

Chapter 4 - Right to Legal Representation

4.1 Overview

High quality representation of all parties in dependency proceedings is necessary to produce good outcomes for children and families. It is clear that justice flows best from a system in which all parties are represented by competent and actively engaged legal counsel. In the end, courts' decisions are only as good as the information upon which they are based, and it is the attorney (or *Pro Se* litigant) who is ultimately responsible for collecting, preparing, and delivering that information.

Historically, there has been a recognized deficiency in the quality of legal representation in dependency cases across jurisdictions. This is attributable to a variety of factors, including unclear role definition, lack of standards of practice, low expectations, high caseloads, inadequate compensation, inadequate resources, and the mistaken view that attorneys working in these cases are relieved of the traditional rigors of the practice of law. This situation has improved as courts have come to recognize the importance of legal counsel in achieving the system's goals of safety, permanency, and well-being for children.

The assignment of competent, well-trained legal counsel for all parties is extremely important in dependency proceedings (PA Children's Roundtable Initiative, 2009, p. 14). Understanding one's rights and responsibilities, as well as the potential legal consequences of actions or inactions is critical to the outcome of a case. As such, courts should ensure counsel for all parties are well-trained and well-equipped to provide comprehensive and thorough client representation. Additionally, counsel should be appointed as early in the case as possible, preferably prior to the Shelter Hearing.

Attorneys should also be engaged in systemic efforts to improve the handling of dependency cases. They should understand the culture change going on in this area and have a strength-based, family engagement focus in their work while zealously representing their clients. The agency and the court should include attorneys representing parents and children in trainings aimed at improving practice in the county.

With quality legal representation as a stated system objective, a number of projects have been undertaken to create enhanced practice. Much of the work has focused on the representation of children, as this was considered the least developed area. However, over time, more attention has been focused on parents' counsel, in recognition of their critical role in achieving good outcomes for children involved in dependency proceedings by protecting due process and statutory rights, presenting balanced information to judges, and promoting the preservation of family relationships when appropriate.

4.2 Legal Representation in Dependency Matters in Pennsylvania

4.2.1 Judge's Role

Judges should understand that attorneys working on dependency cases often receive limited compensation or, in some cases, none; they should be acknowledged for the public service they are providing. However, this should not preclude quality work. The court, which is ultimately responsible for the appointment of counsel, can have a great degree of positive influence on representation in dependency matters. The judge sets the tone in dependency matters and should expect that all counsel come into hearings prepared. The judge also has the authority to remove or stop appointing ineffective counsel. If judges are only as good as the attorneys in front of them, they should take steps to assure those attorneys are of the highest quality.

4.2.2 Guardian *Ad Litem* (GAL)

The GAL is the child's voice in the courtroom, especially if the child is not of age to articulate his or her own best interests. Pa.R.J.C.P. 1128 requires the presence of the child's attorney at all proceedings with no exceptions provided. If the child has a GAL and legal counsel, both attorneys shall be present. Additionally, the Juvenile Court Rules have specifically set forth the duties and responsibilities of the GAL in Pa.R.J.C.P. 1154.

The GAL should always be kept apprised of any changes to the child's placement, custody, visitation or treatment plan. Both the county agency and the GAL should be proactive in assuring the GAL is informed of all actions that affect the child's safety, well-being and permanence. This includes ensuring that the GAL has access to all relevant court and agency records, such as reports on the child's guardians, reports on the child, and the child's medical and school records (Pa.R.J.C.P. 1154 (2)). To fully understand the child's circumstances and represent the child's best interest to the court, the GAL may need to further investigate by interviewing potential witnesses, including the child's guardians, caretakers, and foster parents. In representing the child's best interest to the court, the GAL should fully advise the child of the proceeding and discuss potential outcomes with the child to ascertain the child's wishes to the extent possible. At hearings, the GAL must play an active role in the case by cross-examining witnesses, presenting witnesses, and presenting evidence necessary to communicate to the court the child's wishes and best interests.

"My new Guardian *Ad Litem*, she is amazing. She's there to talk to if I need her. I have the number for her office, if she doesn't pick up she calls me back within the same business day. She's just better, she cares and it shows."

- J.J., 19, Former Pennsylvania Foster Youth

Best Practice – Pre-Service Training for GALs

Prior to the appointment of their first case, GALs must receive pre-service training to qualify for federal reimbursement of costs to the agency. The pre-service training video is available on the OCFC website at:

<http://www.ocfcpcourts.us/childrens-roundtable-initiative/state-roundtable-workgroups/legal-representation/legal-representation-pre-service-dvd>

Best Practice – GAL Meetings with the Child

Too often the GAL's first encounter with the child occurs moments before the first hearing begins. Subsequent meetings follow suit with the GAL and the child meeting in the courtroom or hallway prior to each proceeding. This type of meeting has proven to be ineffective and simply does not provide adequate time for the GAL to understand the child's wishes or best interests.

Instead the GAL should meet with the child immediately upon appointment to the case to ascertain the child's wishes if the child is of appropriate age. The visits should continue on a regular basis in a manner appropriate to the child's age and maturity (Pa.R.J.C.P. 1154).

In many jurisdictions, GAL caseloads are overwhelming, making regular meetings with child clients challenging. To address this issue, some jurisdictions have begun teaming GALs with social workers who meet with children and report back to the GALs. Regardless, high caseloads should not reduce the level of advocacy and representation provided to child clients.

Ideally, the GAL should remain with a case throughout its life span with the courts. Maintaining one GAL throughout the case provides continuity for the child and helps to build a positive relationship.

4.2.3 Legal Counsel for the Child

There are significant differences between the GAL and the child's legal counsel. The GAL is concerned with the child's "best interests" whereas legal counsel is concerned with the child's legal interests. A child may waive his or her right to legal counsel, but a child cannot waive his or her right to a GAL.

Generally, a GAL is assigned to represent all interests of the child if the reasons necessitating the child's placement are a result of the "acts of the parent". These reasons are identified in 42 Pa.C.S. § 6302 (definition of a dependent child) and include (1), (2), (3), (4), and (10).

If, however, the child's own behavior plays a role in the allegation of dependency, there may be underlying legal liability, in which case the child may need separate counsel. These reasons are identified in 42 Pa.C.S. § 6302 (5), (6), (7), (8), and (9). The provisions of Pa.R.J.C.P. 1151 specify the circumstances under which a GAL and separate legal counsel should be appointed to protect the child's best interests and legal interests. If the child waives legal counsel, then the GAL should represent both the child's best interests and legal interest.

4.2.4 Shared Case Management/Dual Jurisdiction

Shared Case Management/Dual Jurisdiction occurs when a child is adjudicated as both Dependent and Delinquent. In this situation, the child is in need of representation from a GAL and/or legal counsel for the dependency matter, as well as legal counsel for the delinquency matter. While this can get burdensome and complex, the different attorneys represent the differing interests of the child. The GAL represents the best interests of the child in the dependency matter; legal counsel represents the child's legal interests in the dependency matter; and if necessary, separate legal counsel represents the child's legal interests in a delinquency case.

4.2.5 Counsel for Parents

All parties in a dependency proceeding have the right to representation by legal counsel. Section E of Pa.R.J.C.P 1151 addresses the requirement to apprise parents and other parties of their right to counsel, as well as the timing of appointment:

“If counsel does not enter an appearance for a party, the court shall inform the party of the right to counsel prior to any proceeding. If counsel is requested by a party in any case, the court shall assign counsel for the party if the party is without financial resources or otherwise unable to employ counsel. Counsel shall be appointed prior to the first court proceeding” (Pa.R.J.C.P. 1151 (E)).

The court should make every effort to ensure that parents and other parties to the case are clearly advised of their right to counsel and have legal representation at the beginning of dependency cases. If counsel is not present at subsequent hearings, the court should again advise of the right to counsel.

Best Practice – Parents’ Counsel

Parents’ counsel should meet with parents immediately upon appointment to the case to appropriately understand their needs and the circumstances of the case. Counsel should maintain contact with parents on a regular basis to keep them aware of the proceedings and get updates regarding any progress or changing needs.

The timely appointment of counsel and active representation in the early stages of the case reduces the potential for delay in subsequent proceedings due to scheduling conflicts and/or lack of attorney preparation. Early appointment of counsel also encourages greater participation by parents in shaping and complying with the provisions of service plans.

Often families that enter the child welfare system have a general lack of understanding of the system, which can be compounded by various disabilities and life struggles. Attorneys for parents should clearly explain in plain language the proceedings and discussions occurring, as well as the potential consequences of noncompliance with Court Orders or Family Service Plans. Parents’ attorneys should also reiterate timeframes and deadlines related to the child welfare system, and the possibility that failure to meet them may ultimately result in their parental rights being terminated. Finally attorneys should advocate for the services needed by their clients to remedy the reasons which led to the dependency proceeding.

Ideally, the attorney for the parent or parents should remain with the case throughout its life span with the courts, both for sake of continuity and to help build positive relationships.

4.3 Pro Se Parents

While best practice dictates that all parties would be represented by appropriate legal counsel in the dependency system as early in the process as possible, it is still possible for parents to refuse representation.

Parents who refuse representation in dependency matters should receive the same accommodations as any *Pro Se* litigant. Accommodations to be given to *Pro Se* parties may include:

- **Notification of the ongoing right to legal representation.** The parent can request attorney representation at any time.

- **Explanation of the court process.** As in any other court proceeding, the *Pro Se* litigant in a dependency matter needs to understand that both sides will be heard.
- **Explanation of the elements of the dependency case.** The parent should understand what occurs in dependency matters and the potential consequences of the hearings, including the potential for the court to ultimately terminate the parents' rights toward the child.
- **Explanation of the rules of procedure and evidence and the proper forms of questioning.** The court should specify what is and is not admissible in a dependency hearing, and should explain that if the parent chooses to question witnesses, these questions should be open-ended to avoid the appearance of advocacy.
- **Explanation of the meaning of the court's rulings and orders.** Finally, the court should rule immediately and explain clearly to the parent what it is that the court is expecting.

4.4 County Solicitors

Unlike counsel for the parents or the child, who are appointed on a case by case basis, the solicitor's appearance can be automatically entered for each dependency case (Pa.R.J.C.P. 1150). The solicitor's primary responsibility is to represent the county child welfare agency in dependency court proceedings. In a broader sense, the solicitor serves as advisor and counselor, as well as legal representative of the agency. The solicitor is also responsible for ensuring that agency staff is prepared for hearings.

Additionally, the solicitor should keep the agency administrator and staff advised regarding current legal developments, including federal and state statutory changes, as well as appellate decisions and rule changes, if they may affect the agency and the conduct of dependency hearings.

Best Practice – Solicitor/Agency Preparation

Before any court proceeding the solicitor should ensure that the agency staff is well prepared for the hearing. The solicitor should prepare with the agency for each court appearance. A good way to do this is through devising a regularly scheduled time to review each case and discuss facts, issues, witnesses and documents necessary for the hearing. Additional time or open schedules should be kept for emergency hearings and unexpected case developments.

4.5 Waiver of Counsel

A child may waive legal counsel only; at no time may a child waive the right to a GAL. All other parties may waive their right to counsel for any proceeding. A party who waives the right to counsel may revoke the waiver at any time and must be informed of the right to counsel at all subsequent hearings (Pa.R.J.C.P. 1152).

If the right to counsel is waived, Pa.R.J.C.P. 1152 requires that the court determine if the waiver is “knowing, intelligent, and voluntary.” The comment to Rule 1152 suggests that the court conduct a colloquy with the party on the record regarding the following points:

1. Whether the party understands the right to be represented by counsel;
2. Whether the party understands the nature of the dependency allegations and the elements of each of those allegations;
3. Whether the party is aware of the dispositions and placements that may be imposed by the court, including foster care placement and adoption;
4. Whether the party understands that if he or she waives the right to counsel, he or she will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;
5. Whether the party understands that counsel may be better suited to defend the dependency allegations; and
6. Whether the party understands that the party has many rights that, if not timely asserted, may be lost permanently; and if errors occur and are not timely objected to, or otherwise timely raised by the party, the ability to correct these errors may be lost permanently.

Best Practice – Additional Colloquy Question

In addition to the colloquy suggested in the comment to Pa.R.J.C.P. 1152, courts may wish to inquire as to whether the party has taken any substance into their body that would make them unable to understand any of the previous questions.

The court may assign “stand-by” counsel if a party waives counsel at any proceeding or stage of a proceeding. Whenever representation is waived, the waiver only applies to the hearing for which it is made. The party may revoke the waiver of counsel at any time, and the court must inform the party of the right to counsel again at each subsequent hearing.