Advocating for Preverbal Children in Dependency Proceedings

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Introduction

• From birth to five years old, children develop the foundation for their future development. Their linguistic, cognitive, emotional, social, regulatory, and moral capabilities are shaped in early life.

• Abuse, neglect, and removal from primary caregivers profoundly affect the growth and development of very young children. As the largest group to enter the child welfare system, very young children involved in dependency court proceedings face many disadvantages, traumas, and losses during a critical time of early brain development.

• Advocates must be aware of and able to assess the quality of the very young child’s relationships with parents and caregivers, and use the legal process to support and create nurturing, healthy attachments when none exist.
To receive federal funding under the Child Abuse Prevention and Treatment Act (CAPTA), states must provide the Secretary of the U.S. Department of Health and Human Services a written plan for improving the state’s child protective services system.

- The plan must document provisions for appointing a guardian ad litem (GAL) to represent the child’s best interests in every case of abuse or neglect that results in judicial proceedings.

NRS 432B.420 states that the court may, if it finds it appropriate, appoint an attorney to represent the child. The child *may* be represented by an attorney at all stages of any proceedings held pursuant to NRS 432B.410 to 432B.590, inclusive.

NRS 432B.500 stated that “after a petition is filed that a child is in need of protection pursuant to NRS 432b.490, the court *shall* appoint a guardian ad litem for the child.”
ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings dated August 2011.

SECTION 7. DUTIES OF CHILD’S LAWYER AND SCOPE OF REPRESENTATION

Section 7(d) Diminished Capacity: The child’s lawyer shall determine whether the child has diminished capacity pursuant to the Model Rules of Professional Conduct. When a child client has diminished capacity, the child’s lawyer shall make a good faith effort to determine the child’s needs and wishes. The lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and fulfill the duties as outlined in Section 7(b) of this Act. During a temporary period or on a particular issue where a normal client-lawyer relationship is not reasonably possible to maintain, the child’s lawyer shall make a substituted judgment determination. A substituted judgment determination includes determining what the child would decide if he or she were capable of making an adequately considered decision, and representing the child in accordance with that determination.
Determining Diminished Capacity

• When determining the child’s capacity the lawyer should elicit the child’s expressed wishes in a developmentally appropriate manner.

• Criteria for determining diminished capacity include:
  – the child’s developmental stage,
  – cognitive ability,
  – emotional and mental development,
  – ability to communicate,
  – ability to understand consequences,
  – consistency of the child’s decisions,
  – strength of wishes and the opinions of others, including social workers, therapists, teachers, family members or a hired expert.
Substituted Judgment

• A substituted judgment determination is not the same as determining the child’s best interests.
• When determining a substituted judgment position, the lawyer shall take into consideration the child’s legal interests based on objective criteria as set forth in the laws applicable to the proceeding, the goal of expeditious resolution of the case and the use of the least restrictive or detrimental alternatives available.
Balancing Act

• Attorneys must balance several factors to best advocate for their client:
  – Safety
  – Permanency
  – Placement with relatives/fictive kin
  – Relationship with biological parents
  – Relationship with siblings
  – Length of time in current placement
  – Minimize placement disruptions

• In general, a child prefers to live with known people to continue normal activities, and to avoid moving.
Advocacy For Very Young Children

• To enhance the effectiveness of legal representation and strengthen the attorney’s ability to handle ethical dilemmas that arise, advocacy for very young children should be:
  – Child-centered,
  – Research-informed,
  – Permanency-driven, and
  – Holistic.
I. Child-Centered Advocacy

- Learn their history
- Get to know your client
- Ensure your client receives a comprehensive health assessment
- Observe the child’s interactions with substitute caregivers
- Understand the parent/child relationship
- Become familiar with child’s environment
Child-Centered Advocacy

- The baby’s needs and interests, not the adults’ or professionals’ interests, must be the center of all advocacy. In other words, attorneys representing very young children must truly see the world through the baby’s eyes and formulate their approach from that perspective.
Learn the Child’s History

• What kind of prenatal care did the mother receive?
• Has the child received immunizations and required health screenings?
• What kind of relationship does the baby or pre-schooler have with his biological parents and any other key caregivers?
• Who cared for the baby in the first days, weeks, months, years of life before the child entered the child welfare system?
• What child care or early education (i.e., Early Head Start/Head Start or Pre-K) environment, if any, has the baby or preschooler experienced?
• What are the familiar comforting items in the child’s life (such as toys, blankets, a “lovey”, books, special cup, diaper brands, clothing item, a detergent or lotion with a specific scent, etc.)?
Learn The Child’s History

• Attorneys should consult with the primary care provider and/or the pediatric nurse practitioner who will be able to discuss and interpret medical information.
  – This will provide insight into the child’s early experience to inform advocacy related to placement, services, treatment, and permanency.
Get To Know Your Client

• A newly verbal or preverbal child “tells” the attorney how she is doing and what she needs through her behavior.
  – Getting to know the baby takes visiting regularly and interacting during visits.
Advocate For The Health Of Your Client

- Child-centered advocacy requires that the attorney understand the connected needs of the whole child and receive and review the comprehensive health assessment.
  - Ensure the child receives:
    - An initial health screen within 24 hours of entering care.
    - Comprehensive health assessment within 30 days in care.
    - Proper immunizations.
    - Appropriate dental services.
Client’s Interactions With Substitute Caregivers

- The advocate must be aware of and knowledgeable about their client’s primary relationships.
  - Are these relationships meeting the needs of the baby?
  - Does the foster parent or relative caregiver interact in a loving gentle manner with the baby?
  - Are they nurturing and warm in their caregiving?
Client’s Interactions With Substitute Caregivers

• It is also important to be able to interpret basic client behaviors:
  – When the caregivers smile and speak kindly to the baby, does the baby smile and gurgle back?
  – Does the toddler use her caregiver as a point of reference physically or verbally connecting with the caregiver once she’s explored the playground or a new environment?
  – Does the preschooler talk with her caregiver and show her new skills (e.g., drawing)?
Parent/Child Relationships

• The child-centered approach requires an attempt to see the child’s perspective of his relationship with his parent.
• The more engaged the parent is with his child, especially during a time-limited interaction, the more responsive he can be to his child’s needs.
• An attorney should observe visits between their clients and their parents to evaluate their relationship.
Child’s Environment

• Research shows the development of a very young child’s brain is significantly impacted by the environment (family, education, community, etc.) in which the child lives.

• Advocates must visit their very young child client wherever he spends considerable time (foster home, grandparents’ house, parents’ home, child care centers, early education/preschools).
II. Research-Informed Advocacy

• Attorneys must understand early child development and how child abuse and neglect can derail healthy physical, social/emotional, and cognitive development.

• Attorneys for very young children should ensure their clients are screened for developmental delays and actually linked to a service or treatment while in care.

• In Nevada, children should be referred to Early Childhood Intervention Services.
III. Permanency-Driven Advocacy

• One year for a one year old is a lifetime. Time is of the essence for any child, especially for a toddler. Therefore, permanency should be a priority from day one.

• Often in child abuse and neglect cases, the early events of the case process predict the final case disposition.
Promote Permanency On Day One

• Children’s attorneys must lead the charge for permanency from day one by harnessing the desire from everyone to get things done in the early months of the case.

• Attorneys must keep all players focused on visitations, placement, services, and regular out-of-court conferences in the first, second, fourth, and eighth weeks of the case.

• Permanency should be revisited monthly. It should not be driven by the court process but by the child’s needs and the parents’ ability to provide a safe, stable home for the child.
Promote Concurrent Case Planning

• Concurrent planning has the potential to support positive permanent outcomes in a timely manner while reducing young children’s overall time in care.

• Relatives interested in becoming permanent guardians or adoptive parents should be sought and vetted for early placement.
Focus On Visitation As A Linchpin Of Permanency

• Consistent contact between the parent and child improves the potential for reunification, promotes healthy attachments between child and parents, and can mediate the negative effects of removal.

• When safe both physically and emotionally, frequent visits and contact between the very young child and her parent(s) are at the “heart of permanency planning” and at the core of permanency-focused advocacy.
Arranging Parent-Child Contact

• Contact between parents and very young children should be:
  – frequent (multiple times weekly);
  – long enough to allow a range of experiences for the parent and child (e.g., diaper changing, playing, feeding);
  – connected to daily activities (e.g., going to the park, taking a walk, visiting the pediatrician);
  – in the least restrictive, most natural, home-like setting;
  – conducive to meaningful parent-child interaction.
Placements

• Ensure children’s primary attachments are considered in placements.
• Separations occurring between six months and approximately three years of age more likely to cause later emotional disturbances.
• Thus moving a baby from an extended foster placement to relative who are not identified until later can harm the baby.
• Relative caregivers must be actively sought early and often to avoid unnecessary placement changes.
• Advocacy to change a baby’s or toddler’s placement must involve assessing the child’s primary attachments with their present caregiver(s) and the short- and long-term impact of another early loss.
Plan For Transitions

• If the baby or young child does not know the new caregivers, there should be a visitation period in which the foster parent and relative are both present.
• Attorneys should ensure that, when safe and appropriate, the former caregivers will remain a resource for the child and the new caregivers.
• A more gradual and considered approach increases the likelihood of a successful, secure transition for the child and reduces the impact of losing the relationship with previous caregivers.
Locating Fathers

• Advocates must ensure diligent searches for fathers occur early in the process and fathers are offered equal opportunities to parent their children, if interested and capable and no safety concerns exist.

• The child advocate must ensure the agency continues its search as the case progresses and new information becomes available.
Fostering Placements With Siblings

• NRS 432B.550(5)(a) states that “it must be presumed to be in the best interests of the child to be placed together with the siblings of the child.”

• Attorneys, whether representing the sibling group or not, should make concerted efforts to ensure siblings are placed together unless doing so poses a safety threat.

• In some instances, attorneys will have to balance speeding permanency with maintaining sibling connections.
Sibling Visitation

• When children are not placed together, child attorneys should advocate for and craft agreements that support regular sibling visits and contacts.
• NRS 432B.580(4) allows for siblings to have visitation. After approved by the court, a visitation order should be filed to enforce the visitation between siblings.
• NRS 127.171(1)(a) states that “in a proceeding for the adoption of a child, the court may grant a reasonable right to visit to a sibling of the child if the child is in the custody of an agency which provides child welfare services and a similar right has been granted previously pursuant to NRS 432B.580.”
• NRS 127.2827(1) states that “if a child who is in the custody of an agency which provides child welfare services is placed for adoption, the agency must provide the court which is conducting the adoption proceedings with a copy of any order for visitation with a sibling of the child that was issued pursuant to NRS 432B.580 and the court must conduct a hearing to determine whether to include an order for visitation with a sibling in the decree of adoption.”
IV. Holistic Advocacy

• Holistic advocacy is essential to harness the strength of the advocate’s tools.
• Children’s attorneys must use all their negotiations, advisory, and counseling skills during non-court meetings and proceedings.
• The attorney knows the case history better than anyone and should connect with caregivers, caseworkers, child care/early education providers, CASAs, and others involved in the child’s case.
How To Advocate Holistically

• Appear on behalf of your client at all hearings, meetings, and staffings.
• Advocate for quality, evidence-based interventions and services.
• Go beyond dependency court to seek remedies and obtain entitlements.
• Be a bridge between service providers, case managers, and the court.
• Advocate for a coordinated system of care for very young children in dependency court.
Ethical Considerations

Confidentiality of Communications

• NRPC 1.6 states “a lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraphs (b) and (c).
Confidentiality Hypothetical

You represent a one year old who is living in his grandmother’s home. From everything you have observed, the home is safe and appropriate for the child and he is happy, adjusted, and thriving. During a client visit, the grandmother tells you that, although she knows she’s not supposed to leave the baby alone with his mother, she has to do this sometimes to go to her monthly doctor appointments. She reveals that the last time the mother came over to help, the mother appeared under the influence of drugs or alcohol, so the grandmother sent her away and cancelled her doctor’s appointment.
Ethical Considerations

Diminished Capacity

- NRPC 1.14 states that: “(a) when a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action...”
Diminished Capacity Hypothetical

You represent a bright and verbal 3 1/2 year-old girl who has been living with her father for six months. She has been having consistent weekly unsupervised visitation with her mother for about a month. The mother attends a substance abuse treatment outpatient program and has been clean for three months. The father tells you and the case worker that after each visit the child’s behavior deteriorates for a day or so with uncharacteristic temper tantrums, bedwetting, and a change in eating and sleeping behaviors. He is concerned the mother is acting inappropriately or doing something to upset the child. The father and the agency file a joint motion to modify visitation so it can be supervised by the agency case worker. You meet with the child who tells you she really likes seeing her mother, but sometimes her mom says bad things about her father during the visits. She says she wants to keep visiting her mother and is not afraid. How will you proceed?
Preverbal Advocacy Hypothetical

• **Hypothetical #1**
• One year old baby removed due to drug abuse and placed in a foster home. Foster family wants to adopt. Child is thriving and bonded to the family. However, after a year, maternal grandmother appears from a diligent search and wants placement of the baby.
  – Should the attorney argue for placement with the grandmother or keep the child in her current home?
Legal Interests to consider

– Safety
– Permanency
– Placement with relatives
– Placement with fictive kin
– Relationship with biological parents
– Relationship with siblings
– Length of time in current placement
– Minimize placement disruptions
Preverbal Advocacy Hypothetical

Hypothetical #2

Two Kids have been placed in the same prospective adoptive home for the last two years. However, the biological parents have a third child which is immediately removed and placed in a separate foster home.

– Should the attorney advocate on behalf of the baby’s legal right to be placed with her siblings even though this could disrupt the adoptive placement of the older two kids?
Legal Interests to consider

– Safety
– Permanency
– Placement with relatives
– Placement with fictive kin
– Relationship with biological parents
– Relationship with siblings
– Length of time in current placement
– Minimize placement disruptions
Preverbal Advocacy Hypothetical

Hypothetical #3

Mom had four kids removed from her care due to child abuse and neglect to one of the kids. Mom was convicted and sentenced to two years in prison. Three of the kids were placed with their natural father with a 550 order closing out the case. The youngest at the time was placed with fictive kin/adoptive resource and eventually Mom loses her parental rights to this child. While in prison, mom gives birth to twins. These twins are then placed in the same fictive kin home as their older sister. The twins have been with this family since they were released from the hospital. They are extremely bonded to fictive kin and their older sister. A couple of months after the twins are born, older sister is adopted by fictive kin. Fictive kin is also an adoptive resource for the twins. Everything is headed toward TPR/Adoption. At the initial TPR hearing, mom is still incarcerated and contests the petition. Putative Dad appears through counsel and also contests the petition.
On the day of the termination trial, DFS advises the Court that DNA has confirmed that Putative Dad is the biological father of the twins. Biological dad expresses his desire to reunify and work a case plan. Also the mother was just released from prison. Thus, the termination trial is continued for 5 months. For the next 5 months, mom and her now 1 year old twins visit twice a week for one hour. At the permanency review hearing the DA and DFS advise that mom has made “sufficient” progress. Moreover, the DA advises the court his intention to dismiss the TPR petition so that reunification with the mother can occur. CAP is appointed.

– Should the attorney argue against reunification with the mother since they have been living with the foster parent for the last 18 months and are bonded?
– What about their rights to remain placed with their older sibling who was recently adopted?
– CAP was referred the case to draft the sibling visitation order as reunification had already been approved by the Court, however, if CAP represented the twins from day 1, would our position change and would we argue against reunification based on the twins bond with fictive kin and sibling?
Legal Interests to consider

– Safety
– Permanency
– Placement with relatives
– Placement with fictive kin
– Relationship with biological parents
– Relationship with siblings
– Length of time in current placement
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Conclusion

• Representing very young children in dependency proceedings can be challenging.

• The attorney must be proactive, seeking out opportunities to observe and interact with the young child client and speed the legal process, while also maintaining the child’s critical relationships.

• Child attorneys need a firm understanding of child development.
Conclusion

• Effective advocacy for a very young child can change the child’s life forever.

• Lawyers who commit to child-centered, informed, permanency-driven, and holistic advocacy can promote the best outcomes for every infant, toddler and preschooler they represent.

• This is not easy work, but it is very rewarding!


6. NRS 127.171(1)(a)

7. NRS 127.2827(1)

8. NRS 432B.420

9. NRS 432B.550(5)(a)

10. NRS 432B.580(4)
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