

Resource Paper Regarding State Appropriation for Legal Representation for Children In Child Protective Services Cases¹

When the Texas Department of Family and Protective Services (DFPS) is called to investigate alleged abuse or neglect of a child, many times the investigation leads to the removal of the child from its home and family to ensure the child's safety and well-being. In order for the State to gain legal custody of the child, DFPS must file a petition in a state court with jurisdiction over the subject matter and the child. Once a judge signs a court order granting DFPS conservatorship and places the child in state foster care, the State stands in the shoes of the parent until the child exits the foster care system. In fulfilling its parental duties, the State must ensure the child is safe while in foster care, develop a plan that details how the child will exit foster care, and provide services designed to ensure the child's well-being while in care.

I. Legal Representation for Children in Child Protection Cases

All states and the District of Columbia provide in their statutes for the appointment of representation for a child involved in a child abuse or neglect proceeding. In 41 states, the representative may be a guardian ad litem who also may or may not be a licensed attorney. Fifteen states require the appointment of a licensed attorney, and five states, including Texas require both a guardian and attorney ad litem.²

Passed in 1974, the federal Child Abuse Prevention and Treatment Act (CAPTA) was the first law to impact advocacy for children because it mandated that each child placed in foster care be appointed a "guardian ad litem" (GAL) to represent his or her interests.³ The same year marked the birth of the Texas Family Code, which became effective on January 1, 1974. By 1977, certain statutory procedures provided for child protective cases by the Texas Family Code were declared unconstitutional, and the process of amendment began.⁴ Although the Texas Family Code, in compliance with CAPTA, required the appointment of a guardian ad litem (GAL) to represent the interests of a child, a panel of three federal judges in *Sims v. Dep't of Public Welfare* declared that Section 11.10 of Title 2 of the Texas Family Code violated the due process clause of the Constitution by not requiring the appointment of an attorney for

¹ The purpose of this Resource Paper, authored by the Children's Commission, should not be read as an advisory issued by the Supreme Court of Texas or any other court. This paper is not a ruling on specific cases or legal issues, but is solely intended to address the improvement of the law, the legal system, and the administration of justice.

² Child Welfare Information Gateway: *Representation of Children in Child Abuse and Neglect Proceedings*, http://www.childwelfare.gov/systemwide/laws_policies/statutes/represent.cfm.

³ Child Abuse Prevention and Treatment Act (CAPTA), 1974 (P.L. 93-247).

⁴ *6 Sims v. State Dep't of Public Welfare*, 438 F. Supp. 1179 (S.D. Tex. 1977) *rev'd sub nom. Moore v. Sims*, 442 U.S. 415 (1979)

the child.⁵ As a result, the Texas Family Code was amended to require that the trial court in a child protection case appoint both a GAL and an attorney ad litem.⁶ In 1995, the Texas Legislature enacted Texas Family Code Section 107.0125 to allow courts to appoint a lawyer in the dual role to serve as both the GAL and the attorney ad litem (AAL) for a child-client.⁷ The Texas Legislature did not, however, provide funding to support this statutory mandate; the Texas Family Code places this burden on the county in which the suit is filed.⁸ Currently, the Texas Family Code requires appointment of an attorney ad litem for a child no later than the fourteen-day hearing mandated by Section 262.102.⁹ The duration of appointment varies by jurisdiction, but can last anywhere from 12 months to several years, depending on how long the child stays in foster care and the jurisdiction's appointment practices and preferences.

While Texas statutes provide the right to court-appointed representation to children and indigent parents involved in child protection suits brought by DFPS, these laws do not guarantee adequate representation. During the pendency of the case, children are often subjected to the additional trauma of enduring a child protection case without adequate agency attention and dedicated advocates to guide their course. The Sunset Advisory Commission Report on DFPS observed that Child Protective Services (CPS) caseworkers contend with difficult working conditions, high caseloads, and low pay. As the backbone of the child welfare agency's effort to protect children, they struggle to balance the competing pressures and interests of keeping children safe, while respecting parents' rights and keeping families together.¹⁰ The difficulties of the job lead to high turnover, which leaves children vulnerable and their safety compromised. Dedicated and qualified attorneys, along with guardians ad litem or CASA volunteers can provide important, additional levels of oversight to help ensure child safety and well-being while the child is in foster care.

II. Statewide Standards and Data

There are no statewide standards governing attorney caseloads, appointment methods, performance, or compensation, and there are minimal standards governing attorney training. There is no reliable and consistent statewide data collected on the number of attorneys who practice child welfare law, the total number of hours billed to counties for CPS-related matters, the total amount of funding spent on legal representation, attorney qualifications, local training requirements, enforcement of the minimum continuing legal education required by the Texas Family Code, or grievances filed against attorneys by parents or child clients in child protection cases. These deficiencies of funding, standards, strong training requirements, and jurisdictional guidelines allow deficient representation to go unnoticed, and in turn, jeopardize not only the rights of the children, but their physical safety, and their mental and emotional health and well-being.

⁵ Id. 438 F. Supp. at 1194.

⁶ Tex. Fam. Code §§107.011 and 107.012.

⁷ Tex. Fam. Code Ann. § 107.0125.

⁸ Tex. Fam. Code Ann. § 107.015.

⁹ Tex. Fam. Code Ann. § 107.012.

¹⁰ Sunset Commission Advisory Staff Report on Department of Family and Protective Services, at 17, *available at* <https://www.sunset.texas.gov/public/uploads/files/reports/DFPS%20Commission%20Decisions.pdf>.

III. Standards of Representation

Texas has not adopted standards of practice for child protection cases although the Texas Family Code lists several duties and responsibilities that attorneys are required to carry out as a court appointed attorney; however, there is no mechanism in place to measure performance against these responsibilities and duties. While there are many qualified and dedicated attorneys who provide legal representation to children in foster care, a study by Texas Appleseed in 2010 found that many attorneys who provide representation for children fail to understand or fulfill their statutorily mandated duties.¹¹ Former foster youth consistently state that they either did not know they had an attorney to represent them throughout the case or if they did, their attorney never met with them, elicited their wishes or desires regarding case outcomes, and never inquired into their health and well-being while in care.

IV. Caseload Standards

The National Association of Counsel for Children (NACC) recommends a caseload cap of 100 individual clients at a time, assuming a caseload that includes clients at various stages of cases, and recognizing that some clients may be part of the same sibling group.¹² This cap also assumes 20 hours of work per child per year and also that the lawyer has adequate support staff.¹³ Texas has not adopted caseload standards for attorneys who represent children in abuse and neglect cases, and under the current appointment system, this is not possible.

V. Cost of Foster Care

The impact of DFPS involvement with a family is significant not only to the parents and children, but also Texas as a whole. It is also expensive for the taxpayer. A lawsuit filed by DFPS can take 12 to 18 months to reach a legal resolution. Some cases last much longer. If the case is resolved by awarding the State permanent managing conservatorship of a child, the case remains active until the child finds a permanent home and exits the foster care system, which can be several years. During the pendency of the average case, the federal, state, and local coffers spend tens of thousands of dollars to provide out-of-home placements for the child and services to the family struggling toward reunification. Of the 7,159,172 children living in Texas in FY2013, almost 28,000 were placed in the state's conservatorship at the end of the fiscal year.¹⁴ On average, Texas spent \$2,000.00 per month per child for foster care placements alone and over \$1.3 billion total.¹⁵

¹¹ Texas Appleseed, *Improving the Lives of Children in Long-Term Foster Care: The Role of Texas' Courts & Legal System* (2010) at 84, available at <http://texaschildrenscommission.gov/media/330/appleseedstudy.pdf>.

¹² http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/certification/red_book_stmt_clarification.pdf.

¹³ <https://www.firststar.org/documents/CaseloadCrisisStudy.pdf>.

¹⁴ Tex. Dep't of Family & Protective Servs., *Annual Report and Data Book* (2013) at 49, available at https://www.dfps.state.tx.us/documents/about/Data_Books_and_Annual_Reports/2013/DataBook13All.pdf.

¹⁵ *Id.* at 115; and 120.

VI. Compensation and Expenditures for Legal Representation

Many states provide in statute that reasonable compensation should be paid to attorneys who are appointed to represent a child. In Arkansas, Colorado, Delaware, Kentucky and Oregon, the child's attorney is contracted through a State agency and paid through agency funds or specially designated funds. Thirty three states pay attorneys' fees through the courts handling the case. A small number of these states use appropriated state funds. Texas is one of 15 states where legal expenses are paid by the county.¹⁶ The \$1.3 billion spent by DFPS in FY2013 does not account for the expenditures the legal system incurs such as attorneys' fees, and judicial and court resources required to conduct review hearings, mediations, and trials, all of which are borne by the county.

A. Compensation

Texas's decentralized judicial system means that compensation varies considerably from county to county. In most counties, the compensation for court-appointed attorneys in CPS cases is significantly lower than attorney compensation in private law matters, which makes it difficult to attract dedicated, qualified attorneys to serve on these cases. Texas Family Code Section 107.015 provides that appointed attorneys should be compensated using the county's general funds in accordance with the fee schedule that applies under Chapter 51 of the Family Code, relating to juvenile proceedings.¹⁷ However, a Legal Representation Study conducted by the Supreme Court Children's Commission in 2010 revealed that many jurisdictions do not compensate CPS attorneys based on the same fee schedule that is applicable to juvenile and criminal cases.¹⁸ The short, quasi criminal juvenile proceeding may not be an appropriate model for the longer, civil child abuse case, and by calling for the same fee schedule for both, Section 107.015 could be a barrier to a jurisdiction wishing to provide a different level or type of compensation for civil child-protection lawyers.

Eighteen counties were surveyed in 2010 about the compensation rates used in their jurisdictions. Most of the counties compensated attorneys based on an hourly fee schedule of around \$75 to \$125 an hour for in-court work, and most treated out-of-court services differently than in-court-work, compensating attorneys at a lower rate or nothing at all.¹⁹ Also, at that time, many attorneys surveyed reported that counties did not reimburse attorneys for travel expenses, including mileage and time spent traveling to and from meetings with clients, investigators, and expert witnesses, and even court appearances.²⁰ Attorneys also reported that judges frequently cut attorney invoices due to budget constraints, which is a particularly troubling practice given that attorneys are required by law to undertake certain actions on behalf of their client.²¹ One of the most important duties an attorney has is the requirement to meet

¹⁶ Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Massachusetts, Minnesota, Mississippi, Nebraska, Ohio, South Dakota, Texas, Wisconsin, and Wyoming.

¹⁷ Tex. Fam. Code Ann. § 107.015.

¹⁸ Legal Representation Study, *Assessment of Appointed Representation in Texas Child-Protection Proceedings* (2011) at 32, available at <http://texaschildrenscommission.gov/media/319/lrs.pdf>.

¹⁹ Id at 33.

²⁰ Id at 34.

²¹ Id at 37.

with a child client before each hearing.²² In this area of the law, making home visits to child clients is essential to building trust and understanding the client by observing the client’s living situation. A high percentage of children in foster care are placed outside their home county; many are more than 100 miles from their home jurisdiction thus visiting a client often requires significant travel time and expense. When a judge prohibits travel to a child client’s placement or cuts the attorneys’ invoices, it conveys the message that out-of-court preparation is less important in this area of the law and encourages attorneys to come to court unprepared and non-compliant with their duties under the Texas Family Code.

B. County Expenditures

In 2014, the Texas Indigent Defense Commission surveyed 200 County Auditors about the total funds spent on legal representation for children in CPS cases in fiscal year 2013. Only 18 counties responded, and only 12 of the 18 were able to report DFPS-related expenditures by child versus parent representation.

County	Child Cases	Total Paid	Per Case Avg
Calhoun	8	\$18,007.00	*\$2,250.88
Collin	327	\$544,980.00	\$1,666.61
Dallas	465	\$239,586.00	\$515.24
Eastland	22	\$10,738.00	\$488.09
El Paso	378	\$513,357.00	\$1,358.09
Franklin	22	\$2,175.00	*\$98.86
Harris	1256	\$2,544,192.00	\$2,025.63
Kerr	159	\$119,446.00	\$751.23
Parker	96	\$99,750.00	\$1,039.06
Randall	159	\$158,960.00	\$999.75
Travis	958	\$1,064,332.40	\$1,110.99
Trinity	70	\$34,725.00	\$496.07

*Low and High per case

Based on the survey data, the TIDC report estimated that counties spent approximately \$38 million on about 17,000 cases at an average of \$1264.00 per child per case.²³

VII. Providing a State Appropriation

The State of Texas might consider instituting a state appropriation that would be used to establish a state-governed process whereby financial relief to counties would be provided in the form of periodic (e.g. quarterly or annual) direct reimbursement. It could also be used to promote Standards of Representation

²² Tex. Fam. Code Ann. § 107.004.

²³ Texas Indigent Defense Commission, Issues in Indigent Defense, Presentation to Texas Association of Counties, August 28, 2014, <http://tidc.texas.gov/media/28225/140828TACCPS-RuckerDubose-.pdf>, at 5.

and provide for administrative oversight and support to collect information from the counties, attorneys, and clients on the quantity and quality of representation provided.

A. Benefits to Children, Counties, and the State of Texas

Providing financial relief to counties will enable courts to support attorneys in fulfilling their duty to comply with the Texas Family Code provisions related to meeting with clients, attending agency meetings, and advocating for services for their client.

When advocacy is not tamped or discouraged due to low or no payment, the child benefits by having a more involved and trusted advocate to help them exit the foster care system sooner rather than later. And, while working toward the day the child exits foster care, the attorney is in a better position to help ensure the child is safe while in care, connected to the child's family and community, and receives the necessary supports and services from the foster care, legal, education, and health care systems.

The state would benefit by the adoption of standards of representation, which would include training and certification requirements and a process whereby the attorney can certify compliance annually. Also, the publication of an appointment of counsel plan that describes the process for appointment and compensation rates as well as data collection that is reported to the Office of Court Administration regarding annual expenditures for child protection cases broken down between parent, child, and state representation would help inform or verify the amount of funding spent on cases initiated by DFPS.

B. Establishing Amount of Appropriation

The amount of funding could be determined in a number of ways, including:

- the number of cases filed in each county per year;
- the number of children removed each month or year;
- the number of children under the court's jurisdiction for some number of days, weeks, or months;
- the number of cases on court's docket at the end of the state fiscal year;
- the number of children on court's caseload at the end of the state fiscal year;

Funding based on the number of cases filed or on the court's caseload is one method of reimbursement, however, it may be an inappropriate measure of reimbursement because many cases include more than one child. Reimbursement based on the number of children on the court's caseload is another method of calculating the reimbursement, but the timing of when or how to measure the reimbursement is critical and may result in burdensome administration. The best method is one that does not result in a perverse incentive to keep cases or children on the court's docket in order to generate fees. For that reason, the best option may be to base the reimbursement on the number of children removed during the state fiscal year. This is simpler to calculate, is a more conservative method of reimbursement and would be less administratively burdensome than any other method.

In fiscal year 2013, DFPS removed, on average, 1,418 children each month of the year for a total of 17,022 children.²⁴ In 2014, removals averaged 1448 per month for a total of 17,378.²⁵ At a modest contribution of \$1500.00 for each removal, the appropriation might range from \$52 million to \$55 million for the biennium and another 2 million per biennium for administrative costs for a total of \$54 to \$57 million, per biennium.

VIII. Conclusion

The provision of quality legal services to indigent persons is not a new challenge for Texas. In 2001, the Texas Legislature enacted the Fair Defense Act to create minimum standards and uniformity in the appointment of criminal defense counsel. Enacting a system for standards of representation, training, and judicial oversight with an appropriate amount of discretion with judges and counties, will help elevate this area of practice and result in better outcomes for Texas' children and families.

²⁴ Tex. Dep't of Family & Protective Servs., *Annual Report and Data Book* (2013), http://www.dfps.state.tx.us/documents/about/Data_Books_and_Annual_Reports/2013/DataBook13All.pdf at 48.

²⁵ Tex. Dep't of Family & Protective Servs., *Annual Report and Data Book* (2014), online publication date early 2015.