

# Chapter 5 – Right to Legal Representation

## 5.1 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 (*Mission and Guiding Principles for Pennsylvania's Dependency System*, 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, children and child welfare agencies 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.

## 5.2 Legal Representation in Dependency Matters in Pennsylvania

### 5.2.1 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.

### 5.2.2 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 dependency 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 in conjunction with guidelines set forth in PA Supreme Court decision *In re Adoption of L.B.M.*, 639 Pa. 428, 161 A.3d 172 (2017) and *In re T.S.*, 639 Pa. 428, 192 A.3d (2018). (See also Chapter 17: Termination of Parental Rights.)

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 or 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 — Online 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. A pre-service training video is available on the OCFC website at:

<http://www.ocfcpcourts.us/childrens-roundtable-initiative/state-roundtable-workgroupscommittees/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 some 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. Other jurisdictions have caseloads that allow GALs to visit clients in their homes. Regardless, caseload size should not reduce the level of advocacy and representation provided to child clients or that expected by the court.

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.

### **5.2.3 Legal Counsel for the Child**

In some situations, a child may need the services of both a GAL and legal counsel. 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.

#### **5.2.4 Dual Jurisdiction**

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 if necessary; and separate legal counsel represents the child's legal interests in a delinquency case.

#### **5.2.5 Counsel for Parents**

All parties in a dependency proceeding have the right to competent 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 must 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.

**5.2.6 Meaningful Representation**

In response to a need for consistent state-wide legal representation in dependency court practice, the PA Children's Roundtable released a publication addressing standards of practice and accountability titled, *Standards of Practice for Parent Attorneys, Guardian Ad litem and Legal Counsel Practicing in Pennsylvania's Child Dependency System*. Topics covered include client contact outside the courtroom, review of the case file, attendance at family meetings, caseload size, specialized training and the dual role of the Guardians *ad Litem* as protector of a child's best interest as well as legal interest of the child. Judges should note that, as part of this dual role, GALs should present witnesses, testimony, evidence and arguments to support the GAL's best interest recommendation, as well as the witnesses, testimony, evidence and arguments necessary to support the child's wishes.

Each judge, in their respective judicial district, should work to identify, maintain and implement practices and procedures that are uniform and consistent within the context of

the particular or unique aspects of dependency proceedings in their court. Ideally adherence to these standards should improve case-flow management and client representation. The standards can be accessed at the following link:

[http://www.ocfcpcourts.us/assets/upload/Resources/Documents/August%202015%20Updated%20typos%20Standards%20of%20Practice2\(1\).pdf](http://www.ocfcpcourts.us/assets/upload/Resources/Documents/August%202015%20Updated%20typos%20Standards%20of%20Practice2(1).pdf)

### **5.3 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 knowingly, willingly and voluntarily waive counsel (See colloquy in section 5.5 of this chapter).

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.

Sidebar, in cases with self-represented parents, should be avoided. If unavoidable, the self-represented parent should be included in the sidebar conversation.

**\*Best Practice — Helping Parents Understand Dependency Court\***

In 2016 the State Roundtable's Legal Representation Workgroup created and released a video aimed at helping parents better understand the dependency court process. The video outlines the dependency courtroom experience, working with parent attorneys, case planning, visitation and permanency. In many jurisdictions, parents are being encouraged to watch the video to better understand the dependency process. The video can be accessed at the following link: <http://www.youtube.com/watch?v=vOrdjqHPBsY&feature=youtu.be>

## **5.4 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.

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. One tool that is helpful in preparing for court is the Permanency Review Hearing Checklist. The checklist was originally created to help judges and hearing officers ensure a thorough hearing however, it was also found to be helpful in preparing for court and preparing a caseworker to testify in court.

**\*Best Practice — Solicitor/Agency Preparation\***

One tool developed and tested in counties is the Permanency Hearing Checklist. This tool, designed specifically for judges and hearing officers, can be used by solicitors in their preparation of agency caseworkers and other witnesses.

The tool can be found at the end of Chapter 13: Permanency Hearing and can be modified to suit the needs of the judge.

## **5.5 Waiver of Counsel**

A child may waive legal counsel only. At no time may a child waive the right to a GAL. Parents may waive their right to counsel for any proceeding. A parent 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 “standby” (also known as “back-up”) counsel if a party waives counsel at any proceeding or stage of a proceeding. The judge should explain to parties what this is and what to expect from standby counsel. (See *Commonwealth v. Spotz*, 47 A.3d 63 (Pa. 2012).) 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.

## **5.6 Substitute Counsel**

It is the court's responsibility to set expectations regarding substitute counsel and hold attorneys to those expectations. Sometimes assigned counsel needs a substitute for a hearing. This is especially true in the case of emergencies. In anticipation of this need, courts should set expectations for substitute counsel. Courts should expect assigned counsel to thoroughly apprise the substitute attorney of the issues expected to be presented at the pending proceeding and what should be covered. Assigned counsel should also be expected to inform their client of the substitution prior to court and notify the court.

In an emergency situation, given the specific circumstance, a case may need to be continued. In non-emergency situations, it is the obligation of the assigned counsel to submit a request for rescheduling in advance of the hearing to minimize disruption of the court calendar and any inconvenience to the parties. Judges and hearing officers should get the party to agree, on the record, to be represented by substitute counsel. If they are not in agreement, the hearing should be continued. Before continuing the hearing, the judge should ask if there are any emergency or time-sensitive issues that need to be handled immediately.

### **\*Best Practice — Substitute Counsel\***

Clearly there are circumstances that occasionally warrant substitute counsel. Some jurisdictions have planned for these inevitable situations through the use of attorney teams, wherein each member of the "team" is aware of all cases and can easily step into a substitute role; other jurisdictions require prior approval of the court to send substitute counsel.

When substitute counsel appears, the court should make an inquiry if counsel is prepared to proceed. The party should be asked if they are in agreement to proceeding with substitute counsel. Best practice is to do a full colloquy on the record to ascertain that they understand.

The court can also leave open for reconsideration an issue raised by substitute counsel that is not fully developed.