

The Tough Issues

Representing Children's Rights and Children's Best Interests

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Convention on the Rights of the Child

- In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the **best interests of the child** shall be a primary consideration. Article 3(1).
- States Parties shall respect the responsibilities, rights and duties of parents. Article 5.
- States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. Article 12(1).



Issue 1: Zealous Representation vs. Best Interests



- A child's attorney owes to his or her client the duties imposed by the law of this state in an attorney-client relationship. OCGA § 15-11-103(c).
- A court's order removing a child from his or her home shall be based upon a finding that:
 - (1) Continuation in his or her home would be contrary to such child's welfare; and
 - (2) Removal is in such child's best interests.

OCGA § 15-11-146(c)



Child Attorney Responsibilities:

- **The Child's Attorney.** The term "child's attorney" means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.
 - ABA Standards for Attorneys who represent children in dependency actions
- **Commentary:** These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client consistent with ER 1.14(a) of the Model Rules of Professional Conduct. In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child/client. As with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child. The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's attorney should ensure that the decision the child ultimately makes reflects his or her actual position.



Child Attorney Responsibilities:

The child's attorney should:

- Obtain copies of all pleadings and relevant notices;
- Participate in depositions, negotiations, discovery, pretrial conferences, and hearings;
- Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family;
- Attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;
- Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process;
- Develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and
- Identify appropriate family and professional resources for the child.



Best Interest Factors

- Child's **physical safety** and welfare, including food, shelter, health, and clothing
- Love, affection, bonding, and emotional ties between the **child and parent** or caregiver
- Love, affection, bonding, and emotional ties between the **child and siblings** (including half and stepsiblings)
- Child's **need for permanence**, including the need for stability and continuity of relationships with parent, siblings, other relatives, and any other person who has provided significant care to the child
- Child's sense of **attachments**, including sense of security and familiarity, and continuity of affection for the child
- The **capacity and disposition of each parent** or person available to care for the child to give him or her love, affection, and guidance and to continue the education and rearing of the child
- **Home environment** of the parent or person available to care for the child considering the promotion of the child's nurturance and safety rather than superficial or material factors
- **Stability** of the family unit and presence or absence of support systems within the community to benefit the child
- **Mental and physical health** of all individuals involved
- **Home, school, and community record and history** of the child, as well as any health or educational special needs of the child
- Child's **community ties**, including church, school, and friends
- Child's **background and ties**, including familial, cultural, and religious
- **Least disruptive placement alternative** for the child
- The **uniqueness** of every family and child
- **Risks** attendant to entering and being in substitute care
- Child's **wishes** and long-term goals
- **Preferences** of the persons available to care for the child
- Evidence of **family violence, substance abuse, criminal history, or sexual, mental, or physical child abuse** in any current, past, or considered home for the child
- **Recommendations** from a guardian ad litem
- **Any other factors** considered by the court/GAL to be relevant and proper to its determination

O.C.G.A. § 15-11-26 (court); O.C.G.A. § 15-11-105 (guardian ad litem)



Conflicts Between these Roles?

- Appoint separate GAL.
- Whose responsibility is it to raise this issue?
- What about courts that don't want to spend the funds?



Issue 2:

Balancing Competing Interests: What's Best for the Child?



Federal and State Requirements:

- Protect children from abuse and neglect.
- Safely maintain children in their homes.
- Reunify children relatively quickly. If reunification is not possible, obtain legal permanency for children relatively quickly.
- Reduce the possibility of children reentering care.
- Maintain placement stability for children.
- Place children close to their home and community.
- Place children with their siblings. If that's not possible, ensure siblings visit frequently.
- Place children with their relatives.
- Ensure frequent visitation between children and parents.
- Ensure children's educational, physical and mental health needs are met.
- Children have a right to be involved and present.



Individual Values, Beliefs, Biases, and Opinions

- Do you believe in spanking?
- What is your attitude towards guns and other weapons?
- Do you believe marijuana affects a parent's ability to care for their child?
- Do you prefer a holistic (natural, homeopathic, etc.) or allopathic (traditional Western) approach to medicine?
- What value do you give to education?
- Do you believe that a parent can change their ways? Do you tend to assume a parent is "guilty until proven innocent" when their child has been removed from their home?



Scenario 1

Is it preferable to pursue guardianship by a relative or adoption with a foster parent with whom the child has an established bond?

- What factors to consider/questions to ask?
- What best interest factors to consider?
- What personal biases/opinions are playing a role?



Scenario 2

Is it preferable to maintain a child in a placement that is far from their home community to ensure placement stability to move them closer to their home community?

- What factors to consider/questions to ask?
- What best interest factors to consider?
- What personal biases/opinions are playing a role?



Scenario 3

Is it preferable to file for TPR and move toward a permanency plan other than reunification to meet ASFA requirements or maintain a reunification case plan to maintain the relationship between the child and parent?

- What factors to consider/questions to ask?
- What best interest factors to consider?
- What personal biases/opinions are playing a role?



Scenario 4

Is it preferable to place siblings together in placements where legal permanency will not be achieved or place siblings separately in placements where legal permanency will be achieved for each?

- What factors to consider/questions to ask?
- What best interest factors to consider?
- What personal biases/opinions are playing a role?



Scenario 5

Is it preferable to pursue legal permanency for a child before they turn 18 or not pursue it so the child can otherwise be eligible for a DBHDD related adult waiver?

- What factors to consider/questions to ask?
- What best interest factors to consider?
- What personal biases/opinions are playing a role?



Scenario 6

Is it preferable for a child to be present for court or for the child to attend school?

- What factors to consider/questions to ask?
- What best interest factors to consider?
- What personal biases/opinions are playing a role?



Scenario 7

Is it preferable for a child to be placed (for a long time) in a home that is not a good fit or to be placed (for a short time) in a hotel?

- What factors to consider/questions to ask?
- What best interest factors to consider?
- What personal biases/opinions are playing a role?



Issue 3:

What You All Came Here for:

WHAT ABOUT TPRs

??????????



HARM



Harm

OCGA § 15-11-310:

- a) In considering the termination of parental rights, the court shall first determine whether one of the following statutory grounds for termination of parental rights has been met:
 - 5) A child is a dependent child due to lack of proper parental care or control by his or her parent, reasonable efforts to remedy the circumstances have been unsuccessful or were not required, such cause of dependency is likely to continue or will not likely be remedied, **and the continued dependency will cause or is likely to cause serious physical, mental, emotional, or moral harm to such child.**



Harm

- In the absence of this permanency plan, the children will experience doubt, uncertainty and hesitancy in life, which the court finds will be harmful to the children.
- Without providing the children with the permanency of an adoptive home, these feelings are likely to continue.
- Based on all of the testimony, the court finds that the continued dependency, and the lack of a permanent adoptive home, will likely cause the children mental and emotional harm in the future.

In Interest of E.M.D., 339 Ga. App. 189, 189, 793 S.E.2d 489, 490 (2016)



Harm

“Our law requires a juvenile court to consider not only the relationship between the parent and child at the time of the termination hearing, but also what might happen if the child were returned to the parent given the likelihood that the deprivation under which the child has been suffering would continue after a reunion with that parent.”

In re J.E., 309 Ga. App. 51, 58, 711 S.E.2d 5, 10 (2011)



Harm

“This dual consideration makes sense given that the statute requires the State to show that continued dependency—not merely a specific arrangement for the child—will cause harm. Dependency will cause harm only if all of the options available to DFCS short of termination—keeping the child in foster care, or returning the child to the parent—will themselves cause harm. Thus, it follows logically that the potential harm of both options should be considered.”

In Interest of E.M.D., 339 Ga. App. 189, 201, 793 S.E.2d 489, 498 (2016)



Harm

“Under this framework, whether returning the child to the parent would cause harm matters little if there is no evidence that the child is likely to experience serious harm under the status quo. And, indeed, the trial court here made no specific findings on the former question, merely stating in general terms “that the evidence supports a finding of harm if the children were to be returned to a parent.””

In Interest of E.M.D., 339 Ga. App. 189, 201, 793 S.E.2d 489, 498 (2016)



Harm

“In considering whether there is evidence that remaining in foster care will cause serious harm to a child, we have examined both (1) the extent to which instability and impermanency are “currently causing specific harms” to the child and (2) whether the parent's current relationship with the child is itself detrimental.”

In Interest of E.M.D., 339 Ga. App. 189, 202, 793 S.E.2d 489, 499 (2016)



Harm

- There is no evidence in this record that maintaining the mother's relationship with the children while they remain in the protection of foster care will itself cause them harm.
- Rather, [the court] relied on generalized findings that the children would experience harm absent the stability and permanency of an adoptive home. It is true that we have observed that “children need permanence of home and emotional stability, or they are likely to suffer serious emotional problems.
- Insufficient

In Interest of E.M.D., 339 Ga. App. 189, 202, 793 S.E.2d 489, 499 (2016)



Harm

- Harm from remaining in foster care has two elements:
 - The extent to which instability and impermanency are "currently causing specific harms" to the child; and
 - Whether the parent's current relationship with the child (while the child is in foster care) is itself detrimental.
- So what is sufficient?
 - Explanation of all the alternatives.
 - Expert testimony on how continuing dependency will harm this child given all of the alternatives.



Harm

Here: “We do not doubt that many children, especially older children, suffer emotional stress and sadness from the uncertainty inherent in foster care. But this is not enough “to show that continuing the legal relationship of parent and child is inherently harmful to the children.”



Harm

Compare:

“Harm shown where record included not only expert testimony about potential problems from lack of stability in foster care, but also evidence that child regressed after visits with mother by acting out, not following direction, and soiling himself, and became distraught when mother, who had an intellectual disability, did not show up for scheduled visits. Here, there was no evidence presented at the hearing that in their current circumstances the children were performing poorly in school or displaying significant age-inappropriate behavioral problems.”



Thoughts?

Ask Me About Peer Review!



Peer Review Project

- Visiting 17 counties
- Interviewing attorneys, CASAs, foster parents, bio parents, children
- Developing training in six regional sites

