Appeals within 30 days after issuance of the notice of the entry of the final decree. If the final decree of adoption was entered by a magistrate judge, the appeal must be filed within 10 days of the docketing of the decree. The parent must first file a Review of the Magistrate Judge’s Order with the presiding judge of the Family Court, pursuant to General Rule D (e)-Rules of the Family Division.¹² An order waiving the birth parents’ rights to consent pursuant to D.C. Code §16-304 (d) & (e) is not a final order and cannot be appealed. *In re S.J.*, 772 A.2d 247 (D.C. 2001). Adoption decrees remain final, even when appealed, unless otherwise reversed or remanded by the Court of Appeals.

Under D.C. Code §16-310, the court may not entertain an attempt to invalidate a final decree of adoption on the basis of a jurisdictional or procedural defect unless it is regularly filed with the court within one year after the effective date of the final decree. *In re M.N.M.*, 605 A.2d 921 (D.C. 1992).

¹¹ For a complete discussion of appeals, see Chapter 14.

¹² Family Court rules are in the process of being updated as of the writing of this chapter.

VIII. Name Change and New Birth Certificate

In the petition, the adoptive parents may request a change of name for the adoptee. Although the new name of the prospective adoptee is set out on the adoption petition, it may be freely amended at any time up until the entry of the final decree of adoption. The District of Columbia Bureau of Vital Records will issue a new birth certificate reflecting the child's new name and new parents upon the issuance of the final decree. The prior birth certificate is sealed and not opened except by order of the court. If the child was born outside the District of Columbia, the court shall furnish the jurisdiction of the child's birth with a certified copy of the final decree of adoption.

IX. Access to Adoption Files

As soon as the adoption petition is filed, the court files are sealed and may not be inspected by any person, including the parties, without a court order and upon a showing that the welfare of the child will be promoted or protected. D.C. Code §16-311). The present practice is for the adoption clerk's office to not reveal any information from the court file to any person, even parties or their counsel. Even a basic request such as the date of the next hearing or the status of a motion cannot be revealed without first going through the adoption judge. Counsel must file a motion in order to obtain any information from the court file.

The District of Columbia has no statute regulating access by an adoptee to adoption records other than D.C. Code §16-311.¹³ In *In re C.A.B.*, 384 A.2d 679 (D.C. 1978), it was ruled that an adult, married adoptee was entitled to an evidentiary hearing to determine if the adoption records should be open to inspection. The Court of Appeals later suggested that the Superior Court liberally grant access to an adult adoptee of the adoption records when the birth parents have consented to this request. *In re D.E.D.*, 672 A.2d 582 (D.C.1996).

X. Open Adoptions

There are a number of views on the proper definition of "open adoption," but probably the narrowest and most accurate definition is that it is an adoption in which the birth parents know the identity of the adoptive parents. The definition might also include adoptions in which the adoptee knows the identity of the birth parents.

In neglect cases, children are likely to know the identity of their birth parents and, particularly when the adoptive parents are foster parents of long standing, the birth parents may know the identity of the adoptive parents. By virtue of the fact that the adoption is not completely anonymous, there is the possibility, at least in theory, that there may be continued contact or exchange of information between birth parents and child.

A more expansive definition of open adoption includes the right of the birth parents to maintain contact with the child. The question of the birth parents' ability to obtain post-adoption visitation rights arises with some frequency in neglect cases, particularly in connection with efforts to secure the birth parents' voluntary relinquishment of parental rights or consent to an adoption. If the parties' identities are already known to one another, the adoption is *de facto* and unavoidably open in the sense that the adoption is not anonymous and the birth parents may, as a result, be able to have contact with the child.

But if the identity of the adoptive parents is unknown to the birth parents, or if the birth parents want to be guaranteed the opportunity to be able to continue to see the child, the birth parents may offer, or may be asked, to consent to adoption in exchange for the right to know the identity of the adoptive parents or the right to maintain contact with the child through visits or other arrangements.

The birth and adoptive parents could have an informal, non-binding understanding regarding the agreed upon contact. Under those circumstances, it would be important for counsel to explain to their respective clients precisely what was

¹³ However, see D.C. Code §31-1005 regarding confidentiality of records of licensed child-placing agencies, which would include adoption agencies and other social services agencies.

– or more accurately, what was not – being agreed to and the lack of enforceability of such an informal agreement.

There is no case law in the District regarding open adoptions or related issues.¹⁴ Open adoption agreements are best used when post-adoption contact is clearly in the child's interest.

XI. Adoption Subsidy

An adoption subsidy, also known as an adoption assistance agreement, is a benefit derived from federal law¹⁵ that is designed to promote adoption, and hence permanency, for children in foster care. An adoption subsidy is a binding written agreement between CFSA and the adoptive parent that provides the following types of benefits: 1) payment of nonrecurring adoption expenses; (2) adoption assistance payments; (3) Medicaid coverage; and (4) services and assistance to meet the child's special needs. The agreement must also contain the following protections: (1) the agreement remains in full force and effect until the child reaches eighteen years of age unless the adoptive parent is no longer legally responsible for the child; (2) the agreement shall remain in effect regardless of the state in which the adoptive parents reside; and (3) the agreement provides a mechanism for the adoptive parents to enforce the agreement if they reside out-of-state.

A. Eligibility

Most children whose permanency goal is adoption are eligible for an adoption subsidy, so that generally eligibility is not something that practitioners need to worry about. This review of the eligibility requirement is, therefore, more academic than practical.

Nevertheless, eligibility is important to understand in case there are glitches. At the outset, it is important to know that eligibility does not depend on the adoptive parent's financial status.

There are three steps in the determination of a child's eligibility for a subsidy. Step one: The child must be Title IV-E or SSI eligible. Step two: The child must have special needs. Step three: A reasonable effort must have been made to place the child for adoption without a subsidy unless the child has developed a significant bond with the prospective adoptive parent.

The child must be "IV-E" eligible. Title IV-E of the Social Security Act deals with federal reimbursement for foster care payments. The child must, therefore, at a minimum be in foster care. However, not all children in foster care are IV-E eligible -- entitled to federal reimbursement for part of the cost of their foster care.¹⁶ In order to be IV-E eligible, the child at the time of his or her removal from the home must have been a member of a home that would have qualified for AFDC benefits, as those benefits were administered on July 16, 1996. Thus even though AFDC benefits, as a result of welfare reform, have been replaced with TANF benefits, eligibility requirements for Title IV-E still employ the old AFDC qualifications -- a three-prong test based on income, assets and family composition. Generally, the asset part of the test, as administered in 1996, limited family assets to \$1,000 excluding homestead property, burial plots, and \$1500 in vehicle equity. The income part of the test varied from state-to-state. Each state set a standard of need or maximum amount of income a family might have to be eligible for assistance. The standard of need varied by the size of the family. In the District of Columbia, the standard of need for a family of three in 1996

¹⁴ *In re Baby Girl D.S.*, 600 A.2d 71 (D.C. 1991), pp.84-85, note 16 where the court suggests that, following a TPR, visits between a grandparent and a child could continue.

¹⁵ The adoption assistance program is primarily codified at 42 U.S.C. §673..

¹⁶ The child must be IV-E eligible at the time he or she entered the neglect system and at the time of the adoption but need not be IV-E eligible in the intervening years. For example, a child can temporarily lose IV-E eligibility if a judge refuses or fails to make a "reasonable efforts" finding but IV-E status is restored when the finding is resumed. A child can also lose IV-e status if the child leaves the foster care system temporarily.

was \$712. A family was eligible for AFDC if its gross income did not exceed 185% of the standard of need and its net income (gross income less specified deductions) did not exceed 100% of the standard of need. The family composition part of the test had two prongs—one to establish the child's dependency and the other to circumscribe who could be rearing the child. Under the dependency prong, the child had to be deprived of parental support due to the death, continued absence, physical or mental incapacity of a parent or by reason of the unemployment of the parent who was the principal wage earner. The other prong of the test restricted the family members in whose household the child could be raised. The relatives who could raise the child were grandparents, siblings, aunts, uncles, nephews, nieces, first cousins, step-parents and step-brothers and sisters. IV-E eligibility also requires two judicial findings: 1) that reasonable efforts were made to prevent the child's removal from his or her home; and (2) that it is contrary to the welfare of the child to be returned home.

If a child is not IV-E eligible, he or she can still receive a subsidy if she or he is receiving SSI. SSI stands for Supplemental Security Income and is a benefit that is established under Title XVI of the Social Security Act for children who have disabilities. SSI, not IV-E eligibility, could be used as the basis to obtain a subsidy for children who are not in foster care or who, although in foster care, do not have IV-E status. For example, a child who is in private placement, rather than foster care, would not be IV-E eligible. And some children, even though they are in foster care, are not IV-E eligible, for example, a child for whom a reasonable efforts finding was not made when he or she was removed from the home.

In addition to being IV-E eligible, the child must also be a "special needs" child. Each state is free to define the criteria that will qualify a child as having special needs. By statute, the District of Columbia provides that a child with special needs is "any child who is difficult to place in adoption because of age, race, or ethnic background, physical or

mental condition, or membership in a sibling group which should be placed together. A child for whom an adoptive placement has not been made within 6 months after he is legally available for [an] adoptive placement"¹⁷ is also a special needs child. Some of these criteria are amplified in CFSA's policy manual. The age factor is set at two years or older. A child has a qualifying mental or physical condition if the child is physically, mentally, or emotionally handicapped and in need of special services as substantiated by appropriate reports. The important point is that these are discrete, not cumulative factors. For example, a child who is handicapped is eligible for a subsidy even before he or she is two years old provided a reasonable effort has been made to place the child for adoption. Since, however, adoption recruitment efforts need not be made where the child is bonded to his prospective adoptive parent, and since very few adoptions in the neglect system are "stranger" adoptions, handicapped children are usually eligible for adoption by their caretakers without proof of unsuccessful recruitment efforts having been made for 6 months.

B. Nonrecurring Expenses

Under the federal adoption subsidy program, \$2,000 is available to cover non-recurring adoption costs. The term "non-recurring adoption expenses" covers attorney fees, court costs, adoption fees, the cost of a home study, health and mental examinations and the like which are not reimbursed from other sources. States may lower the amount, provided the amount is reasonable and consistent with local practices. Where a sibling group is adopted, each child's subsidy must have a provision for non-recurring costs.

CFSA's practice is to award \$2,000 towards attorney fees. CFSA pays this amount directly to the attorney handling the case upon the conclusion of the adoption case. The attorney should send CFSA an itemized bill, a copy of the final adoption decree, and a copy of the subsidy agreement. The attorney's fee scale can be higher than CCAN rates and should be set at the attorney's private practice rate.

¹⁷ D.C. Code §4-301(b)(2)(A)

C. Maintenance Payments and Special Need Coverage

A subsidy agreement must specify that the child is eligible for Medicaid. CFSA's prototype subsidy agreement contains a section dealing with the child's special needs. As a general rule, CFSA is willing to cover the expenses of the child's special needs. The prototype agreement provides that special medical needs of the child will be covered by one of the following means: Medicaid, payments to vendors, or direct reimbursement to the adoptive parent. The guarantee is significant and generally of greater value to the adoptive parent than the monthly maintenance payments, since it assures the adoptive parent that all of the child's special needs will be financially taken care of. It is, therefore, very important to have the adoptive child undergo thorough mental, physical, and dental evaluations in preparation for the subsidy agreement, as only preexisting conditions are covered by subsidy.

The subsidy agreement should carefully document the child's special needs or preexisting conditions. There are two ways the child's special needs can be documented. Either pertinent language from evaluations can be written into the subsidy agreement or evaluations can be attached as exhibits to the subsidy agreement and incorporated by reference. The practitioner should not rely on general references to evaluations in the child's case file at the time of the adoption. The case file or the evaluations can get lost, or the case file can be locked up in some repository and be irretrievable. The practitioner should also add a clause to the prototype agreement clarifying that CFSA guarantees payment for conditions that are related to or may later arise out of the child's existing special needs.

The practitioner should negotiate for special services that the child requires that are not covered by Medicaid. If the child is significantly handicapped, the practitioner should seek respite care for the adoptive parents. If the child has been receiving therapy from a non-Medicaid provider and it should be continued, this service should also be

included in the agreement. The agreement should also establish how the bills for these services will be paid, either through reimbursement to the adoptive parent or through direct payment to the vendor. It is also a good idea to make sure that a child who is handicapped is enrolled in the District of Columbia's bumped-up Medicaid program — Health Services for Children with Special Needs — before the subsidy agreement is concluded and that the subsidy agreement provides that these Medicaid services will continue.

The prototype agreement contains a paragraph in the special needs section stating what services for special needs CFSA will not pay for. CFSA will not pay for a child's special needs that entail educational services including tutoring or tuition or for therapeutic services that can be obtained through the public school system. Some therapeutic services can be procured through the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* The school system, however, will only provide therapeutic services that are needed to help a child function in school. Often a child's mental or physical health requires a higher level of services. As a general rule, CFSA will pay for extra services as long as a doctor explains their necessity.

D. The Process

The adoption subsidy is an agreement. The question is: How is this "agreement" reached? Is it negotiated or is it achieved through litigation? CFSA's practice is to offer a proposal and to include with the proposal a Fair Hearing Request Form for adoptive parents who wish to contest the proposal. Federal law and regulations do not specify what the process should be to reach agreement. However, the United States Department of Health and Human Services has issued a policy statement regarding the adoption subsidy program that states "the adoption assistance payment is determined through discussion and negotiation process between adoptive parents and a representative of the State agency based upon the needs of the child and the circumstances of the family."¹⁸

¹⁸ U.S. Dep't. Health and Human Services Policy Announcement ACYF-CB-PA-01-01 (January 23, 2001).

Because CFSA does not negotiate the terms of the subsidy, it is important for the practitioner to work with the adoption social worker to insure that CFSA is provided important information regarding the child's needs. It is the adoption social worker's role to prepare a package of material to give to CFSA's Subsidy Unit, which, in turn, prepares the subsidy agreement. Make sure the social worker has all of the child's evaluations, past and current, and pertinent school records such as IEPs. If possible, the packet should include the child's birth records to show whether the child's birth was affected by drugs, prematurity, low birth weight, etc. Make sure the social worker is aware of the conditions of the other children in the adoptive family. One child with special needs may not entitle the adoptive parent to respite care but the cumulative effect of several children with special needs may. The social worker should also include information on the amount of any daycare subsidy the adoptive parent is receiving for the child while the child is in foster care and the child's current monthly board rate. Have your client fill out CFSA's financial statement before the subsidy is drafted.

CFSA sends the adoption subsidy proposal directly to the adoptive parents. It sends the practitioner a copy of the proposal. **Instruct the adoptive parent not to sign the subsidy proposal until you have reviewed it.** If the proposal is acceptable, the adoptive parent should sign it and the subsidy will become effective at the time the final decree of adoption is granted.

In many cases, the proposal is mostly, but not entirely, correct. Have the adoptive parent write in and initial any small corrections. Complete the Fair Hearing Request Form and indicate that the adoptive parent only seeks a fair hearing if his or her corrections are not accepted. Contact the adoption subsidy unit to find out if it is willing to accept the small changes. In most cases, a fair hearing will not be necessary.

If the proposal is missing a substantial condition, complete the Fair Hearing Request Form stating the reasons the subsidy is inadequate. The form must be returned to CFSA within thirty days. The practitioner will then need to prepare for a

contested administrative hearing. An appeal from a fair hearing decision is taken to the District of Columbia Court of Appeal in accordance with the procedure set forth in D.C. App. R. 15.

E. Interstate Enforcement

An adoption subsidy remains valid even if the adoptive parent moves to another jurisdiction. The District of Columbia has entered into compacts with a number of states to insure interstate enforcement of adoption subsidies. The practitioner should contact CFSA to determine if there is a compact between the District of Columbia and the adoptive child's resident state.

The adoptive parent should register the child for Medicaid in the state in which the child resides by taking a copy of the adoption subsidy agreement to the local Medicaid office. In addition, because the adoption assistance agreement is entered into in the District of Columbia, the child is entitled to receive all benefits that the child would have been entitled to have had the child resided in the District of Columbia. It is, therefore, important for the adoptive parent to obtain a list of the services that are offered by the District of Columbia Medicaid program. If the child's resident state does not provide a similar service that is needed by the child, District of Columbia Medicaid office will pay for the service.

XII. Legal Sources and Other Material

- The Adoption Assistance and Child Welfare Act, P.L. 96-272, 94 Stat. 501, 42 U.S.C. §§ 670 *et seq.* See especially, 42 U.S.C. §§ 761, 673, 675.
- D.C. Code § 4-301 (local adoption assistance statute).
- 45 C.F.R. § 1356.40 (federal adoption assistance regulations).
- D.C. Code § 4-324 (local adoption assistance interstate Medicaid statute).
- Nacac.org (North American Council on Adoptable Children's website, publishing state profile on adoption assistance agreements).
- U.S. Dep't. Health and Human Services Policy Announcement ACYF-CB-PA-01-01 (January 23, 2001) ■

GUARDIANSHIP

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GUARDIANSHIP

Guardianship is one of several permanency options available for a neglected child who cannot be returned home or reunified with a parent. Guardianship is very similar to legal custody, with some important differences that are discussed below. A guardianship order typically gives a relative or other third party physical and legal custody of the child, but does not terminate parental rights. Like an order of permanent custody, guardianship orders may be modified or set aside under certain circumstances. Motions for guardianship are filed in the existing neglect action and may be brought by the government, by the person seeking guardianship, or by the child's guardian *ad litem* (GAL).

The guardianship statute became effective on April 4, 2001, and is codified at D.C. Code §16-2381 (2003). The purpose of the statute is to “[e]ncourage stability in the lives of certain children who have been adjudicated to be neglected and have been removed from the custody of their parent by...the creation of a permanent guardianship...[and] placement of children, especially with relatives, without ongoing government supervision.” D.C. Code §16-2381 (2003). As the statutory language suggests, any third party may become a guardian of a neglected child under the statute; however, as discussed below, only “kinship caregivers” qualify for a guardianship subsidy.

D.C. Code §16-2381 sets forth the criteria that must be met before a neglect court may grant a guardianship order:

- The child has been adjudicated to be neglected pursuant to section 16-2317;
- The child has been living with the proposed permanent guardian for at least 6 months;
- If the child is 14 years of age or older, the child consents to the guardianship;
- The permanent guardianship is in the child's best interests;
- Adoption, termination of parental rights, or return to parent is not appropriate for the child; and
- The proposed permanent guardian is suitable and able to provide a safe and permanent home for the child.

I. Custody v. Guardianship

Both guardianship and custody are statutory causes of action authorizing a court to grant physical and/or legal custody of a child to someone other than the parent – without terminating the parent's legal relationship with the child. Custody actions are independent of the neglect proceeding and are used in many circumstances, not just neglect cases. Guardianship, on the other hand, is filed by motion in the neglect case and is not available in other circumstances. Under the D.C. statute, subsidies similar to foster care payments are available to relatives who are granted guardianship; this option is not available through custody.

It has become common practice to pursue guardianship rather than custody in neglect cases. However, every case must be evaluated individually. Counsel for the proposed caretaker and/or the child's GAL must ultimately decide which permanency option is preferable.

In most cases the availability of a guardianship subsidy will be a determining factor. In cases where the subsidy is not available (e.g. where the proposed guardian does not meet the definition of "kinship caretaker") or is not a significant motivating factor, guardianship may still be preferred. Motions for guardianship are signed by counsel and not sworn to by the proposed guardian and may be easier to prepare and file than custody complaints, especially when dealing with out-of-state movants. Since custody actions are independent of the neglect case, a filing fee of \$80.00 or an *in forma pauperis* waiver is required for filing. There is no filing fee for guardianship motions. Finally, as discussed in more detail below, guardianship leaves open the possibility of reviving the underlying neglect case should it become necessary; this is not the case with custody.

II. Adoption v. Guardianship

Adoption differs significantly from guardianship. With adoption, the rights of the birth parents are

completely and permanently terminated. The adoption petitioner(s) become the child's legal parent(s). Adoption may be preferred, even by relatives, when the birth parents are no longer involved. The opposite may be true where the parent(s) remain involved with the child or where the caretaker is not interested in having the birth parents' rights permanently terminated.

Guardianship allows the birth parent to retain rights including, in most cases, the right to reasonable visitation. Furthermore, guardianship offers the possibility that one day, if circumstances change, the parent may regain custody of the child. Relative caretakers are often loath to terminate the parental rights of kin, and guardianship allows for access to a subsidy while not causing unpleasant intra-family litigation. In cases where finances are at the forefront, counsel should explain that added financial and tax benefits are available through adoption rather than guardianship.

III. The Guardianship Motion

It is common practice for the proposed guardian to file the motion for guardianship, particularly where the guardian qualifies for court-appointed counsel under the neglect statutes. However the child's GAL is also authorized by statute to file and pursue the motion, and this option is utilized especially when the proposed guardian does not have counsel. Finally, the government also may file and pursue the guardianship.

To initiate a guardianship action, the proponent must file a motion for guardianship in Family Court Central Intake on the John Marshall level of Superior Court. Aside from the proposed guardian, the statute permits third parties, namely the government or the child's GAL, to file the motion asking the court to grant guardianship to the proposed guardian. A motion for permanent guardianship shall include:¹

- A caption stating the case name, case number, social file number, and the name of the judge to

¹ Court rules are being promulgated but not in time for publication.

which the case is assigned;²

- The name, sex, date and place of birth, and current placement of the child;
- The proposed permanent guardian's name and relationship or other connection to the child;
- The name and address of the child's parent(s), if known;
- A plain and concise statement of the facts and opinions on which the permanent guardianship is sought;
- A description of the child's mental and physical health;
- A statement why permanent guardianship, rather than adoption, termination of parental rights, or return to the parent, is in the child's best interest;
- A statement as to the various efforts made by the moving party to locate the parent(s) of the child;
- An itemization of the child's assets;
- A statement of compliance with the Uniform Transfers to Minors Act, D.C. Code §21-301 *et seq.*, if applicable. This section refers only to children who have may have assets in the event they were the beneficiary of a life insurance policy, law suit, or inheritance. If the child has assets, the guardianship motion must include a statement that the assets are protected in accordance with the Uniform Transfers to Minors Act. In most cases this section will be inapplicable.³
- The name of proposed successor guardians, if any, and their relationship or other connection to the child and the proposed permanent guardian;
- Information required by Chapter 46 of Title 16 (Uniform Child Custody Jurisdiction and Enforcement Act); [The Guardianship Act requires the motion to include information required by Chapter 45 of Title 16 (uniform child custody proceedings), which was repealed and replaced by Chapter 46 of Title 16 (Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)).] This section merely requires the movant to no-

tify the court of any other proceedings in any jurisdiction involving the same child. This could mean any criminal, civil, or family cases in which the child is or was involved.

- Written consents, if any, to the permanent guardianship;
- If the child is at least 14 years old, the child's written consent to the proposed guardianship, or a good cause explanation for why the child's consent has not been given;
- A statement indicating whether the proposed guardian has applied for or intends to seek a permanent guardianship subsidy. As noted above, non-relatives may file for guardianship, but only kinship caregivers may qualify for the subsidy. The court needs to know whether a subsidy is being sought in order to ensure the subsidy agreement is settled before closing the neglect case.
- The names, addresses, phone numbers, e-mail addresses, and fax numbers, if any, of all parties, including the moving party, and their attorneys, the assistant attorney general (AAG), and the GAL.

IV. Filing The Motion

A motion for guardianship may be filed anytime after the petitioning of a neglect case. D.C. Code §16-2384(b). However, a guardianship order may not be granted unless the child has been adjudicated neglected and living with the proposed guardian for at least six months. See D.C. Code §16-2383(a). The movant must file with the clerk an original and two copies of the motion for each parent to be served. (Therefore, in a case in which both parents are identified, the movant must provide the clerk with an original and four copies of the motion.) Along with the motion, the movant must provide summons for service upon the parents. Counsel will need to provide two summonses for each parent (one for the court file and one for service upon the each parent.)

² The clerk's office will create a new Guardianship jacket with a GDN number, which mirrors the neglect case number.

³ A child with significant assets would need to have a guardian appointed through the Probate Division to oversee the assets of the child. While nothing precludes one person from acting in both capacities, a separate case and judge is involved. See D. C. Code § 21-101 *et seq.*

Superior Court Administrative Order 02-05 sets forth the notice requirements that must be included in the summons. The court has created a form summons that is widely used; however, attorneys may create their own summons provided it contains the following information:

1. Include a copy of the motion for permanent guardianship;
2. Advise the party that no action shall be taken on the motion unless and until the Court has found that the child who is the subject of the motion was neglected. The summons shall advise the party that, if the court finds or has already determined that the child was neglected, the court shall schedule an adjudicatory hearing on the motion for permanent guardianship; the date, time and location of which the party shall receive separate notice by mail;
3. Advise a party wishing to contest the guardianship that, within 20 days following the date of service of the motion, he or she may file a written opposition with the court and counsel for all parties;
4. Advise a party who wishes to contest the entry of a permanent guardianship that he or she must appear at the guardianship hearing and that a default judgment may be entered if the party fails to appear.
5. Advise the party to contact his or her counsel. The summons shall provide the name and contact information for the moving party's attorney;
6. Advise an unrepresented party that he or she may request the appointment of counsel;
7. Advise the party that, if the motion is granted, the guardian will have the following rights and responsibilities with respect to the child:
 - a. Physical custody;
 - b. Protect, nurture, discipline, and educate the child;
 - c. Provide food, clothing, shelter, education as required by law, and routine health care for the child;
 - d. Consent to health care without liability by reason of the consent for injury to the child resulting from the negligence or acts of third persons unless a parent would have been liable in the circumstances;

- e. Authorize a release of physical and mental health care and educational information;
 - f. Authorize a release of information when law, regulation, or policy requires consent of a parent;
 - g. Consent to social and school activities of the child;
 - h. Consent to military enlistment;
 - i. Obtain representation for the child in legal actions; and
 - j. Determine the nature and extent of the child's contact with other persons except as set forth in the permanent guardianship order.
8. Advise the party that, if the motion is granted, the parent(s) will retain the following rights and responsibilities with respect to the child:
 - a. The right to visit or contact the child, except as may be limited by the court;
 - b. The right to consent to the child's adoption;
 - c. The right to determine the child's religious affiliation; and
 - d. The responsibility to provide financial, medical, and other support for the child.
 9. Advise the party that, if the motion is granted, the child will retain the right to inherit from his or her parents; and
 10. Advise a parent that he or she may consent to the proposed guardianship either by filing an affidavit of consent on a form prescribed by the Court or by appearing at the guardianship hearing and stating his or her consent.

If you are appearing before the neglect judge close to the time you plan to file the guardianship motion, you can inform the court and ask that a guardianship hearing date be set. You can use that date on your motion and summons. Otherwise, put the next neglect court date as the return date on the summons.

V. The Guardianship Subsidy

Relatives who are licensed kinship caretakers and who are granted permanent guardianship of a neglected child may be eligible for a monthly subsidy payment to assist in caring for the child until the age of 18. Caregivers should understand that, un-

like the adoption subsidy program that is federally funded, guardianship subsidies are a creature of District law and entirely funded by the District of Columbia. It is possible that the D.C. Council could discontinue the subsidy program in the future.

The eligibility requirements for guardianship subsidy set forth in the statute are:

- the child must be adjudicated neglected;
- the child must be committed to the legal custody of CFSA;
- the guardian must be an approved kinship caregiver; and
- a subsidy agreement must be entered into between CFSA and the guardian.

An attorney for a caregiver must assess their client's eligibility for guardianship subsidy carefully before advising the client on the various permanency options. Becoming a licensed kinship caregiver can be a time-consuming and frustrating process. Typically, attorneys will wait until the client is already licensed as a kinship caregiver before filing for guardianship. "Kinship caregiver" is defined in D.C. Code §4-1301.02 as a relative of the child by blood, marriage or adoption, a godparent as recognized by a religious ceremony, or a godparent as recognized by reputation in the community and by

other family members. While out-of-state relatives are eligible to file for guardianship and to receive D.C. guardianship subsidies, licensing must be done through the home state and not the District.

CFSA often requires the nature of the kinship relationship to be proven through birth certificates, marriage certificates, or baptismal certificates (or their equivalent). In cases where the proposed kinship caregiver is an "unofficial" godparent or related through common law marriage, CFSA requires the proposed guardian to provide an affidavit by a known relative about the "close personal and emotional ties" of the proposed guardian with the child, or with the child's family if those ties "pre-dated the child's placement in kinship foster parent home."

Guardianship subsidies are governed by District of Columbia regulations found at 29 DCMR §6103. Generally, the subsidy will be equivalent to regular foster care rates, which depend on the age of the child. Unlike the adoption subsidy, the income of the applicant is also factored into the equation. The subsidy allotment will be reduced if a kinship caregiver makes more than \$108,188 per year. Caregivers making over \$270,470, are deemed ineligible for a guardianship subsidy.⁴ The regulations

⁴ 29 DCMR § 6103 PERMANENT GUARDIANSHIP SUBSIDY

6103.1 A permanent guardianship subsidy may include:6bb

- (a) Short-term payments, which are time-limited and intended to meet the cost of integrating a child into the family; and
- (b) Long-term payments, which are intended to help a permanent guardian whose income is limited and is likely to remain so.

6103.2 The amount of the long-term permanent guardianship subsidy shall be:

- (a) Based on the applicant's federal adjusted gross income, as defined by the Internal Revenue Code of 1986 or any successor legislation;
- (b) Based initially on the amount of the foster care board and care payment received by the applicant for the child's care at the time that the application is approved; and
- (c) Following a review held pursuant to § 6105, based on the amount of the foster care board and care payment that would be paid for the child's care if the child were in foster care.

6103.3 The payment schedule for the long-term permanent guardianship subsidy shall be:

- (a) Revised annually.
- (b) Based on the most recent determination of the median family income for the Washington, D.C. metropolitan statistical area as determined by the U.S. Census Bureau.
- (c) For a child under twelve (12) years of age:

Median Income Range	Regular Daily rate	Special Daily rate	Handicapped Daily rate	Multi-handicapped Daily rate
\$0 — \$108,188	\$23.93	\$26.40	\$28.90	\$33.90
\$108,189 — \$162,282	\$17.95	\$19.80	\$21.68	\$24.43
\$162,283 — \$216,376	\$11.97	\$13.20	\$14.45	\$16.95
\$216,377 — \$270,470	\$5.98	\$6.60	\$7.23	\$8.48
More than \$270,470	\$0	\$0	\$0	\$0

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also provide that that the guardianship subsidy agreement shall include “a statement as to whether District of Columbia Medicaid shall be provided.” Regardless of where the guardian resides, D.C. Medicaid will be available for the child. The caretakers of children residing in other states, such as Maryland, would likewise have to determine the child’s eligibility for the Medicaid program in that state if they desire that state. Attorneys should be prepared to investigate and research Medicaid issues in their individual cases.

VI. Service of The Guardianship Motion

If it is at all possible, serve the parents in open court during a neglect hearing, or have a neutral party serve the parents and execute an affidavit of service prior to filing or immediately after filing; this can expedite the process. While the CFSA Diligent Search Unit is quite good at tracking down parents, if movant’s counsel can effect service more efficiently, attorneys should not be afraid to take matters into their own hands. Otherwise service upon the parents will be done by the CFSA Diligent Search Unit, which may take some time. If counsel has completed service, alert the Family Court Clerk in order to avoid a referral to the Diligent Search Unit. Counsel should also explore with counsel for the parent(s) whether the parent will consent to the guardianship and waive service of process. In cases where one or more parents is incarcerated, you can check the D.C. Jail or the federal Bureau of Prisons website (www.bop.gov) to locate the person. Once a parent is located, you can often arrange to have a correctional counselor personally serve the parent and execute an affidavit of service. Otherwise, personal service can

be achieved by the U.S. Marshal Service for a fee or by the Diligent Search Unit.

In cases where either of the parents cannot be located or the identity of the father is uncertain, counsel should seek to accomplish service by filing a motion for constructive service. The motion should request service by posting in the Neglect Clerk’s office. This may be done as a precaution in cases where the putative father has been located but denies paternity. Posting can be accomplished while the results of any paternity test are pending.

VII. The Guardianship Hearing

Every judge has his or her own way of handling guardianship motions. Generally, the first hearing after the filing of the motion is a status hearing at which it is determined whether service has been accomplished and, if so, the positions of the parties. The court will also make sure that the parents are represented by counsel. If there is opposition to the guardianship motion, most judges will schedule a fact-finding hearing. If there is no opposition, some judges will proceed to an abbreviated evidentiary hearing concerning the fitness of the proposed guardian and evidence to support a finding that guardianship is in the best interests of the child.

In contested hearings, parties may avail themselves of discovery permitted under the Neglect Rules. Administrative Order 02-05 dictates that discovery shall be completed within 30 days following the date of service of the motion, unless a party requests and the court orders an enlargement of time. At an evidentiary hearing, the moving party has the burden of proving by a

(d) For a child twelve (12) years of age and older:

Median Income Range	Regular Daily rate	Special Daily rate	Handicapped Daily rate	Multi-handicapped Daily rate
\$0 — \$108,188	\$26.37	\$29.23	\$32.09	\$37.82
\$108,189 — \$162,282	\$19.78	\$21.92	\$24.07	\$28.37
\$162,283 — \$216,376	\$13.19	\$14.62	\$16.05	\$18.91
\$216,377 — \$270,470	\$6.59	\$7.31	\$8.02	\$9.46
More than \$270,470	\$0	\$0	\$0	\$0

SOURCE: Emergency Rulemaking published at 48 DCR 3671 (April 27, 2001), Final Rulemaking published at 48 DCR 10740 (November 23, 2001).

preponderance of the evidence that the guardianship is in the child's best interest. *In re A.G.*, 900 A.2d 677 (D.C. 2006). Every party has the right to present evidence, to be heard on his or her own behalf, and to cross-examine witnesses called by another party. However, if a parent fails to appear after receiving notice, the hearing may proceed in the parent's absence. All evidence which is relevant, material, and competent to the issues before the court shall be admitted. Notwithstanding the provisions of D.C. Code §§14-306 and 14-307, neither the spousal privilege nor the physician/patient privilege shall be grounds for excluding evidence. See D.C. Code §16-2388. Counsel for the parent may call the child as a witness, see *A.G. supra*; however, the GAL or even another party may seek a protective order.⁵

The moving party should scour the neglect case record for evidence of the parent's failure to comply with services offered to facilitate reunification. It is more efficient to introduce certified copies of court orders and findings at the fact-finding hearing than to ask the court to take judicial notice mid-trial of a document buried in the neglect file. Movants should be sure to subpoena drug test results, and perform criminal background checks on the parents to determine if they have been involved in any recent drug-related activity or criminal behavior. Criminal convictions must be certified by the Criminal Division Clerk's office.

The guardianship statute sets forth the criteria the court must consider in determining whether to grant the motion for permanent guardianship. These criteria are identical to those contained in the statute governing termination of parental rights:

1. BEST INTEREST: Whether permanent guardianship is in the child's best interest. In determining whether the proposed guardianship is in the child's best interest, the Court shall consider each of the following factors:
 - a. The child's need for continuity of care and caretakers, and for timely integration into a sta-

- ble and permanent home, taking into account the differences in the development and the concept of time of children of different ages;
- b. The physical, mental, and emotional health of all individuals involved to the degree that each affects the welfare of the child, the decisive consideration being the physical, mental, and emotional needs of the child;
- c. The quality of interaction and interrelationship of the child with his or her parent, siblings, relatives, and caretakers, including the proposed permanent guardian;
- d. To the extent feasible, the child's opinion of his or her own best interests in the matter; and
- e. Evidence that drug-related activity continues to exist in a child's home environment after intervention and services have been provided pursuant to D.C. Code §4-1301.06a.

2. Whether adoption, termination of parental rights, or return to the parent are appropriate for the child; and
3. Whether the proposed permanent guardian is suitable and able to provide a safe and permanent home for the child.

In considering whether to grant the motion for permanent guardianship, the court must take into account any and all relevant, material, and competent evidence presented at the adjudicatory hearing, including any report and recommendation submitted by CFSA.⁶ According to the statute, evidence of continued drug-activity shall be given great weight. See D.C. Code §16-2383(d)(5). In the event the guardianship is granted, the court shall consider any and all evidence, relevant to the issue of what type of contact or level of visitation to accord to parents and other relatives.

In cases where there is little opposition or little dispute over the facts in the case, parties may save time by stipulating to the facts set forth in the CFSA report and recommendation in lieu of taking testimony.

⁵ The issue of calling the child as a witness and the objections that may be lodged are discussed in more detail in the Trial Chapter.

⁶ This requirement set forth in Administrative Order 02-05 may cause a problem in that the CFSA report and recommendation may contain information that is hearsay and therefore not competent evidence.

VIII. Parents' Defenses

Parental defenses to a motion for guardianship are typically similar to those asserted in termination of parental rights or contested adoption proceedings. However, because the rights of the parents remain intact in guardianship cases, the court will decide the merits of the motion using the preponderance of the evidence standard (while the higher clear and convincing evidence standard must be met in TPRs or contested adoptions). Keep in mind that one of the criteria for obtaining a guardianship order is that the child was adjudicated neglected. Thus, the neglectful parent is at a severe disadvantage in the guardianship proceeding because the judge has already concluded in the neglect case that the child should not return home. Thus opposing a guardianship motion has a greater chance of success if the parent opposing guardianship is either a non-neglectful parent or if one or both parents propose an alternative suitable caretaker. Again, the neglect judge likely will have already ruled out any alternative placement option or CFSA will have made its choice known, and the parent will face an uphill battle. In such a scenario, counsel for the parent should seriously consider researching and filing a motion for recusal based the neglect judge's previously stated preference for one caretaker over the other. Counsel for the parents should also review case law supporting the premise that the court must give "weighty consideration" to the parent's choice of a fit custodian. For a full discussion of parental defenses, see Termination of Parental Rights Chapter and Adoption Chapter.

IX. The Guardianship Order

Every guardianship order shall be in writing and shall recite the findings upon which such order is based, including findings pertaining to the court's jurisdiction. D.C. Code §16-2392(a). Typically, the attorney for the movant is responsible for drafting the Findings of Fact and Order Appointing Permanent Guardian. Administrative Order 02-05 states

that an order for permanent guardianship shall state in writing:

1. The findings of fact and conclusions of law on which the order is based, including findings pertaining to the court's jurisdiction; and to each of the considerations listed above;
2. The rights and responsibilities concerning the care, custody, and control of the child that have been granted to the permanent guardian;
3. The rights and responsibilities that are retained by the parent(s);
4. That the court will retain jurisdiction to enforce, modify, or terminate the guardianship order until the child reaches age 18;
5. That, on or before the child's eighteenth birthday, the permanent guardian, child, or GAL may move the court to retain jurisdiction over the guardianship order until the child reaches age 21;
6. That the permanent guardian is required to file a motion to modify the guardianship order before taking any action that is reasonably likely to have an adverse affect on the rights of another party under the guardianship order; and
7. That the permanent guardian shall not relocate with the child over 100 miles from his or her place of residence without filing a notice with the court.

In addition, pursuant to a motion, the court may order child support payments by either or both parents. Likewise, the guardianship order may address the issue of visitation between the child and his or her parents and relatives. If visitation is an issue, the court shall consider any and all evidence relevant to a determination of what contact or visitation, if any, between the child and his or her relatives would be in the child's best interest. If the issue is not specifically raised, a parent's right to reasonable visitation is usually reserved and should be articulated in the order.

One restriction placed on the guardian, as noted above, is on the ability to relocate over 100 miles from the guardian's current place of residence. The provision does not prohibit relocation, it merely requires notice of the intent to relocate to the court and to all parties. The notice must be

personally served on all parties 15 business days before the relocation. Notice of relocation shall include the permanent guardian's new address, telephone number, and anticipated date of relocation unless, for good cause shown, the court permits the permanent guardian to withhold this information from another party.

In addition to the Findings of Fact and Order Appointing Permanent Guardian, counsel for the movant should prepare a short separate order setting forth the rights and responsibilities concerning the care, custody, and control of the child that have been granted to the permanent guardian. This will allow the guardian to present an order to third parties without having to disclose potentially embarrassing family history.

X. Successor Guardian

The moving party may, but is not required to, name a successor guardian in the event of the death or incapacity of the guardian. If the successor guardian is named in the motion, the court may require CFSA to do a preliminary background check to see if the successor guardian is suitable to assume care of the child and to ensure that, in the event a subsidy is sought, the proposed successor guardian does not have any obvious impediments to later becoming a licensed kinship care provider.

Upon the death or infirmity of the permanent guardian, before the transfer of legal status can occur, any party with standing or a person with physical custody of the minor child must file a motion to transfer the guardianship to the proposed successor guardian. If a guardianship subsidy is sought, the person seeking to be the new permanent guardian must first be certified as a kinship care provider through the Agency.

XI. Modification of Guardianship Order

The guardianship statute contains a detailed section on modification of guardianship orders.

Any attorney considering filing or responding to a modification order should review the statutory provisions carefully. As in custody cases, guardianship orders may be modified. Any party may move the court to modify, terminate, or enforce a guardianship order. Notice of a motion to modify, terminate, or enforce a guardianship order must be personally served on all parties. Unlike in custody cases, the parties cannot simply file a consent motion to modify the guardianship order and expect a favorable result. Because the child in question was adjudicated neglected, the court may order CFSA to file a report and recommendation regarding the proposed modification or termination of the guardianship order within 45 days of the filing date of the motion.

The statute requires that the court hold an adjudicatory hearing before modifying or terminating a guardianship order and shall, at the conclusion of the hearing, enter a written order reciting the findings upon which such order is based, including findings pertaining to the court's jurisdiction. A guardianship order may only be modified or terminated if the court finds, by a preponderance of the evidence, that there has been a substantial and material change in the child's circumstances subsequent to the entry of the guardianship order and that it is in the child's best interests to modify or terminate the guardianship order. See D.C. Code §16-2395.

As this Practice Manual goes to press, the Family Court is drafting Guardianship rules to address these issues, but for the time being the procedure is not clear and varies from judge to judge. It is expected that the Guardianship rules will set forth detailed procedures and timelines for dealing with motions to enforce, modify, or terminate guardianship orders.

XII. Reopening the Neglect Case

The guardianship order creates permanency for the respondent and typically triggers what some judges describe as the "administrative closing" of the neglect case. While the court and CFSA stop

monitoring the child, the court may “reactivate” the neglect case when, for example, a motion to set aside or modify the guardianship is filed or granted.

More and more common is the guardian who realizes the child needs additional services that cannot be obtained without court intervention. In an effort to preserve placements and provide guardians with services without reactivating the neglect case, CFSA has created the Post-Permanency Services Unit that strives to assist the permanent caregivers of neglected children with services to avoid placement disruption. Such services are limited in scope, so if the Unit believes that the child needs more extensive services, the agency may seek to reopen the neglect case.

Guardians who conclude they are unable or unwilling to continue caring for a respondent may find themselves the subject of a neglect petition.⁷

Even if a neglect case is not papered, CFSA has been known to place the guardian on the Child Protection Registry as an unwilling caretaker. Counsel for the guardian should warn the guardian against taking any rash actions and invite the guardian to seek the assistance of counsel if they are experiencing any problems or have questions after the guardianship is granted. Counsel may be able to assist the guardian in obtaining post-permanency services or in reactivating the neglect case and finding an alternative placement option without penalizing the guardian.

If you are contacted by a former client to provide additional representation (for example, to pursue a motion to modify on behalf of a guardian or parent whom you had represented) and you wish to become involved in the case again, you should contact the CCAN office to clarify reappointment and payment procedures. ■

⁷ D.C. Code §16-2301(9)(A)(iv) defines a neglected child as “a child whose parent, guardian, or custodian refuses or is unable to assume the responsibility for the child’s care, control, or subsistence and the person or institution which is providing for the child states an intention to discontinue such care.”

CUSTODY

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CUSTODY

In the context of neglect proceedings, one will sometimes come across other actions involving custody of children. There are several manuals and books that deal with that topic in great depth. *See e.g.*, Family Law: Child Custody Training Manual, published through the D.C. Bar Pro Bono Program (hereinafter *Custody Training Manual*), for an in-depth treatment of custody cases in the District of Columbia.

Neglect proceedings are one of the forms of custody actions as that term is defined by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), D.C. Code §§16-4601 *et seq.* Other custody proceedings include guardianship, adoption, custody, *habeas corpus*, and visitation. All such actions are brought in the Family Court of the District of Columbia Superior Court. Guardianship petitions not related to neglect proceedings are filed in the Probate Division.

I. Overview and Legal Authority

A custody case begins when a complaint for custody is filed. The Family Court of D.C. Superior Court has exclusive jurisdiction over these cases pursuant to D.C. Code §11-1101. Unlike neglect cases, the government is not a party in a custody case. The custody lawsuit is filed by a private party – either one of the biological parents or a third party; i.e., grandparents. Similar to other complaints, a custody complaint must be served on the defendant(s), who are usually the parents or an individual who has physical or even legal custody of the child. The defendant(s) must file an answer or risk having a default judgment entered. If the complaint is contested, the parties will proceed to a trial on the merits.

D.C. Code §16-914 states that the primary consideration in custody proceedings between parents is the best interest of the child. That code provision also creates a presumption of joint custody, with exceptions, and sets forth factors that the court is to consider when applying the best in-

terests standard. This statutory provision is codified within the Marriage and Divorce Act and most clearly applies to custody actions between two biological parents. The applicable standard between parents and non-parents is less clear, and dicta in various D.C. Court of Appeals cases lend support to divergent views. *See the Custody Training Manual* for a review of D.C. custody cases between parents and non-parents. Many adhere to the view that the principle of best interests is always controlling. Others argue that the parents must be proven unfit before the court may award custody to another. And a third, intermediate, position holds that, absent a showing of special circumstances, parents should be awarded custody against a non-parent. This final theory does not go as far as requiring that the parents be found unfit, but it does accord some weight to the parent-child relationship. *In the Matter of Baby Boy C.*, 581 A.2d 1141 (D.C. 1990), holds that, at least in an adoption case, the best interests standard incorporates a presumption that a fit biological parent should be given custody of his child.

Further complicating the situation is the case of *W.D. v. C.S.M.*, 906 A.2d 317 (D.C. 2006). There is considerable debate over the practical impact of that decision, ranging from a narrow interpretation that a non-parent caregiver cannot file for custody if a neglect case is pending, to a broader interpretation that even when there is no pending neglect case, a non-parent caregiver cannot file for custody. This uncertainty creates considerable risk for a caregiver client who suspects that the child's biological parent will appear in court and want custody of the child. Counsel for a non-parent caregiver should read this case and discuss the possible outcomes with the client before filing for custody.

II. Relationship to Neglect Cases

In the context of a neglect proceeding, a custody action can arise in several different ways. Frequently, the party with whom the child has been placed will file what is commonly called a "consent custody" case. In this instance, the parents usually know and approve of the caretaker, who may be a relative or foster parent, and will consent to the award of legal custody to that person. If both parents consent, or if the mother consents and the identity of the father is unknown, affidavits of consent may be submitted with the complaint for custody. Arrangements may then be made with the Domestic Relations Clerk to present the case on the consent custody calendar rather than waiting for weeks or months for the case to be calendared on the contested custody calendar.

The plaintiff should be present for the hearing and be prepared to testify briefly to his or her desire and ability to assume the responsibility of legal custody. Copies of the child's birth certificate should be introduced into evidence. If possible, the defendants should also be present, even though an affidavit of consent has been executed. Typically, however, judges will agree to hear the case even if the defendants are not present.

If the father's identity is known, but his whereabouts are unknown, a more difficult problem is

presented. The father is entitled to notice of the proceeding, and attempts must be made to serve him. If personal service cannot be achieved, then service must be made through posting or publication. Constructive service is more complicated in custody actions than it is in neglect cases, where clear authority can be found in the court rules and case law. See *Custody Training Manual* for further information on constructive/alternative service in custody cases.

Although often called "permanent custody," the custody of a child can be modified if the needs of the child so dictate. Given the emphasis on stability and continuity of care for a child, however, a custody decree is not easily or lightly altered. Indeed, a party seeking to modify the custody order must demonstrate that there has been a significant change in circumstances that warrants changing the prior custody order.

Therefore, parents should not be induced to consent to a complaint for custody with the assurance that custody can be regained merely for the asking. The third-party custodian may have stated her sincere intent to relinquish custody if the parents should want the child back in their care. After becoming attached to the child, however, the caregiver may change her mind and refuse to turn over the child. Again, given the need for stability, the parents will need to show that a change in circumstances requires that the custody order be modified, and the third party's initial promise to return the child is not likely to be accorded much weight. On the other hand, a parent may promise to leave a child with the third-party custodian, but subsequently change her mind and institute litigation to modify the custody decree. Even if the parent can prove a change in circumstances, certainly the litigation can be a nuisance.

In short, a custody proceeding may appear to be the logical way to resolve a neglect case. All parties, however, should be apprised of the potential drawbacks before they reach any decision.

Once a custody order has been signed, the neglect case can be closed shortly, if not immediately. Often, it is for this very reason that a custody action

will be instituted. If the child is doing well with no need for services of any kind, and everyone involved agrees that the placement should continue, there is probably no need for continued government intervention, and the neglect case can be closed. The obvious drawback to this arrangement is that, once the neglect case is closed, reunification is no longer even the ostensible goal, and there will be no services offered to the family – to either the child or the parents. Consequently, this action should be taken only after careful consideration and after the client has been apprised of the ramifications.

III. Consolidation

Often a judge will appoint an attorney to represent a third-party custodian in the neglect case.

The nature of the appointment varies and, frequently, it will not be specified. Sometimes the purpose is to represent the person's interest in the neglect case; other times the appointment may be made exclusively for the purpose of securing a custody order in the Domestic Relations Branch so that the neglect case may be closed. In the latter circumstance, the attorney will generally file a motion to consolidate the neglect case with the custody action. This consolidation serves several purposes. First, it allows the two cases which are, after all, both about the custodial placement of a minor child, to be decided consistent with each other. Second, if the cases are consolidated, it is the prevailing view that the consolidation allows the neglect attorney to be paid for work done in the custody proceeding. ■

APPEALS

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APPEALS

Counsels' duties on behalf of clients encompass taking appropriate appeals to the D.C. Court of Appeals, or, if the proceeding was before a magistrate judge, to an associate judge of the Superior Court, and then, if appropriate, to the Court of Appeals. It is the policy of the Court of Appeals to appoint the attorney of record in Superior Court for the appeal. If you practice in the Family Court, you should expect to find yourself practicing in the Court of Appeals as either an appellant or an appellee.

The Court of Appeals revised its rules governing all appeals taken as of January 2, 2004, and references in this chapter will refer to those revised rules. This chapter is not meant to be a substitute for a careful reading of the rules governing appellate procedure. If you do not follow the rules, your brief or other appellate pleading might not be accepted for filing or might be the subject of a motion to strike from the opposing side.

Appeals from decisions of magistrate judges are governed by D.C. Code §11-1732(k) (2001) and Sup. Ct. Fam. R. D (e). No appeal from an order of a magistrate judge may be heard by the Court of Appeals until it has been reviewed by an associate judge of the Superior Court. D.C. Code §11-1732 (k).

I. The Decision to Appeal

The decision to appeal an adverse ruling or order is the client's, as the Child Abuse and Neglect Attorney Practice Standards (included as an appendix to the rules governing neglect proceedings) make clear. Rule F-1 of the standards states:

Counsel shall consider and discuss with the client the client's right to appeal and whether the appeal has merit. When discussing the possibility of an appeal, counsel should explain both positive and negative effects. Counsel should discuss with the client the possibility of expediting the appeal. Counsel should also discuss whether he or she will represent the client in the appeal or whether another attorney will be appointed.

If the client decides to appeal, trial counsel

must file any necessary post-hearing motions and the notice to appeal, and he or she must order the transcript. If trial counsel does not serve as appellate counsel, he or she must transmit all documents relevant to the appeal to appellate counsel.

Child Abuse and Neglect Attorney Practice Standards, R. F-1.

Do not prejudge the merits of an appeal. Even if you doubt the strength of your issue, the reviewing court may find that reversible error has occurred. Your job on appeal, as in trial, is to advocate for your client. Let the court decide whether your client should prevail.

Just as you have explained throughout the entire representation the nature of a trial and other proceedings, you must explain the nature of an appeal. Your client may not know that an appeal is not the time to present new evidence.

It is the opportunity to have three judges review what the trial judge did to see if the trial judge made any substantial error which affected your client's rights. You will have done your best to test the credibility of adverse witnesses at trial, and should explain that you cannot do this again in the Court of Appeals. You must decide whether to advise your client to be present for oral argument, considering whether it will be too frustrating to hear judges talk about the client without the client being able to speak directly to the court. It is your job to determine what issues to present to the Court of Appeals, but your client should receive a copy of the briefs that are filed.

II. Making an Appellate Record Throughout the Family Court Case

Appellate responsibilities begin when the Family Court case begins, and the possibility of an appeal should never be far from your mind. The Court of Appeals' role is to review the record for error, not to hear new evidence. In open court, make clear your objections to adverse rulings, pre-trial or during trial, giving all appropriate grounds for the objection. If you object, the claimed error is preserved, and the Court of Appeals will review under the harmless error rule, examining whether the error had a substantial influence on the result. *Kotteakos v. United States*, 328 U.S. 750 (1946). If you did not object during the trial, the Court of Appeals will review the claimed error only for plain error, which it has defined as "so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial." *Watts v. United States*, 362 A.2d 706, 708-09 (D.C. 1976) (*en banc*). If you cite only one ground for your objection, other grounds argued on appeal may also be reviewed under the plain error standard, under the theory that the trial court did not have an opportunity to consider your rationale. It is important to preserve each ground for the objection, and to be able to tell the Court of Appeals not only that there was error but also that the error prejudiced your client.

When evidence you wish to present is excluded, make a proffer to the court as to what the evidence would have been and why it is crucial to your case. If the evidence is written, submit it for inclusion in the court jacket, and be prepared to make the same prejudice argument to the Court of Appeals. The Court will review the judge's decisions on admission of evidence under a deferential abuse of discretion standard. *Johnson v. United States*, 398 A.2d 354 (D.C. 1979)

Counsel should also make sure that any motions and oppositions which are filed actually get into the court jacket by checking the jacket whenever the case is in court or at least when an appeal is filed. Sometimes guardian *ad litem* reports are simply sent to chambers, and never filed with the clerk. Moreover, even a properly filed pleading or response might not be in the jacket. There is a provision for supplementing the record on appeal if necessary, but it is better to have everything in the jacket in the first place so that it will be available to the reviewing associate judge or copied by the Appeals Coordinator's Office for the Court of Appeals. Although the finding that the government has produced sufficient evidence to prove neglect must be based on what is presented in the courtroom during trial, other decisions made by the trial judge before and after the neglect trial will be based on reports and other documents filed in the court jacket.

If an evidentiary hearing is to be conducted, such as the neglect trial or a post-adjudication proceeding such as guardianship, termination of parental rights or adoption, counsel should contact the Court Reporting Division a few days ahead of time to request that a court reporter be present, and let the judge know you have done so and do not wish to go forward without a court reporter. Although all proceedings are supposed to be recorded on tape, the tape recorder used in those courtrooms without the central recording system may malfunction and not record properly or at all. Moreover, one does not always get a complete transcript from a tape recording, because it is difficult for the transcriber to identify everyone who speaks and some voices are just not clear or loud

enough to be captured on tape. If you do not succeed in obtaining a court reporter, be mindful during the hearing of the need for clarity in the record, stating, for example, “Objection on behalf of Ms. Doe.”

If you have a continuing objection to an entire line of testimony, state it clearly for the record. Move to strike any testimony which is given but to which your objection has been sustained. If you have reason to believe that the judge is not impartial or has pre-judged the case, do not save this argument for appeal. You must request recusal during the proceedings themselves to preserve your issue if recusal is denied.

III. Transcript Problems

Despite your best efforts, you may not have a satisfactory or complete transcript to use for the appeal. If you have some slight problem, such as a few essential words or phrases are rendered as “unintelligible,” you might try calling the tape section of the court reporting division to ask if the transcriber could listen to the tape again.

If you have serious deficiencies or no transcript at all because of tape malfunction, consult D.C. App. R. 10(d), which provides that you may prepare a substitute statement to present to the trial court for review and approval. If you were trial counsel, and took careful notes, this procedure may suffice. If you were appointed only on appeal, you must turn to counsel or others who were present to help you prepare a proposed statement. This may require you to seek the cooperation of the government’s lawyer. Since it is appellant’s duty to provide a record for the reviewing court to review, you may forfeit your client’s claim if you cannot do so. However, if you seek assistance from the government’s attorney and are refused, you should argue in the Court of Appeals that the government has waived its right to assert any claim of forfeiture.

IV. What May Be Appealed

Appeals are taken from final orders. A final order is an order which disposes of a matter or an issue on its merits. The appealable final order in a neglect trial is deemed not to be the findings of fact, but rather the disposition order. A final order for purposes of review by an associate judge of a magistrate judge’s ruling is the same as that for the Court of Appeals.

A disposition order adjudicating neglect is a final order, as is an order granting a motion for termination of the parental relationship (TPR), a guardianship or adoption petition, or denying the same. However, an appeal from only one of several findings which support the adjudication will be dismissed as an appeal from a finding and not from a final order. *In re Z.C.*, 813 A.2d 199 (D.C. 2002).

An order waiving a parental right to consent to an adoption at the end of a show cause hearing is not a final order. *In re S.J.*, 772 A.2d 247 (D.C. 2001). An order denying a parent the right to visitation with his or her child or modifying visitation is a final order. *See, e.g. In re Ko.W.*, 774 A.2d 296 (D.C. 2001).

More than one disposition order may be entered in a case if, for example, a child’s status changes from commitment to third party custody. Each disposition order is a final order and may be appealed. An order revoking protective supervision, which would involve a new disposition order, is appealable. *In re A.M.*, 589 A.2d 1252 (D.C. 1991). On the other hand, an order which merely changes the case goal from, for example, reunification to adoption is not a final order. *In re K.M.T.*, 795 A.2d 688 (D.C. 2002).

An order denying a motion to extend the time for filing an appeal may be appealed. *In re Ak.V.*, 747 A.2d 570 (D.C. 2000). An order permitting television coverage of a child for the purpose of recruiting an adoptive family is appealable. *In re T.W.*, 732 A.2d 254 (D.C. 1999). An order closing a

case may be appealed. *In re S.L.E.*, 677 A.2d 514 (D.C. 1996). However, many pre-trial orders cannot be appealed, such as an order for a party to undergo psychiatric testing. *In re D.T.*, 129 Wash. D.L. Rptr. 45 (D.C. Sup. Ct. Jan. 8, 2001). If you are in doubt about whether something is a final order or otherwise appealable, err on the side of appealing.

V. Emergencies

If an order has been entered which you feel constitutes immediate harm to your client unless reversed, file the appropriate appeal accompanied by an emergency motion to stay the order. You should serve all other parties personally and include with your pleadings everything the court will need to decide whether to stay the order. See D.C. App. R. 4(c)(2).

VI. Who May Appeal

Anyone with party status may appeal from a final order. *In re Phy.W.*, 722 A.2d 1263 (D.C. 1998) (foster parent); *In re G.H.*, 797 A.2d 679 (D.C. 2002) (paramour who was acting *in loco parentis*). An interlocutory appeal may be taken from a shelter care order, but only by the child. D.C. Code §16-2328 (a); *In re S.J.*, 632 A.2d 112 (D.C. 1993). If only one parent appeals, the appeal will still be heard even if reversal of the allegations against that parent will not result in vacating the disposition in its entirety. See, e.g., *In re A.S.*, 643 A.2d 345 (D.C. 1994) and *In re N.P.*, 882 A.2d 241 (D.C. 2005).

VII. Appeals to an Associate Judge From Judgments or Orders of Magistrate Judges

Appeals from final orders of magistrate judges are governed by Sup.Ct. Fam. R. D.(e), which states that the appeal is by motion for review which must be filed within 10 days of the order or judgment from which the appeal is taken. The

motion must specify the grounds for the appeal and summarize the evidence relating to that issue. Another party may file a response to the motion within ten days of service. Sup. Ct. Fam. R. D.(e)(1). If a stay of the order is sought, the request should first be made to the magistrate judge, and if that is refused, to the reviewing judge. Sup. Ct. Fam. R. D.(e)(3). There is provision for an extension of the 10-day filing requirement upon a showing of excusable neglect. Sup. Ct. Fam. R. D(e)(4).

A motion for review should be filed in the neglect clerk's office, just as any other motion, but in addition to giving a courtesy copy to the magistrate judge who issued the order from which the appeal is taken, counsel should give a courtesy copy to the associate judge who is presiding judge of the Family Court. The presiding judge will be assigning the review judge.

It would be best for the reviewing judge to have as full a record as possible in considering the appeal. Therefore, counsel should prepare for an adverse result from the trial or evidentiary hearing by obtaining a transcript voucher from the finance office to submit to the magistrate judge at the end of the hearing. Enter on the voucher the cost of an expedited transcript, and be sure the judge initials that part of the voucher as well as signing the authorization. To estimate the cost of preparation, figure 40 pages per hour of court time. You must have a separate voucher for each court reporter or each day on which the proceeding is recorded only by tape.

It may be that you will not obtain a transcript in time to brief your appeal to the associate judge. Prepare for that eventuality by taking careful notes during the trial or hearing, so that you will be able to refer to the facts of the case accurately. Your motion for review of the magistrate judge's decision should have the same components as any appellate brief, i.e., a recitation of the facts, a discussion of the applicable law, application of the law to the facts of the case, and the request for the relief sought.

VIII. Appeals to the Court of Appeals

An appeal to the Court of Appeals must be taken within 30 days of the judgment or order of an associate judge. D.C. App. R. 4. The Superior Court may enlarge that time to 60 days upon motion and for excusable neglect or good cause. D.C. App. R. 4(a)(5). Only a party who files an appeal to the Court of Appeals is deemed an appellant. All other parties are appellees, and cannot seek reversal in the Court of Appeals of the Superior Court order or finding. An attorney appointed for a child in the Court of Appeals is a guardian *ad litem*, as in Superior Court. Nevertheless, the GAL is bound by the record, as are all appellate counsel. As with other parties, unless an appeal was noted on behalf of the child, the child is an appellee.

Counsel should obtain a copy of the notice of appeal from the Appeals Coordinator's Office or consult the D.C. Court of Appeals website. You must attach a copy of the order from which the appeal is taken. File the notice of appeal at the Family Court Central Intake Center, but take a file-stamped copy to the Court of Appeals along with the attached order. If the appeal is from a decision of a magistrate judge which has ripened by review by an associate judge, the appeal is still from the magistrate judge's decision. On the notice of appeal, put both the date of the magistrate judge's decision and the date of the reviewing judge's decision. It may be good practice to also attach the associate judge's decision to the notice of appeal.

Appeals from orders terminating parental rights or granting or denying an adoption are expedited. D.C. App. R. 4(c)(1). Within 10 days you must order or file a motion for expedited preparation of the transcript. In an adoption, you must also file a motion to unseal the record for the purpose of transcript preparation. Deliver a copy of the order granting your motion to unseal the record to the court reporting division. Expedited appeals will be given priority in calendaring, so you should be prepared to do the necessary legal research and write the brief without delay.

If you are a parent's counsel, delay is seldom of benefit to your client. If a neglect adjudication is not reviewed promptly, by the time you appear at oral argument, your client's child will have been in the undesired placement for months or years, or be in the process of being adopted by someone other than your client. The Court of Appeals cannot be expected to ignore the disruption that might be caused to a fragile child when considering the relief you request.

Filing a notice of appeal does not stay the trial court order or prevent the trial court from continuing to review the case and make decisions about the child's care. D.C. Code §16-2329(d). To obtain a stay of a Superior Court order, you must first seek a stay in Superior Court, or show the Court of Appeals that it would be impracticable to do so. D.C. App. R. 8. The best procedure is first to ask the trial court judge to stay the decision until you can seek redress in the Court of Appeals. If you are denied, then ask for a stay until you can seek a stay in the Court of Appeals. If you are denied, then ask the Court of Appeals for a stay in accordance with Rule 8.

Once you have noted your client's appeal and made sure you have submitted transcript vouchers for all needed transcripts, it is time to update or begin research on the issues you plan to present, whether you are arguing that the government did not meet its burden to prove the allegations of neglect by a preponderance of the evidence, or another issue such as the trial court's exercise of discretion in its rulings. If you plan to practice in the field of neglect and adoption, you should maintain your own library of cases handed down by the Court of Appeals. While this would be an impossible task in criminal law, in neglect and adoption law the body of case law is not overwhelming. The CCAN office can email you a list of neglect and adoption cases. To keep up to date, log on to the Court of Appeals web page every week to read the new decisions. Opinions generally are handed down on Thursdays. They are also immediately available in the Court of Appeals or in the library of the courthouse. About six weeks later, the opinions can be found in the Atlantic Reporter 2d.

Neglect case law is very fact-specific, but if you are arguing that the facts presented at trial did not prove neglect, then it is helpful to read the opinions to see what the Court of Appeals has found does or does not amount to statutory neglect. If your appellate issue is a broader one, such as the admission of or the refusal to admit hearsay or other evidence, your research may take you outside neglect jurisprudence. A parent's right to the custody and control of his or her child is constitutionally protected, and landmark Supreme Court decisions discussing this right should be referenced. Within neglect and domestic relations case law, there are many opinions on the issue of visitation between the child and the non-custodial parent. When you are presenting an issue which is new to the District of Columbia, go to other states for opinions which have analyzed the issue. A well-reasoned opinion from another jurisdiction is persuasive authority for the Court of Appeals, and may be considered by the judges in their deliberations.

For an appeal based on a neglect trial, the Court of Appeals will review the issue of whether the government proved the allegations by a preponderance of the evidence in the light most favorable to the government, as it reviews sufficiency questions in criminal cases. In adoption and TPR cases, the standard is clear and convincing evidence. Other decisions by the trial court are reviewed for improper exercise of the court's discretion. A case which analyzes "discretion" as a legal concept is *Johnson v. United States*, 398 A.2d 354 (D.C. 1979).

Having done your research, obtained your copies of the transcripts, and assembled the parts of the record you wish to draw to the Court's attention, you now write your brief, keeping in mind the requirements of D.C. App. R. 28, which outlines the components of a brief, and R. 32, which sets out page limitations. Both your statement of facts and your argument sections must contain page references to the record, whether it be the filings in the jacket which have been reproduced for the appellate record, or the transcript. D.C. App. R. 28 (a)(7) and (8). D.C. Code §16-2329(b) requires that confidentiality of the child be maintained, in-

cluding being identified only by initials in the transcripts, briefs and other papers.

In appeals of neglect cases the Court of Appeals requires the appellant to submit, along with the brief, four copies of an abbreviated appendix which includes any trial court opinion, findings of fact and conclusions of law which relate to the appeal. The appellant may also include in the appendix any other portions of the record to be called to the court's attention. An appellee may submit an appendix which includes other parts of the record not submitted by the appellant. D.C. App. R. 30(f).

IX. Writing the Brief

From the first word of your statement of facts to the last word of your conclusion, the point of view is that of your client. The facts need not be presented in the order produced by the other side at trial. Tell your client's story. While you cannot ignore unfavorable facts, you can present them within the context of the story from your client's perspective. Develop your own vision of the case. Each case is unique, just as each family is unique. For example, you may look at the facts and see a young or overwhelmed parent doing his or her best, seeking help without getting it, who had a minor or isolated instance of neglectful behavior. You may ask, is it the purpose of the neglect statute to step in and disrupt a family under these circumstances? Be clear, be concise, be complete. Do not force the reviewing court to try to read between the lines. Break down the issues, the facts, and the law into their components. Short sentences are better than long ones. You may choose to include every single relevant fact in the statement of facts, or merely the most important ones, and then add additional facts from the record in the argument section. Always cite to the transcript page or record page when citing any fact.

Consult Rule 28 for your brief's formal requirements. Note that 28(a) requires that you set out the standard of review for each issue. For example, the Court of Appeals reviews arguments that the

evidence was insufficient to support the adjudication by looking at the facts and reasonable inferences from the facts in the light most favorable to the government. It reviews most other court rulings under the abuse of discretion standard. The court will not set aside factual findings unless they are plainly wrong or without evidence to support them. D.C. Code §17-305 (a) (2001). You may set out the standard of review in your opening paragraph on the issue, or include it in the analysis.

It does not matter whether in your argument section you first set out the law and then the relevant facts of the case, or vice versa. The important thing is that you set out both the law and the facts, and apply the law to the facts. Defining the issue is half the battle, however, and thus your analysis of the issue is also from the client's perspective. The appeals court wants to know what you think the trial court did wrong and how this hurt your client. A parent is hurt, for example, if the court finds neglect on evidence which does not rise to neglect under the law, or after a trial in which evidence which was not reliable and should not have been admitted was considered in reaching the decision. An appellee is not restricted to defining the issue the same way as the appellant, but may wish to concentrate not on the errors, but on the evidence which supports the decision and which renders any judicial errors harmless.

Pre-empt the opponent's argument that your issue was not preserved by references in the record to objections below. Pre-empt any argument that the alleged error was harmless by focusing on the injury suffered by the client as a result of the court's error as well as on the error. If the reviewing standard is abuse of discretion, show several ways in which the court's exercise of its discretion was improper, focusing both on the facts and on the law, and picking apart the judge's rationale. Tell the court what it needs to know in order to see the case from your client's perspective.

The fact finder is entitled to make inferences from the evidence. Show the court what the problems are with the inferences the trial court made

by pointing out how the government could have proved its point, but did not, for example, by failing to call the best witness or eliciting the testimony which was necessary for its proof. Show how a witness's testimony was merely conclusory, and not the eyewitness evidence the court may have inferred it to be. The court will not review the trial judge's credibility determinations, so do not allow the other side to turn your argument about insufficiency of the evidence into a credibility argument. If you do not argue that the factual findings were erroneous, you will be deemed to have waived that issue. You will be hard pressed to convince the court that the judge's decision was erroneous if you conceded that each factual finding supporting the decision was correct.

Remember that a trial judge rules on the evidence presented in the courtroom and tested by cross-examination. Do not let an appellee undermine your insufficiency argument by setting out in its own counter-statement of facts allegations from a police report or other document filed in the jacket, if no witness testified to those allegations. Show very clearly in your reply brief how the appellee has done this, if it occurs.

Case law which supports your point of view should be set forth in as much detail as necessary but not more than necessary. String citations without analysis are not impressive. That which undermines your point of view must be presented, if it is controlling authority, but may be distinguished.

An appellant always has a reason to file a reply brief, even if it is merely to hone the argument a little more sharply, under the inspiration of the brief of appellee. Distinguishing unfavorable case law cited by the appellee is one function of the appellant's reply brief. Correcting misstatements of the record or of your argument is another.

After the argument section comes the conclusion. The conclusion is not a summary of the argument. It is just one sentence telling the court what you are asking for, i.e., that the trial court's order or judgment be vacated.

X. Oral Argument

Oral argument is your opportunity to explain in three sentences or less what the trial court did wrong. Crystallize your vision of the case. Don't be afraid to be passionate. The D.C. Court of Appeals is a "hot bench," which means the judges know the record and will pepper you with questions about the record, the case law, and your reasoning after you have spoken a few words. Prepare for this encounter by re-reading the transcript and your case law in the days prior to argument. Think about what questions the judges will ask. These may include questions about which case is your best case, i.e., the one that most supports your argument, or your worst case. Make notes of what points you want to be sure to make so that you can introduce them in response to appropriate questions or when there is a pause in the questioning. If a member of the panel asks you a question, answer it. Give the reason or reasons for your answer, as in, "No, for three reasons." If you are appellant, you will have a few minutes for rebuttal. Prepare an ending to your argument which will encapsulate a reason for the judges to rule in your favor.

Hyperbole is not attractive, nor are *ad hominem* attacks on your opponent or the trial judge. Your argument can be strong without being offensive.

If you get a notice that the case is set on the regular calendar, in the morning, argument has already been granted, and each side will have 30 minutes. If the case is set on the summary calendar, in the afternoon, you must request argument. If you ask for argument within 10 days of receiving the notice, you can do so by letter to the Clerk of the Court of Appeals, with copies to parties. After 10 days, you must do so by motion.

XI. Motions in the Court of Appeals

Motions are governed by D.C. App. R. 27. If you are filing a procedural motion, you must contact the other parties to attempt to secure their consent or determine if a response will be filed, and

state the result in your motion. If every other party tells you it does not oppose, put the word "Unopposed" in the title of your motion. If a case is already on the calendar for argument, or is an emergency or an expedited case, an opposition will be filed and you cannot reach the other party by telephone, you must serve your motion personally. R. 27 (b) (4). A motion or response cannot exceed 20 pages; a reply to a response cannot exceed 10 pages. R. 27 (d)(2).

It may be appropriate to file a motion for summary affirmance or reversal pursuant to D.C. App. R. 27 (c). If, for example, there is clear legal error on the part of the trial court, summary reversal might be appropriate.

If you have received an unfavorable decision, you may wish to ask the court for rehearing or rehearing *en banc*. Consult Rules 35 and 40.

XII. Appeals to the Supreme Court

Redress from an adverse decision of the D.C. Court of Appeals may also be sought in the United States Supreme Court by filing a petition for a writ of certiorari with the Supreme Court. The granting of a petition is discretionary, and occurs only where there is an important federal question.

If you believe you have such a question in your case, but are not a member of the Supreme Court bar, you may file a motion in the Court of Appeals for appointment of an attorney who is a member of the Supreme Court bar for the purpose of filing the petition.

XIII. Withdrawal of an Appeal

If your client tells you he or she wishes to withdraw an appeal after it has been noted, or the issue has become completely moot and is incapable of being repeated, an appeal may be withdrawn. For appointed counsel, the court will require a Waiver of Appellant, signed by the appellant, accompanying your motion to withdraw

the appeal. The waiver should include a statement that the appellant has discussed the appeal with counsel, been advised of the possible relief an appellate court can give, understands that once an appeal is withdrawn, it cannot be revived, and that the decision to withdraw the appeal is the appellant's alone, made free of coercion. You do not have to give a reason for withdrawing the appeal.

XIV. Continuing Jurisdiction of the Trial Court

The trial court has continuing jurisdiction over the case even when an appeal is pending. The trial court is free to enter a new order which renders the order appealed from moot, but it is not free to modify the order from which the appeal is taken. If your client agrees to a modification of the order from which the appeal is taken, move the D.C. Court of Appeals to remand the case to the trial court. If the appellate issue is not rendered moot by the modification of the order, and your client wishes to continue the appeal, then you must note a new appeal. You should then move the Court of Appeals to transfer the record and briefs from the old appeal to the new one.

XV. Orders from the Court of Appeals

Do not ignore an order from the Court of Appeals. It may be an order to show cause why your appeal should be dismissed as not from a final order, or an order to report on the status of the transcripts. A briefing order gives you 40 days from the date of the order to file the principal brief. If you need more time, file a motion for an extension, but do not wait until after the due date. Ask for as much time as you reasonably need. If you do not comply with an order from the Court of Appeals, do not be surprised to find that a referral has been made to the D.C. Bar for appropriate discipline.

The Court of Appeals is mindful of attorney workloads and considerate of well-reasoned requests for more time, but this consideration should not be abused. The atmosphere in the Court of Appeals is one of respect for the attorney and the client, and the well-prepared advocate is welcomed. ■

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PSYCHIATRIC and MEDICAL TREATMENT

Public mental health services for the District of Columbia are provided through the D.C. Department of Mental Health (DMH). The services for people age eighteen years or older are provided through the community mental health centers and the core service agencies. These agencies include First Home Care, Anchor Mental Health Center, and Community Connexions, which have contracts with DMH. *See e.g.* D.C. Code § 7-1131.01 *et seq.* for the scope of their services.

For adults, nearly all publicly supported inpatient mental health services are provided at Saint Elizabeth's Hospital. Private hospitals, such as Psychiatric Institute of Washington and Washington Hospital Center, also provide acute and long-term adult inpatient care and day treatment programs.

For children and persons under the age of eighteen, short-term, evaluative inpatient care is provided at Children's Hospital, Riverside Hospital and the Psychiatric Institute of Washington. DMH no longer provides any direct short-term, evaluative short-term emergency or acute care for persons under the age of eighteen, as it did in the past at St. Elizabeth's Hospital.

Both adults and children may be involuntarily hospitalized, on an emergency basis, pursuant to D.C. Code § 21-521, *et seq.*, or be hospitalized voluntarily, pursuant to D.C. Code § 21-511 *et seq.* Children may be hospitalized voluntarily, when accompanied by a parent, guardian or custodian if they are under eighteen years of age.

Although, unlike DMH, the Child and Family Services Agency (CFSA) does not provide any direct mental health services to children, it does have an Office of Clinical Practice (OCP) which evaluates cases by request, or on an as needed basis pursuant to agency policy, or at the request of agency social workers, the courts, or a guardian *ad litem* ("GAL").

Attorneys need to keep abreast of the available services and of the referral and intake processes for the various evaluative and treatment programs and practices related to mental health services and medical services offered by DMH and CFSA. Since October 1, 2001, when the court receivership for the Commission on Mental Health was abolished, DMH has undergone vast changes in its service delivery system and its partnership with other District social service agencies. *See* GAO report, District of Columbia, *Status of Reforms to the District's Mental Health System*, March 2004.

Attorneys should use the same approach to obtain mental health-related services as any other type of service for their clients. The District of Columbia, as a party to the neglect proceeding, is responsible for providing necessary services regardless of which agency has general administrative responsibility for service delivery; and the District should be ordered to provide the needed services under D.C. Code §16-2320(a)(5). It is immaterial if a particular agency does not wish to provide or contract for mental health services that it believes should be available through a different agency. Counsel should know that the District of Columbia is not limited to merely providing whatever services are currently available but can also be compelled to secure additional services if they are deemed necessary.

I. Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)

The revised edition of the DSM-IV-TR, published by the American Psychiatric Association, is the standard reference work on the classification of mental disorders. The DSM-IV system classifies a mental disorder by a description of its clinical and phenomenological features — that is, the symptoms of the disorder or, to use the DSM-IV terminology, the “diagnostic criteria.” The etiology (origin) of a disorder may not be known or generally accepted by the profession and is usually not a part of the DSM-IV classification. Similarly, the treatment of mental disorders is not discussed in DSM-IV-TR.

DSM-IV-TR is a complex reference manual intended for use in research and treatment and for other purposes, including coding by insurance companies, hospitals and other mental health organizations. It is not user-friendly to the non-mental health professional, or for that matter any person who is not actively involved in mental health treatment or forensic work. Attorneys should read thoroughly the introductory sections on the “Use of the Manual and Multiaxial Assessment.” These sections explain how a diagnosis is formed, what a diagnosis is, the difference between Axis I and Axis III assessments, and so forth. For example, when an attorney receives an assessment which labels a client as being schizophrenic, attention deficit disordered, and mentally retarded,¹ all listed in the Axis I field, how is the attorney to know which is the predominant diagnosis? Attorneys who have familiarized themselves with the introductory sections of the manual will know that, when more than one diagnosis is given in the Axis I section, the principal (or first) diagnosis should be the diagnosis that was (1) responsible for the “occasioning of the admission of the individual” into the inpatient setting or (2) the diagnosis that was responsible for the condition which was the reason for the visit to the outpatient setting. (DSM-IV-TR).

A further note of caution should be heeded by non-clinicians using the classification system. In using the reference manual to research, contest, or understand a particular diagnosis that has been given to a client, attorneys must understand that each diagnosis has a set of diagnostic criteria. One example is Dysthymic Disorder, 300.4 in the DSM-IV-TR, wherein any one of the single descriptors, such as “low energy or fatigue,” or “low self esteem” alone will not be enough to support the diagnosis. For the clinician to be able to conclude that someone fits the diagnosis of Dysthymia, the person must have at least two of the criteria for over two years. The clinician reaches these conclusions through interviews and periods of observation of the family members and the client, as well as review of any other relevant information such as previous written evaluations. The sets of diagnostic criteria were inserted into the DSM-III and DSM-IV manuals to increase the reliability of diagnoses among different mental health professionals.

The DSM-IV-TR has a separate subsection for “Disorders Usually First Diagnosed in Infancy, Childhood and Adolescence.” It is in this subsection that the various descriptions and diagnostic criteria of learning disorders, attention deficit and disruptive behavior disorders, and reactive attachment disorder may be found. Commonly known adult disorders such as “manic depressive disorder” or “schizophrenia” are not found in these subsections.

Each diagnostic classification also has a thorough discussion of associated features and disorders, the likelihood of familial patterns, age of onset, statistical prevalence, differential diagnosis, and much more. Attorneys will find many uses for this DSM-IV-TR Manual: (1) preparing discovery, (2) preparing cross-examination of witnesses and researching psychological reports, (3) reviewing agency disposition and permanency reports, and (4) researching ideas discussed when speaking with mental health professionals during the course of a case.

¹ Though the term “mentally retarded” is used in the DSM-IV, “developmentally delayed” is now widely recognized to be the more culturally competent phrase. Attorneys should make every effort to use the appropriate phrase in the company of clients and clients’ family members and in the courtroom.

II. Who May Authorize Examination and Treatment of Children?

Different statutory provisions address the question of who may authorize medical or psychiatric intervention once court action has been initiated.² When analyzing who may or must give consent for treatment or examination, counsel should consider: (1) who has (temporary or permanent) custody; (2) the stage of the proceedings; (3) the purpose and nature of the intervention sought; and (4) whether the situation can be characterized as an emergency.

In addition, statutory provisions regarding the treatment of children should be read in conjunction with D.C. Code §§ 16-2301(14) (definition of “shelter care”); 16-2301(20) (definition of “guardianship of the person of a minor”); 16-2301(21) (definition of “legal custody”); and 16-2301(22) (definition of “residual parental rights and responsibilities”).

A. Parents

Nothing in the statute suggests that the parental right to make decisions concerning a child’s care is abrogated even after court action is initiated when the parents retain custody of the child. However, under certain circumstances, medical or psychiatric evaluations may be ordered without parental consent, or over parental objection. D.C. Code § 16-2315. In addition, D.C. Code § 16-2320(a)(1) permits the court to impose conditions relating to outpatient “medical, psychiatric, or other treatment” in connection with a dispositional order permitting a child to remain with the parents. *Cf.* D.C. Code § 16-2312(d)(2).

When the GAL is appointed, the appointment order waives the requirements for the Health In-

formation Portability and Accountability Act (HIPAA) and the protections of the D.C. Mental Health Information Act pertaining to all mental health, education and medical records. The order appointing an educational advocate will also include these waivers. Other attorneys may not obtain access to a child’s mental health or medical records without the consent of the parent, absent a court order or unless the records are also provided to the court.

D.C. Code § 7-1231.14(a), states that no minor may be admitted for inpatient mental health services, or in subpart (c) receive psychotropic medication absent the consent of the parent, if the child is under sixteen years of age, except for the provisions outlined below in D.C. Code §§ 16-2315, 2320, and 2321 and 21-545. For children sixteen years of age or older, see D.C. Code § 7-1231-14 (c) and its subparts, which also must be read with § 7-1231.08.

Nevertheless, if a child is over age fourteen but less than eighteen, both the child and the parent must authorize the disclosure or use of mental health and medical information. D.C. Code § 7-1231.08. If the child’s parent has not expressed consent to the child’s receipt of mental health services, the child may, by written authorization, consent to the receipt of professional mental health services and disclosure of mental health records, but may only receive services up to ninety days. See section C, *infra*.

B. Other Custodians

Several statutory provisions address the authority of custodians other than parents to consent to the examination or treatment of children in their custody.

D.C. Code § 16-2301(21) defines “legal custody”³ as a status vesting in a custodian the responsibil-

² Under certain circumstances, the Metropolitan Police Department (MPD) or the Child and Family Service Agency are authorized to consent to examinations and treatment prior to the initiation of court action. See D.C. Code §§ 4-1301.08; 4-1303.05; and 16-2311(d).

³ Note that while the dispositional section of the statute, D.C. Code § 16-2320, speaks specifically of transferring legal custody to an individual or agency, placements pending the fact-finding hearing do not expressly involve a transfer of custody. See D.C. Code § 16-2301(14) (definition of shelter care); D.C. Code §§ 16-2312, 16-2313 (shelter care hearing and placement).

ity for care including “the responsibility to provide...food, shelter, education, and ordinary medical care.” This is the only D.C. Code provision that speaks to the authority of an individual third-party custodian.

In addition to D.C. Code § 16-2301(21), several other provisions define CFSA custodial authority. D.C. Code § 16-2338 permits CFSA to provide emergency medical treatment to a child in its custody who is also under the court's jurisdiction. D.C. Code § 4-1303.05 permits CFSA to authorize evaluation and treatment including emergency medical, surgical, dental or psychiatric treatment for a child in its “physical custody” pursuant to D.C. Code §§ 4-1303.04 (custodial placement), § 16-2313 (shelter care placement), or § 16-2320 (disposition). D.C. Code § 4-1303.05 also allows CFSA, when it has physical custody of a child, to authorize medical and psychiatric evaluations at any time, and to authorize non-emergency medical, surgical, dental, or psychiatric treatment when “reasonable efforts to consult the parent have been made but a parent cannot be consulted.”⁴

Inpatient evaluations require court authorization. See D.C. Code §§ 16-2315 (physical and mental examinations) and 16-2320(a)(4) (inpatient treatment).⁵ *Cf.* D.C. Code § 21-511 (minors may be admitted for psychiatric hospitalization upon authorization by spouse, parents, or legal guardian). In light of the express limitations of D.C. Code §§ 16-2315 and 16-2320(a)(4), nothing in the statute suggests that CFSA has unfettered authority to sign a child in its custody into an inpatient facility.⁶

The interpretation of an additional statutory provision regarding treatment has been a matter of some dispute. D.C. Code § 16-2313(c) provides that a child in shelter care “may be temporarily

transferred to a medical facility for physical care and may, on order of the Division, be temporarily transferred to a facility for mental examination or treatment.” The District of Columbia has, on occasion, taken the position that this provision permits the court to order inpatient hospitalization of a child in shelter care. Opponents of this interpretation argue that D.C. Code § 16-2313, captioned “Place of detention or shelter” simply designates such a facility as but one permissible shelter care placement option. D.C. Code § 16-2313(c) makes it clear that, if otherwise agreeable and appropriate, it is permissible to transfer a child to a facility for treatment other than those placements designated in D.C. Code § 16-2313(a) and (b). If D.C. Code § 16-2313(c) standing alone were interpreted to permit inpatient hospitalization, it would allow the court to side-step the express requirements for inpatient hospitalization set forth in D.C. Code §§ 16-2315 and 16-2320(a)(4) and permit the confinement of a child on an inpatient basis in the absence of any statutory standard at all.

C. Consent to Mental Health and Medical Treatment of Minors

I. MENTAL HEALTH TREATMENT

Absent compliance with the provisions of D.C. Code §§ 21-521 or 545 *et seq.*, D.C. Code §§ 16-2315, 2320 or 2321, minors (persons under eighteen years of age) shall not be admitted to inpatient mental health facilities to receive mental health treatment. D.C. Code § 7-1231.14(a).

Minors may be provided outpatient mental health treatment without the consent of the parent if the mental health provider determines: (1) the minor is knowingly and voluntarily seeking the services; (2) the provision of services is clinically indicated; and (3) the mental health services and supports provided the minor (without

⁴ *Cf.* D.C. Code § 16-2301(22) (definition of residual parental rights and responsibilities).

⁵ Placement of a child in a residential facility, even a treatment facility with locked units, is not generally considered an inpatient placement under D.C. Code §§ 16-2315 or 16-2320(a)(4). Counsel will want to consider the advantages and disadvantages of taking the position that such facilities are in fact inpatient placements.

⁶ For a discussion of the rights of parents, the state, and the child in connection with voluntary psychiatric hospitalization, see *Parham v. J.R.*, 442 U.S. 584 (1979).

the consent of the parent) shall be limited to a 90-day period. D.C. Code § 7-1231.14(b) (1) and (2). At the end of the 90-day period, the mental health provider must make a new determination of the need for mental health services, terminate the services, or notify the parent, with the consent of the minor. D.C. Code § 7-1231.14(b)(1) and (2).

As stated in section II.A., *supra.*, no minor under the age of sixteen may receive psychotropic medication without the consent of a parent or authorization of a court, even when a child is admitted for inpatient mental health treatment. D.C. Code § 7-1231.14(c)(1)

A minor child who is sixteen years of age or older may consent to the administration of psychotropic medication, without the consent of a parent or the authorization of a court under the following circumstances: (1) when the parent is not reasonably available, said medication is clinically appropriate, and the minor has the capacity to consent consistent with D.C. Code § 7-1231.08; (2) when requiring the parent(s) consent would have a detrimental effect on the minor, and the minor has the capacity to consent, and the medication is clinically indicated; or (3) when the minor's parent(s) refuse to give such a consent, and it is indicated that the minor has the capacity to consent, and the medication is clinically indicated. Written notice shall be provided to the parent(s). D.C. Code § 7-1231.14(c)(2)(A-C).

2. TERMINATION OF PREGNANCY

The United States Supreme Court has ruled on the issue of abortions for minors in a series of cases on the constitutionality of parental consent and notification requirements. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979); *H.L. v. Matheson*, 450 U.S. 398 (1981); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Ohio v. Akron*

Center for Reproductive Health, 497 U.S. 502 (1990); and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The Court seems to have concluded that a state may not impose a blanket provision requiring the consent of parent(s) or persons in *loco parentis* as a condition for a minor to terminate her pregnancy. A state must have a judicial bypass procedure for the child to obtain the abortion, or the child must obtain one parent's consent. The judicial alternative to parental consent must ensure that resolution of the issue "will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti v. Baird*, *supra*, at 644.

The District of Columbia has no law regulating abortions for minors and thus has no statutory procedure enabling a minor to obtain judicial consent for an abortion, or granting the right to self-consent. If necessary,⁷ a minor could file a petition in the Civil Division of the D.C. Superior Court, to the Judge in Chambers, similar to the petitions filed by hospitals seeking authorization to treat children in the absence of parental consent. Family Court judges have also entertained motions for appropriate court orders in the context of neglect cases themselves. The requirement of anonymity may permit the court to proceed without notice to the parents. See *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127 (7th Cir. 1983); *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985).

It is clear that the right to have an abortion is a constitutionally-protected right such that, even in the absence of a state statute affirmatively positing the right to self-consent, the right of a minor to self-consent exists, unless the state has elected to modify such right in accord with *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and *Ashcroft*, *supra*.

For additional information, counsel can consult Planned Parenthood, Washington, D.C. (202) 347-8500; National Abortion and Repro-

⁷ Some physicians and clinics will terminate pregnancies without requiring any authorizations other than the minor's consent.

ductive Rights Action League (NARRAL), Washington, D.C. (202) 973-3000 (Legal Department); and National Abortion Federation, Washington, D.C. (202) 667-5881.

3. DO NOT RESUSCITATE ORDERS

In re K.I., 735 A.2d 448 (1999), is a case decided by the D.C. Court of Appeals involving a do not resuscitate order (DNR) for a neglected child. In that case, a medical GAL requested the issuance of a DNR order for a child in a comatose state who was deemed neurologically devastated. The parents appealed the neglect judge's order issuing the DNR. The Court of Appeals held that the trial court properly exercised its *parens patriae* authority in issuing the DNR. The appellate court affirmed the trial court's application of the best interests of the child standard rather than the substituted judgment standard.

D. Emergency Psychiatric Hospitalization

Pursuant to the emergency procedures of the mental health civil commitment statute, D.C. Code § 21-501 (the "Ervin Act"), any child may be hospitalized in a psychiatric hospital, after the appropriate psychiatric interviews and authorizations of dangerousness to self or others. The standards, rights, and protections enumerated in Title 21 of the D.C. Code apply to proceedings brought under that statute, even when a neglect case is also open.

The general legal guidelines which underlie the hospitalization of minors, both children who are committed wards in the neglect and abuse system and non-wards outside the system, are set forth in *Parham v. J.R.* 442 U.S. 584 (1979). *Parham* held that a child may be institutionalized on an emergency basis or otherwise against his wishes, with the consent of his parents (or the state agency to which he is committed), if the child has been in-

terviewed by a psychiatrist (or other appropriate mental health provider as provided by state law), and if the child meets the appropriate criteria of dangerousness to self and/or others. The child must then be re-interviewed on a periodic basis, as to suitability for release by the mental health professionals. However, no legal due process procedures are required at any stage in the process either for committed wards or for non-wards who are in the community. However, in the District of Columbia, because of the Ervin Act, the child is afforded whatever standards and procedures are required under D.C. Code Title 21 if the child is not a committed ward. See *Hardesty v. Draper*, 687 A.2d 1368 (D.C. 1997). If the child is a committed ward, then the process due will be whatever is considered appropriate by the individual neglect court.

Committed respondents who are eighteen years of age or older and whose permanency goal under ASFA is Alternative Planned Permanent Living Arrangement (APPLA) must be treated as adults under the Ervin Act, and CFSA may not hospitalize them or place them in a residential treatment facility without their consent.

E. Inpatient Evaluation for Children

1. STATUTORY AUTHORITY

D.C. Code § 16-2315(b)(2) permits the court to order a child to be admitted as an inpatient to a suitable medical facility for the purpose of a mental health examination.⁸ The court may enter such an order only after a psychiatrist examines the child and makes a written finding that the child is in need of a mental health examination which cannot be effectively provided on an outpatient basis.⁹

The statute seems to permit an inpatient evaluation of a child at any time following the filing

⁸ D.C. Code § 16-2315(b) does not replace D.C. Code § 21-521. Whenever the District of Columbia wishes to commit someone involuntarily, they must use D.C. Code § 21-521.

⁹ D.C. Code § 4-1303.05 permits CFSA to authorize "medical or psychiatric evaluation" of a child in its custody, but given the express limitations of D.C. Code § 16-2315, it would seem difficult to justify an interpretation of D.C. Code § 4-1303.05 that would include inpatient evaluations. However, the GAL and caretakers must be aware that, on occasion, D.C.'s inpatient mental facilities, particularly PIW and Riverside, will ignore the fact that a minor may be ward, and go straight to the Mental Health Branch of the Superior Court.

of a neglect petition.¹⁰ It also appears to authorize the court to order an inpatient evaluation regardless of who has custody of the child. Counsel opposing a court-ordered inpatient evaluation could argue on constitutional grounds that, notwithstanding the language of D.C. Code § 16-2315, the right to admit a child to an inpatient psychiatric facility is reserved to the parent, at least prior to an adjudication of neglect, or when the child is in the parent's custody.

Inpatient hospitalization of a child under this section is for the purpose of evaluation ("examination") only and not for long-term placement or treatment. D.C. Code § 16-2315(b)(3) provides that hospitalization for an examination shall be for a period of not more than twenty-one days. For good cause shown, the court may grant extensions not to exceed a total of twenty-one days in the aggregate. Thus, the maximum period of time for which the court can order hospitalization for examination under this section is forty-two days.

The psychiatric recommendation that is required for an inpatient hospitalization order, generally called a "screening," is done through the Assessment Center, D.C. Department of Mental Health, located at 300 Indiana Avenue, 4th Floor, N.W., Washington D.C. 20001; 202-727-4377. However, any psychiatrist may furnish the written finding required by the statute. It may be difficult to obtain the psychiatric screening on short notice; few private or public mental health facilities will see a child on an emergency basis without an appointment or after regular business hours. Typically, in non-business hours, the child may be taken to Children's Hospital emergency room (and D.C. Kids) and assessed there, and if necessary can be referred to PIW or Riverside Hospital if Children's Hospital is too busy. Counsel should make every effort to provide background information to the examining psychiatrist, or to the Screening Clinic social worker.

When an inpatient evaluation is proposed, the GAL should objectively assess whether an inpatient evaluation is in the client's best interest. If an attorney has been appointed to represent the child, his or her position will be dictated by the client's wishes. Children frequently do not wish to go to an inpatient psychiatric facility. Therefore, such a child's attorney should oppose inpatient hospitalization. If the child has no objection to hospitalization, counsel must determine whether the statutory standards have been met.¹¹

Counsel should be mindful also that, while a child may have emotional or behavioral problems, inpatient hospitalization may be neither legal nor therapeutic. This is borne out by the frequency with which Youth Forensics and its successor DMH unit, upon completion of its evaluation, finds no need for hospitalization based on lack of dangerousness, and recommends discharge. The fact that therapy or treatment is advisable for a child does not by itself justify inpatient hospitalization, especially if the psychiatric screening or a psychiatric medication review can take place promptly on an outpatient basis. Placement in a mental health facility (i.e. Children's Hospital, the Psychiatric Institute of Washington, or Riverside Hospital) is a serious step that for many children carries a tremendous stigma. Such placement may have a detrimental effect outweighing any benefit that may be derived from the inpatient evaluation. In addition, the ward population at an inpatient facility may well include children who are seriously mentally ill or actively psychotic, contact with whom could be frightening or destructive to the minor client.

2. COURT HEARINGS

In light of the fundamental constitutional interests involved, (the liberty of the child and the parents' right of decision-making), counsel opposing the inpatient evaluation should empha-

¹⁰ Mental examinations may be ordered on motion of the Attorney General or counsel for the child, or by the court *sua sponte*. D.C. Code § 16-2315(a). An inpatient evaluation requires the written recommendation of a psychiatrist or qualified psychologist. D.C. Code § 16-2315(b)(2).

¹¹ For a more detailed discussion of the roles of GAL and attorney for the child, see Chapter 16, Ethical Guidance.

size that the statutory standard must be strictly construed. Although the government's burden of proof is unclear, it is not unreasonable to argue that the evidence must be clear and convincing.

Counsel requesting an evidentiary hearing might draw a parallel to the juvenile justice system. When the District of Columbia requests that an alleged delinquent be detained in shelter care and/or placed into an inpatient hospital, the juvenile receives a probable cause hearing, because the child is being removed from his or her home and/or detained. See, D.C. Code § 16-2312(e). The GAL may argue that a similar procedure is required in the neglect case because the child is being detained and inpatient hospitalization is not in the child's best interest.

Several arguments are commonly advanced by the District of Columbia in support of the need for an evaluation and the inability to provide it effectively on an outpatient basis. It may contend that the child will not cooperate and, as a result, an outpatient evaluation cannot be performed. Attorneys should ascertain what attempts were made to have the evaluation done on an outpatient basis. If no such efforts were made, one can argue that an outpatient evaluation must be first attempted. Even if efforts were made to secure an outpatient evaluation, counsel ought to explore how meaningful those efforts were and urge that additional efforts be made, suggesting, if possible, alternative means that may be more successful. Convenience is never a sufficient justification for inpatient evaluation.

Even if the child has refused to cooperate with an outpatient evaluation, counsel may argue that unless the District of Columbia can show a genuine need for hospitalization consistent with D.C. Code Title 21 standards, an inpatient evaluation order should not be entered.

If an outpatient evaluation has been performed recently, counsel can argue that an inpa-

tient evaluation is unnecessary. The government may take the position that it is necessary to perform the evaluation on an inpatient basis in order to obtain a more complete evaluation.

Counsel then can attempt to demonstrate that an inpatient evaluation is not significantly more thorough and provides no additional information than an outpatient evaluation. The tests and interviews that constitute an evaluation are the same, whether administered on an inpatient or an outpatient basis. The primary difference is the potential for increased observation of the child and various safety considerations related to the conduct of the child with regard to his/her self or others, as well as observation of the child during the "trial" administration(s) of various medications. The GAL may be able to argue convincingly that this potential is more theoretical than actual, or that this difference alone is not sufficient justification for the hospitalization. For example, the policy of the inpatient facility providers is to require a treatment conference within ten days of admission, usually with the family. (The GAL is rarely contacted in these instances and must be aggressive about contacting the social worker in order to be involved.) As a result, a substantial observation period may not be a significant factor in an inpatient evaluation.

The government may also argue that the child is a danger to self or others. Counsel should demand proof of the conduct upon which the District of Columbia bases this conclusion: the more distant in time, the less "chronic"¹² and less serious the behavior, the weaker is the case for hospitalization. One fight, one suicide gesture, or even a pattern of disciplinary problems or acting out may be insufficient to establish dangerous behavior warranting hospitalization. If the District of Columbia bases its request on a dangerousness argument, counsel can pursue the Title 21 analogy and argue that the government must show that the child is mentally ill

¹² Mental examinations may be ordered on motion of Assistant Attorney General or counsel for the child, or by the court *sua sponte*. D.C. Code § 16-2315(a). If the behavior has been going on for some time, counsel may argue that the government's failure to request an evaluation sooner suggests that the behavior, while disruptive or anti-social, may not warrant hospitalization.

and that, because of the mental illness, the child is likely to injure self or others. The troubling behavior prompting the hospitalization request, which may include a disrespectful attitude, verbal abuse, curfew violations, truancy, delinquent behavior, or fighting, may not be the result of mental illness, or may be too attenuated to constitute dangerousness. If the conduct in question is not a product of any mental illness, hospitalization is not warranted.

Counsel should consider whether the screening report contains insufficient information upon which to base a finding that the child is in need of a mental health examination which cannot be effectively performed on an outpatient basis. Screening reports may be perfunctory, setting forth conclusions without adequate supporting data. The examining psychiatrist may have been given misleading background information, or may not be applying the appropriate standard.

If the court does not reject the report as insufficient on its face, counsel opposing the evaluation should request an evidentiary hearing. The government may object on the basis that the statute speaks only of the requirement of a "written recommendation" from a psychiatrist. Counsel may argue that, because of the recognized liberty interest at stake, due process at a minimum requires the opportunity for examination of the psychiatrist. *Cf. Ziegler v. Ziegler*, 304 A.2d 13 (D.C. 1973) (denial of due process to prevent counsel in a custody case from litigating the contents of a social report and from cross-examining compiler of report).

The examining psychiatrist is usually not readily available to testify and may have to be subpoenaed. Because the hearings are often held on very short notice, counsel may need to be prepared to argue to the court that he or she did not have sufficient advance notice that the District of Columbia would be making the re-

quest, and should therefore be allowed an opportunity to subpoena and examine the psychiatrist. Counsel can attempt to exclude hearsay from consideration by the court.¹³

If the inpatient evaluation is ordered, it can be performed at any "suitable medical facility." The 21-day evaluations are ordered to be performed at Children's Hospital, Riverside Hospital or the Psychiatric Institute of Washington, as these are the current facilities that are the institutional vendors to children through the Department of Mental Health. Other private facilities can be used, but there are few available.

At the time the order is signed, a status hearing should be set for the expiration of the order. It is also possible to provide in the order itself for an automatic return of the child to a specified placement or custodian upon completion of the examination, or when the 21 days have expired. The hospitalization may be extended for a maximum of an additional 21 days. D.C. Code § 16-2315(b)(3). As soon as an inpatient evaluation is ordered, counsel should begin discharge and placement planning. The child may be able to return to the current placement. If not, intensive planning efforts will be required during the 21-day or 42-day evaluation period.

Counsel for the child should contact the child's case manager, psychologist, or psychiatrist at the inpatient facility and furnish any information that counsel believes might be useful. Counsel should attend the treatment conference at the inpatient facility, at which time the hospital's recommendations are formulated. The inpatient facility must provide a report to the court and Neglect Clerk's office summarizing its evaluation and recommendations. Counsel may want to obtain a full set of the child's records from the hospital.

If the evaluation is completed prior to the expiration of the 21-day period, counsel should

¹³ The evidentiary standard established by D.C. Code §§ 16-2315(b) and 16-2301(16) is unclear as applied to this type of hearing. Counsel opposing the admissibility of hearsay may argue that the distinction created in D.C. Code § 16-2316(b) is between fact-finding and dispositional types of hearings, and that a D.C. Code § 16-2315(b)(2) hearing is by nature a fact-finding hearing. Counsel should emphasize the rigorous due process requirements that are generally associated with proceedings that could threaten a deprivation of liberty.

bring the case into court and request that the child be discharged. The order placing the child in the hospital should have been written to allow discharge to the parent or custodial agency when hospitalization is no longer necessary.

F. Parental Involvement in Child's Evaluations

Parents' attorneys may want to make efforts to ensure that their clients are allowed to participate in the decision-making process in connection with a child's treatment to the extent required or permitted by law. Any question regarding the parents' or the agency's authority can be brought before the court for resolution. In a non-emergency situation, there appears to be no justification for CFSA taking action without first seeking authorization from the parents or the court.

CFSA does not routinely keep the parents' and child's attorneys informed about a child's treatment. Particularly if there is likelihood that treatment will be sought, counsel should stay abreast of the situation. For example, CFSA may attempt to sign a committed child into a mental health facility for an inpatient psychiatric evaluation or treatment without informing counsel or the parents. Normally, a mental health facility will not and cannot admit a child without a court order unless emergency hospitalization proceedings are initiated under D.C. Code § 21-521 *et seq.* However, sometimes those facilities will ignore the statute and admit the child.

In an emergency situation, care must be taken to ensure that the characterization as an emergency is proper and not unduly prolonged. Counsel may argue that proper authorization for hospitalization should be sought promptly, perhaps the next business day (i.e., any day but Sunday for court authorization; any day for parental authorization). Unfortunately, it is the parents' or child's attorney who may need to bring the matter to the attention of the AAG or bring the matter into court, even though the agency should be seeking the appropriate authorization.

Administration of psychotropic medication to children in psychiatric inpatient settings is now

common but remains controversial, especially with regards to administration of anti-depressant medications. If psychotropic medication is being recommended or administered, counsel may want to obtain a second opinion on the treatment. Hospitalization may be necessary to determine what medications will work best.

Opinions vary greatly about the quality of physicians, therapists, psychologists, psychiatrists, and facilities. Attorneys should attempt to gather information from other attorneys, social workers, and other mental health professionals to determine if the treatment resource is appropriate.

III. Forensic Evaluations of Parents or Other Custodians

Prior to adjudication of neglect, a forensic evaluation may be ordered only when a parent is alleged to be neglectful due to a mental illness. See, D.C. Code §§ 16-2315(e)(1) and 16-2301(9)(A)(iii). Likewise, mental health evaluations of the parents are not admissible at the neglect trial unless the petition alleged neglect due to mental or physical incapacity of the parent. D. C. Code § 16-2315(e)(4), *In re N. P.*, 882 A.2d 241 (D.C. 2005). The evaluations are also not admissible in a criminal proceeding. D.C. Code § 16-2315(e)(6). However, parents' past mental health records may be available through discovery. *In re O.L.* 584 A.2d 1230 (D.C. 1990). See *also*, D.C Code §§ 4-1321.05 and 14-307.

If the child is adjudicated as a neglected child pursuant to D.C. Code § 16-2320, the court (the "Division") may on its own motion or the motion of any party, order the mental or physical examination of the parent, custodian or guardian. D.C. Code § 16-2315(e)(2).

Typically, the use of mental examinations post-disposition is often consented to by the parties or ordered, *sua sponte*, by the court, for example when a "bonding study" is ordered with respect to relatives and a foster parent in a competing adoption petition. See §§ 16-2315 (e)(2) & (3).

IV. Who Provides Examinations and Treatment?

Any appropriate facility or professional may provide mental health services for parties in neglect cases. If the parties disagree as to the appropriate therapist or evaluator and/or program or agency administering the evaluation or therapy, those issues may be brought before the court for resolution.

CFSA delivers its mental health services primarily through the “core service” providers who already have contracts with DMH, or through Medicaid providers. Once the CFSA worker has exhausted efforts to find such a mental health service provider, the CFSA worker can turn to a “licensed” or approved evaluation and treatment service vendor.

Finding the appropriate resource and payment are issues that arise commonly in connection with securing services. In this regard, services fall into four categories: (1) in-house staff of the agency, either CFSA or DMH (e.g. the Assessment Center, or a local outpatient DMH facility), or facility that is already monitoring or providing services to the client; (2) mental health or medical providers with whom CFSA and/or DMH have already contracted as Medicaid providers, Core Service Agency providers, or outside approved or “licensed” vendors; (3) public and private resources that are free or sliding scale; or (4) those resources that charge a full fee.

There is a dearth of services offered directly by the agencies, or available at low or no cost in the community. Nonetheless, all the supervising social services agencies in neglect cases (CFSA and private contract agencies) rely most heavily on services in the first three categories. Agencies are usually reluctant for budgetary reasons to pay “out-of-pocket” for services in the fourth category.

However, there are two other payment options: (1) the GAL or parent’s counsel may request by written motion or orally in court that the Court pay for the requested evaluation or treatment service; or (2) Crime Victim’s Compensation monies. See Appendix B, Crime Victims.

A. Medical and Mental Health Referrals, Assessments, and Treatment Recommendations

1. REFERRALS BY CFSA FOR MEDICAL SERVICES

When a child is first removed from his or her home, a medical pre-placement screening is performed at the Children’s National Medical Center, which automatically enrolls the child in the D.C. Kids healthcare system. The child’s medical, dental, vision, occupational therapy, speech and language therapy, and physical therapy needs will be noted by the physicians and nurses, as well as the medical needs related to medical specialties, e.g. cardiology. Children in foster care also receive annual physicals, a medical screening when being moved to a new placement, and exit physicals when leaving foster care.

Because most children in foster care are eligible for Medicaid coverage under Pub.L.No. 96-272, CFSA will generally seek medical and dental services from facilities and doctors who accept Medicaid. If treatment is necessary and a suitable Medicaid vendor cannot be found, counsel may have to persuade CFSA and/or the court to approve payment for the alternate medical provider suggested or recommended with a voucher or, if qualified, under the Crime Victim’s Compensation program mentioned earlier.

2. REFERRALS BY CFSA FOR MENTAL HEALTH SERVICES

If any mental health concerns are noted on behalf of the child in the pre-placement medical screening, the CFSA social worker theoretically can be notified, and the social worker can make the appropriate referral to the CFSA Behavioral Services Unit (“BSU”). If the mental health referral for assessment or treatment services comes through a court order, the social worker should make all referrals through the BSU. The BSU social worker then determines whether mental health treatment can be provided immediately or whether further assessment is required, unless a court order has determined the course of action. Theoretically, the BSU worker takes into account the information gathered from the pre-placement screening, the court, the

family, the GAL, and so forth, when making this decision.

If an assessment is ordered, a referral is made to the Assessment Center (also known as Youth Forensic Services) located at 300 Indiana Avenue, N.W., Room 4023 Washington, D.C. 20001, 202-724-4377. When the court has not specified the type of evaluation needed, the social worker at the Assessment Center will determine what type of assessment is required, after reviewing the court orders, educational, mental health and medical records. The educational, mental health and medical records are part of the referral packet that is provided to the Assessment Center by the caseworker.

Once the assessment is completed, the reports should be provided to the court, the GAL, and the social worker. The social worker should follow up on any mental health treatment recommendations.

If mental health treatment services are requested and/or ordered, the caseworker then makes a referral to BSU. If the requested services are for a child, BSU then refers the case to a Core Service Agency ("CSA") for the recommended services.

3. PSYCHIATRIC EVALUATIONS AND ASSESSMENTS

Psychiatrists at the Assessment Center perform psychiatric evaluations, after the social worker makes a referral to the BSU. The evaluation consists of one, and occasionally more than one, interview with the client. The psychiatrist customarily will have reviewed whatever background information has been made available through, for example, court reports, medical and health records, psychological evaluations, and conversations with social workers or family members.

The Assessment Center usually requires a fairly thorough summary to accompany the completed referral packet, including background

information on the child and the family, e.g. school reports, psycho-educational reports and documentation, prior clinical psychologicals, prior contacts with CFSA and other social service agencies. However, the background information provided may be incomplete, inaccurate or biased, and counsel should attempt to participate in determining what information is made available to the psychiatrist, contribute background material, and make whatever other efforts are necessary to ensure that the psychiatrist has a balanced view of the history of the client and of the case. The psychiatrist can also be sent "referral questions" in order to focus the evaluation on specific issues of concern to the parties. The sources of background information will be listed in the report.

The psychiatrist will assess the client's level of functioning and emotional condition, make a diagnosis and, if appropriate, make recommendations regarding treatment or therapy. Among all mental health professionals, only psychiatrists may prescribe medication. Psychiatrists who receive referrals at the Assessment Center are typically experienced in the child protection field and have an understanding of a child's attachment issues, and they can place those issues in the context of the child's other mental health concerns.

4. PSYCHOLOGICAL EVALUATIONS

Psychologists, who hold a doctorate in psychology, perform psychological evaluations.¹⁴ An evaluation customarily consists of an interview and a series of psychological tests. The entire evaluation usually takes place in one or two sessions of several hours each.

Psychologists use a wide variety of psychological tests to generate different kinds of information. Tests generally fall into two categories: (1) cognitive tests, assessing intellectual ability and academic achievement (intelligence tests,

¹⁴ Occasionally psychological tests will be administered by persons with an M.A. in psychology working under the supervision of the licensed psychologist. Counsel should review the D.C. Municipal Regulations to insure that the person conducting the evaluation has the authority to do so.

achievement tests, developmental tests); and (2) personality or projective tests, assessing emotional development and status. There are protocols and paper and pencil tests for children and for adults, and tests adapted for the visually and hearing-impaired. Tests have also been developed for developmentally delayed persons. There are specialized tests in such areas as motor development, speech, and language (these tests may be administered by physical and speech therapists who are not psychologists).

As with psychiatric assessments, it is important for counsel to ascertain what background information was available to the professional performing the evaluation. The background materials available to the tester may be referenced in the report, as well as the specific tests administered.

The evaluation will present test results, conclusions about the person's functioning and emotional state (frequently including DSM-IV-TR diagnosis), and may recommend treatment. If the results of the evaluation are in dispute, counsel may want to have the test data reviewed by another psychologist, or obtain a new evaluation, or both. Psychologists may resist making the raw test data available, but it is discoverable and subject to subpoena.

A "psycho-educational" examination for school purposes, or special education, may be requested. A psycho-educational exam consists of cognitive testing, i.e. the so called "IQ" tests or "aptitude" tests, such as the WISC, Weschler, or Stanford Binet. Further, academic achievement tests are also required. Common examples of those types of tests are the WAIT and the Woodcock Johnson III.

B. Types of Mental Health Therapeutic Services Provided

Individual or family therapeutic services may be offered in the home or at the agency or therapist's

office, depending on the given provider's preferences or particular therapeutic situation. Outpatient mental health services are offered by the DMH.

The types of therapeutic services offered by mental health providers to children and parents/caretakers involved in the child abuse and neglect system are the same as those offered to the general community: (1) individual therapy or counseling, (2) group counseling, or (3) family therapy or counseling. Further, play therapy may be recommended for children below the age of six. Play therapy will not be discussed at length here, other than to say that play therapy enables young children who are not verbal to externalize mental health issues through play by use of dolls, games, puppets, and so forth.

The primary objective of psychotherapy is to modify both attitude and behavior to improve an individual's functioning in society. This may be taken as an appropriate definition and goal for persons in individual therapy.

Family therapy is based on the idea that the behavior of individuals and families is influenced and maintained by the way other individuals and systems interact with them. See *Working with Families of the Poor*, Patricia Minuchin, Jorge Colapinto, and Salvador Minuchin, 11-31 (1998). In the family therapy setting, the therapist is trained to engage all members of the family as a functioning unit as well as to understand its functioning in its societal context, e.g. the family's interactions with social service agencies, court systems, and so forth. This is called systemic practice, and it includes a wider range of work than what traditionally fits under the title of therapy.

When group therapy referrals take place in the court context, such therapy brings together persons with certain similar identified societal issues or self-identified issues, such as drug abuse, parenting issues, or anger management, to discuss these issues and learn how to modify their behaviors and attitudes to a more constructive level. ■

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ETHICAL GUIDANCE

Representation of parties in abuse and neglect proceedings can involve complex and conflicting relationships between and among the parties that give rise to a variety of ethical issues. The purpose of this chapter is to provide abuse and neglect practitioners with some guidance with respect to those issues. Lawyers handling these cases should keep available for ready reference the D.C. Rules of Professional Conduct, as well as the D.C. Superior Court Child Abuse and Neglect Attorney Practice Standards (hereinafter, DCSC Standards). Those standards, issued on February 28, 2003, by the D.C. Superior Court's Family Division, are included in Appendix M of this Manual and can also be obtained on the court's website (www.dccourts.gov) under Superior Court.

I. Introduction

Lawyers involved in an abuse and neglect case include (1) the assistant attorney general (AAG), representing the District of Columbia, (2) a guardian *ad litem* (GAL), representing one or more children, and (3) separate lawyers for each of the birth parents. If a foster parent or other caretaker with whom any child resides is a party to the abuse and neglect proceedings, that person is usually represented by counsel.

All of the pertinent D.C. Rules of Professional Conduct must be obeyed by the lawyers involved in neglect and abuse proceedings. Rule 1.1 (Competence) is an overriding ethical requirement. Each lawyer must be able to give competent representation to the client as that term is defined in Rule 1.1(a). Rule 1.1(b) requires that each lawyer "shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." This means that each lawyer must be skilled in child abuse and neglect law. As stated by DCSC Standard A-1:

Counsel shall only accept the appointment or otherwise appear in child abuse and neglect proceedings if they are knowledgeable of substantive and procedural child abuse and neglect laws and have participated in the required training programs.

It is the responsibility of the lawyer to make certain that the client understands the limits of the representation, especially if the client is a child. Comment [9] to Rule 1.3 (Diligence and Zeal) states that unless the relationship is terminated as provided in Rule 1.16 (Declining or Terminating Representation), a lawyer should carry through to conclusion all matters undertaken for a client.

DCSC Standard A-7 requires counsel of record to continue to represent the client from the initial court proceeding through disposition, review hearings, permanency hearings, and related Termination of Parental Relationship (TPR), adoption, and guardianship proceedings until the case is closed.

II. Application of Pertinent Ethical Rules to Categories of Lawyers Representing Parties in Abuse and Neglect Proceedings

In view of the differing roles and responsibilities of the lawyers involved in abuse and neglect proceedings, it is appropriate to discuss how each category of lawyer is governed by the more pertinent ethical rules.

A. Guardian *Ad Litem*

§16-2304(b)(5) of the D.C. Code provides that the court “shall in every case involving a neglected child which results in a judicial proceeding, including termination of the parent and child relationship..., appoint a guardian ad litem who is an attorney to represent the child in the proceedings. The guardian ad litem shall be charged with the representation of the child’s best interest.”

1. THE GAL’S ROLE AND AUTHORITY AS ADVOCATE AND NEUTRAL FACT FINDER

DCSC Standard A-5 provides that, in fulfilling his or her statutory obligations, a GAL fulfills a dual role as neutral fact finder for the judge and as zealous advocate for the child’s best interest. Standard A-5 reflects observations of the D.C. Court of Appeals in *S.S. v. D.M.*, 597 A. 2d 870 (D.C. 1991), an adoption case that grew out of a neglect proceeding. The principal issue there was whether the GAL should have been allowed by the trial judge to serve as attorney and witness for the child at the show cause hearing on the adoption petition.

The court noted that the D.C. Code does not clearly distinguish between the dual roles of a guardian *ad litem*, and that those roles may well overlap. The court held that, in this instance, the GAL’s conduct “went beyond the mere overlapping of the dual roles of a guardian *ad litem*.” (*Id.* at 877) The role of advocate does not permit a GAL to testify as a witness for the child because, by doing so, the GAL puts his or her own credibility at issue, and, hence, violates Rule 3.7, which provides that a lawyer shall not act as advocate at a trial in which the lawyer is

likely to be a necessary witness. Accordingly, the court held that when the GAL became a witness, new counsel should have been appointed to represent the child.

Although, in *S.S.*, the court did not reverse the trial court’s adoption decree, there having been no objection to the GAL testifying, and, hence, no miscarriage of justice, the message is that a GAL should not testify unless the GAL believes the testimony would be in the best interests of the child. In that circumstance, the GAL should ask the court to appoint new counsel for the child.

The likelihood is that, in most circumstances, the GAL will be able adequately to perform the dual roles of advocate and neutral fact finder without testifying.

The scope of a GAL’s representation was limited by the D.C. Court of Appeals in *In re J.J.Z.*, 630 A. 2d 186 (D.C. 1993), *cert. denied*, 511 U.S. 1072 (1994). There, the trial court, over objections by the GAL, granted the District of Columbia’s motion to dismiss the neglect petition based upon a determination that the evidence to prove neglect was insufficient to sustain the charge. The trial court also denied the GAL’s request for authorization to proceed with the prosecution of the neglect charge. The court held that, although there may be some overlapping fact finding function for the GAL, “nowhere does the statute provide expressly or implicitly for the GAL to pursue a neglect petition independent of the Corporation Counsel.” *Id.* at 191.

On the other hand, in *In re L.H.*, 634 A. 2d 1230 (1993), the Court of Appeals expanded the GAL’s scope of representation and possible objectives of the child by holding that D.C. Code §16-2354(a) empowered a GAL to file a proceeding to terminate parental rights. The court noted that Super. Ct. Neg. R. 25(a) provided that a motion for termination of the parent and child relationship may be filed by, among others, “the child’s guardian ad litem.”

2. REPRESENTING A CLIENT UNDER A DISABILITY

GALs often are appointed to represent a child

who, because of his or her young age or mental disability, is unable to express a wish as to his or her disposition. In such circumstance, the normal attorney-client relationship will not prevail. The GAL will not be able to have meaningful discussions with the child. There can be no discussion, for example, of whether reunification with the birth mother would be in the child's best interest. Rule 1.14(a) of the D.C. Rules of Professional Conduct requires, under those circumstances, that the lawyer "shall, as far as reasonably possible maintain a normal client-lawyer relationship with the client." Some explanations as to how a normal client-lawyer relationship might be maintained are contained in Comment [1] to Rule 1.14(a).

3. POTENTIAL AND ACTUAL CONFLICTS OF INTEREST

At the outset, a GAL, as stated in DCSC Standard A-5, "should always give careful consideration to potential conflicts and seek guidance as necessary." General guidance is found in Rule 1.7 of the D.C. Rules of Professional Conduct and comments thereto. Specific guidance for GALs appointed in abuse and neglect proceedings is contained in the DCSC Standards. DCSC Standard A-6 provides that a GAL may represent more than one child unless there is a conflict. DCSC Standard A-5 provides that a GAL "shall not represent two or more siblings when their interests are adverse and shall never represent siblings when it is alleged that one sibling has physically or sexually abused the other even when the siblings come to the court's attention at separate times. Further, counsel shall not serve as the guardian ad litem for a minor and her child."

Following the GAL's undertaking of a representation or representations, conflicts may develop which must be resolved. Thus, the GAL may represent a child of sufficient age and mental capacity to understand the issues, who expresses a wish which, if carried out, would not in the GAL's opinion be in the child's best interest. The GAL must be mindful of Rule 1.3(a), which requires a lawyer, as advocate, to represent the client zeal-

ously and diligently. Rule 1.3(b)(1) provides that a lawyer may not intentionally fail to seek the client's lawful objectives. However, a lawyer is precluded by Rule 3.1 from making a frivolous argument. Accordingly, a GAL may not argue to the court that the child's objectives are in the child's best interest if the GAL believes there is no substantial basis for that argument.

At this point, the GAL should not hesitate to act in the role of "advisor." Rule 2.1 provides that, in representing a client, a lawyer "shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social, and political factors that may be relevant to the client's situation." Comment [1] to the rule states that a "client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront."

If, after the GAL expresses his or her honest assessment, the child continues to insist on a disposition that the GAL believes would not be in the child's best interests, the GAL should bring the matter to the attention of the court. DCSC Standard A-5 provides that the GAL "is responsible for ensuring that the child's wishes are expressed to the court, even if these wishes differ from the guardian ad litem's recommendations." See *Meekins v. Corbett*, 147 W.L.R. 1609 (Sup. Ct. 2000, Canan, J.) ("If such a conflict should develop, the Guardian is obliged to notify the Court so an attorney may be appointed to represent the child and his expressed wishes."); and *Robinson v. Evans*, 117 W.L.R. 665 (Sup. Ct. 1989, Alprin, J.) (Where perception of GAL and child differ as to the child's best interests, Superior Court's practice is to appoint an attorney to represent the position of the child.)

Conflicts may arise in a variety of other circumstances. Thus, if the GAL represents more than one child in the same family group, the children may have different preferences. The GAL might

agree with child A's preference as to his or her disposition, but disagree with child B's preference. In these and other circumstances giving rise to a conflict, the GAL should petition the Court to have additional counsel appointed to represent any child with whom the GAL disagrees.

A different kind of conflict of interest situation was the subject of D.C. Bar Ethics Committee Opinion No. 156, issued in 1985. The question decided under the then existing ethical rules (D.C. Code of Professional Responsibility) was whether a lawyer appointed as guardian *ad litem* in a neglect proceeding could also represent prospective adoptive parents in a separate adoption proceeding with respect to the same child, even though there was no known conflict between the positions of the child and the prospective adoptive parents.

The committee concluded that, because the appointment of the GAL presupposed that the child required separate representation and because the child was presumptively too young and inexperienced to provide informed consent, the conditions that might otherwise permit joint representation of the prospective parents while the neglect proceedings was pending could not be met. The GAL could not ethically consent for the child because such action would violate DR 5-101(A), particularly if the prospective adoptive parents intended to pay for their representation. DR 5-101(A) prohibited a lawyer, without the informed consent of the client, from exercising professional judgment on behalf of a client when that judgment "will be or reasonably may be affected by his own financial, business, property or personal interests." In this instance, the child was too young to provide informed consent. The lawyer could not provide disinterested consent to his own employment by the prospective parents. The current applicable rule would be 1.7(b)(4).

4. COMMUNICATION WITH THE CLIENT

The GAL must comply with Rule 1.4(a) requiring a lawyer to keep a client reasonably informed about the substance of a matter, and

also to respond promptly to reasonable requests for information. Comment [3] to Rule 1.4 states that "[t]he guiding principle is that the lawyer shall fulfill reasonable client expectations for information consistent with (1) the duty to act in the client's best interest, and (2) the client's overall requirements and objectives as to the character of the representation." Guidelines pertaining specifically to guardians *ad litem* are contained in DCSC Standard B-1. Regardless of the child's age, GALs "should observe and/or talk with the child regularly, but at least every three months unless the court directs otherwise. It is important to see the child in the child's own environment."

5. CONFIDENTIALITY OF INFORMATION

With limited exceptions, Rule 1.6(a) prohibits a lawyer from revealing a confidence or secret of the lawyer's client, or using a confidence or secret to the disadvantage of the client or for the advantage of the lawyer or a third person.

There should be little difficulty in applying this rule to the normal relationship that exists for example, between the attorney and the parent client in an abuse and neglect proceeding. However, the situation can be difficult and uncertain when it comes to applying the confidentiality rules to the GAL and the child, especially if the GAL and child have differing views as to the child's disposition. The difficulty arises because of the dual roles of a GAL as advocate and fact finder described in *S.S. v. D.M., supra*, and the requirement that the GAL act in the best interests of the child. Should a GAL be precluded by Rule 1.6 from divulging to the court statements made by the child which clearly impact on the best interest issue? An example would be where the child told the GAL of severe drug abuse by the birth parent with whom, over the GAL's objection, the child wished to be reunited. Should the court receive that confidential information to assist it in deciding whether reunification would be in the child's best interest?

Many commentators have wrestled with the question of how to resolve ethical problems

confronting lawyers appointed as guardians *ad litem* for a child. See, e.g., Special Issue: Ethical Issues in the Legal Representation of Children, 64 *Fordham Law Review*, March 1996.

Decisions of courts in a number of jurisdictions also highlight the problems of applying rules of professional conduct to the potentially conflicting roles of a GAL. The most informative District of Columbia decision is *Meekins v. Corbett*, 128 W.L.R. 1609 (Sup. Ct. 2000, Canan, J.). Judge Canan concluded that “[u]ltimately..., if the wishes of the child conflict with the GAL’s view of the child’s best interest, the GAL must prioritize her role as advocate for the child’s best interests over her role as lawyer for the child.” (128 W.L.R. at 1612) In footnote 11, Judge Canan noted that the “hybrid” position of a GAL “can create friction with the Rules of Professional Conduct requirements of confidentiality and zealous representation of the client’s interest from the point of view of the client. As discussed in response to the issue whether the GAL is bound by the attorney-client privilege, courts in some jurisdictions have addressed this problem by modifying the ethical requirements for lawyers who act as GALs.” The Court cited *Clark v. Alexander*, 953 P.2d 145, 153-54 (Wyo. 1998); *Ross v. Gadwah*, 554 A.2d 1285 (N.H. 1988); *Interest of J.P.B.*, 419 N.W. 2d 387, 391 (Iowa 1988); and *In re Marriage of Rolfe*, 699 P.2d 79, 86-87 (Mont. 1985).

The Supreme Court of Wyoming captured the flavor of those decisions in the following statement:

“Contrary to the ethical rules, the attorney/guardian ad litem is not bound by the client’s expressed preferences, but by the client’s best interests. If the attorney/ guardian ad litem determines that the child’s expressed preference is not in the best interests of the child, both the child’s wishes and the basis for the attorney/guardian ad litem’s disagreement must be presented to the court.

“In the same light, the confidentiality normally required in the attorney-client relationship must be modified to the extent that relevant information provided by the child may be brought to the district court’s attention. While it is always best to seek consent prior to divulging otherwise confidential information, an attorney/guardian ad litem is not prohibited from disclosure of client communications absent the child’s consent. As legal counsel to the child, the attorney/guardian ad litem is obligated to explain to the child, if possible, that the attorney/ guardian ad litem is charged with protecting the child’s best interest and that information may be provided to the court which would otherwise be protected by the attorney-client relationship. Wyo. R. Prof. Cond. 1.2, 1.4 and 1.14” *Clark v. Alexander*, 953 P. 2d at 154.”

6. THE GAL’S RESPONSIBILITIES WHERE THE CHILD MAY HAVE A TORT CLAIM

In view of the domestic violence and neglect that often precede abuse and neglect proceedings, a GAL may learn of facts that form the basis for a possible tort action by a child against a birth parent or other individual. What, if any, obligations does the GAL have in such circumstances? D.C. Ethics Opinion No. 252, issued in 1994, is pertinent to that question. The conclusions of the Ethics Committee follow:

(1) A GAL has no ethical obligation to represent the child regarding claims the child may have, including independent actions in tort, even for injuries received during a placement made as a result of the neglect proceedings. Such an action would not come within the GAL’s responsibilities as defined by § 16-2304(b) and Super. Ct. Neg. R. 27. Nothing in Rule 1.2 of the D.C. Rules of Professional Conduct (Scope of Representation) would require the GAL to take such action.

(2) Because of the “unique role of the guardian ad litem in abuse and neglect cases,” the GAL has “the obligation to notify the child or those responsible for the child’s care (and in appropriate cases the court) of potential claims the child may have against a third party, and, “when necessary to preserve them take reasonable steps to file notices required by statute.” That limited duty of a GAL would be required by Rule 2.1, describing the lawyer’s role as advisor, Rule 1.3, requiring diligent representation, and Rule 1.4, relating to communications with clients.

(3) With respect to the question whether a GAL may initiate a tort claim on behalf of the child, the opinion concluded that, even if the child is competent to enter into a normal attorney-client relationship and the child and the GAL agree that a tort action should be brought, Rule 1.7 (Conflict of Interest) precludes the GAL from entering into a retainer agreement on the child’s behalf and acting as a lawyer in a tort action. “This requires a third party decision maker, e.g., a parent, a guardian ad litem separately appointed for that tort case, or referral to another lawyer for the tort litigation,” even if consent to proceed with the litigation has been obtained elsewhere from, for example, a guardian of the child. In particular, Rule 1.7(b)(4) would prohibit the GAL from initiating such an action.

DCSC Standard A-5 requires a GAL to investigate and preserve tort claims pursuant to DC Legal Ethics Committee Opinion 252. The Standard further requires a GAL “to ensure that any apparent and legitimate claims available to the child are explored, and, when appropriate, retain or request that the court appoint counsel to institute administrative or court actions related to the claim.”

B. Lawyers for Parents and Caretakers

D.C. Code §16-2304(b)(1) provides, in part, for the representation by counsel for the parent named in a neglect petition and for the appointment of counsel if the parent is financially unable

to obtain adequate representation. Several of the more pertinent ethical rules are discussed below in light of the role and responsibilities of lawyers representing parents in abuse and neglect proceedings. These rules, where applicable, also must be obeyed by lawyers representing foster parents or other caretakers.

1. CONFLICTS OF INTEREST

DCSC Standard A-6 provides that a lawyer “shall not represent two or more persons who are parties in the same child abuse and neglect proceedings.” Standard A-6 points out that Rule 1.7 prohibits a lawyer from representing multiple parties if a conflict is foreseeable. In abuse and neglect cases, even if there is no conflict between the parents at the beginning of the proceedings, conflicts often develop between them. Therefore, as the standard notes, such a conflict is “certainly foreseeable.” Accordingly, the dual representation of both parents may not be undertaken by a lawyer.

DCSC Standard A-6 also prohibits a lawyer from representing multiple caretakers in the same case.

2. REPRESENTING CLIENTS WITH A DISABILITY

The normal attorney-client relationship will not prevail if the client is under a disability within the meaning of Rule 1.14(a). The lawyer must, “as far as reasonably possible,” maintain such a relationship. Comment [1] points out that such a client “often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.” Rule 1.14(b) provides a safety net to a lawyer concerned about the ability of the client to understand the issues involved in abuse and neglect proceedings, or whether the client is competent to make important decisions. The lawyer may seek the appointment of a guardian or take other protective action with respect to such a client.

3. SEEKING THE CLIENT’S LAWFUL OBJECTIVES

Rule 1.2 (Scope of Representation) requires a lawyer to abide by the client’s decisions concerning the objectives of the representation.

Rule 1.3 (Diligence and Zeal) prohibits a lawyer from failing to seek the lawful objectives of a client through reasonable available means permitted by law. DCSC Standard A-5 provides that “[w]hen representing a parent in a child abuse and neglect proceeding, counsel shall seek the lawful objectives of the client.” The Standard goes on to say that counsel shall not “substitute counsel’s judgment or opinions in those decisions that are the responsibility of the client. Counsel must take all affirmative steps to ascertain the parent’s position prior to all hearings, negotiation and dealings with the child welfare agency responsible for the case.”

4. ATTORNEY AS ADVISOR

DCSC Standard A-5 provides further that, as “advisor,” counsel “should explain the nature of the overall proceeding and then obtain the client’s views and position before advocating on behalf of the client. Counsel should, where appropriate, identify alternatives for the client’s consideration. Counsel should explain to the client the risks, if any, in the client’s position.”

5. REPRESENTING THE ABSENT PARENT

In many instances, a parent of the involved child cannot be found and never appears despite diligent search efforts ordered by the court, or, if served with notice of the proceeding, never appears. In either of those circumstances, there is no way for the court-appointed attorney to know what the absent parent’s position would be with regard to the neglect charge or to reunification, and what decision the absent parent would make concerning the objectives of the representation. Moreover, it will be more difficult than would be the case involving a normal attorney-client relationship to comply with Rule 1.2 (Scope of Representation), and impossible to comply with Rule 1.4 (Communication).

At minimum, the court-appointed attorney should make reasonable efforts to find the client, so that there can be some communication and the client’s objectives can be ascertained. DCSC Standard A-5 states that the attorney “must take all possible steps to locate

the client and help the parent understand the gravity of the situation.”

Beyond that, the extent of the lawyer’s efforts would depend on whether or not the absent parent had notice of the neglect proceedings. If the parent had notice of the proceedings, but failed to appear, the lawyer might reasonably decide not to put on an affirmative case, but make sure that the District of Columbia followed required procedures, and met the burden of proof required to establish the neglect charge. The lawyer might reasonably decide to take a neutral position on the issue of reunification. In order to comply with Rule 1.3, the lawyer should represent the absent client with such zeal and diligence as would be reasonably expected under the particular circumstance confronting the lawyer. The extent of the lawyer’s efforts in circumstances where the absent parent never received notice might depend on the strength or weakness of the government’s case. If the case is weak, the lawyer might reasonably believe that the neglect petition should be opposed vigorously, and argue vigorously for reunification. If the government’s case is strong, the lawyer might reasonably decide not to put on a vigorous defense, and take a neutral position on the reunification issue. No issue of confidentiality (Rule 1.6) will arise where there is no contact or communication between the court-appointed lawyer and the absent parent.

6. REPRESENTING THE AVAILABLE PARENT

In circumstances where the parent is available and competent to participate in the neglect proceeding, the lawyer should have no difficulty complying with Rules 1.2 and 1.3. The objectives of the representation normally will be obvious. The parent either will sign a stipulation of neglect or oppose the neglect charge. The ultimate objective of the parent usually will be reunification. Whatever the circumstances, the lawyer must seek zealously and diligently to achieve the client’s objectives.

7. COMMUNICATING WITH THE CLIENT

Communicating even with a client who has

made an appearance may be difficult in some instances because the client may not be easily contacted for a variety of reasons. In that circumstance, extra effort will have to be made by the lawyer to communicate with the client in order to assure compliance with Rule 1.4. DCSC Standard B-1 requires counsel to “meet and communicate with the parent regularly. Prior to each court session counsel must make efforts to communicate with the client and be prepared to respond to the Court’s inquiry regarding contacts between the attorney and client during the hearing. If the client is involuntarily committed or incarcerated and wishes to attend a hearing, counsel shall make all necessary arrangements for the client’s participation in the hearing.”

8. CONFIDENTIALITY OF INFORMATION

A lawyer must adhere to provisions of Rule 1.6 (Confidentiality of Information). The lawyer may not, without the client’s informed consent, reveal any confidence of the client, which refers to information protected by the attorney-client privilege, or any “secret” of the client, which refers to any other “information obtained that the client has requested to be held inviolate, or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”

C. Other Pertinent Rules Applicable to All Lawyers

1. RULE 4.2(A)—CONTACTS WITH REPRESENTED PARTIES

Rule 4.2(a) prohibits a lawyer from communicating or causing another to communicate “about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other party.”

A GAL, in carrying out his or her duties and responsibilities to protect the best interest of the child, will necessarily have to communicate with other parties to an abuse and neglect proceedings, in particular the birth parents and the custodian of the child, if one has been desig-

nated by the court. Those parties, in all likelihood, will be represented by counsel. Likewise, the lawyers for parents or caretakers will have to contact other parties to prepare for trial.

D.C. Bar Ethics Opinion, No. 295, issued in 2000, provides advice relating to the application of Rule 4.2(a) to a GAL in an abuse and neglect case where the GAL wished to communicate with a parent of the child she represented, who was represented by counsel, without obtaining the consent of the parent’s lawyer.

After discussing several hypothetical situations, the opinion concluded that there should be no communication by a GAL with a represented parent without the consent and authorization of the parent’s lawyer, unless such communication related to an effort by the GAL to obtain information about how to contact the child, or was made for other administrative purposes having nothing to do with the substance of the neglect and abuse proceeding. The age or mental capacity of the child would be irrelevant.

Moreover, the GAL may not attempt to communicate with a represented parent through a third party, such as a social worker. For example, a GAL may not propose questions for the social worker to ask the represented parent without the consent of the parent’s lawyer. First of all, Rule 4.2(a) provides that a lawyer may not “cause another to communicate” with a represented party. Second, Rule 8.4(a) provides that it is professional misconduct for a lawyer knowingly to violate the Rules of Professional Conduct, knowingly to assist or induce another to do so, or to do so through the acts of another.

A social worker or other non-lawyer is not bound by the Rules of Professional Conduct. Accordingly, if the GAL learns that the social worker has obtained information from the parent without having obtained the consent of the parent’s attorney, there is no ethical reason preventing the GAL from obtaining that information from the social worker. However, as noted, the GAL may not initiate the inquiry.

Finally, the opinion considered the question of what, if any, recourse the GAL has if the parent's lawyer refuses to allow the GAL to communicate with the parent, even if the parent's lawyer is present, or does not respond to the GAL's request to communicate with the parent. Reference was made to Rule 1.4 which imposes a duty on a lawyer to communicate promptly with his or her client a request for contact by the child's lawyer.

Moreover, Rule 4.4 provides that a lawyer may not "use means that have no substantial purpose other than to embarrass, delay, or burden a third person." Comment [1] to Rule 4.4 recognizes the lawyer's responsibility to a client, "but that responsibility does not imply that a lawyer may disregard the rights of third persons." The ethics opinion noted that "[t]his point is particularly critical in neglect proceedings, where in some cases...the GAL cannot get any information about her client except from a represented party. In every case, the GAL has an affirmative duty to talk to all of those who have information relevant to the determination of the child's best interest. The parent's lawyer's diligence in responding to requests for consent is essential to the functioning of the process. Lawyers for a parent in neglect proceedings should be conscientious in responding to requests from GALs to communicate with the parents of the children they represent." As a practical matter, a GAL, faced with this problem, could call the other lawyer's attention to Opinion No. 295.

The conclusions reached in the Ethics Opinion No. 295 are, as indicated, applicable to all lawyers involved in abuse and neglect proceedings—the AAG, lawyers representing parents, and the attorney, if any, representing a foster parent or other caretaker who is a party to the proceedings. Thus, none of the lawyers would be permitted to communicate directly or through an intermediary with a represented party regarding a substantive issue without the consent and authorization of the party's lawyer.

Similar rules regarding contact with repre-

sented parties are found in DCSC Standard B-2. It is important to note that the contact strictures of Rule 4.2(a) and Standard B-2 would ordinarily not be applicable to a situation where the GAL or counsel for other parties wished to contact a caseworker. Thus, DCSC Standard B-2 provides that "[c]ounsel may communicate with caseworkers unless, in exceptional cases, directed otherwise by the Assistant Corporation Counsel or caseworker's counsel."

2. RULE 4.3--CONTACTS WITH UNREPRESENTED PARTIES

There are instances where a party to an abuse and neglect proceeding will not be represented by a lawyer. For example, a foster parent or other caretaker of the child, even though a party, may not choose to be represented by a lawyer. Also, a foster parent or caretaker might not be entitled to be a party to the neglect proceedings if the child had not resided with such person for 12 months, and, hence, might not be represented. See D.C. Code §16-2304(b)(4)(B). In addition, other non-party individuals often have a significant interest in the outcome of an abuse and neglect proceeding, such as relatives of the child or relatives of the birth parents, and probably would not be represented by a lawyer.

The GAL and lawyers for other parties, in preparing for the neglect and abuse hearing, would in all likelihood contact such individuals to obtain relevant information. If so, they would be required to abide by Rule 4.3(a) which provides that a lawyer shall not "give advice to the unrepresented person other than the advice to secure counsel, if the interests of such person are or have a reasonable probability of being in conflict with the lawyer's client."

Rule 4.3(b) prohibits a lawyer from stating or implying to an unrepresented person, whose interests are not in conflict with the lawyer's client, that the lawyer is disinterested. If the lawyer "knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding,"

DCSC Standard B-2 provides that, in dealing with an unrepresented person, “counsel shall not state or imply that he or she is disinterested, and when the unrepresented person misunderstands counsel’s role, the lawyer shall make reasonable efforts to correct the misunderstanding.”

Thus, care must be taken by all lawyers in abuse and neglect proceedings not to influence or otherwise take advantage of unrepresented individuals they contact for the purpose of obtaining relevant information. In general, it is desirable for a lawyer who deals with an unrepresented person to make clear whom he or she represents and in what context. As Comment [1] puts it, an “unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer will provide disinterested advice concerning the law even when the lawyer represents a client. In dealing personally with any unrepresented third party on behalf of the lawyer’s client, a lawyer must take great care not to exploit those assumptions.” Where the interests of the unrepresented person conflict with the interests of the lawyer’s client, “the possibility of the lawyer’s compromising the unrepresented person’s interests is so great that the Rule prohibits the giving of any advice, apart from the advice that the unrepresented person obtain counsel.”

Rule 8.4(c) also would be violated if the lawyer, in communicating with an unrepresented person, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

III. Conclusion

Abuse and neglect practitioners must comply with the pertinent D.C. Rules of Professional Conduct. Useful guides applying specifically to lawyers handling abuse and neglect cases can be found in the DCSC Child Abuse and Neglect Attorney Practice Standards.

The ethical responsibilities of lawyers representing parents and other adults in abuse and neglect proceedings are, for the most part, no different from those of lawyers practicing in other areas of the law where there is a normal attorney-client relationship. However, in performing the dual roles of neutral fact finder for the court and advocate, a conflict can arise between the GAL’s perspective as to the best interest of the child and the wishes of the child. A GAL should seek the advice and assistance of the court in attempting to resolve the conflict. If the conflict cannot be resolved, normal ethical requirements must give way to the child’s best interest, necessitating a modification of otherwise applicable rules of professional conduct. ■

CONFIDENTIALITY

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CONFIDENTIALITY

The child welfare system in general, and the foster care system in particular, generates and collects a significant amount of personal and sensitive information about children, biological parents, foster parents, siblings, and relatives. How this information is used and shared is not often analyzed in much detail. Litigation regarding privacy, confidentiality, privileges, and the impact of federal and local law on the disclosure of information is rare in the District and nationally as well. Although there are numerous law review articles and judicial opinions on evidence, privacy, and confidentiality, very few address the issues that pertain to foster care and that arise in child abuse/neglect proceedings. It is impossible to provide a succinct guide detailing how and when information can or must be disclosed. Also implicated are the ethical considerations of the involved professionals, such as lawyers, social workers, psychiatrists, psychologists, physicians, and addictions counselors. Court rules relating to discovery also impact disclosure of records. The degree to which information can be collected and shared by the individuals and entities involved in child abuse/neglect proceedings is affected by a complex web of District of Columbia and federal laws, regulations, policies, and practices.

This Appendix does not attempt to reference all the laws, regulations, and policies but instead undertakes four tasks: 1) to provide citations to the laws that are most likely to be involved in child abuse/neglect proceedings; 2) to provide citations to cases and materials that might be useful in further research; 3) to suggest an approach that might be useful when confronted by confidentiality issues; and 4) to provide some guidance regarding privacy and children.

I. Citations to Relevant Laws

A. Federal

INFORMATION-SHARING AMONG AGENCIES

Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a.

Social Security Act, Title IV-E, 42 U.S.C. § 671(a)(8); 45 C.F.R. §§ 1355.21-1355.30 (2006); 45 C.F.R. § 205 (2006).

45 C.F.R. § 1355.30(p)(3) (2006). Records maintained under this regulation are subject to confidentiality provisions of 45 C.F.R. § 205.50 (2006).

SUBSTANCE ABUSE RECORDS FROM TREATMENT CENTERS

42 U.S.C. § 290dd-

42 C.F.R. §§ 2.1 *et seq.* (2006), especially § 2.14 (minor patients).

CRIMINAL BACKGROUND CHECKS

42 U.S.C. § 671(a)(2)

42 U.S.C. § 5119 (a)-(c); 28 C.F.R. § 20.1-20.38 (2006).

HOMELESS CHILDREN

42 U.S.C. § 5731

45 C.F.R. § 1351.19(b) (2006).

MEDICAL RECORDS

Health Insurance Portability and Accountability Act of 1996 (HIPAA) Public Law 104-191, 110 Stat. 1936 (1996).

HIPAA regulations:

Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182 (Aug. 14, 2002) (codified at 45 C.F.R. pts. 160 and 164), 65 Fed. Reg. 82,461 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160 and 164); 45 C.F.R. pts. 160, 164 (2006), especially 45 C.F.R. § 164.512(e) (2006) (disclosures for judicial and administrative proceedings).

SCHOOL AND RELATED DEVELOPMENTAL RECORDS

Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g

34 C.F.R. §§ 99.3, 99.36 (2006).

Individuals with Disabilities Education Act, Pub. L. No. 91-230 (1970); 20 U.S.C. § 1412(c), 20 U.S.C. § 1401(19); 34 C.F.R. § 300.571, subpart F (2006).

HIV-AIDS AND OTHER INFECTIOUS DISEASES

Health Insurance Portability and Accountability Act of 1996 (HIPAA) 45 C.F.R. pts. 160 and 164 (2006). See especially 45 C.F.R. § 164.512(e) (2006).

These and other confidentiality-related statutes have been collected by the National Child Welfare Resource Center on Legal and Judicial Issues at the American Bar Association Center for Children and the Law. See Mark Hardin, *Privacy and Information Sharing in Child Abuse and Neglect Cases* (ABA 2001), www.abanet.org/child/rclji/privacy_canc.pdf. Or contact markhardin@staff.abanet.org. The Children's Bureau at the U.S. Health and Human Services Department has issued some helpful policy guidance about what information can be released to the public and what can be discussed in open court. See U.S. Department of Health and Human Services, Administration for Children and Families, www.acf.hhs.gov.

B. District of Columbia**D.C. SUPERIOR COURT FAMILY COURT STATUTES AND RULES**

Superior Court. Neglect Rule 46

D.C. Code § 16-2331 Juvenile case records

D.C. Code § 16-2332 Juvenile social records

D.C. Code § 16-2333 Law enforcement records

D.C. Code § 16-2334 Fingerprint records

D.C. Code § 16-2335 Sealing of records

D.C. Code § 16-2336 Unlawful disclosure of records; Penalties

D.C. Code § 16-2348 Parentage records

D.C. Code § 16-2363 Termination of Parental Rights proceeding records

D.C. Code § 16-2393 Permanent guardianship records

DISTRICT OF COLUMBIA STATUTES

D.C. Code § 3-1205.14(a)(16) Penalties for breach of confidentiality by health professional

D.C. Code § 4-1117 Confidentiality of records for children in District care

D.C. Code § 4-209.04 Confidentiality of records; applicants and recipients of public assistance

D.C. Code § 4-216.01 Regulations regarding public assistance records

D.C. Code § 4-210.10; 210.16 Public assistance due process hearings, confidentiality

D.C. Code § 4-511 Victim's assistance confidentiality

D.C. Code § 4-1302.01-.09 Child Protection Register

D.C. Code § 4-1303.06 Child and Family Services Agency general confidentiality of records

D.C. Code § 4-1303.07 Unauthorized disclosure of CFSA records

D.C. Code §§ 4-1305.01, 1305.08 Criminal records check, confidentiality

D.C. Code § 4-1321.05 Waiver of doctor-patient privilege

D.C. Code §§ 4-1371.04, 1371.08, 1371.09 Child Fatality Review Committee, confidentiality

D.C. Code § 4-1405 Child placing agency records

D.C. Code §§ 5-113.01 *et seq.* Police records

D.C. Code §§ 7-131-154 Communicable diseases (See D.C. Code § 7-131(b)(1) reports submitted to D.C. Dep't of Health regarding communicable disease, including AIDS, shall be kept confidential)

D.C. Code § 7-219 Vital records

D.C. Code §§ 7-1201.01 *et seq.* Mental Health Information Act

D.C. Code § 7-1201.02 Prohibited disclosures, mental health information

D.C. Code § 7-1202.05 Authorized disclosures, minors

D.C. Code §§ 7-1231.01-1231.15 Mental Health Consumers Rights Protection Act of 2001

D.C. Code §§ 7-1231.02(16)-(18), (21); 7-1231.07; 7-1231.14 Consent of youth receiving mental health services

D.C. Code §§ 7-1601-1606 AIDS Health Care

D.C. Code § 7-2103(a)(4)(D) Youth residential facilities; confidentiality

D.C. Code § 14-307 Doctor-patient privilege

D.C. Code § 16-311 Adoption judicial records (sealing and inspection)

D.C. Code § 21-562 Medical/psychiatric records-institutionalized persons

D.C. Code § 24-604 Public intoxication

D.C. Code § 31-1606 AIDS information disclosure, insurance, informed consent

D.C. Code § 44-211 Medical laboratory test results

DISTRICT OF COLUMBIA MUNICIPAL REGULATIONS

17-73 DCMR §§ 7300.1 *et seq.* Addiction Counselors (incorporates Code of Ethics)

22-6 DCMR §§ 600.1-600.7 Consent of minors to treatment

22A-1 DCMR § 100.5 Minor's rights as a mental health consumer

29-60 DCMR § 6023.1 Confidentiality – Foster Homes/Foster Parents

29-62 DCMR § 6226.1 Confidentiality – Youth Shelters/Residential Shelters

29-62 DCMR § 6227 Privacy – Youth Shelters/Residential Shelters

29-63 DCMR § 6320.1 Confidentiality – Independent Living Programs

II. Cases and Materials

Adams, William, “*But Do You Have To Tell My Parents?*” *The Dilemma for Minors Seeking HIV-Testing and Treatment*, 27 J. Marshall L. Rev. 493 (1994) (discussing, *inter alia*, legal standards that are applied to the rights of minors, especially involving health care consent).

Bennett, Paul, Symposium, *Hearing Children's Voices: Secret Reflections: Some Thoughts About Secrets and Court Processes in Child Protection Matters*, 45 Ariz. L. Rev. 713 (2003) (examining the role “family secrets” play in litigation and therapy).

Katner, David R., *Confidentiality and Juvenile Mental Health Records in Dependency Proceedings*, 12 Wm. & Mary Bill Rts. J. 511 (2004) (arguing that the legal system should ensure greater confidentiality for juvenile mental health records to better protect victims of abuse and neglect).

Katner, David R., *The Ethical Dilemma Awaiting Counsel Who Represent Adolescents with HIV/AIDS: Criminal Law and Tort Suits Pressure Counsel to Breach the Confidentiality of the Clients' Medical Status*, 70 Tul. L. Rev. 2311 (1996) (exploring the tension between confidentiality and ethics in cases involving the failure to warn third parties of a client's medical status).

In re: Kristine W., 114 Cal. Rptr. 2d 369 (2001) (minor is protected by state law psychotherapist-patient

privilege but child's therapist is allowed to provide information to advance therapeutic objectives).

In re: O.L., 584 A.2d 1230 (D.C. 1990) (disclosure of parent's psychiatric records in a child abuse and neglect proceeding over parent's objection).

In re: Sealed Case, No. 03-7021, 363 U.S. App. D.C. 214 (D.C. Cir. 2004) (application of the federal psychotherapist privilege to limit discovery in a civil case involving adult wards of D.C.)

J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981) (dissemination of social histories of juvenile offenders not barred by Constitution).

Matter of Damon A.R., 447 N.Y.S.2d 237 (N.Y. Fam. Ct. 1982) (child subject to a neglect investigation has statutory right to access reports made to child protective services).

Nevada Division of Child and Family Services, Department of Human Resources v. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, 81 P.3d 512 (Nev. 2003) (denial of minor child's petition to obtain names of siblings' adoptive and biological parents).

Pelster v. Walker, 185 F.Supp.2d 1185 (D. Or. 2001) (minor girls, who were alleged victims of a crime, did not have an absolute Fourth Amendment right to refuse to be searched or medically examined).

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (limiting disclosure of child abuse records in a criminal proceeding).

S.C. v. Guardian ad Litem, 845 So.2d 953 (Fl. Dist. Ct. App. 2003) (child in shelter care had right to notice and opportunity to be heard to prevent disclosure of therapeutic records to guardian *ad litem*).

S.M. by R.M. v. Children and Youth Services of Delaware County, 686 A.2d 872 (Pa. Commw. Ct. 1996) (foster child's parents and legal guardian were entitled to family case record of foster family in which child was allegedly abused).

Simpson v. Braider, 104 F.R.D. 512 (D. D.C. 1985) (application of doctor-patient privilege to information regarding a child).

III. Approaching Privacy and the Disclosure of Information

One way to begin the analysis of any specific situation is to determine who or what is requesting what kind of information, from whom, and for what purpose? What are the precise records at issue and to whom do the records apply? The parent's records of substance abuse treatment? A teenager's medical records pertaining to her pregnancy? The school records of a ten-year-old? Here is a conceptual approach to analyzing the situation:

A. Who seeks the records?

- Child/GAL
- Biological parent
- Court
- Law enforcement
- Therapist/mental health professional
- Social worker/social services agency

B. Whose records?

- Child
- Biological parent
- Foster parent
- Relative/sibling
- Potential adopter/foster parent

C. Why are the records sought?

- Treatment
- Litigation/Discovery
- Witness impeachment

D. What/who has possession of the records?

- Court
- CFSA
- Medical facility
- Individual
- Social service agency
- Treating or evaluating professional

E. Venue

- Judicial proceedings
- Administrative proceeding
- Ancillary proceeding
- Discovery

F. When will the information be disclosed?

- Reporting of suspected child maltreatment

- Investigation of suspected child maltreatment
- Petitioning of a neglect/abuse case
- Pretrial
- Trial
- Post-trial
- TPR/adoption
- Criminal proceedings
- D.C. Attorney General

G. Primary Issues:

- Does the person to whom the records pertain have a right to *prohibit disclosure* and, if so, are there exceptions?
- Has anyone with authority to consent or object consented or objected to the disclosures?
- What laws *prohibit, allow or require* disclosure?
- Are there any conflicts between and among the laws that apply to the information at issue?

IV. Children's Privacy – Children's Records

Very few statutes are specifically intended to protect the privacy of children because they are children. It is safe to conclude that children do not have the same rights to privacy as adults. This situation exists for two related reasons. First, society has not granted children the same rights as adults, either with regard to privacy or most other matters. Second, a child's interests in the accuracy or confidentiality of their records would at least, in theory, be asserted and protected by their parents. As a general rule, and in the absence of a specific statute or court ruling, parents can obtain and disclose records pertaining to their own children. However, the situation is quite different for children who are 1) receiving services from the government; 2) foster children; 3) subject to child abuse/neglect proceedings; or 4) in the juvenile justice system. For these children there are statutes, court rules, and regulations that protect the privacy of children and the disclosure of records pertaining to them. In any event, there is very little case law, either in the District of Columbia or elsewhere, regarding the privacy rights of children.

A. Doctor-Patient Privilege

Neither the husband-wife privilege nor the physician-patient privilege can be used to exclude evidence in any proceeding in the Superior Court concerning the welfare of a "neglected child" if a Family Court judge determines that the privilege should be waived in the interest of justice. D.C. Code § 4-1321.05. However, this raises the question of whether the physician-patient privilege should be waived in all cases if it is the *child* who is the patient. Section 1321.05 can be used and is used to prevent a parent or guardian from raising the privilege when it is the parent or guardian who is (or was) the patient and who is also being accused of abusing or neglecting the child. What if the patient is the child and the child does not wish the privilege waived? It is true that, at least theoretically, the child could be subpoenaed and threatened with contempt if the *child* refuses to testify. However, should a physician be compelled to reveal information – over the objection of the child – about a child-patient even if the information is relevant to the welfare of that particular child? If the information is needed to protect *another* child, the interest in waiving the privilege of a protesting child-patient makes more sense. In addition, the decision to compel a physician to reveal information may turn on whether the objective is to prevent future harm to a child or to punish or uncover past harm.

B. Family Court Proceedings

When a child is involved in child abuse/neglect proceeding or is subjected to juvenile criminal proceedings, the court has almost unlimited discretion to order the child to be mentally or physically examined. D.C. Code § 16-2315 (physical and mental examinations). This statute should be closely read not only because it can be and is used to undermine a child's right to privacy, but also because the results of the "examination" may be used against the child. For example, the results may be used by the court to justify the child's placement into an institution. The examination re-

sults may also be used against the child in a hearing to determine if the child should be subjected to a criminal trial as an adult or to involuntary commitment through mental health proceedings. In addition, the statute assumes that the results of the examination are “admissible” and does not create any grounds for preventing the results of the examination from being made known to the court or other parties.

D.C. Code §§ 16-2331 and 2332 are intended to create broad protections against the disclosure of all court and “social records” that pertain to children who are subjected to juvenile criminal proceedings or child abuse and neglect proceedings. Similarly, D.C. Code § 16-2333 provides protections for police records and § 16-2334 provides protection for fingerprint records. All four sections also set out the requirements that must be met before disclosure can occur including the categories of persons or entities that can access the protected records. Sections 2331 and 2332 also apply to all “juvenile case and juvenile social records” created during “termination of parental rights” proceedings (governed by D.C. Code § 16-2363). It is unclear whether the records covered by these statutes can be disclosed only in accordance with the statutes themselves or whether the records can be disclosed in response to other circumstances or requests. For example, can the records be subpoenaed by a party in an unrelated proceeding?

D.C. Code § 16-2335 allows for the records covered in sections 16-2331 and 2332 to be sealed and sets out when and how the sealing may occur and under what conditions records may be unsealed. D.C. Code § 16-2335 penalizes violations of sections 16-2331 through 16-2335. (D.C. Code § 16-2364 penalizes violations of § 16-2363).

Detailed rules regarding the sealing and unsealing of records under D.C. Code § 16-2335 are found at Superior Court General Family Rule P. These rules also have sample forms pertaining to sealing. In addition, two Juvenile Rules pertain to the inspection and sealing of juvenile records, SCR-Juv. 55 and 118. The inspection and disclosure of neglect records is controlled by SCR-Neg. 46.

C. Records Pertaining to Wards and Children Receiving Government Services

D.C. Code §§ 4-114 and 116 provide broad authority for the government to care for children. D.C. Code § 4-117 requires that each child cared for by the government shall be “fully” “investigated” and the “facts learned entered in permanent records.” These records “shall be confidential but may be made available in the discretion of the Board [of Public Welfare].” It is difficult to assess the meaning and scope of this statute especially as it may pertain to records pertaining to children. The Board of Public Welfare no longer exists; it was replaced by the Department of Human Services. Foster children are now the responsibility of the Child and Family Services Agency. A common-sense reading of this statute could lead to the conclusion that whoever is responsible for children in the care of the government may disclose whatever records need to be disclosed in order to properly care for the children and promote their welfare. Otherwise, the records are “confidential” and may not be disclosed. However, the statute could also be taken to read that the records are confidential unless otherwise subject to disclosure, such as by court order or subpoena, or if the children were to consent to disclosure. In any event, exactly how this statute protects or erodes the privacy of a child’s records remains to be determined. Also relevant to foster children are D.C. Code §§ 4-209.4 and 4-216.01 which provide protection for information relating to “use and disclosure of information concerning applicants for, or recipients of public assistance.” (D.C. Code § 4-216.01(a)).

D. Child-Placing Agencies

D.C. Code § 4-1405 provides, with exceptions not relevant here, that only “licensed child-placing agenc[ies]” may place children into foster or adoptive homes. The statute goes on to state that child-placing agencies shall keep records regarding children and their parents and that “all records” and “all facts” shall be “deemed confidential.” The records that are “deemed confidential” shall not be disclosed except to the “authorities”

that license the agencies. The statute goes on to state that the records “shall not be subject to judicial subpoena in collateral proceedings” except that, in accordance with regulations, the Mayor “may” make records or information “available” when the Mayor or the agency determines that disclosure “shall promote or protect the interest and welfare of any child the Mayor or such agency has served.”

The scope and impact of this section is difficult to assess. It would seem that the records and information pertaining to all children in the care of the government who are in a foster or adoptive home would be covered. In any event, it is common practice that these records are available to the court and to the parties and their attorneys in child abuse and neglect and juvenile proceedings. The incompatibility between § 4-1405 and the practices under §§ 16-2301 *et seq.* (proceedings regarding delinquency, neglect, or need of supervision) cannot be easily explained. Similarly, it is unclear how either of these statutes meshes with D.C. Code §§ 4-209.04 and 4-216.01. It needs to be remembered that section 4-1405 was enacted in 1944 and was in part designed to protect the privacy of those families whose children were in foster care or who were to be adopted. The District’s child abuse and neglect laws were enacted many years later and were designed to protect the safety and welfare of children.

E. Runaways

The federal program that funds services to “run-away youths” prohibits the disclosure of “records containing the identity of individual youths.” 42 U.S.C. § 5731; 45 C.F.R. § 1351.19(b) (2006). As with so many laws that affect records concerning children, this particular statute was probably well-intentioned and designed to protect the privacy of children who had run away from home. Exactly how it impacts access to a particular child’s records is unclear. For example, if the child becomes a ward of the District does the District government have access to the records created and maintained at the runaway shelter? Can they be subpoenaed by a parent of the child in a custody case?

F. Medical and Health Services to Children

District law provides that psychiatric hospitalization records of institutionalized persons are confidential. The act does not distinguish between adults and minors. D.C. Code § 21-562.

Records and information pertaining to those who receive services from a “mental health professional” are protected by the District’s Mental Health Information Act. D.C. Code §§ 7-1201.01-1208.07. This quite detailed law does not distinguish between children and adults and a very good argument could be made that since it does not make any such distinction it is intended to protect the confidentiality of children just as it would the confidentiality of adults. Section 7-1201.05 does address disclosures for “clients” under the age of 18. For “clients” “beyond the age 14,” section 1201.05 permits disclosure only after authorization from the “client” and the parent or legal guardian. For clients not yet 14 the statute appears to permit disclosure to be authorized by a parent or guardian.

The District has a regulation that allows minors to obtain certain kinds of health and medical care without parental consent. 22-6 DCMR §§ 600.1-600.7. It would therefore seem that any records generated by the provision of such treatment would be confidential unless the child consented to disclosure or unless disclosure were required by law (for example, the child abuse and neglect reporting law). Except for the regulations that allow minors to get treatment for sexually transmitted diseases (*id.*) there are no laws in the District of Columbia that are applicable specifically to children and also address AIDS/HIV records or confidentiality. The federal government has enacted a law that conditions the provision of federal funding for AIDS/HIV intervention services on whether the receipt of such services will remain confidential. 42 U.S.C. § 300ff-61. The District does not have a statute that specifically creates blanket confidentiality protections for AIDS/HIV information. Instead, D.C. statutes provide that AIDS/HIV information receives the same protections as certain other illnesses or conditions or creates confi-

confidentiality in certain circumstances. See D.C. Code §§ 7-131 to 7-154 (2-200 DCMR § 22-200 *et seq.* (Communicable and reportable diseases)); D.C. Code §§ 7-1601 to 7-1606 (AIDS Health-Care Response Act of 1986); D.C. Code § 31-1606(d)(2) and § 1608 (HIV testing for insurance purposes); D.C. Code §§ 44-211 and 212 (Confidentiality of laboratory test results); 42 C.F.R. § 431.305 (2006), 29-20 DCMR § 2020.1 (Confidentiality of information regarding financial assistance for health benefit premiums); D.C. Code § 3-1205.14(a)(16) (Disciplinary action against a licensed health care provider for breaching confidentiality).

Federal regulations contain language intended to protect, insofar as is possible, the privacy rights and concerns of minors who receive drug or alcohol treatment under conditions that implicate the federal confidentiality requirements. 42 U.S.C. § 290dd-2. The regulations are found at 45 C.F.R. §§ 2.1 *et seq.* (2006). The section pertaining to minors is 45 C.F.R. § 2.14 (2006).

G. Adoption

The District of Columbia has one statute and one court rule that apply to records in adoption proceedings. Unlike many other states, the District does not have any statutory mechanism to “break the seal” of closed adoption files or to obtain access to ongoing adoption proceedings. Instead, D.C. Code § 16-311 states in part:

From and after the filing of the petition, records and papers in adoption proceedings shall be sealed. They may not be inspected by any person, including the parties to the proceeding, except upon order of the court, and only then when the court is satisfied that the welfare of the child will thereby be promoted or protected. . . . The clerk of the court shall keep a separate docket for adoption proceedings.

SCR –Adopt. 79-I, allows the clerk to reveal such things as the names of the attorneys, the adoption agency that is investigating the adoption, the case number and the “actions taken and hearings scheduled.”

H. Paternity Proceedings

The District of Columbia has provided by statute for the confidentiality of records in paternity cases, D.C. Code § 16-2348. Although such records still receive protection, the circumstances under which they can be disclosed has been clarified and expanded. In general, confidential paternity records can be disclosed to aid in the collection of child support and to protect the safety of those who may be involved in domestic violence.

I. Federal

Title IV of the Social Security Act creates some confidentiality protections for records pertaining to people served by government programs funded under certain parts of the Social Security Act and also provides that records can be disclosed for purposes related to the administration of the programs. 42 U.S.C. § 671 and 45 C.F.R. §205.50 (2006). Juvenile criminal records may be disclosed when the juvenile consents or when disclosure helps carry out the purposes of the Juvenile Justice and Delinquency Prevention Act. 42 U.S.C. § 5676 (2003). ■

USE OF CRIME VICTIMS COMPENSATION FUNDS FOR CHILDREN IN THE NEGLECT SYSTEM

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USE OF CRIME VICTIMS COMPENSATION FUNDS FOR CHILDREN IN THE NEGLECT SYSTEM

The District of Columbia has had a longstanding program to provide some monetary compensation and reimbursement to victims of violent crime. Under the amended act of 1996, children who are victims of the offense of “cruelty to children” are specifically included as eligible for benefits. Further amendments by Administrative Order in 2003 established that it is no longer necessary that the child or sibling be the subject of a police report alleging physical abuse, or that the court establish physical abuse in the disposition. “Cruelty to children” is established by the filing of a petition of neglect for the child. Thus, any child in the neglect system is now eligible.

I. Use and Sources of the Fund

Victims can be compensated for financial burdens such as emergency housing, medical and mental health care costs, funeral expenses, and loss of support and services. This includes medical and mental health assessments and mental health counseling, with a maximum limit of \$6,000 for a child (double the \$3,000 limit for an adult). For children in the neglect system, the Crime Victims funds may be used to cover specialized or high quality mental health counseling or testing. The Crime Victims Compensation Program is funded from fines assessed against defendants in criminal and civil matters in DC Superior Court, and from a grant from the US Department of Justice. The Program is administered by the Crime Victims Compensation Office in DC Superior Court.

Applicable statutes and rules are:

- A. DC Code §4-501 *et seq.* (1996).
- B. “DC Superior Court Crime Victims Compensation Program” Rules are found at the end of Volume 1. (DC Superior Court Rules 2004)
- C. D.C. Superior Court Administrative Order 03-10, issued by the Chief Judge in March 2003, amended some aspects of the prior rules to

more clearly elucidate eligibility for funding of children in the neglect system; *i.e.*, the usual one-year time limit for filing a claim for compensation following the occurrence of the triggering “crime” is specifically waived for children who are the victims of “cruelty to children” by the filing of the neglect petition. (Rule 7). There is no time limit after that.

II. Practical Uses for Crime Victims Funds

For children in the neglect system, the funds are most commonly applied to pay for mental health services which are not otherwise available from a provider who accepts DC Medicaid. Common uses include specialized therapy for sexual abuse, post-traumatic stress disorder, and specialized assessments which need to be completed more rapidly than the healthcare system DC Kids can provide.

III. How to Make a Child Eligible for Benefits

Guardians *ad litem* (GALs) are specifically envisioned as persons who would file for benefits on behalf of a minor child in the neglect system,

although social workers for a foster care agency may do so also. Some foster agencies routinely make an application for each child in their care. A child may be registered with the program prior to the identification of the service needed or of the service provider.

The multi-page application may be obtained directly from the CVCP office at:

Crime Victims Compensation Program
Superior Court Building A, Room 104
515 5th Street, NW
Washington, DC 20001
Tel: 202-879-4216.

Or on-line at <http://mpdc.dc.gov/serv/victims/victimsfaq.shtm>.

The office's workers are very helpful to anyone who is trying to file a claim.

Several tips for completing the application are:

A. GALs file as the "claimant" on behalf of the child(ren), although the application does not make this clear on its face.

B. One child is listed as the "victim." Additional siblings in a multiple-child family are listed in the application as the "secondary victims."

C. The GAL or social worker must provide the following information and documents with the application:

- 1) Correct name and date of birth for each child;
- 2) Social security number for each child;
- 3) One copy of neglect petition showing all the included children.

D. The Crime Victims Compensation Program office takes about one day to process the application, then assigns it a case number for the entire family group, and assigns the case to an examiner in the office, who will eventually process any claims. GALs should keep track of the case number to later pass along to service providers.

IV. Reimbursements to Mental Health Providers

Mental health service providers seeking reimbursement from CVCP funds must be licensed psychiatrists, psychologists, social workers, marriage counselors, or family or child counselors [Rule 24 (d)]. The provider must submit proof of licensure to CVCP to establish payment eligibility.

The CVCP office is oriented to paying one-time claims for victims of crimes, and has been less able to consistently process claims submitted intermittently by mental health providers for child clients. If the office is late in compensating providers and the continuity of services is threatened, GALs may be called upon to intervene with CVCP on behalf of the providers in particular cases.

V. Perpetrators Are Barred

Perpetrators of the cruelty to children are barred from benefiting from the services to the child, so family counseling which involves a perpetrator parent will generally not be compensable to the provider. Family counselors are sometimes willing to split billing, and proportionately bill counseling that they provide to the child.

The program reportedly paid out \$323,000 for counseling services for children in the neglect system in the twelve months ending in September 2004. ■

DOMESTIC VIOLENCE

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DOMESTIC VIOLENCE

For many years, child abuse and adult domestic violence were handled by the legal system as two separate and largely unrelated phenomena. This bifurcation occurs less frequently now, as the connection between the two types of abuse has become more apparent. Studies have shown that child abuse and domestic violence occur in the same families 45-70% of the time.¹ Courts and social service systems have begun to address the co-occurrence of these two types of violence within families. As the prevalence of co-occurrence has gained acceptance, theoretical and practical materials on the problem have emerged. A preliminary effort came in 1999, when the National Council of Juvenile and Family Court Judges published *Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice*, commonly called “The Green Book.” The focus of much of the current literature has been to work towards safety of the victims of family violence—typically the mother and child—without rendering adversarial the mother-child relationship.

Lawyers in child abuse and neglect cases, whether they represent the child, the parent(s), or the government, must be aware of the likelihood that adult domestic violence may be occurring in the same home as the alleged child abuse. The adult violence can be relevant in the child abuse action in several ways. First, the adult domestic violence may serve as the factual basis for an allegation of child abuse, *i.e.*, a parent could be charged with exposing a child to an environment of domestic violence, or with injuring a child as a by-product of the adult violence. Second, the domestic abuse could be relevant to requests for removal or for the provision of services. Indeed, the Rules Governing Neglect and Abuse Proceedings require that reports to the court and orders of the court contain information on domestic violence and its amelioration within the family. *See, e.g.*, SCR-Neg. 22(j), 25(q), 29(b)(17) and 34(g)(9). Third, there may be a separate, intrafamily court dealing with the adult abuse that has implications for the child abuse proceeding.

The following material briefly describes the relevant court offices and procedures, contains a synopsis of the civil protection order statute, and reviews relevant neglect law. It then discusses several practical considerations and ends with a listing of resources.

¹ Evan Stark, *A Failure to Protect: Unraveling “The Battered Mother’s Dilemma,”* 27 W. St. U. L. Rev. 29, 35 (2000).

I. D.C. Superior Court Domestic Violence Unit — Administrative Structure

In 1996, the District of Columbia Superior Court created a Domestic Violence Unit by Administrative Order of the Chief Judge. The unit handles both criminal cases and civil cases (civil protection orders) arising from allegations of domestic violence. This unit is separate from the Family Court.

Depending on the status of the various actions, one judge—either from the Domestic Violence Unit or in the Family Court—may hear related cases together. It is likely that the Domestic Violence Unit judge will at least be aware of pending related matters. That judge may also have been sent the court files for those related cases. The Domestic Violence Unit does not, however, adjudicate neglect and abuse cases. If there is a pending neglect case and a Petition for Civil Protection Order (CPO) is filed, the neglect judge may be asked to handle the CPO hearing. Although this consolidation may happen administratively, counsel should be aware of its possibility. Further, SCR-Neg. 3 authorizes consolidation of the neglect action with other related matters before the Family Court, including domestic violence matters. See D.C. Code §11-1101(a) and (b) for the jurisdiction of the Family Court. A same-day temporary protection order (TPO) request—a common occurrence in CPO cases—would, however, go to an available judge in the Domestic Violence Unit, not the neglect judge.

In the Domestic Violence Unit, CPO cases are filed and processed through the Domestic Violence Clerk's Office in Room 4242 of D.C. Superior Court. Four dedicated courtrooms adjudicate both civil and criminal domestic violence proceedings. Judges are assigned to the unit for one year terms. There are two Domestic Violence Intake Centers in Washington, D.C. The original intake center is located in Room 4235 of the D.C. Superior Courthouse and abuts the Domestic Violence Clerk's Office. A satellite intake center at Greater Southeast Community Hospital opened in October 2002. The Domestic Violence Intake Centers provide assistance to survivors of violence through a

five-group collaborative: Women Empowered Against Violence (WEAVE), Survivors and Advocates for Empowerment (SAFE), the Office of the Attorney General for the District of Columbia, the Metropolitan Police Department (MPD), and the U.S. Attorney's Office.

WEAVE intake counselors can explain the court process and help a domestic violence survivor fill out a CPO petition. Advocates with the SAFE program provide safety planning. Child support cases can be initiated in the intake center by filing a case with an Office of the Attorney General child support enforcement officer. A survivor of intimate partner violence may file a police report at the intake center. Victim/witness advocates in the U.S. Attorney's Office may discuss criminal charges and may gather information from the crime victim to aid in criminal prosecution. In a small number of cases, a petitioner may be able to get legal representation for the CPO hearing. Individuals interested in legal representation may be referred to the Office of the Attorney General's Domestic Violence Section, local legal services offices, law school clinics, or pro bono attorneys.

The intake centers can assist only one party in any given dispute. Therefore, if both parties to the same incident appear at the office, the intake center will typically assist the first one to seek assistance. The second party will be sent to the Domestic Violence Clerk's Office where he or she may file a petition, but without the technical assistance of the intake center staff.

II. Intrafamily Law

D.C. Code §16-1001 *et seq.* governs intrafamily proceedings, including the issuance of civil protection orders. This statute, initially enacted in 1970, has been amended multiple times and is supplemented extensively by Domestic Violence Unit Rules. To qualify for a protection order, a petitioner must demonstrate a certain relationship with the respondent, which may include being related by blood, marriage, domestic partnership, a child in common, current or past shared resi-

dence, current or former romantic relationship, stalking, or currently or previously having a romantic partner in common. D.C. Code §16-1001(5)(A)-(D). Acts that give rise to the issuance of a protection order are acts that are “punishable as a criminal offense committed by an offender upon a person.” D.C. Code §16-1001(5). These acts are called “intrafamily offenses.” Assaults and threats to do bodily harm are common intrafamily offenses in CPO cases. The same acts can and often do form the basis of both a criminal complaint and a civil protection order petition.

A protection order may be ordered when there is “good cause” to believe that the respondent has committed or is threatening to commit an intrafamily offense. D.C. Code §16-1005(c). Good cause has been interpreted to impose the standard civil burden of proof by a preponderance of the evidence. *Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991).

Protection order relief generally occurs in two phases. The first phase is preliminary *ex parte* relief in the form of a temporary protection order (TPO). If a petitioner feels that the respondent immediately endangers the safety or welfare of the petitioner or the petitioner’s children, the petitioner can request a TPO. D.C. Code §16-1004(d)(1). Relief awarded in a TPO typically focuses on immediate safety concerns, with a judge frequently ordering a respondent to not abuse, threaten, contact, or come near the petitioner and to stay away from designated individuals and locations. A judge may order a respondent to vacate a shared residence and may order temporary custody for the duration of the TPO, among other relief. The request for a TPO is generally heard by a judge and decided the same day the CPO petition is filed. For petitioners at the Greater Southeast Community Hospital satellite office, requests for TPOs are heard by judges through video connected to D.C. Superior Court.

A TPO lasts for 14 days. D.C. Code §16-1004(d). Whether or not a TPO is sought or granted, a hearing on the CPO petition will be calendared when the petition is filed. If there is a TPO, the CPO

hearing will be set within 14 days.

The respondent must be served with the TPO for it to be enforceable. Naturally, the respondent must be served with the Petition for CPO before it may be heard. Service may be achieved either using a private process server or through the Metropolitan Police Department. The MPD will attempt to effectuate service in these cases and also has agreements for service with surrounding Maryland county sheriff’s departments. The MPD service of process is free. In addition, there is no filing fee for a Petition for CPO or for a request for a TPO.

The second phase of relief is the CPO, which if granted, typically lasts for one year. D.C. Code §16-1005(d). In the District, upon finding good cause to believe that an intrafamily offense occurred, a judge may award a wide array of relief in the CPO. Possible relief includes ordering the respondent to not abuse, threaten, harass, or assault the petitioner or the petitioner’s children; to not contact the petitioner; to stay away from the petitioner’s person, home, workplace, vehicle, and other locations; to vacate a shared residence; and to complete counseling programs for domestic violence, parenting skills, drug use, and/or alcohol abuse. The court may also award temporary custody, child support, possession of property, other monetary support, and other relief “appropriate to the effective resolution of the matter.” D.C. Code §16-1005(c). An order may be entered after an adjudicated hearing; by entering the respondent’s default if the respondent fails to appear after being served; or based on the agreement of the parties, and this consent order may be entered with or without the respondent admitting to committing a criminal act. The CPO may be extended before its expiration for good cause shown. It may also be modified or rescinded for good cause. D.C. Code §16-1005(d).

Violation of a TPO or CPO is punishable as contempt of court or a misdemeanor crime. In the contempt or misdemeanor case, the penalty for each violation of a protective order is imprisonment for up to 180 days, a fine not exceeding \$1,000, or both. D.C. Code §16-1005(f), (g), and (i).

III. Domestic Violence and Child Abuse Issues

A. Background

Current research proves what is now considered obvious, but was previously doubted: children are often harmed when they are exposed to adult domestic violence. The harm could be physical, happening either as a result of the child getting caught in the crossfire or by the child actively intervening in an attempt to stop the violence. The latter is particularly common among older children. The harm could also be emotional or psychological, resulting from the exposure to the adult violence. The psychological or emotional harm differs depending on the age and gender of the child, as well as on the amount and nature of the exposure. Exposure to domestic violence may cause depression or have other psychological effects, and may result in school and behavioral problems. There is also concern about role-modeling, e.g., boys and girls learn that it is normal to either abuse or to be abused.

Child abuse agencies have begun to respond to the harm that may be caused by exposure. This response has been both varied and controversial. In New York, a federal class action has received widespread media attention. *Nicholson v. Scopetta*, 344 F.3d 154 (2d Cir. 2003). That litigation challenged New York City's child abuse agency's practice of charging mothers with failure to protect their children from exposure to domestic violence. Much of the legal debate—in *Nicholson* and elsewhere—has focused on whether exposure could be deemed to be per se neglect. In October 2004, the N.Y. Court of Appeals, resolving certified state law issues referred to it by the Second Circuit, held that exposure, without more, does not meet the state law definition of neglect. *Nicholson v. Scopetta*, 3 N.Y.3d 357 (2004). The *Nicholson* trial court opinion has extensive findings and analysis of the impact of witnessing domestic violence on children. It is helpful reading for lawyers confronting these issues. *Nicholson v. Williams*, 203 F. Supp. 2d 153 (2002).

B. Domestic Violence as Grounds for Neglect

Domestic violence can be raised in child abuse and neglect proceedings in several ways: physical harm as a result of domestic violence between the adults; failure-to-protect charges against the victim/survivor of violence, emotional or mental abuse charges against the batterer or, potentially, a separate count that codifies exposure to domestic violence as child abuse. At this time, the Prevention of Child Abuse and Neglect Act (PCANA) as amended, as is true with most jurisdictions, does not contain this latter provision.

Failure-to-protect charges may be brought when one parent has failed to protect a child from physical or sexual abuse by the other parent. In an increasing number of jurisdictions, however, failure-to-protect charges allege that children have been harmed by domestic violence between the adults, either physically or through witnessing instances of domestic violence. The D.C. child abuse code, like many other child abuse statutes, allows the charging of a parent for “failing to protect” a child from harm. D.C. Code §16-2301(9)(A)(i) defines a neglected child as a child whose parent “has failed to make reasonable efforts to prevent the infliction of abuse upon the child.”² That section further specifies that filing for a CPO constitutes reasonable efforts.

In addition to failure-to-protect charges, a parent or other custodian subject to the statute may have abuse allegations leveled against them based upon causing mental injury to a child who has been exposed to domestic violence. The D.C. Code includes in its abuse definition a child whose parent, guardian, or custodian inflicts mental injury. D.C. Code §16-2301(23)(A)(i). Mental injury is further defined in D.C. Code §16-2301(31). These charges could lie against either a batterer or a victim.

The D.C. Court of Appeals has heard multiple failure-to-protect cases in recent years. In *In re L.D.H.*, 776 A.2d 570 (D.C. 2001) the D.C. Court of Appeals decreed that a child's presence in the

² This “failed to make reasonable efforts to prevent the infliction of abuse” language was a 2002 addition to the statute. Testimony before the D.C. Council indicated concern that the language would be used to wrongfully prosecute battered mothers.

midst of domestic violence can constitute mental abuse sufficient to sustain a child abuse adjudication under D.C. Code § 16-2301(9)(A). The *L.D.H.* court said: "...[I]n light of the evidence that [the child] was present during episodes of domestic violence that caused injury to [the mother], there was sufficient basis for the trial court to find ...mental abuse, within the meaning of § 16-2301(9)(A)." *Id.* at 575. See also, *In re N.P.*, 882 A.2d 241 (D.C. 2005), in which the court followed the reasoning of *In re L.D.H.*

The D.C. Court of Appeals has recently examined the admissibility of evidence used in findings of neglect. In *In re Ca.S.*, 828 A.2d 184 (D.C. 2003)³ the appellate court renounced the trial judge's reliance on hearsay evidence to make a finding of mental abuse due to a father exposing his children to domestic violence by beating their mother. The court did not reject the basic concept that neglect could be predicated, if properly proven, on such grounds, and found that other grounds existed to support a finding of neglect. More recently, in *In re Ty.B.*, 878 A.2d 1255 (D.C. 2005), the D.C. Court of Appeals reversed the adjudication of neglect after finding that the trial court erred in relying on inadmissible testimony.

The intersection of domestic violence and neglect proceedings is important to note. In the *L.D.H.*, *Ca.S.*, *Ty.B.*, and *N.P.* cases, CPO petitions or findings were admitted into evidence at the neglect trial.

C. Practical Issues

Defenses to failure-to-protect may involve evidence that the victim suffered the effects of battered women's syndrome. Although this may be successful as a defense to a failure-to-protect charge, it may disadvantage the woman as she attempts to retain or regain custody. Typically, such defenses involve showing her helplessness or inability to act. Defending against the failure-to-protect charges, therefore, may involve portraying the woman in a way that undermines her ability as a

capable parent. For example, the trial court in *In re N.P.*, 882 A.2d 241, 251 (D.C. 2005) relied on testimony about battered women's syndrome to find that the mother was mentally incapacitated to such an extent that she was unable to care for her children. There has been much written in this area of the law and a lawyer with a client so charged may want to read some of the available literature. See, e.g., G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 Harv. Women's L.J. 89 (1999).

A victim's seeking of help by getting a protection order or even calling the police may trigger the institution of a child abuse investigation based on such alleged mental injury or on failure-to-protect grounds. Lawyers for battered women should make every effort to discourage or fight such charges. It is possible to do so on several grounds. First, require the proof of harm rather than assumption that exposure always creates the level of harm required to justify state intervention. This requirement of proof, as well as of a nexus between the established harm and the alleged parental action or inaction, is what the N.Y. Court of Appeals mandated in the *Nicholson* case.

Second, address and defend against the failure-to-protect issue head on by challenging the alleged failure to make reasonable efforts. Often the mother has taken steps to protect her children, perhaps risking her own wellbeing. In fact, leaving may have been more dangerous than staying. Increased threats and violence often accompany a woman's efforts to leave, a phenomenon known as separation assault. Judges, social workers, and other lawyers may need to be educated about this phenomenon.

It is important to ask the mother what measures she has taken to keep her children and herself safe. To her, they may not seem like "protective measures." They may be, paradoxically, both commonplace and lifesaving. Therefore, finding out what she has done will require sensitive interview-

³ The neglect petition ran only against the father, as it was filed two days after the mother's death.

ing. Too often women are simply asked some version of the question: “Why didn’t you leave?” This question may elicit some factual information helpful to the case, but more likely, it can be heard as a hostile judgment and serve to shut down valuable lawyer-client communication.

For the judge and the social worker, the “Why didn’t she leave?” question may still need to be answered. There are numerous answers to this question: emotional attachment, love, belief in promises that the violence will not reoccur, hope for a return to better times, denial, for the sake of the children, no place to go, economic barriers, family pressure, religious pressure, threats, fear, and separation assault or a safety assessment in which the survivor of violence determined that staying in the relationship was less lethal than attempting to leave. The reasons are long and varied.

Find out from your client what she has tried to do, perhaps how many times she has left, as women do often leave and return before they leave permanently. But find out in a way that does not communicate that she was a bad mother not to leave. In some cases, expert testimony to explain that the mother’s actions were protective, rather than constituting a failure to protect, may be valuable.

The above suggestions are not limited, of course, to the mother’s lawyer. The guardian *ad litem* (GAL) should find out what the mother has done to protect the children, rather than make the assumption that, because she did not leave or seek a protection order, she has failed to protect the children. In concert, the GAL and mother’s attorney can be powerful allies to demand services and remedies that protect both of the victims (the mother and child). Where domestic violence is present, child abuse professionals, particularly those unaware of or uninterested in domestic violence patterns and behaviors, may pit the mother’s safety against the child’s by unnecessarily seeking removal of the child from the mother. This result is discouraged in the current literature, including the Green Book, issued by the Juvenile

Court Judges. Counsel should be prepared to argue that the harm caused to the child by removal is greater than any harm caused by exposure to domestic violence. Argue the obvious: a child is more likely to be able to cope with any harm caused by exposure with the help and nurturing of the non-violent parent than working through it in the home of strangers.

Creative lawyering will also use the child abuse and protection order statutes in concert to benefit mother and child. A GAL or mother’s attorney can file for a CPO requiring the abusive parent to vacate the home, refrain from assaulting or threatening the other parent and child, and refrain from disciplining the child. This will be especially useful in light of the frequently imposed condition that the mother may only have continued custody or secure her child’s return upon the seeking of a protection order. Even if filed post-neglect petition, counsel may also argue that the mother has now met the statutory requirement of reasonable efforts.

Counsel representing any party in the neglect case should be aware of a practice in protection order cases to allow “consent orders without admissions.” In these cases, the respondent agrees to the institution of the CPO and its relief, *e.g.*, orders to vacate and temporary custody, but does not admit to the allegations in the protection order petition. Such consent orders lack the judicial findings or party admissions that would support their admission in the neglect case. Whether and for what purpose the orders may be admissible is fact-specific.

Neglect lawyers may already be familiar with the necessary juggling when there is a criminal case flowing from a child abuse incident. The same is true for domestic violence situations. The existence of a criminal domestic violence case is likely to complicate the neglect case, both procedurally and substantively. There will be criminal defense counsel with different goals and who will be very wary of anything approaching an admission in the civil action.⁴

⁴ See *In re T.B. et al.*, 762 A.2d 20 (D.C. 2000), for a discussion of the role of criminal defense counsel in neglect cases that also have a domestic violence component.

A note of caution is warranted about protection orders. Protection orders are often seen as the holy grail in the domestic violence realm. Indeed, it is codified in the PCANA as reasonable efforts. But a protection order is no assurance of safety, just as a mother's hesitation to seek one does not demonstrate disregard for her child's safety. By seeking and obtaining a protection order, the mother and child may be at increased risk due to separation assault. Thus, it is important for the lawyer to ensure that all individual circumstances are brought to the fore and taken into account. Boilerplate conditions and responses are unlikely to produce the best outcomes.

Moreover, the lawyer should see to it that the mother engages in "safety planning." Safety planning is the intentional consideration and action required to enhance the safety of the mother and child. Actions to consider include: changing locks, installing a security system, moving temporarily or permanently,⁵ and altering routes to work and school. Clients should be advised not to retreat to the kitchen or bathroom, as they are the two most dangerous rooms in the house. Further, free cell phones that dial only 911 are typically available at the Domestic Violence Intake Centers. Lawyers should be familiar with the safety planning concept and able to assist their client. In addition, while in the courthouse, an attorney may send his or her client to the Domestic Violence Intake Center for assistance with safety planning, as well as checking there for the availability of other resources.

A final note on perspective and context. Those who are pre-disposed to a defense lawyer philosophy may see the CPO system as unfair and may think that orders are awarded too readily. On the other hand, advocates for victims of domestic violence may believe that their clients' testimony and experience is discounted and turned against them. Lawyers in neglect cases will inevitably bring their own professional experience and views

into the litigation, but they should not do so unencumbered by facts and information. Neglect lawyers must also make it their business to learn as much as possible about the laws, practice, and procedures of domestic violence cases in order to do competent lawyering for their clients.

IV. Resources

There are various resources available for assistance with issues of domestic violence. A Petition for CPO can be filed in the Domestic Violence Clerk's Office at D.C. Superior Court, 500 Indiana Avenue, Northwest, Room 4242 (202-879-0157). A variety of services are available at the Domestic Violence Intake Centers. One intake center is located at D.C. Superior Court, Room 4235 (202-879-0152). The satellite office is located at Greater Southeast Community Hospital, 1328 Southern Avenue, Southeast, Room 311 (202-561-3000). The D.C. Coalition Against Domestic Violence (202-299-1181), Survivors and Advocates for Empowerment (SAFE) (202-879-7851), and Women Empowered Against Domestic Violence (WEAVE) (202-452-9550) are organizations that can provide general information and specific assistance. The Crime Victim's Compensation Program may be able to provide funds for measures to increase an individual's safety (202-879-4216). House of Ruth (202-347-2777) and My Sister's Place (202-529-5991) are shelters for battered women. The National Domestic Violence Hotline is 800-799-SAFE.

The D.C. Superior Court Domestic Violence Unit's website, at <http://www.dccourts.gov/dc-courts/superior/dv/index.jsp>, has good descriptions of the unit, the intake centers, and the supervised visitation center, as well as links to court forms and additional resources. The D.C. Bar also offers trainings on the topic. Finally, the D.C. Bar Manual has a comprehensive section on domestic violence. ■

⁵ The Crime Victim's Compensation Program in the District can often assist with funds for temporary emergency housing, moving expenses, installing a security system, replacing locks, repairing broken windows or doors, and other measures to increase a person's safety.

FAMILY TREATMENT COURT

The Family Court of the Superior Court of the District of Columbia has a program to assist a mother in the neglect system when substance abuse is associated with child neglect. The goal of the Family Treatment Program is to offer a structured plan that will, if successfully completed, result in reunification of the mother with her children in their home, and case closure. The objective is family preservation in a safe and stable home environment. The Family Treatment Court program is similar to diversion in the criminal justice setting.

In the early stages of the case, even as early as the Initial Hearing, the social worker may recommend the mother for the Family Treatment Court (FTC). The attorney for the mother may request that she be placed in the program, but it is the social worker's obligation to make the referral. In order to refer the mother for the FTC, the social worker must determine that the mother, despite her drug use, is ready and able to parent her children.

Once the referral is made, the mother is interviewed at court by the FTC coordinator. The coordinator does a brief assessment of the mother's mental health. The mother also needs to agree to abide by the rules of the Family Treatment Court. The mother's criminal background is checked. If the mother passes these minor hurdles, she will be referred for a mental health evaluation conducted by the D.C. Department of Mental Health. This evaluation is scheduled within a week of the referral.

After the mother passes the mental health evaluation done by the Department of Mental Health, she will be scheduled for detoxification.

The detoxification can last three to seven days.

While the mother is proceeding with the preliminaries for entry into the FTC program, the neglect case will also be proceeding. The parties and the attorneys determine how the neglect case will proceed. Some AAGs want the mother to enter into a stipulation before entry into detoxification. Others prefer that the mother stipulate after she has completed the detoxification. Either way, the mother must stipulate before she can enter into the FTC program. The stipulation must be based upon drug use; this is a necessary program requirement.

When the stipulation is agreed, and accepted by the judge, the mother is admitted into the Family Treatment Court Program, if space is available. If not, she is placed on a waiting list. The next step is that the mother must enter into a written contract accepting the terms and conditions of the program. The mother must also consent in writing to the release of private information to assist the staff in evaluating her needs so that an appropriate treatment plan may be developed.

Following detoxification, the mother must report to the residential treatment provider, in this instance, CAG (Community Action Group), by order of the Judge. Court hearings occur frequently, and may be as often as bimonthly, so that the judge can be apprised of the mother's progress and adherence to the program. The program will include drug testing, substance abuse treatment, and appropriate individual/group therapy. It may include vocational and/or educational training, and self-esteem building.

The treatment provider will develop an individualized treatment plan, which may be modified or altered as the treatment progresses. The mother

must agree to refrain from illegal activities, the use of alcohol or illegal drugs, as well as to adhere to the rules of the treatment facility. The program uses a system of graduated sanctions as a deterrent. If a mother consistently violates the rules of the facility and/or the court orders, the judge may terminate her from the program. Positive behaviors are, of course, rewarded with increased privileges.

Up to four children under the age of ten may be placed with the mother in the treatment facility.

The children usually do not join their mother at the CAG facility until she has one month of program compliance. A spiritual component is incorporated into the program; however, participation by the mother is optional. A detailed and precise daily schedule for the mother and children in the facility is carefully structured and arranged. This contributes to the development of timely discipline and greater self-reliance.

A six-month after-care regime follows the residential component. ■

IMMIGRATION LAW

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IMMIGRATION LAW

United States immigration law is an exceedingly complex and intricate body of law comprised of a somewhat confusing mix of procedures, rules, and a myriad of visas with names that span most of the alphabet. To further complicate matters, immigration laws are continually changing. This ever-changing complex body of law penetrates many other practice areas, including family law. This appendix is designed to provide basic information relating to U.S. immigration law for the family law practitioner.

I. Brief History of Immigration Law

The federal government has enumerated powers to regulate immigration.¹ Congress has entrusted the executive branch with broad power to control immigration into the United States. In 1952, the McCarran-Walter Act was passed, establishing the basic structure of immigration law. Title 8, U.S.C. This Act has been amended frequently, but it remains the fundamental foundation of present immigration law.

Until November 2002, the central immigration agency was the Immigration and Naturalization Service (“INS”), a bureau of the Department of Justice. On November 25, 2002, the Homeland

Security Act (“HSA”) was signed into law. Pub.L. 107-296, §§441, *et. seq.* The HSA abolished INS and transferred virtually all immigration functions to the Department of Homeland Security (“DHS”).² Significantly, for the first time in U.S. history, immigration policy is closely tied to national security.

DHS has divided the primary INS functions into three bureaus, each of which is supervised by the DHS Directorate for Border and Transportation Security: (1) Bureau of Citizenship and Immigration Services (CIS); (2) Bureau of Immigration and Customs Enforcement (ICE); and (3) Bureau of Customs and Border Protection (CBP).³

¹ The Naturalization Clause of the U.S. Constitution empowers Congress to “establish a uniform Rule of Naturalization.” Art. I § 8, Cl. 4.

² Notably, other federal agencies retain jurisdiction over various aspects of immigration law and alien activities.

- **Department of State** -- Consuls issue visas required to enter U.S.; however, the Secretary of Homeland Security has the ultimate authority to decline visas. HSA § 428, codified at 6 U.S.C. § 236.
- **Department of Labor** -- grants certification allowing aliens to work in the U.S.; appeals go to Board of Alien Labor Certification Appeals (BALCA).
- **Department of Justice** -- Executive Office for Immigration Review (EOIR) oversees the adjudication of administrative actions taken by the Bureau of Border Security and the Bureau of Citizenship and Immigration Services. HSA § 1101, codified at 6 U.S.C. § 521.
 - *Immigration Courts*: preside over deportation and exclusion hearings; appeals go to the Board of Immigration Appeals.
 - *Board of Immigration Appeals (BIA)*: hears appeals from immigration court decisions; BIA decisions may be reviewed by the Attorney General.
 - *Office of the Chief Administrative Hearing Officer (OCAHO)*: hears complaints regarding employment of unauthorized aliens and immigration-related unfair employment practices.
- **Administrative Appeals Office (AAO)** -- decides appeals from denials of various petitions by Homeland Security district directors and regional service centers.

³ HSA declares that the three bureaus are equally important and should each be adequately funded. Pub.L. 107-296, § 441.

The United States Citizenship and Immigration Services⁴ is the services and benefits branch, which handles immigrant and non-immigrant visa petitions, adjudication of asylum and refugee proceedings, approval of naturalization applications, service center adjudications, and all other INS applications and inspections. While DHS oversees visa operations, the Department of Justice through the U.S. Consulates will continue to handle visa applications and enforce visa regulations outside of the U.S. To assist applicants in resolving any problems with the services bureau, the HSA established a new position, the Immigration Services Ombudsman. The Ombudsman also monitors performance of the immigration bureaus and periodically reports to Congress. HSA § 452.

The Bureau of Immigration and Customs Enforcement⁵ is responsible for law enforcement of immigration and customs laws. ICE is DHS's largest investigative bureau. In addition to investigation of possible statutory violations, ICE is also responsible for detention and removal of aliens

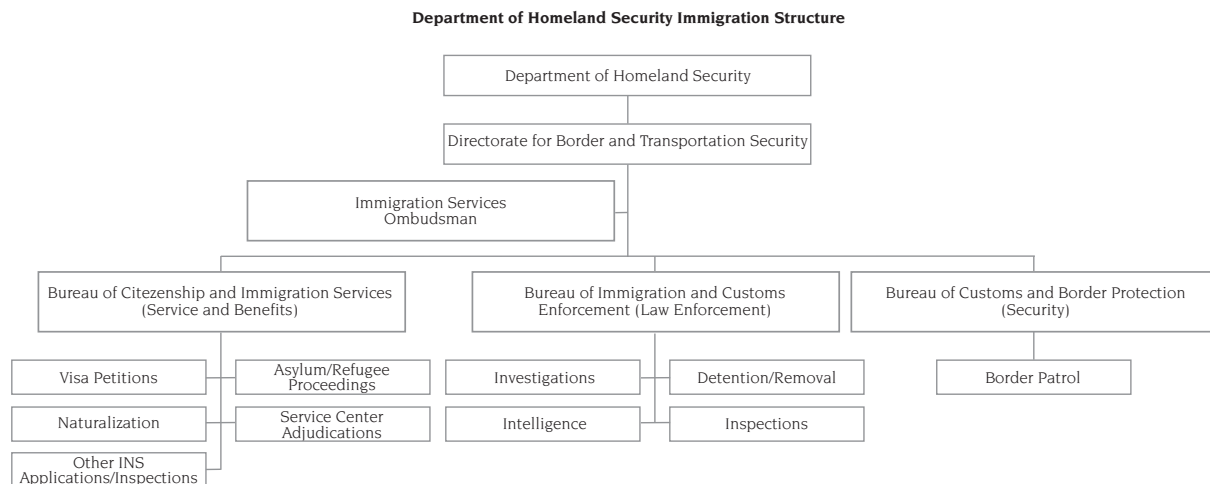
and for collection, analysis, and dissemination of strategic and tactical intelligence data.

The Bureau of Customs and Border Protection⁶ is responsible for managing, controlling and securing our nation's borders. In particular, CBP enforces immigration and customs laws at ports of entry.

Importantly, the responsibilities of the former INS Office of Children's Affairs have been transferred to the Office of Refugee Resettlement of the Department of Health and Human Services. This department is responsible for the needs of unaccompanied children arriving in the U.S., as well as children who come under state supervision due to abuse and neglect.

II. Immigration Structure

The U.S. immigration structure simply considers two types of people in the United States -- citizens and aliens. It also considers two types of aliens --



⁴ website: www.uscis.gov

⁵ website: www.ice.gov

⁶ website: www.cbp.gov

immigrants and non-immigrants. Non-immigrants are those who come to the U.S. temporarily. Immigrants are defined in the negative as “every alien except an alien who is within one of the following classes of nonimmigrant aliens.” INA § 101(a)(15). Immigrants are presumed to be coming to the U.S. for an indefinite period of time.

A. Non-immigrants

An individual who intends to come to the U.S. temporarily can apply for non-immigrant status or for a non-immigrant visa if he or she meets the requirements of a specific non-immigrant category defined by the Immigration and Naturalization Act (INA). In addition, the general requirements for temporary admission are: (1) the purpose of the visit must be temporary; (2) the individual must agree to depart upon termination of the authorization; (3) the individual must have a valid passport; (4) the individual must maintain a foreign residence; (5) the individual may be asked to show that they are citizens of another country and may be required to provide proof of financial support; and (6) the individual must abide by the terms and conditions of admission.

The following chart briefly outlines the categories of nonimmigrant visas.⁷

Nonimmigrant Visa Classifications

A-(1-3)	Foreign Government Officials
B- (1-2)	Visitors
C-(1-4)	Aliens in Transit
D-(1-2)	Crewmen
E-(1-2)	Treaty Traders and Treaty Investors
F-(1-2)	Academic Students
G-(1-5)	Foreign Government Officials to International Organizations
H-(1-4)	Temporary Workers
I	Foreign Media Representatives
J-(1-2)	Exchange Visitors

K-(1-4)	Fiance(e) of U.S. Citizen
L-(1-2)	Intracompany Transferee
M-(1-2)	Vocational and Language Students
N-(8-9)	Parent/Child of Alien Classified SK-3 "Special Immigrant"
NAFTA (TN/TD)	North American Free Trade Agreement (NAFTA)
NATO-(1-7)	North Atlantic Treaty Organization (NATO)
O-(1-3)	Workers with Extraordinary Abilities
P-(1-4)	Athletes and Entertainers
Q-(1-3)	International Cultural Exchange Visitors
R-(1-2)	Religious Workers
S-(5-6)	Witness or Informant
T (1-4)	Victims of a Severe Form of Trafficking in Persons
TWOF	Transit Without Visa
U-(1-4)	Victims of Certain Crimes
V-(1-3)	Certain Second Preference Beneficiaries
TPS	Temporary Protected Status

The amount of time it takes to secure a nonimmigrant visa varies significantly. Some visas may be processed within hours (e.g., B-1 business visitor; TN/TD NAFTA professional). Others may take a few days or even months. The duration of these visas also varies greatly, but some may be valid for many years.

B. Immigrants

Immigrants are those aliens who intend to reside permanently in the U.S. INA § 101(a)(20). To immigrate, an individual must establish entitlement under one of the immigrant classes established in the INA. Generally, this requires the filing and approval of an immigrant visa petition. Once a visa petition is approved, the individual is considered a lawful permanent resident (“LPR”), permanent resident alien, or greencard holder.⁸

⁷ More detailed information about each nonimmigrant visa classification can be found at <http://www.uscis.gov/portal/site/uscis>

⁸ It should be noted that an immigrant is considered a lawful permanent resident upon entry to the U.S. with a valid visa or upon adjustment of status (if residing in the U.S. at the time LPR is granted). The card is not determinative of LPR status.

While LPRs enjoy many of the same privileges as U.S. citizens, this LPR status: (1) does not grant citizenship;⁹ (2) is not permanent -- LPR status can be lost;¹⁰ and (3) does not allow for automatic entry into the U.S. -- LPRs must demonstrate admissibility each time they seek to enter the U.S.

INA establishes five classes of individuals who are eligible to obtain lawful permanent residency: (1) family sponsored immigrants; (2) employment-based immigrants; (3) diversity immigrants; (4) refugees and asylees; and (5) persons not subject to limitations.

1. Family sponsored immigrants

U.S. citizens over the age of 21 can petition for immediate relatives, including parents, spouses, and unmarried children under the age of 21, to receive immigrant visas and LPR status. There is no waiting period or limit for immediate relatives of U.S. citizens.

U.S. citizens and LPRs may petition on behalf of relatives who fit within one of the four family-sponsored preference categories for immigrant visas and LPR status. However, there are limits on the number of family-sponsored visas that will be issued each year. Each preference category has long waiting periods, ranging from one to thirteen years.

First Preference includes unmarried sons or daughters of U.S. citizens who are over 21. Derivative status is available to children under 21.

Second Preference includes spouses and unmarried children of LPRs who are under 21.

Third Preference includes married sons and daughters of U.S. citizens.

Fourth Preference includes brothers and sisters of U.S. citizens.

2. Employment based immigrants

The INA grants employment-based immigrant visas to individuals who meet one of five preference categories. At least 140,000 employment-based immigrant visas are issued each year. Certain categories require a labor certification from the U.S. Department of Labor, and individuals in all categories must file a petition with the Bureau of Citizenship and Immigration Services (BCIS).

Employment First Preference (E1) includes priority workers; persons of extraordinary ability in sciences, arts, education, business or athletics; outstanding professors and researchers; and certain executives and managers who are employed by an overseas affiliate, parent, subsidiary, or branch of a U.S. employer.

Employment Second Preference (E2) includes professionals holding advanced degrees or persons of exceptional ability in the arts, sciences or business.

Employment Third Preference (E3) includes skilled workers capable of performing a job requiring at least two years of training or experience; professionals holding Baccalaureate degrees; and other workers capable of filling positions requiring less than two years of experience.

Employment Fourth Preference (E4) includes certain religious workers; overseas employees of the U.S. government; former employees of the Panama Canal Company; retired employees of international organizations; dependents of international organization employees; and members of the U.S. Armed Forces.

Employment Fifth Preference (E5) includes individuals who invest in the U.S. and hire U.S. workers as employees.

3. Diversity immigrants

Under the Diversity Immigration Program, by random selection 50,000 LPR visas are issued to

⁹ LPRs may be eligible to become citizens upon meeting all of the naturalization requirements.

¹² LPRs may be deported if they are subject to deportation under the INA. For example, an LPR who commits a drug crime may be deported. LPR status also may be lost if an LPR abandons this status (e.g., fails to maintain a U.S. residence).

persons from countries¹¹ that have low rates of immigration to the U.S. Eligibility to apply for this program is determined by an individual's birth country (not citizenship or residence).

In addition to being born in a qualifying country, applicants must have either a high school education or two years of work experience in an occupation requiring at least two years of training or experience.¹²

4. Refugees and asylees

U.S. immigration laws permit individuals fleeing persecution in their home country to seek protection in the U.S. Such persons may be either refugees or asylees. A refugee applies for protection while outside the U.S., most often from a refugee camp or other processing site outside their home country. An asylee, on the other hand, has already entered the U.S.

To qualify for refugee resettlement in the U.S., an individual must: (1) come from a country designated by the Department of State; (2) meet the definition of a refugee by proving that he or she has a "well founded fear of persecution on account of race, religion, nationality, membership in a political group or political opinion;" (3) fit into one of the government established set of "priority" categories; and (4) pass a vigorous screening process. INA § 101(a)(42)(A). Refugees are eligible to become LPRs after they have been in the U.S. for one year.

Likewise, to be granted asylum, an individual must prove that he or she has a "well founded fear of persecution on account of race, religion, nationality, membership in a political group or political opinion." INA § 101(a)(42)(A). An individual may apply for asylum in two ways. First, an application may be submitted affirmatively

by mailing it to a USCIS Service Center. Second, an individual who is in removal proceedings may file a defensive application. An application must be submitted within one year of entry to the U.S., or the application automatically will be denied.¹³ Like refugees, asylees are eligible to become LPRs after one year; however, only 10,000 asylees are permitted to become LPRs each year.

5. Persons not subject to limitations

The INA establishes five categories of individuals who are not subject to limitations and who are eligible for LPR status. First, "registry" includes those individuals who entered the U.S. before January 1, 1972, and have maintained continuous residence and have good moral character. Individuals may apply for registry even if they are in exclusion proceedings. INA § 249. Second, an LPR who has been granted relief from removal is not subject to limitations. Third, special immigrants, as defined by INA § 101(a)(27), are not subject to limitations, including certain returning LPRs and former U.S. citizens. Fourth, children of foreign diplomats born in the U.S. are not subject to limitations. Finally, individuals who received LPR status through legalization are not subject to limitations.

C. Naturalization

An LPR is eligible to become a U.S. citizen after he/she has been an LPR for five years or has been married to a U.S. citizen for three years. In addition, an LPR must have resided in the U.S. for at least one-half of the time required in LPR status (2.5 years or 1.5 years if married to a U.S. citizen). An LPR may not have been absent for a continuous period of more than one year. If absent for more than 6 months, but less than one year, the

¹¹ Persons born in an excluded country are not eligible to participate in the program. Excluded countries may change each year, but presently include the United Kingdom, Canada, China, Colombia, the Dominican Republic, El Salvador, Haiti, India, Jamaica, Mexico, Pakistan, the Philippines, Russia, South Korea, and Vietnam.

¹² A list of occupations requiring at least two years of training or experience is available on the Department of State's website at <http://travel.state.gov/ONET.html>.

¹³ An exception may be allowed under extraordinary circumstances.

LPR may be required to show that residence has not been abandoned. An LPR also must demonstrate good moral character. INA defines what is not good moral character to include: false testimony or misrepresentation; certain criminal convictions; service of six months or more in jail; being a habitual drunkard; multiple criminal convictions with a total sentence of greater than five years, even if the sentence was suspended; and serious criminal conviction, including any felony, any crime of violence, and DUI resulting in injury. Lack of good moral character has been found in cases where an individual failed to provide financial support for all of his children, adultery, and failure to register with Selective Service. Finally, to be eligible for naturalization, an LPR must be willing to take the oath of citizenship.

D. Deportation

Deportation occurs when the U.S. determines that an immigrant should no longer be in the U.S. and removes that person from the U.S.

An immigrant who is already in the U.S. can be deported. Once deported, an immigrant cannot re-enter the U.S. for at least five years. In addition, a deported immigrant must receive permission from BCIS prior to re-entry. It is a felony for a deported immigrant to re-enter before the end of five years.

An immigrant may be deported for a number of reasons including:

- Inadmissibility at the time of entry;
- Committing fraud or misrepresenting a material fact in order to obtain a visa or green card;
- Committing a crime of moral turpitude or a crime with a possible jail term of greater than 1 year for 1 conviction within 5 years after admission or 2 convictions if not arising from the same misconduct;
- Conviction of a serious crime, including murder, illegal trafficking of firearms, money laundering, or crime of violence that carried a sentence of 5 or more years;
- Aggravated felony or attempt or conspiracy to commit a serious crime;
- Any conviction of a narcotics crime (exception

for single possession);

- Drug abuser or addict;
- Committing a weapons violation; or
- Domestic violence.

There are few options available to a deportable immigrant to suspend deportation. In order to suspend deportation, the immigrant must: (1) be continuously and physically present in the United States for at least seven years; (2) be of good moral character; and (3) show that, if deported, this would cause extreme hardship on the immigrant or his or her family. Under certain situations, a deportable immigrant may petition for asylum. See Refugees and Asylees *infra*.

III. Key Issues for Family Law Practitioners

A. Impact of Domestic Violence on Immigration Status

Under the Violence Against Women Act (VAWA), the spouses and children of U.S. citizens or LPRs may self-petition to obtain lawful permanent residency. VAWA's immigration provisions allow battered immigrants to file for immigration relief without the abuser's knowledge or sponsorship. The Victims of Trafficking and Violence Protection Act of 2000 amended the INA. Similarly, the Battered Immigrant Women Protection Act of 2000 (BIWPA) made significant amendments to section 204(a) of the INA.

As a result of these Acts, the following classes of persons are eligible to self-petition:

- *Spouse* -- a battered spouse married to a U.S. citizen or LPR.
- *Parent* -- a parent of a child who has been abused by a U.S. citizen or LPR spouse.
- *Child* -- a battered child (under 21 years of age and unmarried) who has been abused by a U.S. citizen or LPR parent.

The following requirements must be met prior to a person filing a self-petition:

- The petitioner must be legally married to a U.S. citizen or LPR batterer;
- The petitioner must have been battered in the

U.S., unless the abusive spouse is an employee of the U.S. government or a member of the U.S. armed services;

- The petitioner must have been battered or subjected to extreme cruelty during the marriage or must be the parent of a child who was battered or subjected to extreme cruelty by the U.S. citizen or LPR spouse during the marriage;
- The petitioner must demonstrate his/her good moral character;
- The petitioner must have entered into the marriage in good faith and not solely for the purpose of obtaining immigration benefits.

A self-petitioning child must qualify as the child of the abuser as "child" is defined in the INA for immigration purposes.

B. Special Immigrant Juvenile Status for Children Under Juvenile Court Jurisdiction

In 1990, Congress created a "special immigrants" visa category that enables undocumented children who have been abused, neglected, or abandoned to petition for LPR status.¹⁴ This benefit, called Special Immigrant Juvenile Status ("SIJS"), has made it possible for thousands of children to obtain LPR status.

1. Who is eligible to become an LPR through SIJS?

Undocumented children in foster care under

the age of twenty-one are eligible to apply for SIJS. The child must not be married. Legal custody of the child must be with an agency or department of a state, or the juvenile must be declared dependent on a juvenile court located in the U.S.¹⁵

The INA requires that the applicant be a dependent of a juvenile court located in the United States or "whom such a court has legally committed to, or placed under the custody of, an agency or department of a State." INA § 101(a)(27)(J)(i). It also requires that the juvenile has been "deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment." *Id.* Accordingly, the court must have found that family reunification is not a viable option and that it is in the best interest of the child to remain in the U.S.¹⁶

A court must sign an order making three key findings: (1) the child is in the custody of a state or local agency due to neglect, abuse, or abandonment; (2) family reunification is not a viable option; and (3) it is not in the best interest of the child to return to the child's home country or country of last habitual residence. It is imperative that, prior to making these findings, the court obtain the specific consent¹⁷ of the Secretary of the Department of Homeland Security. *Failure to do so will render the order invalid.*

¹⁴ See INA § 101(a)(27); 203(b)(4), Pub. L. No. 105-119, 11 Stat 2440 § 113 (November 26, 1997) (amending the definition of a "special immigrant juvenile" to include only those juveniles deemed eligible for long-term foster care based on abuse, neglect or abandonment; requires specific and express consent of the Secretary of the Department of Homeland Security).

¹⁵ INA § 101(a)(27)(J) states that a special immigrant juvenile is: "an immigrant who is present in the United States — (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment; (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and (iii) in whose case the [Secretary of the Department of Homeland Security] expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status; except that — (I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the [Secretary of the Department of Homeland Security] unless the [Secretary of the Department of Homeland Security] specifically consents to such jurisdiction; and (II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act."

¹⁶ This can be established in various ways, including by having a foreign social service agency conduct a home study or by interviewing the child.

¹⁷ "Specific consent refers to a determination to permit a juvenile court, which otherwise would have no custody jurisdiction over the juvenile alien, to exercise jurisdiction for purposes of a dependency determination." USCIS Memorandum #3 — Field Guidance on Special Immigrant Juvenile Status Petitions (May 27, 2004).

As noted above, the express consent of the Secretary of the Department of Homeland Security is also required prior to securing SIJS status. "Express consent means that the Secretary, through the USCIS District Director, has determine[d] that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect [or abandonment.] In other words, express consent is an acknowledgement that the request for SIJ classification is bona fide."¹⁸

Once the juvenile court enters an order, it must retain jurisdiction until the immigration application is decided and the juvenile is deemed an LPR.¹⁹

2. What are the benefits of SIJS?

Most importantly, a child who is granted SIJS becomes an LPR. As an LPR, the child will have the right to live and work in the U.S. permanently, and after five years the child will be eligible to become a U.S. citizen. In addition, the child becomes eligible for federal funds for foster care and adoption assistance and is eligible to receive some health benefits (*i.e.*, emergency services and immunizations). Notably, once an SIJS application is submitted, the child becomes protected against deportation and, if applicable, the child is granted employment authorization.

3. Are there any risks?

The most significant risk to the child in applying for SIJS is that it will alert the government that the child is undocumented, and the child could be removed from the U.S. Another risk, depending on the age of the applicant, is that the child may turn twenty-one prior to final adjudication. In other words, the child may "age-out." An individual who turns twenty-

one, is no longer eligible for SIJS. Importantly, if a child has any type of criminal history, that history may jeopardize their ability to succeed in a SIJS application.

4. What is the application procedure?

Once it is determined that a child may be eligible for SIJS, an SIJS Petition must be filed with USCIS. Although current regulations allow for separate filing of the Form I-360 (Petition for Amerasian, Widow(er), or Special Immigrant) and the Form I-485 (Application To Register Permanent Residence or Adjust Status), USCIS strongly encourages concurrent filing of both forms in order to expedite the completion of the juvenile's application.

In its Memorandum #3, Field Guidance on Special Immigrant Juvenile Status Petitions,²⁰ USCIS outlines the requirements for both Forms I-360 and I-485.

Form I-360 must be supported by:

- Court order declaring the child's dependency on the juvenile court or placing the juvenile under, or legally committing the juvenile to, the custody of an agency or department of a State;
- Court order deeming the juvenile eligible for long-term foster care due to abuse, neglect, or abandonment;
- Determination from an administrative or judicial proceeding that it is in the juvenile's best interest not to be returned to his/her country of nationality or last habitual residence, or the juvenile's parents' country of nationality or last habitual residence; and
- Proof of the juvenile's age.

Form I-485 must be supported by:

- Birth certificate or other proof of identity in compliance with 8 CFR 103.2;
- A sealed medical examination (Form I-639);
- Two ADIT-style color photographs; and, where applicable, also supported by:
 - Evidence of inspection, admission or parole,

¹⁸ *Id.* (citing H.R. Rep. No. 105, at 1-40530 [1997]).

¹⁹ Notably, the process takes approximately twelve to eighteen months, and the child must be twenty-one at the time the case is adjudicated.

²⁰ (May 27, 2004) <http://www.immigration.com/newsletter1/memojuvenilelrpet.pdf>

if available. By law an individual with SIJ classification is deemed to be paroled for purposes of adjustment of status 7;

- If the applicant is over 14, he/she must submit a Form G-325A (Biographic Information);
- If the juvenile has an arrest record, he/she must submit certified copies of the records of disposition; and
- If the juvenile is seeking a waiver of a ground of inadmissibility that is not

otherwise automatically waived under INA § 245(h)(2)(A), he/she must submit a Form I-601 (Application for Waiver of Ground of Excludability) and supporting documents establishing that waiver is warranted for humanitarian purposes, family unity, or in the public interest. Supporting documents could include affidavits, letters, press clippings, etc. ■

INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

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INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

The Interstate Compact on the Placement of Children (ICPC) is a uniform law that provides for safe placement of children across state lines. All 50 states, the District of Columbia, and the U.S. Virgin Islands have enacted it. The ICPC is used as the means to place children out of the District of Columbia, in either a foster home or a kinship home. Without using the ICPC, children placed out of the District would not be afforded the same benefits of child welfare agency oversight, as the DC Child and Family Services Agency (CFSA) cannot send its social workers across state lines. Similarly, Child Protection Registry checks, and other background checks that are available to CFSA as a tool to assess a placement within the District of Columbia, cannot be done for children who are placed out of the District of Columbia without the use of the ICPC.

The ICPC is in the D.C. Code, § 4-1422, Articles I through X. The ICPC contains 10 articles, which define the types of placements and placers subject to the law, the procedures to be followed in making an interstate placement, and the specific services and requirements brought by enactment of the law. There are also numerous regulations, such as Regulation 7 – Priority Placement, which are not found in the Code but have been incorporated into the ICPC. These regulations are applicable to the District of Columbia and all other member states as well.

Children placed out-of-state need the same protections and services that would be provided if they remained in their home states. They must also be assured of a return to their original jurisdiction should placements prove not to be in their best interests, or should the need for out-of-state services cease, or when reunification is able to occur.

I. Applicability

The ICPC applies to four situations in which CFSA places children in other states,¹ but only the first three apply directly to children sent through CFSA:

- Placements preliminary to an adoption.
- Placements into foster care, including foster homes, group homes, residential treatment facilities, and institutions.

- Placements with parents and relatives.
- Placements of adjudicated delinquents in institutions in other states.

The ICPC clearly delineates who must use it to “send, bring, or cause a child to be brought or sent” to another party state. “Sending agencies” are bound by the ICPC. Along with CFSA and the Family Court, they include:

- A state party to the Compact, or any officer or employee of a party state.

¹ For purposes of the ICPC, the District of Columbia is a “state.”

- A court of a party state.
- Any person (including parents and relatives in some instances), corporation, association, or charitable agency of a party state.

A “receiving agency” is the person or agency in the state to which the child is to be placed.

Not all placements of children in other states are subject to the ICPC, nor are all persons who place children out-of-state subject to the ICPC. The ICPC does not apply to placements:

- made by a parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or the child’s guardian (enumerated individuals) if the child is placed with another enumerated individual, but without the intervention of CFSA or other sending agent.²
- in medical and mental health facilities or in boarding schools, or “any institution that is primarily educational in character.”³

If the matter is not before the Family Court and placement occurs, for example, by a parent transferring custody to an aunt (or any of the other enumerated individuals), the ICPC does not apply. However, if CFSA is involved and “approves” the placement, even if the matter is not before the Family Court, then the ICPC applies. Likewise, the ICPC applies in all abuse and neglect matters before the Family Court.

The ICPC does not apply to children who are visiting another jurisdiction. Visiting was once a commonly used practice in the District (and elsewhere) as a way to circumvent the ICPC. A child would be sent to live with a relative, but the court order would call it a visit. However, noting a trend of children “visiting” out-of-state relatives for extended (and unlimited) periods of time, ICPC Regulation 9 was adopted. Regulation 9 defines a visit as a placement for less than 30 days, though the visit may be longer than 30 days if it begins and ends during a summer vacation. The problem of extended visits prior to Regulation 9 was that,

without the ICPC, CFSA could not supervise the placement, nor did the local child welfare agency have any ability to supervise the placement or to assist the child and placement resource.

II. Purpose

The purpose of the ICPC is to safeguard children. To that end, the ICPC:

- Provides the sending agency the opportunity to obtain home studies and an evaluation of the proposed placement.
- Allows the prospective receiving state to ensure that the placement is not “contrary to the interests of the child” and that its applicable laws and policies have been followed before it approves the placement.
- Guarantees the child legal and financial protection by fixing these responsibilities with the sending agency or individual.
- Ensures that the sending agency does not lose jurisdiction over the child once the child moves to the receiving state.
- Provides the sending agency the opportunity to obtain supervision and regular reports on the child’s adjustment and progress in the placement.

Safeguards are routinely available when the child is within a single state or jurisdiction.

When the placement involves two states or jurisdictions, these safeguards are available only through the ICPC. Each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide necessary care. The Court, guardian *ad litem* (GAL), and others who are concerned with the best interests of a child expect that a placement will be selected carefully. Once the child is placed, those concerned with the best interest of the child expect that the place-

² Article VIII (1).

³ Article II (2).

ment will be monitored and the conditions of the home and child carefully and continually reviewed. When a child is placed within the District of Columbia, CFSA or its contract agencies are mandated to perform those functions. The ICPC provides that same protection to children from the District of Columbia who are placed into another jurisdiction.

While the child remains in the out-of-state placement, the sending agency retains legal and financial responsibility. This means that CFSA, as the sending agency, has both the authority⁴ and the responsibility to determine all matters in relation to the “custody, supervision, care, treatment, and disposition of the child,” just as CFSA would have if the child had been placed within the District of Columbia.

The ICPC allows the receiving state to have a full opportunity to ascertain the circumstances of the proposed placement, thereby promoting compliance with applicable requirements for the protection of the child. It allows the sending state to obtain the most complete information to evaluate a potential placement. CFSA is unable on its own to ascertain certain information from the receiving state, such as their CPR and criminal background checks. The ICPC mandates that the receiving state do that; thus CFSA can base its placement decision on a fuller universe of information.

Appropriate jurisdictional arrangements for the care of the child to be placed will be promoted. CFSA can arrange for payment for school, medical insurance and other needs of the child, before the child is placed. Such needs will be identified by the receiving state who will inform the sending state of what is needed prior to placement.

The sending agency must notify the receiving state’s Compact Administrator of any change in the child’s status. Changes of status may include a termination of the interstate placement, a new placement of the child in the receiving state, or a transfer of legal custody.

The sending agency’s responsibilities for the child continue until it legally terminates the interstate placement. The placement may be terminated by returning the child to the home state or, with the child left in the receiving state, when the child is legally adopted, becomes self-supporting or reaches majority, or for other reasons with the prior concurrence of the receiving state.⁵

III. Method

Lawyers should become familiar with the ICPC process and procedures CFSA must utilize to assure that the child is placed properly.

CFSA must fill out and send an ICPC Form 100A to the receiving state’s ICPC office. From there, the 100A is sent to the local jurisdiction’s child welfare agency. For example, if a child is to be placed by the Family Court into Pennsylvania, CFSA must first send ICPC Form 100A to Harrisburg, Pennsylvania (the capital), which will then forward the Form to the specific Pennsylvania county agency where the child is to be placed. This can be a slow process.

To speed the process, practitioners should familiarize themselves with Regulation 7. Regulation 7 - Priority Placement is used to place a child quickly with a relative in another jurisdiction. There must be a court order that specifies that (a) the placement is with a relative and (b) the child is either (1) under age two, (2) in an emergency shelter, or (3) has spent a substantial amount of time in the home of the person living in the receiving state. To accomplish such a finding and order, a motion for a priority placement must be made, usually by the GAL or the Assistant Attorney General (AAG).

Because so many children from the District of Columbia need to be placed with relatives in Maryland, CFSA and Maryland have adopted an agreement that allows the District of Columbia to send the child to Maryland for placement more quickly. If the child is to be sent to a pre-approved

⁴ Ultimate authority rests with the Family Court.

⁵ Article V (a).

licensed foster home in Maryland, CFSA may make the placement immediately. Then, immediately after the placement, CFSA notifies Maryland of the placement into a licensed foster home. The formal 100A packet, which includes the court order, is sent a few days later.

CFSA is not able to place children in Maryland with a non-parent relative but can do so only for a parent, as the non-parent relative must be licensed before the District of Columbia child can be placed with them. If the non-parent relative lived in the District of Columbia, a provisional foster license may have been able to be obtained. Maryland has no provisional licensing process. However, as of April 2008, a Pilot Program for Emergency Placements in Maryland has begun to allow CFSA to place District of Columbia children into Maryland on an emergency, provisional basis. The Pilot Program will be closely monitored with the hope of expanding it in the future. The revised ICPC or Congressional legislation may solve the problem for the District of Columbia and other jurisdictions needing to send children to relatives across state lines.

IV. Congressional Fix

While respecting the importance of the ICPC, Congress recognized that the ICPC is sometimes a barrier to timely placements. In an effort to prompt the ICPC to function more timely, Congress passed the *Safe and Timely Placement of Foster Children Act of 2006*.⁶ The law amends Titles IV-B and IV-E of the Social Security Act, encourages States to improve protections for children, and holds them accountable for the safe and timely placement of children across State lines.

The Act requires:

- Receiving states to conduct and complete a home study (either directly or through a private contractor) within 60 days of a request;

there is a \$1500 incentive for home studies completed within 30 days;

- Sending states to have 14 days upon receipt of the home study report to determine if placement in the receiving state is in the best interest of the child;
- On-going visitation to occur at least every 6 months, instead of 12 months; and
- Giving foster parents, pre-adoptive parents, or relative caregivers a right, rather than only an opportunity, to be heard at court proceedings.

To encourage States to implement the above, there are incentives to Title IV-E funding.

V. Proposed (new) ICPC

The ICPC has not undergone major revision in over 40 years. The American Public Human Services Association (APHSA) is leading a team of national experts to re-draft the ICPC.⁷ It is their hope that a revision will cause the ICPC to evolve with the changing policies and practices in child welfare, especially those involving swift permanency for children.

The proposed new ICPC continues where the current (old) ICPC left off. The new draft ICPC narrows the applicability of the compact to the placement of children in foster care systems and children placed across state lines for adoption; addresses the issue of time-frames for the completion of the approval process; and provides clear rulemaking authority and enforcement mechanisms while it clarifies state responsibility and the state's ability to purchase home studies from licensed agencies to expedite the process.

VI. ICPC Paradigm Shift?

Practitioners of family law, especially child maltreatment law, may find the ICPC to be an

⁶ P.L. 109-239 signed into law on July 3, 2006.

⁷ Further information on the ICPC, including the proposed (new) ICPC, Congressional Legislation and a more detailed analysis of each, can be found on APHSA's website, aphsa.org.

impediment to the proper placement of a child. Attorneys for parents may be dismayed as the law delays their client's wish to have their child placed with a relative from being achieved while ICPC approval is sought, and the child remains in foster care with a non-relative. GALs may be discouraged, as the law causes a child whose best interests the GAL represents to be placed in or stay in a traditional, non-relative foster home instead of going to a relative's home, often seen as a clearly "better" placement, primarily because the relative does not live in the District of Columbia.

Judge Stephen W. Rideout suggests that the ICPC is undergoing a paradigm shift and that family law practitioners and judges should become part of that shift. Judge Rideout retired recently from the Alexandria, Virginia, Juvenile and Domestic Relations District Court, and he now provides ICPC consulting services through the National Council of Juvenile and Family Court Judges. Presenting at a D.C. Family Court interdisciplinary training in April 2008, Judge Rideout expressed hope that the evolution of the ICPC will cause judges and lawyers to become more actively involved in the process of placing children promptly across state lines.

Judge Rideout suggested several actions that a practitioner can take for the benefit of a client, whether a parent or child, who wants a child placed into a non-District of Columbia resident relative's home:

- Set schedules to track the ICPC process.
- Have out-of-District of Columbia family placement possibilities discussed at the beginning of the case, and throughout, especially during a Family Team Meeting.
- Make sure that an identified relative is a vi-

able placement, informing the relative of the positives and negatives of becoming a resource parent. Do not unnecessarily name relatives if they are not viable, as that will delay the placement process.

- Work with the District of Columbia ICPC Office and assist in the process.
- Determine why progress has slowed and seek a solution with the:
 - assigned social worker
 - assigned assistant attorney general
 - CFSA ICPC Office
 - judge in the receiving state, by means of the next-listed action
- Become familiar with the UCCJEA,⁸ and use its procedures to encourage communication between the District of Columbia Family Court judge in your case and a judge in the receiving state for the purpose of expediting ICPC clearance.⁹
- Check on the ICPC status within 7 days of the beginning of the process.
- Check on the ICPC status at least 7 days prior to scheduled court hearings.
- File reports with the court and parties apprising everyone of the ICPC status.

VII. Conclusion

The ICPC is an important tool to protect children placed from one jurisdiction into another. Although there are timeliness problems, without the ICPC children placed out-of-state are less safe than children placed in-state. Family law practitioners should become more active participants in pressing for prompt ICPC clearance for their clients. ■

⁸ The Uniform Child Custody Jurisdiction and Enforcement Act can be found at D.C. Code §16-4601.01 – §16-4604.02.

⁹ Obtain contact information from the Supreme Court Website in the receiving state or <http://cosca.ncsc.dni.us/StateCourtPointsofContact.html> or The National Council of Juvenile and Family Court Judges.

MENTAL RETARDATION PROCEEDINGS

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MENTAL RETARDATION PROCEEDINGS

The rights of mentally retarded persons are governed by D.C. Code §7-1301 *et seq.* Services are provided by the D.C. Department on Disability Services (DDS), a cabinet-level department created to replace the Mental Retardation and Developmental Disabilities Administration, which had been a division of the District of Columbia Department of Human Services.

I. Non-Residential Services

A person 14 years or older may apply to “any hospital, clinic or facility or other community based service owned or operated by, or under contract with, the District of Columbia for out-patient non-residential habilitation.” D.C. Code §7-1303.03. Application for such services may be made to the director of such institution or to the Department on Disability Services. The services available are spelled out in D.C. Code §7-1301.03 (5). These “shall include, but not be limited to, diagnosis, evaluation, treatment, day care, training, education, sheltered employment, recreation, counseling of the mentally retarded person and his or her family, protective and other social and socio-legal services, information and referral, and transportation to assure delivery of services....”

II. Residential Services

A person 14 years or older may obtain residential services from DDS through either involuntary commitment or voluntary admission.

The standards for involuntary commitment are largely governed by D.C. Code §7-1303.04. A petition for commitment may be filed by a parent or guardian of the person. In order to commit the person the court, after a hearing, must determine,

by proof beyond a reasonable doubt, that the person is not competent to refuse commitment; that the person is at least moderately mentally retarded and requires habilitation; that commitment is necessary to receive the habilitation indicated by the Individual Habilitation Plan, defined under D.C. Code §7-1304.03; the facility is capable of providing the required habilitation; and commitment to the requested facility is the least restrictive means by which the required habilitation can be provided.

The standards for voluntary admission are largely governed by D.C. Code §7-1303.02. A person 14 years or older who is mentally retarded may apply for voluntary admission to a facility where he or she can receive appropriate habilitation and care. A voluntary admission requires a court inquiry and possible hearing to determine if the admission is voluntary and if the person requesting the admission is competent to do so. The procedures for these are spelled out in D.C. Code §7-1303.02. There is no requirement that a person requesting voluntary admission be moderately retarded. This is usually the way to obtain residential services for a client who is mildly retarded. Anyone more severely retarded may have difficulty being found competent to request admission.

The involuntary commitment of a person under the age of 14 is governed by D.C. Code §7-1303.06. The requirements are virtually identical to those

for a person over 14, except that there is no requirement that the child be shown to be incompetent in order to have the court order the commitment.

III. Coordination Between CFSA and DDS

Probably the most important practical consideration for attorneys in the neglect system is that the diagnosis of mental retardation must be made before a child's 18th birthday. D.C. Code §7-1301.03(19) defines mental retardation as "a substantial limitation in capacity *that manifests before 18 years of age* and is characterized by significantly subaverage intellectual functioning, existing concurrently with 2 or more significant limitations in adaptive functioning." (emphasis added)

The Child and Family Services Agency (CFSA) and DDS have signed a Memorandum of Agreement to coordinate services "to children and youth and caregivers involved in a child abuse or neglect proceeding who ... have a diagnosis of mental retardation." This agreement provides for the sharing of information and resources between agencies and that staff members of each agency receive appropriate training in the fields of child welfare and the care and habilitation of persons with mental retardation. It provides for each agency to designate a liaison for the purpose of overseeing communications and interactions with the other.

The CFSA liaison is to "provide the MRDDA [now DDS] liaison profile information concerning children/youth in the custody of CFSA who are fourteen (14) to twenty (20) years of age who may be eligible for services through [DDS]." The information is to be electronically transmitted quar-

terly and updated annually. DDS is to maintain this information. The exact information is specified in the Memorandum of Agreement.

Both agencies are to jointly review the case plans of children after they have turned 18. CFSA shall remain responsible for case management services until the child/youth is 21. CFSA is to submit a complete application package for a youth to DDS one year prior to the youth's 21st birthday. This package includes an intake application, a current psychological evaluation, records of all previous psychological and educational testing and available medical records and history. DDS is to assign a case manager upon receipt of a formal application and create an intake file for eligibility determination. DDS is to initiate service planning and Individual Support Plan meetings if the child/youth is determined to be eligible. DDS is to attend treatment team meetings held by CFSA. A discharge planning meeting is to be held 6 months before the youth's exit from CFSA care via entry into the DDS system.

CFSA is to identify cases of youth with mental retardation who will be emancipated before their 21st birthday and discuss these with the DDS liaison at the administrative review meeting. CFSA is also to refer neglect case parents who have diagnosed mental retardation through the DDS intake process. CFSA is responsible to convert the child/youth's benefits such as Medicaid and SSI to the adult system.

The DDS liaison under this agreement is the supervisor of the DDS intake unit. The CFSA liaison is the supervisor of the CFSA Health Services Unit. CFSA retains financial responsibility for children referred to DDS until the child/youth reaches 21. ■

PROBATE ISSUES IN NEGLECT CASES

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PROBATE ISSUES IN NEGLECT CASES

Neglect cases can overlap the areas of law practiced in the Probate Division when someone dies and children or adults are entitled to inherit, when children are injured, or when children are entitled to public benefits. Guardians *ad litem*, in particular, must be sensitive to these situations because, as a part of the duty to pursue what is in the best interests of the child, a guardian *ad litem* must make an effort to collect and preserve any money or benefits to which a child is entitled. There is no unique, ideal method of collecting and preserving whatever a child might be entitled to receive. The solution should always be tailored to the needs of the child, and those of the adult whom the child will become, with a view toward preserving any public benefits to which the child is entitled and protecting the asset recovered so that the child receives the maximum benefit from it.

I. Fact Situations That Arise Frequently in Neglect Cases

A. Inheritance

Someone dies, and a child is, or could be, entitled to inherit either (a) through a probate proceeding or (b) because the child is named as a beneficiary entitled to an asset, often a life insurance policy, sometimes a certificate of deposit or savings bond. See D.C. Code §20-1106 (2001 ed.), distributions from an estate to a minor.

Situation (a) occurs when a parent dies either with or without a will and a child will inherit. See D.C. Code §§18-101 through 20-1305 (2001 ed.), probate estates.

Situation (b) occurs, for example, when a parent who is, or has been, a civil servant dies and has designated the child as beneficiary of that parent's Federal Employees Group Life Insurance (FEGLI) policy. See D.C. Code §§21-101 *et seq.* (2001 ed.), guardianship of a minor, and D.C. Code §§21-301 *et seq.* (2001 ed.), the Uniform Transfers to Minors Act, for possible solutions.

B. Injuries

A child is injured, there is a lawsuit, and there will be a judgment or consent agreement. A too-frequent example of this situation is when a committed child is injured while in the care of the District of Columbia; for example, by a foster parent or at school. See D.C. Code §§ 21-101 *et seq.* (2001 ed.), regarding guardianship of a minor; and, if the amount to be recovered is large and the child has special needs expected to continue throughout his or her life, consider whether a Special Needs Trust should be established.

C. Public Benefits

A child is, or might be, entitled to receive a public benefit of some kind, for example, Supplemental Security Income or the Social Security personal needs allowance that a child might receive while in a residential treatment facility.

II. Analytical Approach

If you are faced with one of the fact patterns

above, consider the following factors in determining what to do:

- A. the age of the child,
- B. the amount at issue,
- C. the presence of special needs or handicapping conditions,
- D. the child's resources, i.e., intelligence, ability to work, future prospects,
- E. the character of the child's relatives, as sometimes the relatives influence the child and either are not able to handle money or will want any money available for their own uses,
- F. other sources of income for the child while still a child or as an adult, and
- G. the potential for lawsuits brought by the District of Columbia and/or D.C. Medical Assistance to recover amounts spent for the care of the child while the neglect case was open.

III. Solutions

The following strategies have been used successfully by CCAN attorneys to protect assets for children:

- A. If the amount is small, ask the Neglect judge to order that the money be used to pay for something specific for the child (such as summer camp, tuition, a computer), pay the money to the child if the child is older, or pay it to a responsible relative. However, note D.C. Code §21-120 (2001 ed.), which requires that if the amount is more than \$3,000.00, the person receiving it, if not the child, must be appointed guardian by the Probate Division.
- B. Ask the Neglect judge to enter an order restricting the child's access to the money until the child turns eighteen or 21 (if the amount is small). If the amount is larger, the likely maturity of the child at age eighteen or 21 should be considered. If the child is immature or has emotional issues or criminal problems, another solution would be better.
- C. Use the Uniform Transfers to Minors Act (if a suitable custodian can be found).

D. Establish a guardianship of a minor so that the money may be held by the guardian.

E. Establish a Special Needs Trust. If the child is incapacitated in a way that will continue, is receiving a large amount, is eligible to receive public benefits (such as D.C. Medical Assistance or Medicaid), and/or is potentially subject to suits for recoupment of funds expended by the District of Columbia, a Special Needs Trust will protect and preserve the money for the benefit of the child. These trusts are irrevocable and must provide that any money left when the child dies is paid to the District of Columbia as repayment for funds expended on the child's care. Such a trust is complicated to draft and administer. After it is drafted, a petition to establish a trust case should be filed in the Probate Division so that there is on-going oversight, a bond can be purchased, and annual accounts can be filed and audited.

F. Establish a conservatorship. When the guardianship of the minor is coming to a close because the minor is about to be eighteen, but the young adult lacks the ability to receive and evaluate information effectively or to communicate decisions to such an extent that the young adult cannot manage financial resources, a conservatorship may be appropriate. The legal standard for establishing a conservatorship is set forth at D.C. Code §21-2011(11). A petition for a protective proceeding requesting the appointment of a conservator has to be filed in the Probate Division and should be accompanied by a statement from a doctor detailing how the young adult is incapacitated; i.e., the diagnosis and the impact of that diagnosis on the ability to make and communicate decisions. An attorney will be appointed for the young adult. Sometimes an examiner and visitor are appointed also. These proceedings are becoming more expensive, and many of the appointed parties receive compensation from the young person's money that is being preserved, so this course of action should not be undertaken lightly. See D.C. Code §§21-2001 through 21-2077 for the law governing conservatorships.

IV. Other Resources

The Probate Division of the Superior Court of the District of Columbia conducts training to improve the quality of the work performed in the division and has developed training manuals covering these topics. The Probate Division handles the following matters:

Guardianship of a minor - D.C. Code §§21-101 *et seq.*

Guardianship and/or conservatorship of an adult - D.C. Code §§21-2001 *et seq.*

Estates of decedents - D.C. Code §§18-101 through 20-1305

Uniform Transfers to Minors Act - D.C. Code §§21-301

For additional information, contact the Trusts and Estates Section of the D.C. Bar. This section is very active and is composed of knowledgeable practitioners who are willing to share their expertise. ■

RELATED CRIMINAL PROCEEDINGS

Criminal offenses are set forth in D.C. Code §22-101 *et seq.* and criminal procedure at D.C. Code §23-101 *et seq.* The Criminal Practice Institute Trial Manual deals with matters relating to criminal trials for adult offenders.

Sometimes, the actions that result in a neglect or abuse case in Family Court will also result in the parents being prosecuted criminally for those acts. When that occurs, the neglect case will customarily track the criminal case so as not to prejudice the parents' defense, nor their Fifth Amendment rights. Whereas a defendant's silence in a criminal matter is protected, a parent's volitional silence in a non-criminal proceeding such as a neglect matter may be considered by the non-criminal judge against the parent.

Procedurally, by having the criminal trial proceed first, the necessity of having a neglect trial on the same issue may become moot. Because criminal cases must be proven beyond a reasonable doubt, if a parent is found guilty for conduct in a criminal matter, then that person must likewise be found involved in neglect or abuse in a matter that requires proof only by a preponderance of the evidence.

The parent's neglect attorney should open a line of communication with the corresponding criminal defense attorney. On the pick-up day, the neglect parent's attorney may discover the corresponding criminal attorney for the same client by reviewing the lock-up list posted outside courtroom C-10. Because the Domestic Violence and Sex Offense branch of the prosecutor's office will prosecute many of these criminal matters, many of the cases will initially be presented in courtroom 119. However, if the matters are pre-

sented as felonies, then the attorney will be appointed at the initial hearing in courtroom C-10.

If the neglect parent's attorney needs to identify the corresponding criminal attorney at a later time, then that information can be discovered on the Court's Criminal Information System. There are terminals in the lawyers' lounge and in room 4001 of the courthouse that connect to the Criminal Information System. The Criminal Information System may also provide the inquiring attorney with the case number, the date of the next hearing, the type of hearing that is upcoming, and the judge assigned to the case.

Because both the criminal attorney and the neglect attorney have an interest in defending their client's respective positions in each case, the attorneys should make an effort to exchange information so that each can have a better position during their respective litigation. However, caution should be used in providing information from a neglect proceeding that can be used in a criminal proceeding because of the privacy laws that protect the interests of minors involved in neglect matters.

A child may be required to testify against the parents in the adult criminal proceeding. The child's guardian *ad litem* (GAL) may wish to accompany the child to speak with the Assistant U.S. Attorney and to be available to advise the child during the grand jury process, although the attorney will not be allowed to accompany the child when he or she testifies before the grand jury. Before permitting the child to assist the government, the GAL should try to recognize the potential for issues that may arise when the child has to testify against his or her parent.

The parent's criminal attorney may be able to negotiate a more favorable outcome in the criminal case if that parent is already subject to, and participating in, therapy or other remedial steps being taken in the neglect case. Thus, the parent's attorney in the neglect matter should provide the

corresponding criminal attorney with information regarding the client's progress since the cases were opened. Parents' attorneys should advise their clients that early intervention and participation in services may help them with the resolution of the corresponding criminal matter. ■

RELATED JUVENILE PROCEEDINGS

I. Juvenile Proceedings	J-3
II. Juvenile Proceedings for Youth in the Neglect System	J-5

RELATED JUVENILE PROCEEDINGS

Children who are involved in the Neglect Branch may also become the subject of one or more cases in the Juvenile Branch of the Family Court of Superior Court. Both juvenile and neglect cases arise from the same statutory law at D.C. Code §16-2301 *et seq.*, but the two systems diverge in case law and court rules. Juvenile procedure is similar to that of adult criminal procedure.

I. Juvenile Proceedings

Jurisdiction of the Juvenile Branch begins with the Attorney General filing a petition alleging that the child is delinquent or that the child is a person in need of supervision (often referred to as “PINS”).

A delinquent child is defined through a two-part test. D.C. Code §§16-2301(6) & (7). In the adjudicatory stage, the government must prove, either at a trial or with the child’s guilty plea, that the child has committed a “delinquent act;” that is, an act that would have been a criminal offense if committed by an adult. At the disposition hearing the government will ask the judge to make the second finding, that the child “is in need of care and rehabilitation.”

D.C. Code §16-2301(7) defines “delinquent act” as an “act designated as an offense under the law of the District of Columbia, or of a State if the act occurred in a State, or under Federal law. Traffic offenses shall not be deemed delinquent acts unless committed by an individual who is under the age of sixteen.” In the petition charging a child of being a person in need of supervision, the govern-

ment will also allege that the child “is in need of care and rehabilitation,” an issue that in juvenile proceedings is generally resolved at the disposition hearing. At the trial on a PINS petition, the government will try to prove conduct that constituted a PINS offense.¹

Delinquency cases generally begin with the arrest of the child, who may be released or held in custody. Within a day or two of the arrest, the child is presented to the New Referral Courtroom for an initial hearing. An attorney is appointed, a plea of “not guilty” is customarily entered, and the judge decides whether to release the child or to remove the child from home pending trial via either shelter care or secure detention. D.C.’s current juvenile speedy trial law sets a 30-day deadline for conducting the fact-finding hearing for youth placed in secure detention and a 45-day fact-finding hearing deadline for youth placed in shelter care. D.C. Code §16-2310(e).² Since the trial may be several weeks from the initial hearing, a shelter care or detention decision can be very unfortunate for the child. Nevertheless, the court will reconsider such decisions any time and on an expedited basis if the appropriate motion is made. SCR - Juv. 107(c).

¹ PINS conduct is defined by D.C. Code §16-2301(8) as a child who is subject to compulsory school attendance and habitually truant from school without justification; has committed an offense committable only by children; or is habitually disobedient of the reasonable and lawful commands of his parent, guardian, or other custodian and is ungovernable.

² Counsel should likewise be aware of Superior Court Administrative Order 08-05, *Performance Measures – Time to Disposition and Excludable Time*. This Order sets precise goals for Court processing of juvenile and all other types of cases.

The range of options available at the initial hearing can be anywhere on a spectrum from the conditional release of the child to a responsible parent or other relative, to the child's secure detention under supervision by the D.C. Department of Youth Rehabilitation Services at the Youth Services Center in D.C. A detention order removing the child from home must be based both on an evidentiary finding of probable cause of the charge and on social criteria suggesting future dangerousness to self or others or risk of flight. D.C. Code §16-2312(f) and SCR - Juv. 106. Between conditional release and secure detention on the continuum, there are "youth shelter homes" which are short-term pre-adjudication group homes generally administered by private contractors whose qualifications and commitment vary.

Conditions of release are fairly general (e.g., attend school, abstain from drugs, stay out of cars). An order for "home detention" means the child will be released to a parent, guardian, or custodian, but that someone will be calling the home to monitor the child's compliance with a court-ordered curfew.

There may be additional programs available to monitor the child or provide services pending trial in the juvenile case, including drug testing and counseling. A limited number of spaces are available for short-term foster care, but candidates are carefully screened and rarely placed. Intensive case management services and screening may be available through some limited pretrial programs available by court order for at risk juveniles who would otherwise be detained.

If the child fails to appear for a court hearing or if the child absconds from the placement which was ordered, the juvenile may again be arrested on a "custody order" issued by the court on application by the government.

In the Juvenile Branch, there are surprisingly few institutional resources for care and rehabilitation

available during the time between the arrest and the disposition hearing. The intake worker in the Court Social Services office has continuing probationary responsibility for all juvenile cases until there is an adjudication or diversion.³ Nevertheless, the intake probation officer from Court Social Services may have limited contact with the child or family after the initial screening on the day of the initial hearing. While it may take some time between the initial hearing and the adjudication, one cannot generally expect any treatment of the child's problems during this time.

Even after adjudication, the treatment provided through the Juvenile Branch is seldom more effective than that available through the Neglect Branch. Children placed on a period of probation after adjudication will be expected to meet with a probation officer on a regular basis. Children who test positive for drug use on the day of their arrest and/or during the time pending trial will be required to submit to weekly drug testing requirements. The probation officer may require other services, such as peer counseling, educational advocacy, tutoring, and individual counseling. In acknowledgement of the broader treatment needs of an adjudicated juvenile's family, the D.C. Council authorized the court to order the child's parents or caretaker to fully cooperate and assist in the entire rehabilitative process, including the completion of parenting classes or family counseling where either or both was ordered. D.C. Code §16-2325.01.

At a juvenile disposition hearing, children whom the Family Court judicial officer commits to the Department of Youth Rehabilitation Services (DYRS) become wards of the city, potentially until age 21, with placement in a local group home, Oak Hill, or a distant residential program. Adjudicated PINS children may not be placed with committed delinquent children, at least until they have had a second PINS adjudication. D.C. Code §16-2320(d).

³ A diversion program or a consent decree may be offered by the Court Social Services to juveniles without prior adjudications and based on certain criteria. There are different diversion programs, but generally they require a delay in the proceedings while the child is referred to an agency or probation officer for community supervision. If the diversion program is successfully completed, the juvenile case is dismissed without adjudication. See D.C. Code §16-2314 and Juv. Rule 104.

II. Juvenile Proceedings for Youth in the Neglect System

For children who are already in the neglect system, there is no need to wait for treatment services from a pending juvenile case. The parties in the neglect case could intensify available resources for diagnostic and treatment services to the family in an effort to obviate the need for more punitive and arguably less effective juvenile dispositional remedies. If in fact such services are provided, the juvenile attorney may be in a better position to move for dismissal under SCR-Juv. 48(b), which allows the court to terminate a juvenile case at any time “if such action is in the interests of justice and the welfare of the child.” A superseding statute, D.C. Code §16-2317(d), however, restricts this relief to cases in which there has been an adjudication. Thus a 48(b) dismissal may only be granted at or after disposition.

Parties and professionals involved in the neglect system should not be too willing to allow the Juvenile Branch to assume responsibility for the child. Although in some cases parents in the neglect system would welcome juvenile proceedings as a means of shifting the focus from their own conduct to that of the child’s behavior, it is rare that a guardian *ad litem* could conscientiously view juvenile court jurisdiction over a neglected child to be in the child’s best interest.

Notwithstanding its statutory concern with the child’s need for “care and rehabilitation,” juvenile court can be punitive with the focus on the child’s behavior. There may be exceptional cases where temporary detention is in the child’s best interests while diagnostic and treatment services are marshaled on behalf of the child and the family. Unless such services are provided through the neglect case, however, treatment may unfortunately be limited to the child’s behavioral problems rather than the family’s underlying needs.

Before 2003, there may have been some advantage to having a juvenile proceeding concurrently with a neglect case. If a child were to be committed as a delinquent, the trial judge frequently attached a series of conditions prescribing in considerable detail exactly what rehabilitative services were to be provided for the child. The judge could review periodically whether there was compliance with the order. However, in *In re P.S.*, 821 A.2d 905 (D.C. 2003), the D.C. Court of Appeals decided that the trial judge did not have the statutory authority to direct the placement or future treatment of juveniles who have been committed to a public agency. As a result, the rehabilitative care to be afforded a committed delinquent (unlike an adjudicated delinquent who is placed on probation) is now subject to virtually no judicial oversight. ■

SPECIAL EDUCATION

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SPECIAL EDUCATION

Many children in the neglect system have a mental or physical disability that adversely affects their ability to learn. As a result, they may be entitled to a free, appropriate, public education (FAPE) pursuant to the Individuals with Disabilities Education Act (IDEA) and Individuals with Disabilities Education Improvement Act (IDEIA 2004), 20 U.S.C. §1400 *et seq.* In essence, FAPE is the right to receive appropriate special education and related services.¹ The term “special education” means “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.” 34 C.F.R. §300.39. The term “related services” means “transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education....” 34 C.F.R. §300.34.²

Under IDEA, all educational rights are granted to the parent on behalf of the child. The IDEA does not grant any rights directly to the child until their eighteenth birthday. See 34 C.F.R. §300.520. The term “parent” is broadly defined under the IDEA to include not only biological and adoptive parents, but also “a foster parent”, “a person acting in the place of a parent such as a grandmother... with whom a child lives”, and a legal guardian, or “an individual who is legally responsible for the child’s welfare”. 34 C.F.R. §§300.30. Children who are committed to the custody of CFSA and who have no adult in their life who meets the definition of “parent” may have a surrogate parent appointed by the court or D.C. Public Schools to protect the rights of these children under the IDEA. 34 C.F.R. §§300.30; 300.519(c).³ When more than one individual meets the definition of “parent”, such as where there is both a biological or adoptive parent and a foster parent involved in the neglect case, the biological or adoptive parent must be presumed to be the parent so long as they are attempting to act as the parent and there is no judicial decree extinguishing their authority to make educational decisions for the child. *See* 34 C.F.R. §300.30(b)(1). Whatever a child’s current living situation is, it is generally a good idea to clarify who has the authority to make educational decisions on the child’s behalf before initiating the special education process.

To ensure that children with disabilities receive FAPE, the Act imposes a series of requirements on educational agencies within the State.⁴ Specifically, educational agencies are required to identify children with disabilities in need of special education and related services; evaluate their needs; develop appropriate individualized educational programs (IEPs); and implement these programs in an appropriate educational setting.⁵ Throughout the special education process, the school must comply with extensive procedural regulations designed to ensure informed parental participation in the development of an appropriate educational program for the child. Each stage of the process is described briefly below.

¹ The parameters of the entitlement to FAPE have been the subject of extensive litigation over the past two decades.

² The regulations provide a non-exhaustive list of related services, including speech pathology, psychological services, physical and occupa-

I. Identification (or “Child Find”)

Under federal and local law, the State must have in effect policies and procedures to ensure that all children with disabilities residing in the state who are in need of special education and related services are identified, located and evaluated. 34 C.F.R. §300.111. This includes children who are homeless, wards of the state, and children with disabilities who are attending private schools. This requirement is commonly referred to as the “child find” requirement.

There are many behaviors that may indicate that a child has a disability that should trigger the identification process. These include if a child is failing multiple subjects, failing to progress from grade to grade, or exhibiting behavioral difficulties that are interfering with their performance in school.

II. Evaluation

According to the IDEA, either the parent or the public agency may initiate a request for an initial evaluation to determine if a child is eligible for special education services. 34 C.F.R. §300.301; 5 D.C.M.R. §3004(b). In the District of Columbia, the referral process is usually initiated when a parent or teacher requests a special education assessment at the child’s school. The social worker or GAL can also initiate assessment by writing a letter to the school special education coordinator. For children who are committed wards of DC

placed in foster homes outside the District, the evaluation process may be pursued in either jurisdiction; however, the District of Columbia Public Schools, in its capacity as the “local education agency,” is ultimately responsible for ensuring that all wards of the state receive a free, appropriate public education. 5 D.C.M.R. §3002.1.

While a referral for special education assessments may be made by a variety of people, including teachers, doctors, and social workers, the school must notify the parent and obtain the parent’s consent in order to begin the evaluation process. 34 C.F.R. § 300.300; 5 D.C.M.R. § 3026.1. However, IDEIA 2004 does create an exception to the parental consent requirement and permits GALs to provide consent for an initial evaluation in limited circumstances, such as if the parent’s whereabouts are unknown or the parent’s rights have been terminated. 34 C.F.R. § 300.302(2). If the child is a ward of DC, a parent surrogate may consent to the evaluations.⁶ If the parent refuses to consent to the initial evaluation, DCPS cannot override the parent’s wishes and DCPS is exempted from any legal responsibility to provide FAPE to that particular student. See 34 C.F.R. § 300.300(4).

Once a referral for evaluation has been made and DCPS has notified the parent and obtained the parent’s consent for testing, the evaluation process begins. A team known as the “Multidisciplinary Team” (MDT),⁷ conducts the evaluation. The MDT usually includes at least a psychologist, a speech language pathologist, a social worker,

tional therapy, recreation, counseling, parent counseling and training and medical services for the purposes of diagnosis (but not treatment). Obviously, children in the neglect system often need the kinds of services categorized in special education law as “related services.”

³ DCPS does not have a functional surrogate parent program in operation at this time, but the law gives judges the authority to appoint an individual to serve in that capacity.

⁴ In the District of Columbia, the District of Columbia Public Schools (DCPS) is the responsible state agency. The DCPS Special Education Office is at 825 North Capitol Street, NE, 8th Floor; Washington, DC 20002. The main phone number is 202-442-4800.

⁵ At one time, in the District of Columbia, the entire process (evaluation, eligibility and placement) was required to be completed within fifty days of the referral for special education. *Mills v. District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972). However, current law now gives DCPS one hundred twenty (120) days. DC ST §38-2501.

⁶ Prince Georges County Schools has a policy that any person other than the biological parent must complete a surrogate parent training before they can be authorized to consent to any services on the child’s behalf.

⁷ “Multidisciplinary Team” is the entity DCPS has created to serve as the IEP Team in the DC Public Schools. Other school districts or jurisdictions may have another name for the group of individuals who fill that role.

and a team coordinator. However, depending on the needs of the child, the team may also include other professionals necessary for a complete assessment of the child's needs.

Each DCPS assessment team is responsible for special education assessments in several schools. The teams operate centrally out of the main DCPS office at 825 North Capitol Street, NE. However, each school has a special education coordinator on-site who is responsible for scheduling meetings and evaluations. Every charter and private school has a DCPS representative⁸ assigned to oversee their special education programs and attend meetings.

The team must assess the child in all areas of suspected disability, including health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. §300.304; 5 D.C.M.R. §3005.9(g). In the District of Columbia, a special education evaluation will virtually always include: (1) a psycho-educational assessment (measuring the child's intellectual abilities, current academic functioning, visual-motor coordination, basic emotional status, and if mental retardation is suspected, adaptive skills); (2) a speech-language assessment (measuring receptive and expressive language skills, vocabulary, and articulation); (3) a social history (including a detailed interview with the parent regarding the child's developmental history and areas of concern); and (4) a vision and hearing screening. Detailed federal regulations require fairness and accuracy in the testing materials and procedures. See 34 C.F.R. §300.304; 5 D.C.M.R. §3005. In addition, a comprehensive re-evaluation must be com-

pleted at least every three years unless the parent and DCPS agree that a reevaluation is not necessary. 34 C.F.R. §300.303; 5 D.C.M.R. §3005.7.

III. Eligibility

Once the testing is complete, the parent is given a "letter of invitation" to an "eligibility determination meeting" or an "eligibility/IEP" meeting is scheduled with the parent. At this meeting, the MDT, including the child's teacher, the parent, and an individual who can interpret the instructional implications of the evaluation results⁹ discuss the test results, and determine whether the child has a disability which adversely affects the child's educational performance and whether special education and related services are necessary. If the team determines that the child is eligible, an IEP is usually developed as part of the same meeting since the necessary participants are all present. 34 C.F.R. §300.344. If the parent disagrees with the Multi-disciplinary Team's assessment of the child, the parent has a right to obtain an independent evaluation at public expense. 34 C.F.R. §300.502; 5 D.C.M.R. §3027.

A child may be identified as eligible for services if the child has one of the disabilities specifically enumerated in the Act and if that disability adversely affects the child's educational performance. See 34 C.F.R. §300.502. The categories of disability recognized under federal law are: mental retardation, hearing impairments (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, another health im-

⁸ At present, these DCPS personnel are called "placement specialists" and they operate out of the Placement and Non-Public Unit of the DCPS Office of Special Education.

⁹ For every child's IEP meeting, several participants are required by law to participate: 1) parent; 2) the regular education teacher (if the child is, or may be, participating in the regular education environment); 3) a special education teacher; 4) a representative from DCPS who is qualified to provide or supervise the provision of specially designed instruction to meet the needs of a child with a disability, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of resources of the public agency; 5) an individual who can interpret the evaluation results; 6) other individuals who have knowledge or special expertise regarding the child, including related services personnel where appropriate, and 7) the child, if age appropriate. 34 C.F.R. §300.321; 5 D.C.M.R. §3003.1. If the parent wants additional persons to attend the meeting, the parent should request the presence of those persons in writing.

pairment (including asthma, attention deficit disorder, diabetes and epilepsy), a special learning disability, deaf-blindness, or multiple disabilities. 34 C.F.R. §300.8. Children from age three to seven who are experiencing developmental delays may also be eligible for special education under the DC-recognized category of disability called “developmental delay.” 5 D.C.M.R. §3001. The criteria for each disability are described in some detail in both the federal and local regulations. See 34 C.F.R. §300.8; 5 D.C.M.R. §3001. The IDEA and DC local regulations extend coverage to children who are either residing in the District of Columbia or who are wards of the District from ages three to the semester in which the child turns twenty-two. 5 D.C.M.R. §§300.1; 300.2(b).

IV. Individualized Education Plan

If the child is determined to have a disability that makes him/her eligible for special education, the MDT must then proceed to develop the child's individual education plan (IEP). The IEP is a written document which describes the child's educational plan and services and is enforceable by law. All of the services which the child needs must be included as part of the IEP document in order for the school to be held accountable.

In the development of the IEP, DCPS is legally obligated to take steps to ensure that one or both of the parents of the child is present and afforded the opportunity to participate. 34 C.F.R. § 300.322. Furthermore, if the child is age fourteen or over (or younger, if appropriate), it is advisable for the child to participate as well.

The IEP document must include: (1) a statement of the child's present levels of educational performance; (2) a statement of annual goals, including short term instructional objectives; (3) a statement of the specific special education and related services to be provided to the child and the extent to which the child will be educated with non-disabled peers; (4) the projected dates for the services; and (5) objective criteria for determining, on an annual basis, whether the objectives are being achieved.

34 C.F.R. §300.320. For a child age fourteen or over, and younger, if appropriate, the IEP must include a description of the transition services which will be provided to assist the student in becoming an independent and functional adult. 34 C.F.R. §300.320(b). The IEP must be revised annually. 34 C.F.R. §300.324(b)(i); 5 D.C.M.R. §3008.

The legal sufficiency of an IEP is measured by two inter-related tests: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits.” *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982). The Court emphasized the primary importance of adhering to procedures calculated to promote informed parental participation in developing an education program because “adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” *Id.* at 205-206. The Court did not establish a specific standard for substantive content, except to hold that the IDEA does not require that the school develop a program designed to maximize the child's potential but only to enable the child to receive educational benefits. The Court suggested, however, that evidence of educational benefit would be whether the child is achieving passing marks and advancing from grade to grade. *Id.* at 207. Thus under the Rowley test, an IEP may be deficient either because the school failed to comply with the Act's procedures, thus impeding informed parental participation in the development of the IEP, or because the IEP is not substantively sufficient to enable the child to receive an educational benefit.

IV. Placement

Once the IEP is completed, the school is legally required to provide written notice of the proposed educational placement which can implement the IEP. As a general rule, placement decisions are

made at least annually; in addition, placement decisions must be based on the child's current IEP, and the proposed placement must be as close as possible to the child's home. 34 C.F.R. §300.552. The school must maintain a "continuum of alternative placements" capable of implementing the full range of possible educational programs, from part-time separate classes to twenty-four-hour residential facilities. 34 C.F.R. §300.551; 4 DCMR §3012. However, the school must also ensure that children with disabilities are educated to the "maximum extent appropriate" with their non-disabled peers. 34 CFR §§30.550 and 300.551. In the District of Columbia, the IEP will indicate the number of hours the child is in special education per week. Some students will be able to receive services in their regular neighborhood school, either as pull-out services or within the regular "inclusion" classroom. The majority of students receive special education programs provided within regular education settings. Some receive special education and related services for only a few hours per week, while others might be in special education for virtually all academic subjects and mainstreamed only for non-academic periods. Generally the MDT makes the placement decision for children who receive less than full-time services.

Some students require full-time special education and related services in a separate, special-education day school. Full-time schools may be public schools, such as the Mamie D. Lee School for students with mental retardation, or private schools, such as the Lab School for students with learning disabilities. In the District of Columbia, the Department of Human Services also operates some full-time educational facilities, such as the Rose School for elementary aged emotionally disturbed children. If a student is identified as needing full-time services, the MDT refers the case to the Central Placement Committee (CPC) for a placement proposal. The CPC is presently located at the main DCPS office. DCPS is required to place children in programs within the District of Columbia unless there is no suitable program available. Only then can DCPS consider schools located outside the District. 5 DCMR §3013.6.

The most intense level of service is residential treatment (34 C.F.R. §300.302; 5 DCMR §3014), which means that the student receives special education and related services within a twenty-four-hour, seven-day-a-week residential facility, most of which are located at a considerable distance from the District of Columbia. A student may be identified as needing residential treatment for educational reasons if the child cannot be educated in anything less than a comprehensive setting. Decisions regarding residential placements are made by the Multi-Agency Planning Team (MAPT) which is hosted by different city agencies on different days of the week. MAPT was established to consider alternatives to residential treatment and/or identify the appropriate residential program if necessary. The MAPT team includes representatives from CFSA, DCPS, Department of Mental Health, family members, the respondent, the GAL and educational advocate. The social worker is responsible for presenting the cases of committed wards who have been identified as needing residential placement to the MAPT team for a placement decision.

V. Due Process Hearings

If a parent disagrees with the result of any phase of the special education process - identification, evaluation, programming, or placement - the parent is entitled to an administrative due process hearing. 34 C.F.R. §§300.506 and 300.507; 5 DCMR §3029. Under IDEIA, when the educational advocate files a request for a due process hearing, DCPS is required to hold a "resolution session" within fifteen days. If the issue is not resolved through the resolution session or the session does not occur in a timely manner, the DCPS Student Hearing Office will then schedule an administrative due process hearing. The due process hearing is required to occur within forty-five (45) days of the resolution session. Both sides may put on witnesses to prove their case. Typically, DCPS will call school staff to testify. Educational advocates often rely on expert witnesses, as well as social workers and foster parents, to prove their

case. After conclusion of the hearing, the hearing officer has fifteen days to issue a written decision.

The hearing officer may order DCPS to fund a specific placement or provide services requested by the advocate. In addition, the hearing officer has the authority to order DCPS to retroactively fund a private placement made by the court or parent. In cases where placement is at issue, the advocate may refer the student to several private school programs in order to secure a placement. DCPS will typically offer a public placement, and educational experts may be necessary to determine whether the public program can meet the student's needs.

Compensatory education services may be awarded to make up for any damage caused to the student by DCPS's failure to provide appropriate services in a timely manner. Examples of compensatory services are one-on-one tutoring; summer programs; or additional hours of related services, such as speech/language, occupational therapy, and/or physical therapy.

A parent who prevails in these proceedings is entitled to attorney fees and costs at market rate. 34 C.F.R. §300.513; 5 DCMR §3032. Recent federal case law clearly states that the educational advocate must represent the parent in order to be awarded fees.¹⁰ If the advocate is also acting as the parent (or parent surrogate), DCPS is not required to make any award of attorney's fees. In addition, DCPS has imposed caps on the hourly

rates that educational attorneys will be reimbursed and on the total attorney fee payments for any one student. Because payment by DCPS can often take several months or more, some advocates prefer to seek payment at CCAN rates through the court voucher system.

A candid review of any neglect caseload should present numerous opportunities for special education advocacy. Attorneys who are interested in learning special education law and practice, particularly as it relates to neglected and delinquent children, may wish to attend one of the many special education training sessions offered by the Juvenile Law Clinic of the District of Columbia School of Law. However, even attorneys who do not want to develop special education as a practice area should ensure that the educational needs of their clients are being appropriately addressed. Attorneys needing special education representation for clients in neglect matters should request that the court appoint a special education advocate. The CCAN office maintains a list of attorneys qualified to accept new cases.

Advocates can be helpful at all stages of the special education process. The advocate may (1) have a student evaluated (either privately or thru DCPS), (2) ensure an IEP is completed in a timely manner and appropriate to the student's needs, (3) investigate whether a placement is appropriate, and (4) facilitate placement in or transition out of residential treatment center. ■

¹⁰ *Bowman v. District of Columbia*, 496 F. Supp. 2d 160 (D.D.C. 2007)

STANDBY GUARDIANSHIP

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STANDBY GUARDIANSHIP

In June 2002, the D.C. Council passed the Standby Guardianship Act of 2002, allowing chronically ill parents or legal custodians to make future care arrangements for their children. D.C. Code §16-4801 *et seq.* (2002). Standby Guardianship laws have been passed in at least twenty-two states, primarily as a response to the number of parents who are infected by HIV disease and want to make plans for their children, but do not want to transfer decision-making power before they are incapacitated.

Unlike custody actions, where legal custody is transferred to another person when the court issues the Custody Order, Standby Guardianship laws allow parents to name a trusted person to “standby” or “step into the shoes” of the parent when a triggering event such as incapacity or death occurs.

As with any other custody action, the standard for granting standby guardianship is best interest of child.

I. Designation – the first step in the process

A. A parent or legal guardian may designate a third party to assume legal custody of a child by executing a “Standby Guardian Designation.” The process is similar to writing a Will. The Designation must be signed by the parent and the nominated standby guardian and witnessed by two people. The Designation, once executed, need not be filed in court to be legally effective as the first step toward standby guardianship.

B. The designation should include:

- The full name, address, birth date and gender of the child.
- The full name, address and telephone number of the designator.
- If known, the name and address of the noncustodial parent.
- The full name, address and telephone number of the standby guardian and the standby guardian alternate, if one is designated.
- A statement that the standby guardianship

designation does not go into effect until a “triggering event” occurs (the designator’s debilitation, incapacity or death).

- A statement that the designation is not valid until signed, and dated by the designator or the designator’s proxy in the presence of two witnesses who are over 18 years of age and who are not the standby guardian or the alternate standby guardian.

C. After a triggering event has occurred, the standby guardian has 90 days to petition the court to be appointed permanent standby guardian of the child.

D. Even after a triggering event occurs, the parent designator will have concurrent authority over the child as his/her health permits.

E. The designator may revoke the designation at any time

II. Filing a Petition for Standby Guardianship

A. To complete the standby guardianship process, the designator or the designated

standby guardian must petition the court for standby guardianship.

1. By the designator – If a triggering event has not occurred, the designator must file the petition. **Note:** Your case may be more compelling if the designator is available to testify as to his/her “best interest” reasons for selecting a particular person as standby guardian.

2. By the standby guardian designee – If a triggering event has occurred, the standby guardian must petition the court for standby guardianship within 90 days of the triggering event to keep his/her authority under the designation from lapsing.

B. The petition should include:

- Name and address of the designator.
- Name, address, telephone number, and date of birth of the standby guardian and any alternate standby guardian.
- Statement that the standby guardian’s authority shall take effect upon the occurrence of triggering event, such as debilitation, incapacity or death.
- Statement that the designator suffers from a chronic illness, injury or disease from which he/she may not recover.
- Date of the triggering event (if it has occurred).
- Name and address of any other parent of the child, if known.
- Consent of the other parent, or statement why that parent is not assuming responsibility for the child.
- Statement as to any other custody order or pending litigation involving the child.
- Names and addresses of all persons who the child has lived with in the past five years.
- Statement as to why granting the petition is in the best interest of the child.

C. The following documents should be included with the petition:

- a copy of the designation.
- proof of the triggering event (e.g., copy of death certificate).
- the child’s birth certificate.
- proof of notice to the non-custodial parent
- affidavit of consent by the non-custodial

parent or reason why that person is not assuming responsibility for the child.

III. Notifying the Non-Custodial Parent(s)

According to the statute, non-custodial parents must be notified that a Standby Guardianship Petition has been filed in Superior Court within 10 days of filing. Service is made in accordance with SCR Dom. Rel. 4; however, notice rarely is provided within the 10-day period prescribed by statute. Notice shall be by summons, certified mail, or any other method provided for in SCR Dom. Rel. 4. If the parent’s address is unknown, reasonable efforts, such as are required in any other custody action, must be taken to find the parent and reported to the Court.

IV. Challenges to Standby Guardian Designation

Non-custodial parents may contest a standby guardianship designation and petition by initiating a child custody proceeding in D.C. Superior Court, or in any other court that could exercise jurisdiction. The non-custodial parent has 20 days after receipt of notice to request a child custody hearing.

V. Court Process for Standby Guardianship

The statute provides a rebuttable presumption that the standby guardian designate is capable of serving as standby guardian. Further, the statute provides that court approval of the standby guardian designate is in the best interest of the child (1) if the designator is the sole surviving parent, (2) the parental rights of any noncustodial parent have been terminated, or (3) all parties consent to the designation. The court may approve the designation without a hearing if the required conditions are met; however, some judges prefer to set the matter down for a hearing before issuing a final order. ■

MISCELLANEOUS ATTACHMENTS

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FAMILY COURT PRACTICE STANDARDS

Superior Court of the District of Columbia Child Abuse and Neglect Attorney Practice Standards

**Submitted to Rufus G. King, III, Chief Judge
Superior Court of the District of Columbia
February 2003**

By

**The Family Court Advisory Rules Committee
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District of Columbia Courts
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Acknowledgments

The Family Court Advisory Rules Committee (formerly known as the Family Division Advisory Rules Committee) was established in January 2000 by Eugene N. Hamilton, then Chief Judge of the Superior Court of the District of Columbia. One of the goals of the Committee, then chaired by Judge Kaye K. Christian, formerly Deputy Presiding Judge of the Family Division, was to develop standards of practice for attorneys appointed to represent children and parents in abuse and neglect cases. Following an internal review by the Chief Judge, the practice standards were published for comment.

This document, *Superior Court of the District of Columbia Abuse and Neglect Attorney Practice Standards*, would not have been possible without the dedication and hard work of the members of the Family Court Advisory Rules Committee who were chosen because they have a manifest interest in the practice of child abuse and neglect law and possess both the depth of experience and practical insight in this area of the law necessary to effect change.

Deep gratitude is also owed to Judge Christian and Judge Mitchell-Rankin, whose leadership launched the creation of standards and made their ultimate implementation possible, and to the committee members and the American Bar Association Center on Children and the Law who facilitated the work of the Committee.

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***Superior Court of the District of Columbia
Child Abuse and Neglect Attorney Practice Standards***

Executive Summary

Quality legal representation is essential to a high functioning court process. Attorneys practicing in the child abuse and neglect field must be well trained and educated to deliver high quality representation for all parties. These practice standards are intended to define the role of counsel in the child abuse and neglect system in the Superior Court of the District of Columbia and improve the level of representation for all parties in that system. The standards apply to parents' counsel, guardians ad litem and attorneys for children, and the Office of the Corporation Counsel.

Basic Obligations

The practice standards address the general authority and duties of child abuse and neglect attorneys. Under these standards, attorneys shall only accept an appointment or otherwise appear in child abuse and neglect proceedings if they are knowledgeable of substantive and procedural child abuse and neglect laws and have participated in the required training programs. The fundamental obligations are based on the DC Rules of Professional Conduct and the Superior Court Rules. They are elements that help define competent representation.

The standards also address the role of individual counsel:

- ❑ The guardian ad litem, who is appointed by the Court to represent the child in abuse and neglect proceedings. The role of the guardian ad litem is to protect a child's basic needs and interests. The guardian ad litem should always be mindful of the child's safety and well being and take all steps to promote speedy permanency for the child.
- ❑ Parent's counsel, who is appointed to provide legal representation to one of a child's parents. Since passage of the Adoption and Safe Families Act and the implementation of its shortened timeframes this job has become even more challenging and essential.
- ❑ Office of the Corporation Counsel, which represents the District of Columbia in child abuse and neglect proceedings and has the responsibility to assist the court in guaranteeing safety and speedy permanency for children and protecting due process rights for all parties to the action.

Responsibilities to the Client

Establishing and maintaining a trusting relationship with a client is the foundation of quality representation. These standards identify an attorney's responsibilities to his or her client, including:

- ❑ solid, honest communication;
- ❑ thorough investigation of all necessary and relevant information;
- ❑ attempts to settle the case or as many issues as possible, through formal or informal alternative dispute methods;
- ❑ adequate pre-trial preparation;
- ❑ attendance and participation in court conferences and hearings;
- ❑ post-hearing follow-up and review of any orders, including assisting clients with accessing services or navigating the system; and
- ❑ discussion with the client about his or her right to appeal and whether the appeal has merit.

Finally, the Family Court Panels Committee is developing procedures for evaluating attorneys appointed to represent children and parents. After the panels of attorneys have been established, in order to remain on a panel, attorneys must be in full compliance with these practice standards.

Superior Court of the District of Columbia Child Abuse and Neglect Attorney Practice Standards

Statement of Intent

D.C. Code §16-2304(b)(1) provides that children and parents involved in abuse and neglect cases in the Superior Court of the District of Columbia are entitled to representation at all critical stages of the proceedings. The District of Columbia Family Court Act of 2001, Pub. L. 107-114, provides that the Superior Court shall establish standards of practice for attorneys appointed as counsel in matters under the jurisdiction of the Family Court. The Court recognizes the legal and psychosocial complexity of child welfare matters and its oversight role with respect to attorneys appointed to represent children and parents in abuse and neglect cases. To accomplish the goals of the Family Court Act and to promote high quality representation for all parties in abuse and neglect proceedings, the Chief Judge issued Administrative Order No. 02-15, which requires the Family Court Panels Committee to establish panels of qualified attorneys to represent children and families in abuse and neglect cases. Also, the following Child Abuse and Neglect Attorney Practice Standards have been developed.

A. General Authority and Duties

A-1 Prerequisites for Appointments and Training – Counsel shall only accept an appointment or otherwise appear in child abuse and neglect proceedings if they are knowledgeable of substantive and procedural child abuse and neglect laws and have participated in the required training programs. Counsel must certify, in writing, that he or she has read and understands these standards, the District of Columbia Rules of Professional Conduct and the Superior Court Rules and Statutes governing Neglect Proceedings.

Prior to an initial appointment, all counsel must receive certification of training that includes classroom instruction as well as courtroom observation. Further, to be eligible to receive an appointment, counsel must obtain a Certificate of Discipline from the District of Columbia Bar Counsel. This certificate shall be presented to the CCAN Director.

Each year, all counsel on the CCAN eligibility list must attend 16 hours of continuing formal CCAN training on abuse and neglect-related topics to continue to represent parties in child abuse and neglect proceedings.

Similarly, an Assistant Corporation Counsel must participate in 16 hours of training per year, which can include formal CCAN programs or trainings organized by the Office of the Corporation Counsel. The Office of the Corporation Counsel will oversee the initial

training program for the Assistant Corporation Counsels.

Any training program must be approved by the CCAN Director or Office of the Corporation Counsel training supervisor in order for the attorney to receive credit. CCAN counsel must present a Certificate of Completion to the CCAN Director at or near the end of the calendar year.

Attorneys appearing pro bono in abuse and neglect matters must ensure that they receive the necessary training on child welfare issues to provide competent representation in these matters.

Appropriate training topics can include but not be limited to relevant legal topics as well as specific child welfare topics such as:

- federal laws, including the Adoption and Safe Families Act (ASFA), the Multi-Ethnic Placement Act (MEPA), the Indian Child Welfare Act (ICWA), the Child Abuse Prevention and Treatment Act (CAPTA), the Foster Care Independence Act of 1999, Social Security entitlements, disabilities law, and fiduciary law;
- DC neglect law;
- professional ethics;
- termination of parental rights law;
- evidence and trial procedure;
- legal permanency options;
- adoption subsidies;
- developmental psychology
- communicating with clients in developmentally appropriate language;
- medical issues and medical evidence in child abuse and neglect cases;
- negotiation strategies and techniques;
- appeals procedures;
- understanding mental illnesses and mental retardation;
- issues arising from substance abuse;
- the impact of domestic violence on children;
- cultural, ethnic and socioeconomic issues;
- available services and resources for families;
- immigration law issues that relate to child welfare;
- special education laws and resources.

Commentary -

See DC¹ 1.1 Competence

The practice of child abuse and neglect law is complex and multi-faceted. It

¹ District of Columbia Rules of Professional Conduct, referred to throughout as “DC”.

involves knowledge of traditional legal sources such as case law, statutes, evidence and trial practice, but is further complicated by the need to understand information generally not part of legal practice. In addition, the stakes for children and families involved in the child welfare and court systems are very high. Therefore, attorneys practicing in the field must be well trained and educated to deliver high quality representation for all parties.

Counsel seeking inclusion on the CCAN eligibility list shall receive training certification from the CCAN office. Counsel appearing pro bono shall receive certification from the legal services organization with which they are affiliated, or from their employer, that they are eligible to receive appointment in abuse and neglect matters. This certification shall be subject to review by the CCAN office.

As part of the training process, new attorneys are strongly encouraged to seek the advice and input of more experienced lawyers who have represented parties in abuse and neglect proceedings. Correspondingly, experienced attorneys are encouraged to provide mentoring to new attorneys, including assisting new attorneys in preparing cases, debriefing following court hearings, and answering questions as they arise. Experienced attorneys designated by the CCAN Director as “trainer attorneys” will receive credit toward their 16 hours of continuing training for the time they spend instructing new attorneys.

All counsel will be assisted in obtaining meaningful training opportunities by the CCAN office or by the legal services organization with which they are affiliated. Training seminars will be offered on issues impacting on child welfare practice, videotapes of the training will be made available, and other resource materials will be provided.

A-2 Basic Obligations – All counsel appearing before the Superior Court in an abuse or neglect case shall:

- be familiar with relevant federal and DC laws, regulations and policies affecting child welfare;
- prepare and file all pleadings and motions in a timely fashion;
- serve all filings and communications with the court on all parties;
 See Superior Court Neglect Rule – Service of Subpoenas
 Superior Court Neglect Rule – Service of Pleadings and Other Papers
- obtain copies of all pleadings and relevant notices filed by other parties;
- maintain a case file on each active case;
- thoroughly prepare for all hearings;
- provide the case file to successor attorneys;
- prepare or help prepare findings of fact and conclusions of law when requested;
- participate in negotiations, discovery, pretrial conferences, mediation sessions and hearings;
- counsel clients concerning matters related to their cases;

See DC 1.4 Communication

DC 2.1 Advisor

- assess client's needs for services and assist in obtaining those services;
- develop a case theory and strategy to follow at hearings and negotiations;
- cooperate and communicate civilly with other professionals and parties in a case.

See DC Bar Voluntary Standards for Civility in Professional Conduct,
Adopted by the DC Bar Board of Governors June 18, 1996; Amended March
11, 1997

Commentary –

See DC 1.1 Competence

DC 1.3 Diligence and Zeal

DC 1.16(d) Declining or Terminating Representation

DC 2.1 Advisor, Comment 4 Consultation with Other Professionals

These basic obligations are based on the DC Rules of Professional Conduct and the Superior Court Rules. They are elements that define “competent representation” and are not exhaustive. For instance, in most cases, all attorneys should work to reduce case delay because delays generally hinder progress in a case and are not beneficial to any of the parties. There may be times, as part of a case strategy, that delay is necessary, but this should be rare. Additionally, counsel should make an independent determination of what services are necessary to meet the client's needs and to advance the client's interests in the litigation. Counsel should consider any barriers to the client's use of available services including disabilities or transportation, language, cultural, or financial barriers and seek to overcome such barriers.

When counsel is filing a pleading or report with the court, it shall be filed in the neglect court clerk's office pursuant to the time set by the requisite Superior Court Rule. Counsel must send a courtesy copy of the pleading or report to the judge and serve all parties of record.

A-3 Financial Eligibility Determinations – Pursuant to District of Columbia Code § 16-2304 and Administrative Orders of the Superior Court, immediately upon appointment, counsel must ensure that clients are interviewed to determine their financial eligibility under the CCAN Program. If after investigation, the client is not available, the attorney must file an absent party form with the CCAN office. Once the party is available, the attorney has an obligation to ensure that the eligibility interview is held.

A-4 Case Management – Counsel shall comply with all statutory and court-imposed deadlines. Counsel should develop a timeline for each case that identifies the actions to be taken and their deadlines. Counsel should maintain a manageable caseload to adequately represent clients and avoid numerous scheduling conflicts.

Commentary –

An attorney must be aware of several time-sensitive events set forth in the Adoption and Safe Families Act (ASFA). For example, within 60 days of a child's removal from the home, the agency, in conjunction with the parents, must create a case plan setting forth the services to be delivered and tasks each party must complete. The court must hold a permanency hearing 12 months after the child enters foster care at which time the court will establish a permanency plan for the child. Finally, a termination of parental rights motion must be filed when the child has been in care for 15 of the last 22 months, unless certain exceptions apply.

The attorney must, therefore, know the case specific timeline prescribed by ASFA to manage the process for reaching the permanency goal. For example, in addition to the 12 and 15- month deadlines, the court must hold hearings every six months to consider reasonable efforts to finalize the permanency plan. The attorney must understand the implications of the timeline and understand whether any exceptions apply.

A-5 Role of Individual Counsel –

Guardian ad litem for the Child – A guardian ad litem is an attorney appointed by the Court to represent the child in abuse and neglect proceedings. The guardian ad litem is charged with representation of the child's best interests. A guardian ad litem fulfills a dual role, as neutral fact finder for the judge and as zealous advocate for the child's best interests. The guardian ad litem should also monitor all litigation concerning the child such as delinquency matters and any civil proceedings.

Commentary –

See D.C. Code § 16-2304(3)

In re LH, 634 A.2d 1230 (1993)

SS v. DM, 597 A.2d 871 (1991)

DC Legal Ethics Opinion 252

Independent Representation for the Abused and Neglected Child: The Guardian ad Litem, 13 Cal. W. L. Rev. 16, 33 (1976)

Special Issue: Ethical Issues in the Legal Representation of Children. *Fordham Law Review* 64, March 1996.

The role of the guardian ad litem is to advocate for the child's safety, well being and best interests. In serving this role, the guardian ad litem must fulfill the following functions:

- an investigator whose task it is to discover all the relevant facts
- an advocate whose task is to ensure all the relevant facts are before the court at all hearings

- counsel whose task is to ensure the court has all available options before it at all stages of the proceedings
- a guardian whose task is to ensure the child's interests are fully protected.

The guardian ad litem is responsible for ensuring the child's wishes are expressed to the court, even if these wishes differ from the guardian ad litem's recommendations.

The guardian ad litem has a duty to investigate and preserve tort claims pursuant to DC Legal Ethics Opinion 252.

The guardian ad litem should always be mindful of the child's safety and well being and ensure these issues are raised at every hearing. Further, the guardian ad litem should take all steps to promote speedy permanence for the child, which will generally mean: attempting to reduce case delay, ensuring the issue of reasonable efforts is raised at all hearings, and working with the agency responsible for the care of the child to identify and provide appropriate services to the family and find the child a permanent home. Counsel should visit all placements and conduct appropriate introductions and interviews at the placement.

Lawyers should approach decision making on behalf of their clients with extreme caution. In determining what is in the child's best interests, the guardian ad litem should use objective criteria. The lawyer should avoid relying on experiences from the lawyer's own childhood, stereotypical views of clients whose backgrounds differ from the lawyer's, or the lawyer's instinct.

The criteria for determining what is in the child's best interests should include, but not be limited to:

- interviews/observations and/or discussions based on the child's developmental stage with the child in an environment familiar to the child;
- a full and efficient investigation including interviews and consultation with the child's caretakers, relatives, therapists, teachers, doctors, social workers and other service providers to assess the child's circumstances;
- an inquiry into all available placement and visitation alternatives (including sibling).

To provide competent representation, the guardian ad litem should meet with the child in his or her environment. It is important for the guardian ad litem to recognize that children may not be comfortable talking to the guardian ad litem in his or her office. A child will often not trust new adults and may be more willing to confide in the guardian ad litem in a setting that is familiar. Further, it is important for the guardian ad litem to observe a child's home or foster home to be confident that the child's surroundings are safe, nurturing and appropriate. Even

preverbal children can provide valuable information about their needs through their behavior, including their interactions with their caretakers and other adults.

The guardian ad litem must ensure that any apparent and legitimate claims available to the child are explored and, when appropriate, retain or request that the court appoint counsel to institute administrative or court actions related to the claim.

Counsel, and especially the guardian ad litem, may find there are issues presented by the case that are beyond the original appointment. These issues could include child support, delinquency proceedings, domestic violence, SSI and other benefits, personal injury, immigration, special education, probate matters or mental health proceedings.

Parent's Counsel – When representing a parent in a child abuse and neglect proceeding, counsel shall seek the lawful objectives of the client and not substitute counsel's judgment or opinions in those decisions that are the responsibility of the client. Counsel must take all affirmative steps to ascertain the parent's position prior to all hearings, negotiations and dealings with the child welfare agency responsible for the case. Counsel should explain the nature of the overall proceeding and then obtain the client's views and position before advocating on behalf of the client. Counsel should, where appropriate, identify alternatives for the client's consideration. Counsel should explain to the client the risks, if any, in the client's position.

Commentary –

See DC 1.2 Scope of Representation

DC 1.3 Diligence and Zeal

DC 1.4 Communication

DC 1.6 Confidentiality of Information

DC 1.14 Client Under a Disability

DC 2.1 Advisor

Since the passage of the Adoption and Safe Families Act and the implementation of its shortened timeframes, the role of the parent's attorney has become even more challenging and essential. The stakes for parents are higher. The time they have to seek reunification with their children is shorter, and their responsibilities are greater. Therefore, the duty of their attorneys to counsel them about the expedited ASFA timelines and their parental obligations is vital.

The attorney must take all possible steps to locate the client and help the parent understand the gravity of the situation. Parent's counsel may need to employ an investigator to help locate clients. According to the D.C. Bar Counsel, if a judicial officer directs counsel to reveal information on the status of the client's whereabouts, as an officer of the court, counsel must respond to the Court's

inquiry and provide information based upon the attorneys instructions from his client or face the possibility of contempt. Counsel must be mindful of protecting the record when complying with the court's directive.

The attorney may also find him or herself taking on tasks that formerly belonged to others. For example, the attorney may be the best person to help the client obtain services that will increase the chances of reunification. Parent's counsel may also find that mediation and other alternative dispute methods are more helpful to the parent than over-litigating the case. Counsel must be open to these alternatives and always act in furtherance of the client's position.

Office of the Corporation Counsel – The Office of the Corporation Counsel represents the District of Columbia in child abuse and neglect proceedings. The Assistant Corporation Counsel appearing on the case shall present evidence necessary to sustain the government's burden, move for dismissal when appropriate, and ensure that the issues of reasonable efforts, safety and permanency are addressed at each hearing.

Commentary –

See In re J.J.Z., 630 A.2d 186 (1993)

DC 1.2 Scope of Representation

DC 1.3 Diligence and Zeal

DC 1.4 Communication

DC 1.13 Organization as Client

DC 2.1 Advisor

As the representative for the District of Columbia, the Assistant Corporation Counsel has the responsibility to assist the court in guaranteeing safety and speedy permanence for children and protecting due process rights for all parties to the action. The Assistant Corporation Counsel must file appropriate pleadings, present evidence on behalf of the government, and participate in all proceedings relevant to a case.

A-6 Conflict Situations – Counsel shall not represent two or more clients who are parties in the same child abuse and neglect proceeding. A guardian ad litem may represent more than one child unless there is a conflict.

Guardian ad litem – The guardian ad litem shall not represent two or more siblings when their interests are adverse and shall never represent siblings when it is alleged that one sibling has physically or sexually abused the other even when the siblings come to the court's attention at separate times. Further, counsel shall not serve as the guardian ad litem for a minor and her child. The attorney should always give careful consideration to potential conflicts and seek guidance as necessary.

Further, if the guardian ad litem's assessment of the child's best interests conflicts with the views of the child, the guardian ad litem shall notify the court and an attorney may be appointed to serve as the child's counsel. The new attorney for the child will represent the child's views while the guardian ad litem will notify the court of his or her assessment of the child's best interests. As soon as the court resolves the issue that caused the conflict, the attorney for the child shall request leave of court to withdraw.

Commentary –

See DC 1.7 Conflict of Interest

DC 1.9 Conflict of Interest: Former Client

AS & JS, 118 DWLR 2221, 2227 n. 15

S.S. v. D.M., 597 A.2d 870 (1991)

DC Legal Ethics Opinion 295

One of the guardian ad litem's most important roles is to counsel the child client and help the child understand the legal process and the guardian ad litem's assessment of the child's situation. If the client, after thorough and informed discussions with the guardian ad litem, continues to disagree with the guardian ad litem about the direction of the case, the guardian ad litem should inform the court of the conflict. This conflict does not include the situation in which the guardian ad litem and the child cannot work together and the child has a personality clash with the guardian ad litem and wants another representative: such a conflict does not warrant the appointment of an attorney for the child. Rather, the court should determine if a new guardian ad litem should be appointed.

Parent's Counsel – Counsel shall not represent more than one parent.

Commentary –

See DC 1.7 Conflict of Interest

DC 1.9 Conflict of Interest: Former Client

AS & JS, 118 DWLR 2221, 2227 n. 15

It is important to have separate counsel for each parent. Based on the Rules of Professional Conduct, one attorney should not represent multiple parties if a conflict is foreseeable. Often in abuse and neglect cases, a situation does not appear to present a conflict at the beginning of the case, but develops into a conflict between the parents as the case progresses. Therefore, a conflict is certainly foreseeable. If only one attorney were to represent multiple parents and such a conflict occurred, the attorney would have to be removed from the case and two new attorneys appointed. In addition to the ethical dilemma this situation presents, there are practical issues such as the waste of time, money and judicial resources that results.

Caretaker's Counsel – Counsel shall not represent multiple caretakers in the same case.

A-7 Continuity of Representation – It is expected that counsel of record shall continue to represent the client from the initial court proceeding through disposition, review hearings, permanency hearings and related TPR, adoption and guardianship proceedings until the case is closed.

Commentary –

See DC 1.16 Declining or Terminating Representation

The best representation for a client occurs when the counsel of record handles the case from the beginning through all stages until the case is closed. To effectuate this principle, counsel are encouraged to remain on a case until it closes.

B. Client Contact

B-1 Meeting with the Client – In all cases counsel must maintain sufficient contact with the client to establish and maintain an attorney-client relationship that will enable counsel to keep abreast of the client's interests and needs, and of the client's position in the case.

The attorney-client relationship and all the obligations that result from that relationship begins at the time of the initial appointment. Immediately upon receipt of notice of the assignment, counsel shall take appropriate steps to locate his or her client. Counsel shall inform the client of the assignment and meet with the client as soon as practicable. To the extent possible, the initial meeting should take place sufficiently prior to the first court hearing to permit counsel to prepare for such hearing. As soon as practicable, and to the extent possible given the client's age and abilities, counsel shall explain to the client the nature of the court proceedings and applicable law, the role of counsel, and the existence of and limits to privileges covering the client's communications with counsel, therapists, social workers and other relevant individuals. Counsel shall also determine the client's interests, goals and position in the proceeding.

Counsel shall remain in communication with the client during the course of the case and especially before court hearings or important planning meetings and when emergencies or changes in the case arise to discuss, to the extent possible given the client's age and abilities, the progress of the case, trial strategy and preparation, negotiation and settlement strategies, and post-trial goals. Counsel shall inform the client of all court hearings and inform the client of his or her right and/or obligation to attend the hearings. Counsel should respond to telephone calls and other types of contact from his or her clients promptly.

Guardian ad litem – Regardless of the child's age, counsel should observe and/or talk with the child regularly, but at least every three months unless the court directs otherwise. It is important for counsel to see the child in the child's own environment. When talking to the child about the case, counsel should be mindful of the child's

emotional well being and developmental stage. Counsel may not need to repeat interviews that have previously been conducted by caseworkers, law enforcement, therapist or medical experts, but rather should learn about the child and the child's wishes concerning the future.

Parent's Counsel – Counsel must meet and communicate with the parent regularly. Prior to each court session counsel must make efforts to communicate with the client and be prepared to respond to the Court's inquiry regarding contacts between the attorney and the client during the hearing. If the client is involuntarily committed or incarcerated and wishes to attend a hearing, counsel shall make all necessary arrangements for the client's participation in the hearing.

Office of the Corporation Counsel – In representing the District of Columbia and children's best interests, the Assistant Corporation Counsel is available for consultation with caseworkers, police, witnesses and agency counsel to prepare for hearings, file pleadings, and develop a responsive, constructive relationship.

Commentary –

See DC 1.2 Scope of Representation

DC 1.3 Diligence and Zeal

DC 1.4 Communication

DC 1.14 Client Under a Disability

DC 2.1 Advisor

In the Matter of Michael S. Lieber, 442 A.2d 153 (D.C. App. 1982)

Establishing and maintaining a trusting relationship with a client is the foundation of representation. For this reason, it is essential that the attorney be in regular contact with a client. A trusting relationship develops over time and is based on solid, honest communication. No matter whom the attorney represents in the child welfare system, communication is necessary for high quality representation. During a proceeding the courts inquiry may include requests for information regarding the contacts made or attempted between an attorney and his or her client. However, the Court may not inquire about the content of the contact.

The lawyer has an obligation to explain clearly, precisely, and in terms the client can understand the meaning, implications and consequences of legal proceedings. A client may not understand the legal terminology and, for a variety of reasons, may choose a particular course of action without fully appreciating the implications.

With a child the potential for misunderstanding may be even greater. Therefore, the guardian ad litem has additional obligations based on the child's age, level of education, and language skills. There is also the possibility that, because of a particular child's developmental limitations, counsel may not completely understand the child's responses. Therefore, the guardian ad litem must learn how

to ask developmentally appropriate questions and how to interpret the child's responses. The guardian ad litem must be especially careful when interviewing children so as not to unduly influence the child's statements. The guardian ad litem shall work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.

At the initial stage of the case, the guardian ad litem should try to minimize the number of interviews a child has by speaking with other professionals or reviewing reports regarding the alleged abuse or neglect. The guardian ad litem should evaluate the impact of the child's participation in a criminal proceeding and take the necessary steps to safeguard the child's best interests.

B-2 Contact with Other Parties – Counsel shall not contact or interview other parties without permission from the party's attorney. This includes discussions with the child without permission from the guardian ad litem. The guardian ad litem may contact represented parties for the limited purpose of scheduling visits with the child. Counsel may not circumvent the Rules of Professional Conduct concerning communication with a represented party by asking a caseworker or other third party to ask the parents for information. *See* Legal Ethics Opinion 295.

Counsel may communicate with the caseworker unless, in exceptional cases, directed otherwise by the Assistant Corporation Counsel or caseworker's counsel.

In dealing with a person who is not represented by counsel, counsel shall not state or imply that he or she is disinterested, and when the unrepresented person misunderstands counsel's role, the lawyer shall make reasonable efforts to correct the misunderstanding.

Commentary –

See DC 4.1 Truthfulness in Statements to Others

DC 4.2 Communication Between Lawyer and Opposing Party

DC 4.3 Dealing with Unrepresented Person

DC 4.4 Respect for Rights of Third Persons

While child abuse and neglect proceedings may at times appear informal, it is important that all counsel fully respect the attorney-client relationship.

B-3 Investigation – Counsel should conduct a thorough, continuing and independent review and investigation of the case, including obtaining information, research and discovery to prepare the case for trial or post-adjudicatory proceedings. The investigation could include but is not limited to:

- Interviewing clients and individuals the client appropriately believes are potential witnesses;
- Identifying and interviewing potential witnesses such as school personnel, neighbors, relatives, foster parents, etc.;

- Talking with the client and the caseworker about necessary services for the client;
- Assisting the client in obtaining the needed services;
- Reviewing client's records including educational, psychological, psychiatric, medical, substance abuse treatment, law enforcement, and court files;
- Conferring with other counsel on the case about settlements or interviews with the other parties;
- Obtaining necessary authorizations for releases of information;
- Reviewing court files and other records concerning the child;
- Reviewing all relevant evidence, which may include photographs, tapes, etc.;
- Retaining the service of a private investigator or other experts when appropriate.

Commentary –

See Superior Court Neglect Rule – Discovery
DC 1.1 Competence

Conducting a thorough investigation is an essential aspect of competent representation because it is through this investigation that the attorney may learn necessary and relevant information about the case and preserve the client's rights.

C. Pre-trial Actions

C-1 Participation in Case Plan and Requests for Services – Counsel should attend case plan meetings. If there is a disagreement about the provision of services, counsel should make a formal request to the court or otherwise preserve the client's interests.

Office of the Corporation Counsel – The Office of the Corporation Counsel shall make efforts to assign an Assistant Corporation Counsel at CFSA's request to be present at case plan meetings.

Commentary –

A case plan meeting must occur within 60 days of the child's removal and the parents must be included in the plan. During these meetings, important decisions are made concerning services, permanency goals and tasks for each party to complete. It is important for counsel to monitor the meetings and request services that will, in the attorney's estimation, assist the client in reaching desired outcomes. A date for the case plan meeting should be established at the initial hearing. If it is not, counsel should request a date.

C-2 Filing Pleadings – When appropriate, counsel must file motions, requests for discovery, and responses and answers to pleadings filed by other parties. These pleadings must be thorough, accurate and timely. They must be served on all parties pursuant to Superior Court Rules.

C-3 Negotiating Settlements – Counsel should participate in settlement negotiations to seek the best result possible for the client consistent with the client's interests and directions to counsel. Counsel should consider using available settlement resources to narrow contested issues or reach global resolution. There are certain issues, however, that cannot be compromised, e.g., the child's health and safety. Prior to entering into any negotiations, counsel shall have sufficient knowledge of the strengths and weaknesses of the client's case, or of the issue under negotiation, to enable counsel to advise the client of the risks and benefits of settlement.

However, it is important for the attorney to keep the client's position in mind while negotiating. The attorney should use alternative dispute resolution resources when appropriate. Counsel shall never make a decision without consulting with his or her client.

Commentary –

See DC 1.2 Scope of Representation

Negotiated settlements often provide clients with a greater sense of ownership and empowerment because of their participation in the process. Direct participation in alternative dispute resolution leads to a higher degree of compliance with a plan and generally reduces delay, which can have a negative effect on the child and family. Furthermore, contested litigated actions are detrimental to the development of positive,

trusting relationships between parents, children, social workers and others involved in the case.

While all issues may not be resolved through an alternative dispute program, in the interest of reaching positive results for all parties, counsel should attempt to settle the case or as many issues as possible, through formal or informal alternative dispute methods.

C-4 Mediation – Counsel shall participate in mediation sessions in good faith. Good faith implies the obligation of full preparation prior to the mediation session, including appropriate consultation with clients and other parties, performance of site visits, investigation, research, and preparation of all required reports.

C-5 Evidence and Preparation for Hearings – Counsel shall prepare as early as possible for each hearing. Counsel should develop a witness list well in advance of a hearing. Counsel should subpoena witnesses and obtain records in a timely manner. Counsel should set aside adequate time to prepare their witnesses and exhibits before the

hearing. Counsel must follow the Superior Court Rules of Civil Procedure in preparing all cases.

Commentary –

See Superior Court Neglect Rules:

- Service of Process
- Service of Pleadings and Other Papers
- Petition
- Discovery
- Mental and Physical Examinations
- Motions

Preparation is the key to successfully resolving a case, either in negotiation or trial. By spending time preparing the case, counsel will generally save time later and will certainly provide a higher level of representation for the client. At a minimum, adequate preparation requires communicating with the client in advance of the hearing, attempting to resolve issues prior to the hearing, preparing witnesses in advance of the hearing, preparing exhibits and conducting necessary legal research on relevant topics when appropriate.

Counsel should present a written plan and/or position on behalf of the client as well as respond to inaccurate or unfavorable information presented about the client. Further, being familiar with and following the relevant Evidentiary and Procedural Rules governing proceedings before the Family Court, Neglect Branch in the District of Columbia Superior Court is vital.

D. Hearings

D-1 Court Appearances – Counsel must attend and be prepared for all hearings and participate in all telephone or other conferences with the court. If counsel has a conflict, he or she has an obligation to call the court's conflict line and notify the courtroom clerk and all other counsel. Counsel should maintain a manageable caseload to adequately represent clients and avoid numerous scheduling conflicts.

D-2 Client and Witness Testimony – Counsel should explain to the client and the witnesses in clear, developmentally appropriate language what is expected to happen before, during and after each hearing. Counsel should prepare clients and witnesses for direct and cross-examination.

D-3 Child as Witness – **In determining whether to call a child as a witness, counsel should consider the child's competency to testify and the need for the testimony.**

If counsel decides to call a child as a witness, counsel must contact the child's legal

representative (B-2) and may not have discussions with the child without permission from the guardian ad litem. If the guardian ad litem objects to discussion with the child, counsel must file the appropriate motions for relief.

If the child is to serve as a witness, the GAL shall ensure that the child is prepared to testify and understands the process of testifying in court.

Counsel should consider whether the child should be present at the hearings even if he or she is not testifying because the proceeding concerns the child's life and the child's input must be considered. In the event that the child does not testify, the guardian ad litem should present the child's position to the court and incorporate the child's position in the court record.

Commentary –

See *Maryland v. Craig*, 497 U.S. 836 (1990)

Hicks-Bey v. United States, 649 A.2d 569 (DC 1994)

Whitcomb, Debra. *When the Victim is a Child*, 2d ed. Washington DC: US Department of Justice, March 1992.

Testifying in court can be difficult for any witness, but may be even more so for a child. Counsel, even those representing parents, should be mindful of the negative impact testifying could have on the child and consider ways to lessen potential trauma to the child such as: taking the child to see the courtroom ahead of time, having the child testify in chambers, phrasing questions in ways the child can understand, keeping argumentative questions to a minimum, requesting support persons are present, using closed-circuit television, conducting trials at multidisciplinary centers or using special one-way mirrors during the child's testimony.

When considering whether to have a child appear in court when he or she is not testifying, thought should be given to the child's age, level of understanding of the proceedings, the child's desire to attend, the child's educational needs, activities and regular schedule, and whether the child would be traumatized by the experience. Some children benefit from being present in court and hearing directly from the judge and other parties about issues fundamental to their lives. Therefore, the guardian ad litem must carefully weigh the potential value to the child against any possible detrimental effects.

D-4 Motions and Objections – Counsel should make appropriate motions and evidentiary objections during hearings to advance the client's position. Counsel should file appropriate motions with memoranda of points and authorities and proposed orders in support of the client's position. Counsel must preserve legal issues for appeal.

Commentary –

See Superior Court Neglect Rule – Motions

D-5 Presentation of Evidence – When necessary to advance the client’s position, counsel must present and cross-examine witnesses and prepare and present exhibits.

Office of Corporation Counsel – It shall be the obligation of Corporation Counsel to present evidence in support of all petitions in the Superior Court of the District of Columbia.

Commentary –

See District of Columbia Code § 16-2316.

There may be times when the guardian ad litem’s position is the same as the government’s or a parent’s position. The guardian ad litem should communicate in advance with the Assistant Corporation Counsel or parents’ attorneys and coordinate the presentation of evidence, rather than duplicating efforts. However, the guardian ad litem should be prepared to fully participate in the hearing.

D-6 Conclusion of Hearing – Counsel may make a closing argument and when requested provide proposed findings of fact and conclusions of law. Counsel should take necessary actions to ensure a written order is entered and provided to the client.

Commentary –

See Superior Court Neglect Rule – Fact finding hearing

Superior Court Neglect Rule – Stipulations

Superior Court Neglect Rule – Dismissal

E. Post-Hearing

E-1 Reviewing Order with Client – The attorney and client shall review any written order to ensure it reflects the court’s oral order and the client understands what is required. If the client objects to the order, counsel should consider filing a motion to reconsider and/or pursuing an appeal if so directed by the client.

Commentary –

It is important to review the order with the client soon after the order is entered. If the client has tasks to perform as a result of the order, the client needs to understand them and begin taking action immediately. In reviewing the order, the attorney should remind the client of the ASFA timelines and possible implications of compliance or non-compliance with the court order. If the client wants to pursue an appeal, the attorney must take action within the time allowed by District of Columbia statutes and Superior Court Rules.

E-2 Implementation of the Order – Counsel should monitor the client’s and agency’s efforts to implement the order and answer any questions the client may have about his or

her obligations under the order. Counsel should be available to assist the client in obtaining services or navigating the system.

Commentary –

See Superior Court Neglect Rule – Disposition

Superior Court Neglect Rule – Review

Counsel's role since ASFA's passage has expanded. Attorneys may find themselves helping clients obtain such services as counseling, housing or substance abuse treatment. While this is not the traditional role of the attorney, it may be the best way to help the client attain his or her goals.

The guardian ad litem must ensure that any apparent and legitimate claims available to the child are explored and, where appropriate, retain or request that the court appoint counsel to institute administrative or court actions related to the claim.

Counsel, and especially the guardian ad litem, may find there are issues presented by the case that are beyond the original appointment. These issues could include child support, delinquency proceedings, domestic violence, SSI and other benefits, personal injury, immigration, special education, probate matters or mental health proceedings.

F. Appeal

F-1 Decision to Appeal – Counsel shall consider and discuss with the client the client's right to appeal and whether the appeal has merit. When discussing the possibility of an appeal, counsel should explain both positive and negative effects. Counsel should discuss with the client the possibility of expediting the appeal. Counsel should also discuss whether he or she will represent the client in the appeal or whether another attorney will be appointed.

If the client decides to appeal, trial counsel must file any necessary post-hearing motions and the notice to appeal, and he or she must order the transcript. If trial counsel does not serve as appellate counsel, he or she must transmit all documents relevant to the appeal to appellate counsel.

Trial counsel must protect his or her client's interests by responding in a thorough and timely manner to any post trial motions, notice of appeal and order for transcript filed by any adverse party. This obligation remains in effect until appellate counsel has been appointed for his or her client.

Commentary –

See DC 3.1 Meritorious Claims and Contentions

DC 1.16 Declining or Terminating Representation

District of Columbia Code § 16-2328; 16-2329

Superior Court Neglect Rule – Reconsideration and interlocutory appeal of shelter care determination

F-2 While the Appeal is Pending – Trial counsel, if appointed to handle the appeal, must carefully review his or her obligations as defined by the Rules of the District of Columbia Court of Appeals.

F-3 Concluding Appeals – Trial counsel must communicate the result of an appeal and its implications to the client in a developmentally appropriate manner. If, as a result of the appeal, the client must take action in the case, counsel should instruct the client to do so. Counsel must file any necessary motions with the trial court that result from the appeal. If trial counsel did not handle the appeal, he or she must keep apprised of the matter and monitor whether necessary motions are filed with the trial court.

G. Effective Date

G-1 Effective immediately – These practice standards shall take effect immediately, except that attorneys already engaged in the practice of abuse and neglect law before the District of Columbia Family Court may satisfy the certification requirements of subsection A–1 by June 1, 2003, and need not meet the training requirements applicable prior to an initial appointment. For the balance of 2003, attorneys already in practice may fulfill the annual training requirement by attending 12 hours of continuing, formal CCAN training.

G-2 After 2003 – After calendar year 2003, all attorneys practicing abuse and neglect law before the District of Columbia Family Court must fulfill all requirements of these Practice Standards and the requirements for membership in one or more of the practice panels to be established in the near future.

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VI. Internet Resources

American Bar Association Center on Children and the Law

<http://www.abanet.org/child>

Association of Family and Conciliation Courts

<http://www.afccnet.org>

Child Welfare League of America

<http://www.cwla.org>

Children's Defense Fund

<http://www.childrensdefense.org>

National Council of Juvenile and Family Court Judges

<http://www.ncjfcj.unr.edu/homepage>

National Court Appointed Special Advocate (CASA) Association

<http://www.nationalcasa.org>

Office of Juvenile Justice and Delinquency Prevention

<http://www.ojjdp.ncjrs.org>

U.S. Department of Health and Human Services

<http://www.acf.dhhs.gov>

MAYOR'S SERVICES LIAISON OFFICE

PART I: Overview

The Mayor's Services Liaison Office was established pursuant to the District of Columbia Family Court Act of 2001, and implemented pursuant to the MOU between the District of Columbia and the D.C. Superior Court. The mission of the Mayor's Services Liaison Office is to promote safe and permanent homes for children by working collaboratively with stakeholders, including the Family Treatment Court, to develop readily accessible services that are based on a continuum of care that is culturally sensitive, family-focused and strength-based.

The objectives of the Mayor's Services Liaison Office are to:

1. Support social workers, case workers, attorneys, family workers, and judges in identifying and accessing client-appropriate information and services across District agencies and in the community for children and families involved in Family Court proceedings;
2. Provide information and referrals to families and individuals;
3. Facilitate coordination in the delivery of services among multiple agencies; and
4. Provide information to the Family Court on the availability and provision of services and resources of services and resources across District agencies.

The Mayor's Services Liaison Office serves children, youth and families who are involved in Family court proceedings. The Mayor's Services Liaison Office is supported by twelve District of Columbia government agency liaisons who are familiar with the types of services and resources available through their agencies and can access their respective agencies' information systems and resources. The agency liaisons respond to inquiries and requests for information concerning services and resources, and consult with the assigned social worker(s) or case worker(s) in an effort to access available services for the child and/or family. Each liaison also is able to provide information to the court about whether a family or child is known to its system, and what services are currently being provided to the family or child. The MSLO serves child neglect, child abuse, and juvenile cases.

The following District of Columbia government agencies physically locate staff members in the Mayor's Services Liaison Office (located in the Carl H. Moultrie Courthouse) during specific, pre-assigned days of the week:

- * Child and Family Services Agency
- * Department of Mental Health
- * District of Columbia Housing Authority
- * District of Columbia Public Schools
- * Department of Youth Rehabilitation Services
- * Department of Health: Addiction Prevention and Recovery Administration

The following District of Columbia government agencies do not physically locate staff at the MSLO. However, they do have designated MSLO liaisons who respond to requests for services and requests for information:

- * Income Maintenance Administration
- * Metropolitan Police Department /Youth and Preventive Services Division
- * Department of Health and Human Services: Strong Families Division
- * Department of Health: Maternal and Family Health and Youth Prevention Services Division
- * Department of Employment Services

Part II: Mayor's Services Liaison Office: Referral Process

The MSLO serves child neglect, child abuse, and juvenile cases. Cases come into the MSLO from different sources. Requests for services or information can be made by a family or through a referral from a court-appointed guardian *ad litem*, social worker, family worker, attorney, judge, and/or probation officer. The goal of the interagency collaboration within MSLO is to create a seamless system of care for accessing client information, appropriate services, and resources supporting families and children.

The type of cases that are court-ordered to the Mayor's Services Liaison Office for services include housing, such as transfers, inspections, emergency housing; mental health evaluations and assessments; individual therapy; family therapy; substance abuse treatment; school placements; school IEP's; special education issues; DCPS Due process; DCPS testing; general education; TANF assistance; medical assistance; financial assistance; furniture assistance; food; employment and literacy information. The MSLO effectively links families and children to a variety of services. Chief among them was drug treatment for parents/guardians and youth. Other service linkages and resources included housing, mental health services, and educational services.

The MSLO provides several resources to the women in the Family Treatment Court program, such as housing assistance, eviction prevention, assistance with the Housing Voucher Client Placement program (DCHA), TANF assistance, and medical assistance (IMA).

In those cases where a service is requested, the MSLO within 24 to 48 hours ensures that the request is in the hands of the appropriate agency liaison. The agency liaison immediately meets with the family and provides the services and the resources necessary to resolve the issue(s).

Part III: Summary of Key Statistics

2007: The Mayor's Services Liaison Office processed a total of 1,595 requests. 510 were requests for information, 237 were court-ordered, and 848 were court-involved.

2008 January through May: The Mayor's Services Liaison Office processed a total of 1,800 requests. 700 were requests for information, 400 were court-ordered, and 900 were court involved.

Part IV: Contact Information

Ora Graham, Director
Mayor's Services Liaison Office
Room JM 185
500 Indiana Avenue, NW
Washington, DC 20001
Telephone: 202-879-1910
Email: ora.graham@dc.gov

CASA FOR CHILDREN OF DC

Restoring hope to abused and neglected children

Founded in 2002 by a former foster child and DC community members, CASA for Children of DC (CASA of DC) is a certified 501 (c) (3) affiliate of the National CASA Association. CASA of DC is committed to supporting the thousands of abused and neglected children who come through the DC court each year. Our volunteers advocate for these children, helping them achieve better educational outcomes, secure the vital services they need, and find safe, permanent, loving homes. CASA of DC achieves these goals by recruiting, screening, training, and supervising volunteers from the metropolitan area to serve as powerful voices for these children. Through our volunteers, CASA of DC promotes the growth of strong children by restoring the hope that leads to healing and a successful transition to adulthood.

What is a Court Appointed Special Advocate?

Upon completing 30 hours of rigorous training, a volunteer is sworn in as court appointed special advocate (CASA) and assigned to a child. CASAs typically remain involved in their case from the time the judge makes the appointment until the case is closed. The CASA assesses the youth's living environment, academic needs and his or her physical and mental health to make sure necessary services are in place. Based on this comprehensive assessment, the CASA develops a plan to ensure all of the child's needs are fully met and in compliance with court orders. CASAs also work to ensure coordination among the various agencies and organizations providing services to youth.

CASA Volunteers Improve Outcomes

CASAs can have a profound impact on a child's life. Studies show that the children who have a CASA at their side are more likely to have:

Permanent Homes



They are substantially less likely to linger in long-term foster care.

Stability

They are highly unlikely to return to the system.

Support

Children and parents receive more services.

Success in School

They are more likely to complete all their courses and less likely to have conduct problems.

Positive Self Esteem

The advocacy and support gives

children a greater sense of control over their own lives.



Programs

CASA of DC helps restore hope and healing for children and families through four major programs.

Family Drug Treatment Court

In partnership with the court, CASAs work with children and their mothers who have been charged with neglect, often due to treatable substance abuse or mental health problems. CASA volunteers provide the Family Treatment Court Judge with an unbiased perspective on the families of foster children, with a focus on their level of functionality and continuing service needs.

Dual-Jacket Initiative

In a dual-jacket case, CASAs advocate on behalf of a foster youth under the supervision of the child welfare system because of abuse or neglect, who has subsequently been arrested for a crime and consequently placed in the juvenile justice system. CASA volunteers enhance coordination among agencies, organizations and individuals providing services to these youths, and their recommendations are presented to the court for adjudication.

Preparing Youth for Adulthood Initiative

A collaborative effort with the DC Family Court and DC Child Family Services Agency, this program was established for foster youths about to "age out" of the foster care system. CASA volunteers help them prepare for independence and enhance coordination among agencies and organizations providing services to these young adults.

Gay, Lesbian, Bisexual and Transgender Youth Initiative

Gay, lesbian, bisexual and transgender foster youth in the child welfare system greatly benefit from careful pairing with a caring and supportive CASA volunteer. This program helps foster youths navigate the court system while building a positive and healthy identity. Volunteers provide advocacy, support, information, resources, guidance and positive role-modeling.

Ordinary People Help CASA Restore Hope to Children

Become a CASA volunteer and contribute:

Commitment

When you take on a case, you take responsibility for a child's future. Many cases settle in less than a year while others last longer. The amount of time you spend on a case will vary depending on the stage of the proceedings.

Objectivity

Your role as a CASA volunteer is to represent the best interests of the child. You must be able to talk to everyone involved in a case and remain objective in your judgments and recommendations.

Communication Skills

A child's future depends on your ability to communicate well. As a CASA volunteer, you'll need to be able to talk to a wide variety of people, from healthcare professionals to school officials to parents. You'll need to be able to present written reports to the court and to speak in the courtroom on behalf of the child.

You can learn more about becoming a CASA volunteer, or make a tax deductible donation by visiting www.casadc.org or contacting the CASA of DC office at (202) 887-0007.

CASA for Children of Children of DC
919 18th Street, NW
Suite 510
Washington, DC 20006

VOLUNTEERS FOR ABUSED AND NEGLECTED CHILDREN, INC.

MISSION: To recruit, train, and direct community volunteers appointed by a Family Court judge as Court Appointed Special Advocates to represent abused and neglected children in the Family Court System; provide information and recommendations to the judge in the best interests of children; help give them a chance to grow up in safe, permanent homes.

Credentials: Washington, DC corporation, founded 1991; IRS approved 501(c)(3); Program of the Family Court, Superior Court of the District of Columbia; operating under Program Act 10-228 of the D.C. City Council; and Approved as a participant in the Combined Federal Campaign of the National Capital Area.

Cooperating with: D.C. Superior Court Counsel on Child Abuse and Neglect and D.C. Child and Family Services Agency & other Providers

Community volunteers are: Residents of the Greater Washington Area, average age 37, employed in business, government, education and professions, and some retired; 93% have college and specialist degrees; 85% are African American; and 15% are Caucasian, Hispanic and Asian.

Volunteer Activities and Services:

Maintain regular visitation schedule (personal interaction,) not less than twice monthly;
 Monitor delivery of services per court orders and case plans;
 Maintain liaison with the team serving the best interests of the child(ren);
 Participate/make recommendations at Administrative Reviews relating to case plans and goals affecting child(ren);
 Keep abreast of child(ren)'s health needs/services according to case/court plans and professional evaluations;
 Identify/recommend referrals and resources available to meet child(ren)/family needs, including gaps in services;
 As appropriate, provide positive learning experiences for assigned child(ren);
 Represent best interests of children in court;
 Monitor schooling and make appropriate recommendations;
 Assist in facilitating permanency through legal custody, guardianship, adoption, Preparation for Independent Living, and other ways as requested by the court; and
 Demonstrate care, concern and constancy in their involvement with child(ren) especially with respect to permanency placement and families.
 Prepare reports/recommendations to the Family Court; attend hearings.

Contact Information:

Volunteers for Abused and Neglected Children, Inc.
 1705 DeSales Street, NW, Suite 300
 Washington, DC 20036
 Phone 202-328-2191; website: www.voladv.org

HEALTHY FAMILIES/THRIVING COMMUNITIES COLLABORATIVES

The Healthy Families/Thriving Communities Collaboratives (HFTCC) began in 1996 through a partnership with the District of Columbia's Child and Family Services Agency (CFSA). CFSA was interested in developing a new model by which the agency would partner with a network of nonprofit organizations, health providers, schools, the faith community and city residents to serve at-risk families in their respective neighborhoods.

In 1997, the HFTCC Council was established to serve as a policy making entity and to coordinate issues relating to the Collaboratives such as resource development, advocacy, training and quality assurance.

The vision of the Collaboratives is to develop and sustain a seamless network of community partners throughout the District of Columbia that work to build strong families and supportive communities in which children, youth and adults can safely and productively reside and thrive. This vision is supported by five main principles that guide the work of the Collaboratives:

Commitment to children: We are committed to the safety of children, their right to be free from abuse and their right to achieve their full potential as members of our community.

Respect for families: We believe that families are innately resilient and possess strengths which provide the foundation for change.

Reliance on community: It is our goal to involve community residents in the design, development and oversight of services to families.

High quality, flexible and responsive services: We are committed to high quality services that produce positive outcomes.

Accountability: We are committed to defining the results expected from our services and to being accountable for those outcomes.

Collaborative Profiles

There are currently seven Collaboratives operating in all quadrants of the District of Columbia in 22 offices with over 150 staff. Each Collaborative is an independent 501c3 led by individual community-based boards of directors. Since their formation the Collaboratives have established a network of over 400 organizations and community leaders working together to create healthier and stronger families and communities. In FY 2007, the Collaboratives provided family preservation case management services to 2,195 families with approximately 5,000 children who were either in, or at risk of entering the child welfare system. Additionally, 6,288 families with approximately 15,000 children were served through information and referral.

Although each Collaborative has unique characteristics that reflect the community in which it serves, there are a number of core services and programs provided by all Collaboratives. They include: family stabilization, community case services, community capacity building, parenting support, youth aftercare, housing support, Fatherhood Education, Empowerment, and Development Program (FEED), and information and referral. Other services/programs that are unique to specific Collaboratives include:

Columbia Heights/Shaw Family Support Collaborative – (CHSFC) serves primarily Ward 1 residents.

Services/programs include: Truancy Diversion Program, Gang Intervention Program, Family Group Decision Making training and facilitation, Community Beautification Program

East River Family Strengthening Collaborative – (ERFSC) serves Ward 7 residents. Services/programs include:

Second Responder Program, Financial Literacy Program, Successful Family (economic stability initiative)

Edgewood/Brookland Family Support Collaborative – (EBFSC) serves primarily Ward 5 residents. Services/programs include: Truancy Diversion Program, school-based services, support groups, Family Group Decision Making facilitation

Far Southeast Family Strengthening Collaborative – (FSFSC) serves primarily Ward 8 residents. Services/Programs include: Second Responder, family support centers, Systems of Care Program (mental health)

Georgia Avenue/Rock Creek East Family Support Collaborative – (GARCEC) serves Ward 4 residents.

Services/programs include: Truancy Diversion Program, Systems of Care Program (mental health services), Parent Empowerment Program (in schools, partnerships and GARCEC sites)

North Capitol Collaborative, Inc. – (NCCI) serves sections of Wards 1,2,5,6. Services/programs include Youth Truancy Diversion Program, Mentoring Program

South Washington/West of the River Family Strengthening Collaborative – (SWWR) serves primarily Ward 6 residents. Services/Programs include Youth Truancy Diversion Program

Healthy Families Thriving Communities Collaboratives Contact Information

❖ **Columbia Heights/Shaw Family
Support Collaborative** ❖

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❖ **East River Family Strengthening
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❖ **Edgewood/Brookland Family Support
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❖ **Far South East Family Strengthening
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❖ **Georgia Avenue/Rock Creek East
Family Strengthening Collaborative** ❖

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(202) 722-2485 **Fax**
kfeinstein@garcec.org

❖ **North Capitol Collaborative, Inc.** ❖

Carmen Robles-Inman, Executive Director
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❖ **South Washington/West of the River
Family Strengthening Collaborative** ❖

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