

Council For Children
Gary F. Redenbacher, Chair
Gary Richwald, M.D., M.P.H., Vice-Chair
Bill Bentley
Denise Moreno Ducheny
Anne Fragasso
John M. Goldenring, M.D., M.P.H., J.D.
Hon. Leon S. Kaplan (Ret.)
David Meyers
Thomas A. Papageorge
Gloria Perez Samson
Ann Segal
Alan Shumacher, M.D.

Emeritus Members
Robert L. Black, M.D.
Birt Harvey, M.D.
Louise Horvitz, M.S.W., Psy.D.
James B. McKenna¹
Paul A. Peterson
Blair L. Sadler
Owen Smith

Executive Director

Robert C. Fellmeth *Price Professor of Public Interest Law, USD School of Law*



Children's Advocacy Institute



University of San Diego School of Law
5998 Alcalá Park / San Diego, CA 92110
(619) 260-4806 / (619) 260-4753 (Fax)

2751 Kroy Way
Sacramento, CA 95817 / (916) 844-5646

727 15th Street, NW, 12th Floor
Washington, DC 20005 / (917) 371-5191

Reply to: San Diego Sacramento Washington
info@caichildlaw.org / www.caichildlaw.org

TO: Barbara McDowell and Gerald S. Hartman Foundation
FROM: Children's Advocacy Institute, USD School of Law
DATE: March 21, 2018
RE: Six-Month Grant Report

As described in our grant proposal, the Children's Advocacy Institute will be filing suit to establish nationally the constitutional right of foster children to attorney representation. These children are subject to the parental jurisdiction of the courts, which determine where they are to live, what school they will attend, who they may see, etc. — sometimes for the entire 18 years of childhood. The impact that these proceedings have on these children's lives warrants the appointment of competent, trained counsel to represent them. One decision has been favorable to this thesis, the *Kenny A.* case in Atlanta, but it was a district court case that was not appealed and is not considered precedent. And regrettably, many states ignore the basic constitutional right of these children to have legal representation.

Over the first six months of this grant, CAI has conducted research with Gerald Glynn, a longtime member of the Board of Directors of the National Association of Counsel for Children (NACC), who is a Florida child advocate attempting to bring that state into compliance with constitutional obligations. We sought to identify the appropriate violative state to create a holding at the circuit or Supreme Court level that will have national impact. We chose Indiana, which has a balkanized and confusing system where children often lack even a Guardian Ad Litem, and hence transgresses even the narrower obligation under the federal Child Abuse Prevention and Treatment Act (CAPTA). Those children who do receive GALs are assigned volunteer Court Appointed Special Advocates (CASAs). These often beneficial actors cannot lawfully practice law, and the protection of these children requires the ability to function in a court that serves as the legal parent of a child and determines every aspect of these children's lives. The proper role of a GAL in abuse and neglect proceedings is to call witnesses, subpoena documents, ask questions of those under oath, make motions and argue, and appeal or seek writs; assigning a non-attorney GAL both deprives children of needed legal representation to assure basic protections, and effectively commands the unauthorized practice of law.

In order to effectively litigate this issue, CAI has been joined by the pro bono wing of Morrison and Foerster, with experienced MoFo attorney Steve Keane joining Professor Fellmeth as counsel. Respected Indiana attorney Kathleen Delaney has signed on as local counsel. Also joining to directly assist is NACC Executive Director Kim Dvorchak.

CAI and our team are now finalizing a public records act request for 24 categories of documents to establish the current state of representation (or non-representation) both at the state level and in a group of typical Indiana counties. Among other things, we are requesting information regarding the

number of children who were the subjects of a Child in Need of Services (CHINS) proceeding or termination of parental rights (TPR) proceeding during the last 3 years; the number of such children who were not considered parties to their proceedings; the number of such children who received a court-appointed GAL or CASA; the number of GAL appointees in CHINS or TPR proceedings who were licensed attorneys; and any documents reflecting the criteria used for determining whether to appoint an attorney, lay GAL, or CASA to represent a child in CHINS and/or TPR proceedings. Following receipt of the responsive documents, we will submit a demand letter to state officials, to ensure that administrative remedies have been exhausted.

Additionally, all counsel are participating in the collection of information and initial client arrangements and pleadings; identifying plaintiffs and proper defendants; developing legal theories for the complaint, including proposed relief, with potential claims including due process, equal protection, a CAPTA violation (in that Indiana is not appointing even a lay GAL to each case, as required by CAPTA), and the unauthorized practice of law by GALs.

Additional efforts that will be taking place in the next few months include legal research on the necessity of naming state officials as defendants for facial statutory challenge, the viability of an equal protection claim, standing to assert a CAPTA violation, Seventh Circuit law on the right to counsel; and Indiana state law on right to counsel. Our team will also be identifying potential experts to testify with regard to specific facts about Indiana's kids and how often they are represented in dependency proceedings, and about poor outcomes that befall children and youth when representation is inadequate and/or nonexistent; drafting the complaint; and determining factual evidence that is needed and formulating discovery requests.

We hope to complete the pre-filing public records act discovery and the other tasks described above, and be in a position to file our complaint before the end of June 2018.

For more information, please contact Robert Fellmeth at cpil@sandiego.edu or (619) 260-4806.