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# Doing More for Children With Less: Multidisciplinary Representation of Poor Children in Family Court and Probate Court

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# DOING MORE FOR CHILDREN WITH LESS: MULTIDISCIPLINARY REPRESENTATION OF POOR CHILDREN IN FAMILY COURT AND PROBATE COURT

*Robert N. Jacobs\* & Christina Riehl\*\*†*

*Family court and probate court are Barmecide feasts for too many children, especially poor children with special needs. “Multidisciplinary representation” of children enables the courts to address needs and risks that cannot be resolved by fine-tuning a custody schedule, frequently at little or no additional cost to the taxpayers. Since most children cannot identify the salient issues in their cases and do not have standing in family court or probate court much less lawyers to represent them, it becomes the court’s responsibility in every case to identify the issues most relevant to children’s interests and decide whether multidisciplinary representation is indispensable to*

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*justice.*

*[S]he reminded him of the barefoot boy in the thin shirt and thin, tattered trousers and of all the shivering, stupefying misery in a world that never yet had provided enough heat and food and justice for all but an ingenious and unscrupulous handful. What a lousy earth! He wondered how many People were destitute that same night even in his own prosperous country, how many homes were shanties, how many husbands were drunk and wives socked, and how many children were bullied, abused or abandoned. How many families hungered for food they could not afford to buy? How many hearts were broken? How many suicides would take place that same night, how many people would go insane? How many cockroaches and landlords would triumph? How many winners were losers, successes failures, rich men poor men? How many wise guys were stupid? How many happy endings were unhappy endings? How many honest men were liars, brave men cowards, loyal men traitors, how many sainted men were corrupt, how many people in positions of trust had sold their souls to blackguards for petty cash, how many had never had souls? How many straight-and-narrow paths were crooked paths? How many best families were worst families and how many good people were bad people? When you added them all up and then subtracted, you might be left with only the children, and perhaps with Albert Einstein and an old violinist or sculptor somewhere.<sup>1</sup>*

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1. JOSEPH HELLER, CATCH-22 412–13 (Simon & Schuster, 50th Anniversary ed. 2011).

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## I. INTRODUCTION

This Article proposes a series of postulates to help resolve some of the stupefying misery that routinely attends children's custody cases in family and probate courts in this era of low wages, tough neighborhoods, straitened court budgets, and no standing for children.<sup>2</sup>

The postulates are that when custody is at issue, children's goals are always the same: to be safe, healthy, and happy; to get what they need to make the most of themselves; and to have the best possible relationship with both parents. Sometimes these goals require more from the court than a custody-and-visitation schedule. Some children need lawyers to have any chance to accomplish these goals. When necessary, children's lawyers should work with other professionals and community members to provide multidisciplinary representation. And children's advocates must do more than go through the motions, since illusory representation accomplishes nothing. Existing law makes it possible to do much more for children with less.

This Article derives these postulates from a discussion of seven cases<sup>3</sup> on one lawyer's docket in Los Angeles County in 2014 and 2015. Offering more than anecdotal evidence, case studies can be the best way to evaluate a system.<sup>4</sup> The cases discussed below explain how family and probate courts work, do not work, and could work for children—particularly poor children.

Part II, "Some Children Need Effective Lawyers," explains why some children need lawyers to accomplish their goals in custody cases. No one has more at stake when custody is at issue, and no one has less access to justice, because children cannot represent themselves as a matter of law. Part III, "Multidisciplinary

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2. See *infra* notes 5, 49.

3. The authors selected these cases not because they are extraordinary, but because they illustrate recurring issues. The cases are organized into categories that are somewhat arbitrary, since most of the cases illustrate more than one issue and thus could easily fit into more than one category. In deference to section 7643 of the California Family Code, section 827 of the California Welfare and Institutions Code, the parties' interest in privacy, and the court's suggestion in *Conservatorship of Schaeffer*, 119 Cal. Rptr. 2d 547 (Ct. App. 2002), that probate pleadings containing sensitive information be disclosed only to the parties, this Article uses pseudonyms for all parents and children and does not cite documents in any court file.

4. See Oliver Sacks, *The Mind of AR Luria*, 89 THE LISTENER 870–73 (1973) (elucidating how case studies can isolate the contributing factors behind the situation at hand). See generally ALEXANDER L. GEORGE & ANDREW BENNETT, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES (2005) (analyzing research methods using case studies and arguing that case studies complement quantitative research and formal models).

Representation: The Missing Link,” explains why children and their lawyers must work with social science professionals, collateral relatives, and the community to address complex parenting pathologies, some of which have roots that date back generations. Multidisciplinary representation can be the missing link between children and justice in family court and probate court. Part IV, “A Life in the Balance,” shows that illusory representation and kabuki hearings are pointless. This Part discusses the unfolding case of a teenager who has lived on Death Alley in south Los Angeles since the court placed him there when he was nine days old. Part V, “Family Code § 3153: A Partial Answer to Limited Scope Representation and the § 2030 Conundrum,” explains how the courts could do more for poor kids at little or no additional cost to the taxpayers.

Part VI concludes that since children can neither represent themselves nor be expected to identify the salient issues in their cases, it becomes the trial court’s responsibility in every case to identify the critical issues and use triage principles to decide whether multidisciplinary representation is indispensable to justice.

## II. SOME CHILDREN NEED EFFECTIVE LAWYERS

### A. Children Cannot Represent Themselves

Because children cannot represent themselves as a matter of law,<sup>5</sup> no one has less access to justice than children without lawyers at ground zero of custody disputes in family<sup>6</sup> or probate court.<sup>7</sup>

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5. Children cannot appear in court because they lack “legal capacity to make decisions.” Family courts and probate courts almost never appoint *guardians ad litem* for children, partly because they generally do not have standing. CAL. CIV. PROC. CODE § 372(a) (West 2015); CAL. BUS. & PROF. CODE § 6125 (West 2003); *J.W. v. Superior Court*, 22 Cal. Rptr. 2d 527, 533 (Ct. App. 1993). See *infra* note 49 for an explanation of children’s standing when custody is at issue in family court and probate court. As a practical matter, most children could not represent themselves even if the law permitted them to do so because they do not understand what is going on in court. Cf. Leslie E. Shear, *Dude I’m 14 Years Old and I’m Here to Address The Court . . . Now What? California Prepares for Teenagers in Family Court*, 4 INT’L ACAD. MATRIM. L.J. 1 (2011) (discussing the practical questions that may arise when children are allowed to actively participate in custody proceedings).

6. “‘Family court’ refers to one or more superior court judicial officers who handle litigation arising under the Family Code. It is not a separate court with special jurisdiction, but is instead the superior court performing one of its general duties.” *In re Chantal S.*, 913 P.2d 1075, 1079 (Cal. 1996); see also WILLIAM P. HOGOBOOM & DONALD B. KING, CALIFORNIA PRACTICE GUIDE: FAMILY LAW ¶ 3:3.10, p. 3–3 (2016) (“In practice, the superior court exercising jurisdiction under the Family Code is known as the ‘family court’ or [‘family law court’]. But

Family and probate courts have discretion to appoint counsel for children.<sup>8</sup> But most family courts and many probate courts never exercise that discretion.<sup>9</sup> A report by the Elkins Family Law Task Force expressed concern that other courts routinely appoint unqualified lawyers to represent kids as a form of patronage.<sup>10</sup> Some children need effective lawyers to survive.

### B. Anquan Paul<sup>11</sup>

Anquan Paul is safe at home with his grandparents today because his lawyer reversed the effects of a series of *ex parte* and *sua sponte* orders that had separated him from his grandparents, left him homeless for long stretches of time, caused him to fail fifth grade, and literally put his life at risk.

Anquan is an everyday kid from South-Central Los Angeles. He loves his blended family, which comprises his maternal grandparents, brother, cousins, aunt, and dog—not necessarily in that order. He likes sports, goes to school during the week, and goes to

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there is no separate ‘family court’ per se.”). The basic outline of family court *qua* family court “jurisdiction” is set out in section 2010 of the California Family Code.

7. “Probate jurisdiction is in the superior court, and the probate court is a department of the superior court exercising such jurisdiction. Jurisdiction and the power of the probate court are statutory.” *Richer v. Superior Court*, 134 Cal. Rptr. 52, 56 (Ct. App. 1976), *overruled on other grounds by Kowis v. Howard*, 838 P.2d 250, 256 (Cal. 1992). The probate court makes child custody orders when it appoints a guardian of the person. *See* CAL. PROB. CODE § 1510 (West 2016). The probate court also makes child custody orders when it appoints a conservator of the person. Conservatorship cases are beyond the scope of this Article.

8. *See* CAL. FAM. CODE § 3150(a) (West 2011); CAL. PROB. CODE § 1470 (West 2008); Cal. Standards of Judicial Admin. § 5.11(a) (2007); Uniform Marriage & Divorce Act § 310 (West 1988).

9. *See infra* notes 169, 202 and accompanying text. *See generally* Amy Pellman, Robert Jacobs, & Dara K. Reiner, *A Child-Centered Response to the Elkins Family Law Task Force*, 20 WM. & MARY BILL RTS. J. 81, 83 n. 13 and 87 (2011) [hereinafter Pellman, Jacobs, & Reiner] (noting that the existing family court appointment statute, California Family Code § 3150(a), and California Rule of Court 5.240, shed little or no light on two crucial questions: (1) precisely when the court shall exercise its discretion to appoint counsel for children, and (2) precisely what is appointed counsel’s role in these cases).

10. *See* JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, ELKINS FAMILY LAW TASK FORCE: FINAL REPORT AND RECOMMENDATIONS APRIL 2010 7, 53 (2010), <http://www.courts.ca.gov/documents/elkins-finalreport.pdf> (recognizing a need for “greater transparency and clarity regarding how such appointments are made and how complaints regarding performance of appointed counsel will be addressed.”). The Supreme Court addressed related concerns in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) when it required trial courts in termination-of-parental- rights hearings to decide on a case-by-case basis whether parties have a due process right to counsel, “subject, of course, to appellate review.” *Id.* at 31–32.

11. This Article uses pseudonyms for all parents and children and does not cite documents in any court file. *Supra* note 3.

church on Sunday. His pastor lives on his block and came to court hearings to support him.

Immediately after he was born, Anquan's maternal grandparents assumed the role of parents, and had sheltered him from his parents' gang culture. Both of Anquan's parents are convicted felons with gang histories and no income. Anquan's father told a former girlfriend that Anquan was conceived in the course of a gang initiation rite. Anquan's mother is in prison for attempting to murder a member of a rival gang. His father just got back from prison after serving a sentence for residential burglary.<sup>12</sup>

After Anquan's biological mother was arrested for the attempted murder that sent her to prison, Anquan's grandparents filed a probate petition in downtown Los Angeles for appointment as Anquan's legal guardians.<sup>13</sup> Two days later, Anquan's biological father filed a parentage action in family court, asserting what he believed to be his paternal rights.<sup>14</sup> He filed his action in Orange County, where he lived with a girlfriend and her daughter in the girlfriend's uncle's home. The girlfriend subsists on the Supplemental Security Income (SSI) benefits<sup>15</sup> she receives for having bipolar disorder. The girlfriend's daughter has autism.

Judicial decisions in these cases forced Anquan to attend a total of five schools in the next three months. A special needs child,<sup>16</sup> he had received special education services in Los Angeles through an Individualized Educational Program (IEP).<sup>17</sup> He was entitled to the

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12. "Parental incarceration is independently associated with learning disabilities, attention deficit disorder and attention deficit hyperactivity disorder, behavioral or conduct problems, developmental delays, and speech or language problems" Kristin Turney, *Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 55 J. HEALTH & SOC. BEHAV. 302, 302 (2014). See generally *id.* (analyzing some of the negative consequences of parental incarceration); *infra* notes 101, 145, 154–155 and accompanying text (discussing potential adverse effects through the generations of parental incarceration).

13. See *infra* notes 22, 25.

14. Parentage actions are governed by the Uniform Parentage Act ("UPA"). CAL. FAM. CODE §§ 7600–7730 (West 2016).

15. SSI pays cash benefits to low-income individuals who have a "medically determinable physical or mental impairment" that makes them unable "to engage in any substantial gainful activity." 42 U.S.C. § 1382 (c)(a)(3)(A) (2012).

16. See Daniel B. Pickar & Robert L. Kaufman, *Drafting Plans for Special Needs Children: Applying a Risk-Assessment Model*, 53 FAM. CT. REV. 113 (2015) (defining "special needs" and explaining their relevance when child custody is at issue); see also *infra* note 202 and accompanying text (citing publications discussing courts' treatment of "special needs" children).

17. An Individualized Educational Program ("IEP") is the "constitution" that sets up a child's unique needs, establishes his or her present levels of performance, explains and interprets



same services at each of his new schools,<sup>18</sup> but his IEP never caught up to him. As a result of his transfers and failure to receive special education, Anquan failed the fifth grade.

Orange County's family court got the case off to a bad start when it issued an *ex parte* change-of-custody order<sup>19</sup> without waiting for Los Angeles County's probate court to rule, appointing a lawyer for Anquan, or hearing any evidence of "immediate danger" or "irreparable harm" to anyone.<sup>20</sup> The court failed to consider that Anquan's grandfather was his presumed father for custodial purposes<sup>21</sup> and that both grandparents were presumptively entitled to custody as Anquan's de facto parents.<sup>22</sup>

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the appropriate tests conducted, and suggests how and what goals, objectives, services and accommodations are to be developed for the child's progress. The IEP is a written statement that must be developed, reviewed, and revised for each student with a disability. CAL. EDUC. CODE § 56345 (West 2003); 34 C.F.R. § 300.340(a) (2005).

18. *See, e.g., In re Student with a Disability*, 44 IDELR 83 (SEA Mont. 2005) (addressing transferability of IEPs).

19. Section 3064(a) of the California Family Code states: "The court shall refrain from making an order granting or modifying a custody order on an *ex parte* basis unless there has been a showing of immediate harm to the child or immediate risk that the child will be removed from the State of California." CAL. FAM. CODE § 3064(a) (West 2016). Likewise, under California Rule of Court 5.151(b)(1), a family court should not order an immediate change of custody absent evidence of "an immediate danger or irreparable harm to a party or to the children involved in the matter." CAL. R. CT. 5.151(b)(1) (2016).

20. *Cf. Robert Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 257 (1975) (reporting that "[i]n many instances, a judge lacks adequate information about even the most rudimentary aspects of a child's life . . .").

21. A party to a custody proceeding must establish a parent-child relationship before the court can adjudicate custody and visitation. CAL. FAM. CODE §§ 7604, 7635 (West 2016); *id.* § 7635 (West 2014); HOGOBOOM & KING, *supra* note 6, at ¶ 7:23, pp. 7–8 to 7–9. A party must establish that he or she is a "presumed parent" to establish a parent-child relationship. CAL. FAM. CODE §§ 7600–7730 (West 2013); CAL. PROB. CODE § 6453 (West 2005). Biology is not destiny under the Family Code. It is possible for a man to achieve presumed father status without being the biological father; even if paternity is denied and disproved, a man may be deemed to be a presumed father. *In re Nicholas H.*, 120 Cal. Rptr. 2d 146, 152–53 (Ct. App. 2002). In fact, the legal trend is to minimize the importance of biology, especially if the child is over two years old. *See, e.g., In re A.A.*, 7 Cal. Rptr. 3d 755 (Ct. App. 2003); *In re Kiana A.*, 113 Cal. Rptr. 2d 669 (Ct. App. 2001). A "presumed parent" is someone who has demonstrated an abiding commitment to the child and the child's well-being, regardless of his or her relationship with the child's other parent. *In re Sabrina H.*, 266 Cal. Rptr. 274, 276–77 (Ct. App. 1990). The very purpose of parentage law is to distinguish those who have demonstrated a commitment to the child regardless of biology and grant them the "elevated status of presumed [parenthood]." *In re T.R.*, 34 Cal. Rptr. 3d 215, 220–21 (Ct. App. 2005).

22. A de facto parent is a "person . . . in whose home the child has been living in a wholesome and stable environment" for a substantial period of time. CAL. FAM. CODE § 3040(a)(2) (West 2004). A showing by a preponderance of the evidence that a proposed guardian has acted as a de facto parent creates a rebuttable presumption by clear and convincing evidence that it would be detrimental to place the child in the custody of a parent, and the best interest of the child requires nonparental custody. *Id.* § 3041(d) (West 2006); *In re Guardianship*

So Anquan went to live with his biological father. His grandparents gave him a cell phone so he could call home. His father threw the phone out of the car window on the way to Orange County, explaining, “you won’t be needing this.” Several weeks later, Anquan’s biological father separated from his girlfriend, leaving her responsible for Anquan. Several weeks after that, both Anquan and his father disappeared.

Meanwhile, Los Angeles County’s probate court appointed counsel for Anquan. With the help of staff at Anquan’s elementary school in Orange County, Anquan’s lawyer traced Anquan to the high-desert town of Lancaster in Los Angeles County. From there, Anquan and his father moved to South-Central Los Angeles. A posting on Anquan’s father’s Facebook page explained all these moves: he was “trying to find somewhere to live [sic] me and my son.”

While Anquan and his father were bouncing between the streets and other people’s homes, Los Angeles County’s probate court sent Anquan’s guardianship case (along with his lawyer) to Orange County’s family court, which set a trial in the combined guardianship and parentage case. On the day set for trial, however, the court *sua sponte* transferred the combined case to Orange County’s probate court to consider appointing Anquan’s grandparents as his guardians. But the probate court declined to rule at its initial hearing, leaving Anquan in limbo.

Anquan’s lawyer therefore drafted a motion to join Anquan’s grandparents as parties in the family court action.<sup>23</sup> At the same time, Anquan’s lawyer drafted new pleadings in Orange County’s probate court to keep the guardianship case alive. In the end, three months after Orange County’s family court removed Anquan from his grandparents’ custody, its probate court appointed the grandparents

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of Estate of Vaughan, 144 Cal. Rptr. 3d 216 (Ct. App. 2012). This presumption shifts the burden of proof to the opposing party to show the contrary by a preponderance of the evidence. CAL. FAM. CODE § 3014(c)–(d) (West 2004). This rule recognizes that “continuity and stability in a child’s life most certainly count for something” and “in the absence of proof to the contrary, removing a child from what has been a stable, continuous, and successful placement is detrimental to the child.” *In re Guardianship of L.V.*, 38 Cal. Rptr. 3d 894, 900–01 (Ct. App. 2006).

23. Under Rule 5.24(c)(2) of the California Rules of Court, “[a] person who has or claims custody . . . of any of the minor children subject to the [parentage] action . . . may apply to the court for an order joining himself or herself as a party to the proceeding.” CAL. R. CT. 5.24(c)(2) (2016).

as Anquan's temporary guardians. Five months later, the probate court made that appointment permanent. The family court then dismissed the parentage case.

Without his attorney's intervention, Anquan would still be with his biological father, pounding the streets of the roughest neighborhoods in Los Angeles, looking for a stable place to live.

### C. *Esteban Santa Cruz*<sup>24</sup>

Esteban is a sweet little boy from East Los Angeles who was about to start kindergarten. A probate court had appointed his maternal grandmother as his guardian<sup>25</sup> when he was a baby because his parents were, in his maternal grandmother's words, "living on the street, moving from motel to motel . . . on and off drugs."

Without appointing a lawyer for Esteban, the court terminated the guardianship three years later, after Esteban's father was released from prison. Esteban proceeded to live with his father and his father's husband for about five months. Esteban loves his father but wanted to go back home to his grandmother. He explained that his father's husband could be mean. He said that the husband hit him when he got mad, and that he would beat up Esteban's father "right in front of me." Esteban said that happened a lot.<sup>26</sup>

The probate court had awarded visitation rights to Esteban's maternal grandmother when it terminated her guardianship.<sup>27</sup> The court appointed counsel for Esteban when his grandmother came back to court to enforce her visitation rights. Both Esteban's father and his husband were present in court. In separate interviews, they gave Esteban's lawyer the same street address but claimed to live in different cities. It turned out that the street address does not exist in either city, and they had no stable address.

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24. This Article uses pseudonyms for all parents and children and does not cite documents in any court file. *Supra* note 3.

25. A court may appoint a guardian for a minor "if it appears necessary or convenient." CAL. PROB. CODE § 1514(a) (West 2002).

26. Children who are exposed to domestic violence can suffer a form of "secondary abuse" because they "are affected by what goes on around them as well as what is directly done to them." *In re Heather A.*, 60 Cal. Rptr. 2d 315, 321–22 (Ct. App. 1996). Even a child who is not present during violent incidents may still be detrimentally affected by the violence because they live with the aftermath of and context surrounding violent incidents. *Id.* at 320.

27. Rule 7.1008(a) of the California Rules of Court authorizes the court to "order visitation [with the guardian] if it is in the best interest of the child" before terminating a guardianship. CAL. R. CT. 7.1008(a) (2016).

Esteban's lawyer tracked down Esteban's paternal grandmother, who told the lawyer that Esteban's father's husband used what social scientists call, "coercive controlling violence," to control her son.<sup>28</sup> In addition to beating him up on a regular basis, the husband required Esteban's father to put his telephone on speaker during all phone calls, physically held Esteban's father's legs while he slept so he could not leave when he woke up, and made sure that Esteban's father had no money.

Research on the effects of a child's exposure to domestic violence shows that it can have an adverse impact across a range of child functioning, increases the risk for child abuse, and is associated with other risk factors.<sup>29</sup>

Esteban's lawyer immediately arranged to meet the maternal grandmother at Public Counsel's probate clinic,<sup>30</sup> which helped her file an *ex parte* petition for reappointment as Esteban's guardian. The probate court granted the petition, and made the appointment permanent several months later—but not before Esteban had seen things that a little boy should never see and lived through things that no one should have to live through.

### III. MULTIDISCIPLINARY REPRESENTATION: THE MISSING LINK

#### A. Concurrent Jurisdiction and Case Plans

The family, probate, and juvenile dependency divisions of California's Superior Court<sup>31</sup> generally have concurrent jurisdiction

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28. See, e.g., Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476 (2008).

29. See *supra* note 26; *infra* notes 61–68 and accompanying text. For summaries of the empirical research on the effects of domestic violence on children, see Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1 (2001).

30. Public Counsel's Skadden Arps Pro Per Guardianship Clinic assists with legal guardianship petitions for adults "caring for children whose parents cannot or will not properly care for them." *Pro Per Guardianship Clinic*, PUB. COUNS. (Sept. 19, 2010), [http://www.publiccounsel.org/seminars\\_clinics?id=0004](http://www.publiccounsel.org/seminars_clinics?id=0004).

31. See *supra* notes 6 and 7 for a discussion of the jurisdiction of family courts and probate courts. The "juvenile dependency court" may take jurisdiction over children who have been abused or neglected as described by section 300 of the California Welfare and Institutions Code. Under California Welfare and Institutions Code section 300.2, the purpose of dependency law is "to provide maximum safety and protection for children who are currently being physically [sexually] or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are risk of that harm." CAL. WELF. & INST. CODE § 300.2 (West 2000).

over abused and neglected children,<sup>32</sup> sometimes over exactly the same children.<sup>33</sup> County departments of Child Protective Services (CPS) play a leading role in choosing the venue for children's cases.<sup>34</sup>

But two recent cases create exceptions to this general rule: In *In re Kaylee H.*,<sup>35</sup> California's Fourth District Court of Appeal held that a dependency court may not take jurisdiction over a child in order to provide her with the services she needs if a probate guardian would suffice to protect her from her parents.<sup>36</sup>

California's Second Appellate District took that reasoning a step further in *In re A.G.*,<sup>37</sup> holding that a juvenile dependency court erred

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32. See Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 94 (2006) (discussing the historical development of family courts); cf. Virginia G. Weisz & Suzanne McCormick, *Abandon Probate Court for Abandoned Children: Combining Probate Guardianship of the Person and Dependency into One Stronger, Fairer Children's Court*, 12 S. CAL. REV. L. & WOMEN'S STUD. 191 (2003) (arguing that "[d]rastic differences in the adjudication of guardianship proceedings by juvenile dependency courts and probate courts in California deprive children of equal justice under the law and contravene the central goal of protecting the 'best interest of the child.'").

33. Several of the children whose cases are described in this Article had cases in more than one of these courts.

34. See generally Barbara Flicker, *A Short History of Jurisdiction over Juvenile and Family Matters*, in FROM CHILDREN TO CITIZENS: THE ROLE OF THE JUVENILE COURT (Francis X. Hartmann ed., 1987) (providing an overview of the courts and agencies that exercise jurisdiction over matters involving children). By directing at-risk children's cases to family or probate court rather than to juvenile dependency court, the child welfare system saves the cost of the "child welfare services" discussed *infra* at note 43 and accompanying text, and economizes on the cost of the appointed counsel discussed *infra* at notes 44–45 and 156–157 and the accompanying text, as well as on the stipends paid to the nonparent caregivers described *supra* at notes 22–23 and 25. Most nonparent caregivers appointed in juvenile dependency court receive about twice the maximum payment available to nonparent caregivers appointed in family or probate court. When they provide "specialized care," nonparent caregivers appointed in dependency court receive several times the maximum payable to nonparent caregivers appointed in family or probate court. Compare L.A. CTY. DEP'T OF CHILD. & FAM. SERVS., *Rates for Placement and Related Services*, in CHILD WELFARE POLICY MANUAL § 0900–511.10 (2015), [http://policy.dcfslacounty.gov/#AFDC\\_FC\\_GRI\\_FC\\_Rates.htm%3FTocPath%3DFinancial%20Support%20Systems%7CRates%20and%20Allowances%7CRates%20for%20Placement%20and%20Related%20Services%7C\\_\\_\\_\\_\\_0](http://policy.dcfslacounty.gov/#AFDC_FC_GRI_FC_Rates.htm%3FTocPath%3DFinancial%20Support%20Systems%7CRates%20and%20Allowances%7CRates%20for%20Placement%20and%20Related%20Services%7C_____0) (showing payment rates for dependency court caregivers), with *State Law Changes Maximum Aid Payment (MAP) Levels for Cash Aid Recipients*, CAL. DEP'T HEALTH & HUM. SERVS. (Oct. 1, 2016), <http://www.dss.cahwnet.gov/cdssweb/entres/forms/English/TEMP2250.pdf> (showing "Maximum Aid Payment (MAP) Levels" for all other caregivers).

35. 139 Cal. Rptr. 3d 867 (Ct. App. 2012).

36. *Id.* at 879–80. The court ruled that "[t]he availability of . . . taxpayer-funded services in dependency proceedings is not relevant to the question whether dependency proceedings are necessary to protect the child; those services are merely an incidental and necessary benefit to the parent when a dependency petition has been filed." *Id.* at 878 n.14.

37. 163 Cal. Rptr. 3d 383 (Ct. App. 2013).

in sustaining a petition in order to provide services to a mother with a mental impairment when the father could take care of the children.<sup>38</sup> “Matters such as this one,” the court held, “belong in family court.”<sup>39</sup>

Citing the United Nations’ Declaration of the Rights of the Child,<sup>40</sup> the court in *In re Holly H.*<sup>41</sup> held that whenever custody is at issue, all courts must act in “the best interests of the child.”<sup>42</sup> The choice of court division, therefore, should not make much difference. But “the best interests of the child” turns out to have much different meanings in different divisions.

In juvenile dependency court, most children and parents receive “child welfare services” in the form of a “case plan” for periods ranging from six months to several years to resolve the issues that brought their families to court. “Child welfare services” include:

[S]ervices . . . directed toward . . . protecting and promoting the welfare of all children, including handicapped, homeless, dependent, or neglected children [and] preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children . . . .<sup>43</sup>

“[U]nless the court finds that the child would not benefit from the appointment of counsel,” juvenile dependency courts must

38. *Id.* at 392. California’s Second District Court of Appeal held that the juvenile dependency court “should have dismissed the petition, staying the order until the father obtained from the family court an award of custody to him and monitored visitation to the mother.”

39. *Id.* Cases like *In re A.G.* blur the traditional distinction between the functions of the juvenile dependency court and the family court. *See* 163 Cal. Rptr. 3d 383. In *In re Chantal S.*, 913 P.2d 1075 (Cal. 1996), the court explained that the family court traditionally provides parents with a forum to resolve private issues regarding child custody and visitation; both parents are presumed to be fit and capable of raising their children. *Id.* at 1078. In contrast, the juvenile court’s traditional role is to protect children by restricting parental behavior with regard to their children and the presumption of parental fitness does not apply. In *In re A.G.*, however, a presumption of fitness was unjustified as to at least one parent. 163 Cal. Rptr. 3d at 392. And as some of the cases discussed in this Article demonstrate, family and probate courts routinely adjudicate cases these days in which children need protection from both parents.

40. G.A. Res. 1386 (XIV), Declaration of the Rights of the Child (Nov. 20, 1959).

41. 128 Cal. Rptr. 2d 907 (Ct. App. 2003).

42. *Id.* at 914 n.5.

43. *See* CAL. WELF. & INST. CODE §§ 361.5, 11400, 16501.1 (West 2016). State law defines “child welfare services” in section 16501 of the California Welfare and Institutions Code. Federal law defines the same term at 42 U.S.C. § 625(a)(1). The Juvenile Court Law requires courts to review case plans at six-month intervals, and generally allows parents up to 18 months to comply with their case plans and thereby resolve the issues that caused the Court to take jurisdiction over their children. *See* CAL. WELF. & INST. CODE §§ 366.21, 366.22, 366.25 (West 2016); *cf. In re Elizabeth R.*, 42 Cal. Rptr. 2d 200, 209 (Ct. App. 1995) (allowing additional time for parent with mental impairment).

appoint independent counsel for every child to protect his or her right to a proper case plan.<sup>44</sup> Another lawyer represents the State's *parens patriae* interests in every case.<sup>45</sup> To more effectively investigate cases and develop better case plans, children's lawyers in Los Angeles County's dependency courts employ social workers and experts,<sup>46</sup> and the State's advocates work with the county's child welfare services agency.<sup>47</sup>

By contrast, most family courts and many probate courts refuse to appoint counsel for children, thereby leaving at-risk children with cases in those courts out in the cold.<sup>48</sup> Children generally do not have standing to make requests in their own custody cases,<sup>49</sup> and in any event, standing without representation would be of dubious benefit to most kids. Most kids know very little about the world, much less the range of possibility in a given case, and they generally would not know what to ask for. Children, especially little children, cannot be expected to undertake the investigation necessary to develop an appropriate case plan. Even if they could stand up for themselves, most would not do so because they are intimidated by adults—

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44. CAL. WELF. & INST. CODE § 317 (West 2016).

45. *See id.* § 318.5.

46. In Los Angeles County, the Children's Law Center of Los Angeles (CLC) represents over 80 percent of children in the dependency court, and private attorneys under contract with the county represent the rest. *See* Denise C. Herz et al., *Challenges Facing Crossover Youth: An Examination of Juvenile-Justice Decision Making and Recidivism*, 48 FAM. CT. REV. 305, 312 (2010).

47. *See, e.g.*, CAL. WELF. & INST. CODE § 272 (West 2016).

48. *See supra* note 5 and *infra* notes 49, 157, and 169–170 (describing restrictions on children's participation in family and probate court proceedings).

49. Minors are not parties to marital actions; therefore, they are not entitled to *guardians ad litem*. *In re Marriage of Lloyd*, 64 Cal. Rptr. 2d 37, 41 (Ct. App. 1997). With exceptions not relevant here, "[t]he only persons permitted to be parties to a proceeding for dissolution, legal separation, or nullity of marriage are the spouses." CAL. R. CT. 5.16 (2016). California law is not very clear about children's standing in probate court. The legislative history of California Probate Code section 1470, which gives the court discretion to appoint counsel to represent children, analogizes guardianship cases to marital actions: the court's authority to appoint counsel "is comparable to the court's authority . . . to appoint private counsel to represent the minor's interests in connection with a child custody issue arising in a proceeding under the Family Law Act." CAL. PROB. CODE § 1470 (West 2011); *see Guardianship-Conservatorship Law*, 14 CAL. L. REV. COMM'N REPS. 501, 538 (1978). California Family Code section 7635 makes some children parties to parentage proceedings and requires family courts to appoint *guardians ad litem* under defined circumstances, but the authors have never seen that happen. CAL. FAM. CODE § 7635 (West 2016). *See generally* Ellen B. Wells, *Unanswered Questions: Standing and Party Status of Children in Custody and Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. L. 95, 102–04 (1995) (addressing the "paradox inherent in a system [that] continues to place limitations on the participation of children in custody and visitation proceedings" when children have "gained the right to participate fully" in various kinds of non-custody proceedings). *Cf. supra* note 5.

especially adults in positions of authority, like parents.<sup>50</sup>

Neither family courts nor probate courts have access to the social workers, experts, or investigators necessary to handle a difficult case,<sup>51</sup> and both courts are infamous for misusing the resources they do have.<sup>52</sup>

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50. See *Schall v. Martin*, 467 U.S. 253, 265 (1984) (explaining that “[c]hildren, by definition, are not assumed to have the capacity to take care of themselves . . . the State must play its part as *parens patriae*.”); see also *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (holding that constitutional rights of children could not be equated with those of adults because of their “peculiar vulnerability . . . [and] inability to make critical decisions in an informed, mature manner . . .”).

51. Rules 5.220 and 5.215(b)(4) of the California Rules of Court authorize family courts in some counties to obtain an interview with a child, a “partial evaluation” from court staff, or a “full evaluation” including psychological tests from a credentialed expert. CAL. R. CT. 5.220 (2016); CAL. R. CT. 5.215 (2006); see CAL. CIV. PROC. CODE. § 2032.020 (West 2014); CAL. FAM. CODE §§ 3110–3118 (West 2005); CAL. EVID. CODE §§ 730, 733 (West 1995). Section 1513 of the California Probate Code authorizes probate courts to order investigations in guardianship cases. CAL. PROB. CODE § 1513 (West 2016). Interviews, partial evaluations, experts’ opinions, and investigators’ reports are not designed to replace lawyers or to resolve any of the issues discussed in this Article. See, e.g., *Leslie O. v. Superior Court*, 180 Cal. Rptr. 3d 863 (Ct. App. 2014) (removing expert who assumed role of advocate). Neither the interviewers, the evaluators, nor the courts themselves make any attempt to measure outcomes, but there is little reason to believe that these resources produce benefits for at-risk children in difficult cases. Evaluators have no duties to or relationship with the child; rarely address the child’s health, education, or welfare in any meaningful way; have no legal expertise, and cannot research the relevant issues in a case or file pleadings or appear for the child in court; and cannot monitor compliance with court orders because they generally are relieved after every hearing. Partial evaluators and interviewers have no means to resolve difficult factual disputes about important issues like domestic violence, substance abuse, parental incapacity, or a child’s special needs, and have no means to discover placement options when awarding custody to either parent would be detrimental to the child.

52. Family courts misuse their resources when, for example, they use the mechanisms described in the preceding note to appoint self-styled experts to recommend custody-and-visitation schedules based on “clinical impressions” that have no real scientific basis. The Association of Family and Conciliation Courts (“AFCC”) has published *Guidelines for Brief Focused Assessment: AFCC Taskforce on Brief Focused Assessments*, 50 FAM. CT. REV. 558 (2012), urging courts not to draw large inferences from partial evaluations. Likewise, the American Psychological Association’s ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 9.02 (2010) cautions experts to rely only on “assessment instruments whose validity and reliability have been established for use with members of the population tested.” But family and probate courts ignore these precautions every court day. See, e.g., *Robert F. Kelly & Sarah H. Ramsey, Child Custody Evaluations: The Need for Systems-Level Outcome Assessments*, 47 FAM. CT. REV. 286, 287 (2009) (finding no evidence that evaluations produce better outcomes for children, yet “[m]any reasonable, but anecdotal, reports” indicate that judges rely on them anyway because they “find custody cases to be difficult and frustrating . . .” (citations omitted)). Timothy M. Tippins and Jeffrey P. Wittmann, in *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193 (2005) explain that the partial evaluations and full evaluations described *supra* in note 51 enable family and probate courts to ignore the rules of evidence that protect litigants in other courts, and encourage them to rely on insufficient data, including otherwise inadmissible hearsay and tests whose validity and reliability cannot be established. California’s Supreme Court put a stop to



“Multidisciplinary representation” can be the missing link between children and justice in family and probate courts. The cases discussed in this part show that just like kids in juvenile dependency court, some kids in family and probate court need help to investigate their cases and to develop and enforce effective case plans. “Multidisciplinary representation” means bringing together people from different professions and sectors of the community to address complex multigenerational parenting pathologies that cannot be resolved by tweaking a custody schedule.<sup>53</sup>

California’s Judicial Council adopted this model in 2012 when it enacted California Rule of Court 5.242,<sup>54</sup> which generally authorizes children’s lawyers to use all available resources and do as much as possible to advance the interests of the kids they represent.<sup>55</sup>

### B. Veronica Beltran<sup>56</sup>

In family court, a case plan is known as a “parenting plan.”<sup>57</sup> Substantive justice in family court means a parenting plan that serves

some of this legal legerdemain in a recent criminal case, *People v. Sanchez*, 204 Cal. Rptr. 3d 102, 111 (2016), holding that an expert may not “supply case-specific facts about which he or she has no personal knowledge.” A venerable line of California cases, beginning with *People v. Kelly*, 130 Cal. Rptr. 144 (1976), keeps out of other courts opinions based on scientifically unproven assessment instruments. There is no good reason to apply different rules in family or probate courts. *See, e.g., Elkins v. Superior Court*, 163 P.3d 160, 177–78 (Cal. 2007) (holding that due process requires that family court litigation proceed under the same rules of evidence and procedure as other matters).

53. Multidisciplinary representation seems to be an idea whose time has come in juvenile dependency court. *See* Vivek S. Sankaran et al., *Strange Bedfellows: How Child Welfare Agencies Can Benefit from Investing in Multidisciplinary Parent Representation* at 2, CTR. STUDY SOC. POL’Y, <http://www.cssp.org/reform/child-welfare/strange-bedfellows-how-child-welfare-agencies-benefit-from-multidisciplinary-parent-representation.pdf> (last visited Aug. 22, 2016) (noting that “[l]egal offices across the country” are providing clients “with the assistance of a team consisting of a lawyer, social worker and a parent mentor . . .”).

54. CAL. R. CT. 5.242 (j)(1), (j)(5), (k)(3), (k)(4) (2014).

55. When it enacted this rule, the Judicial Council rejected the Elkins Family Law Task Force’s contrary recommendations, which prescribed a much narrower role for a minor’s counsel. *See* Pellman, Jacobs, & Reiner, *supra* note 9, at 112–129.

56. This Article uses pseudonyms for all parents and children, and it does not cite documents in any court file. *Supra* note 3.

57. For a brief discussion of “case plans,” see *supra* note 43 and accompanying text. In *Montenegro v. Diaz*, 27 P.3d 289 (Cal. 2001), the court held that section 3040(b) of the California Family Code allows family courts “the widest discretion to choose a parenting plan that is in the best interest of the child.” *Id.* at 292–93; see *infra* note 58. *See generally* Steve Baron, *Issue Facing Family Courts: The Scope of Family Court Intervention* 4 J. CTR. FAM. CHILD & CTS. 115, 115 (2003) (“[A]dvocating an expanded scope of the family court to deal with family dysfunction . . .”).

the child's best interest.<sup>58</sup> Parenting plans can be complicated and involve a lot of work. Justice in family court for Veronica Beltran required a parenting plan to reduce the intense hostility between her parents<sup>59</sup> and teach her parents much better parenting skills,<sup>60</sup> or at least to shelter her as much as possible from their continuing conflict.

Very few parents would slap a small child in the face, but the way some parents treat each other can amount to the same thing. Intense parental conflict is bad for children, especially young children:<sup>61</sup> "In acute form, [conflict] elicit[s] in children the same shortness of breath, increased blood pressure and heart rate, fear etc., that we all experience when threatened, because they are caused by the instantaneous release of the same powerful hormones."<sup>62</sup> Chronic conflict can produce physical changes in a child's brain that can

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58. See generally Andrew Shepard & Peter Salem, *Foreword to the Special Issue on the Family Law Education Reform Project*, 44 FAM. CT. REV. 513, 516 (2006) (explaining that "today's family court judge . . . [should] oversee a multidisciplinary group of service providers all engaged with the children and families whose cases are before the court."). Chapter 1 (commencing with section 3020) and chapter 2 (commencing with section 3040) of part 2 of division 8 of the California Family Code, identify the factors that trial courts must consider and procedures they must follow in resolving child-custody disputes. CAL. FAM. CODE § 3020 et seq. (West 2016); see *id.* § 3011 (West 2013); *id.* § 2335 (West 2004) (disallowing findings of fault in divorce cases); *id.* § 3100. See generally *In re Marriage of Burgess*, 913 P.2d 473, 478 (Cal. 1996) (noting that the Family Code affords a trial court "the widest discretion to choose a parenting plan that is in the best interest of the child," and lists relevant evidentiary factors).

59. Some parent-education programs aimed at reducing conflict between parents and improving ties with children have been shown to shield children from conflict, promote strong relationships with parents, and increase child satisfaction. Tamara A. Fackrell et al., *A Special Focus on Court-Affiliated Parent Education Programs: How Effective Are Court-Affiliated Divorcing Parents Education Programs? A Meta-Analytic Study*, 49 FAM. CT. REV. 107 (2011); see *infra* notes 70–73.

60. In California, family courts have jurisdiction to order parents and children to participate in outpatient counseling with a licensed mental health professional or through other community counseling services (including mental health or substance abuse services) for not more than one year to address family functioning. CAL. FAM. CODE § 3190(a) (West 2016). The counseling must be specifically designed to facilitate communication between the parties regarding their child's best interests, to reduce conflicts over visitation and custody, or to "improve the quality of parenting skills of each parent." *Id.* § 3191. *But see infra* note 93.

61. CARLA B. GARRITY & MITCHELL A. BARIS, *CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE* 26 (1994) ("Those who witness intense bitterness between their parents and are caught repeatedly in loyalty binds are at high risk for later emotional disturbance. Parental conflict interrupts many of the critical tasks of psychological development"); see *supra* notes 26–28 and accompanying text.

62. William V. Fabricius et al., *Parenting Time, Parent Conflict, Parent-Child Relationships, and Children's Physical Health*, in PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT 188, 205 (Kathryn F. Kuehnle & Leslie M. Drozd eds., 2012).

“adversely color” the rest of his or her life.<sup>63</sup>

Veronica’s parents separated in 2008, when she was four years old. Between March 17, 2011 and August 7, 2014, the family court issued twenty-four orders related to custody in their divorce case. During the same period, CPS completed countless informal investigations and five formal investigations of reported child abuse without filing a dependency petition, several local police departments investigated numerous reports of domestic violence, Los Angeles County’s District Attorney convicted Veronica’s father of domestic violence for punching her mother in the buttocks, and Los Angeles County’s Superior Court dismissed an action by Veronica’s paternal grandmother against Veronica’s mother for alleged elder abuse. In dismissing that case, the court rejected the testimony of Veronica’s three paternal aunts in support of the paternal grandmother.

The acute conflict between her parents was more than Veronica could handle.<sup>64</sup> She was having clinically significant panic attacks several times a week, as well as nightmares, difficulty sleeping, and irritability.<sup>65</sup> Although Veronica was a bright girl, her grades were poor and getting worse from year to year and marking period to marking period.<sup>66</sup> She finished fourth grade in June 2014 with two

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63. *Understanding the Effects of Maltreatment on Brain Development*, ISSUE BRIEF 6–7 (Child Welfare Info. Gateway, Washington, D.C.), Apr. 2015, [https://www.childwelfare.gov/pubPDFs/brain\\_development.pdf](https://www.childwelfare.gov/pubPDFs/brain_development.pdf) (summarizing neuroimaging studies of children exposed to “toxic stress” showing “reduced volume in the hippocampus, which is central to learning and memory;” “decreased volume in the cerebellum, which helps coordinate motor behavior and executive functioning;” a “smaller prefrontal cortex, which is critical to behavior, cognition, and emotional regulation;” and abnormal cortisol levels, which affect energy resources, cognitive processes, immune and inflammatory reactions, and affective disorders); *see supra* note 29.

64. Intense conflict between parents can be a form of emotional child abuse. In *In re Heather A.*, 60 Cal. Rptr. 2d 315 (Ct. App. 1996), the court recognized that children “are affected by what goes on around them as well as what is directly done to them.” *Id.* at 321–22. According to a recent study, children who are emotionally abused and neglected face similar and sometimes worse mental health problems than children who are physically or sexually abused. Joseph Spinazzola, *Unseen Wounds: The Contribution of Psychological Maltreatment to Child and Adolescent Mental Health and Risk Outcomes*, 6 PSYCHOL. TRAUMA: THEORY, RES., PRAC., & POL’Y S18, S20, S24 (2014).

65. Unless they incur physiological damage, most children are resilient and return to baseline functioning within one to two years, but an important minority of children suffer long-term negative mental and physical health consequences well into adulthood. One of the most well-established factors in predicting negative outcomes for children is high levels of marital conflict during and after a divorce. Ryan D. Davidson et al., *Psychological and Biological Processes in Children Associated with High Conflict Parental Divorce*, 65 JUV. & FAM. CT. J. 29 (2014).

66. *See infra* note 111 (discussing the relationship between family strife and bad grades).

Bs, two Ds, and nine Fs. Unless her family situation changed dramatically, Veronica's prognosis<sup>67</sup> was not good. Longitudinal studies show that the prognosis is poor for children with behavioral problems from dysfunctional families.<sup>68</sup>

By the time the court appointed counsel for her in March 2014, Veronica was cathected to her father and bitterly estranged from her mother for reasons that seemed completely disproportionate to any alleged offense.<sup>69</sup> Compounding the problem—or perhaps describing the same problem in a different way—Veronica's father seemed existentially threatened by any attempt to improve Veronica's relationship with her mother.

In May 2014, Veronica's lawyer and her parents negotiated a stipulated parenting plan.<sup>70</sup> The plan required the parents to hire a licensed clinical social worker (LCSW) as a parenting coach and liaison with minor's counsel. With her background as clinical director of a community-based mental health agency serving low-income children and families, founder of the mental health department of a large foster family agency, adoptive mother and foster mother, the LCSW was exceptionally qualified to help this

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67. "Prognosis" is the essence of the judicial function in child custody cases. ANDREW SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 3 (2004) (positing that "[i]n a child custody case . . . a court reconstructs past events concerning family relationships for the purpose of making a prediction about the future . . . . That prediction is not made to assess blame . . . but to make an educated guess about what will happen to the child if the court orders one custody arrangement or the other.").

68. Research consistently associates family relationships marked by high levels of conflict with mental health problems in childhood and adulthood. *See, e.g.*, E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED (2003); Rena L. Repetti et al., *Risky Families: Family Social Environments and the Mental and Physical Health of Offspring*, 128 PSYCHOL. BULL. 330 (2002). Behavioral problems often become chronic, persist into adulthood, and are transmitted from one generation to the next. *See generally* Inge Van Meurs et al., *Intergenerational Transmission of Child Problem Behaviors: A Longitudinal, Population-Based Study*, 48 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 138 (2009) (documenting that unemployment, poverty, mental illness, and incarceration can cycle through the generations); Judith S. Brook et al., *Intergenerational Transmission of Risks for Problem Behavior*, 30 J. ABNORMAL CHILD PSYCHOL. 65 (2002) (same).

69. *See infra* note 82 (regarding children who are estranged from a parent).

70. There are three kinds of parenting plans: Plan A is for parents who have decided to go their separate ways for reasons that are not the court's concern and need little more than a custody schedule and a division of property. Plan B is for parents who must change and can, with help. Plan C is for families that may need an intermediary until the last child leaves the home. *See generally* Jay Lebow & Kathleen N. Rekart, *Integrative Family Therapy for High-Conflict Divorce with Disputes over Child Custody and Visitation*, 46 FAM. PROCESS 79 (2007) (describing family therapy targeted toward families "locked in intractable disputes"). All indications are that Veronica will need Plan C.

family.<sup>71</sup> The plan also required the parents to (1) stop discussing their problems and saying negative things about each other around Veronica, (2) attend individual therapy to figure out what makes their divorce so difficult,<sup>72</sup> (3) enroll in co-parenting classes to figure out how to start cooperating,<sup>73</sup> (4) enroll Veronica in a better school, and (5) find Veronica a math tutor. The stipulated plan also authorized the noncustodial parent to call Veronica once a day and no more; and ordered the parents to communicate only via an email service known as Our Family Wizard (OFW)<sup>74</sup> except in emergencies. The plan assigned primary physical custody to Veronica's mother because her father's job required him to work out of town on a frequent and unpredictable basis.

Both parents ignored most of their stipulated order, but Veronica's mother did enroll her in a much better school (over Father's objection) and hired the LCSW at a sharply discounted rate. Veronica's father's behavior during two conjoint sessions with the

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71. See, e.g., Jeffrey A. Cohen, *Managed Care and the Evolving Role of the Clinical Social Worker in Mental Health*, 48 SOC. WORK 1, 34–43 (2003) (finding that managed care institutions see licensed clinical social workers as viable alternatives to clinical psychologists and psychiatrists because of their extensive training and ability to provide assessments and provide non-medical mental health treatment); see also *infra* note 72 (regarding the importance of interventions based on evidence).

72. All therapists are not created equal, and therapy is not a talisman that works simply by invoking it. See, e.g., Lucy Berliner et al., *Report of the APSAC Task Force on Evidence-Based Service Planning Guidelines for Child Welfare*, 20 CHILD MALTREATMENT 6, 8 (2015); William R. Miller et al., *Evidence-Based Treatment: Why, What, When, Where and How?*, 29 J. SUBSTANCE ABUSE TREATMENT 267, 267–68 (2005) (finding that clinicians too often use unsupported interventions and deprive their clients of effective treatments). Los Angeles County's Superior Court maintains a list of counselors and evaluators, but makes no representations regarding the clinicians' relative qualifications, techniques or effectiveness. *Choosing a Counselor or Evaluator*, SUPER. CT. OF CAL., CTY. OF L.A., <http://www.lacourt.org/flresource/ui/fl0108.aspx> (last visited Aug. 21, 2016). The California Clearinghouse of Evidence Based Programs for Child Welfare attempts to fill in some of these gaps. *Welcome to the CEBC: California Evidence-Based Clearinghouse for Child Welfare*, CAL. EVIDENCE-BASED CLEARINGHOUSE, <http://www.cebc4cw.org/home> (last visited Aug. 21, 2016); see *infra* note 73.

73. Co-parenting classes are not universally effective, and some are more effective than others. See, e.g., Margie J. Geasler & Karen R. Blaisure, *1998 Nationwide Survey of Court-Connected Divorce Education Programs*, 37 FAM. & CONCILIATION CTS. REV. 36, 37 (1999) (suggesting that courts should adopt written standards to guide the implementation of divorce education programs such as co-parenting classes because they need to be “based on a sound framework that documents current and best practices in content development, instructional or teaching strategies, implementation issues, and evaluation efforts”); see also Fackrell et al., *supra* note 59, at 113–15 (noting that some parent-education programs have proven to be effective at reducing conflict between parents, improving ties with children, and shield children from parental conflict); *infra* note 97 and accompanying text (regarding the negative effects of poverty); *infra* note 104 (regarding the Positive Parenting Program).

74. See OUR FAMILY WIZARD, <http://ourfamilywizard.com> (last visited Aug. 21, 2016).

LCSW in July offered insight into family dynamics: he openly expressed his concerns about her mother's parenting style as well as his concerns regarding other case-related issues in front of Veronica. He could not contain such conversation even with prompts from the LCSW and feedback from Veronica that such talk made her anxious. Veronica was fidgety during these sessions, and she had pressured speech, difficulty with word retrieval, and difficulty focusing on the conversation.

During an individual session on a Tuesday with the LCSW, Veronica's father called her twice on her cell phone. When Veronica saw the call, she visibly tensed, moved to a corner of the couch, and curled in a ball with a pillow in her lap. Her mood immediately changed from happy and wistful to tense and serious. When she answered, she softly told her father that she was in session and would call back when it was over. When the session ran a bit longer than scheduled, her father called repeatedly, starting precisely at the time the session was scheduled to end, until Veronica answered the phone.

Veronica's individual session with the LCSW was scheduled for every Tuesday at the same time, and the LCSW had spoken with her father the preceding Sunday night to confirm that the session would happen as scheduled that week. Both the stipulated family court order in May and the criminal court order in the domestic violence case limited Veronica's father to one call per day, except in an emergency.

So why was her father calling Veronica during therapy? Ostensibly to make sure that she was supervised and OK. But Tuesday nights during therapy, ironically, were the only times that Veronica's father should have known that she was supervised and OK. Veronica's mother had custody on most other weekday evenings, and routinely left Veronica alone for hours at a time.

As a "mandated reporter"<sup>75</sup> under California's Child Abuse and Reporting Act (CANRA),<sup>76</sup> the LCSW had reported this practice to CPS, which rejected the report, apparently on the ground that leaving a ten-year-old alone at night for several hours on a regular basis does not meet its criteria for abuse or neglect.<sup>77</sup>

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75. See CAL. PENAL CODE § 11165.7(a) (West 2016).

76. See *id.* §§ 11164–11174.3.

77. See *Child Protection Hotline*, DCFS (July 29, 2015), [http://policy.dcfslacounty.gov/content/Child\\_Protection\\_Hotline.htm](http://policy.dcfslacounty.gov/content/Child_Protection_Hotline.htm) (authorizing CPS to screen calls reporting alleged abuse or

After hearing about these developments, the family court ordered Veronica's lawyer to find a nonparent to take custody. But a nonparent was not an option; CPS had rejected the case time and again.<sup>78</sup> Veronica's paternal relatives had proved in the elder abuse case that they would go to extraordinary lengths to undermine her relationship with her mother, in violation of California's public policy to preserve the relationship between the child and both parents.<sup>79</sup> Veronica's maternal relatives were not an option because her grandmother lives in a three-bedroom home with her only uncle, who has schizophrenia, and her only aunt, who is divorced and has two young children who have been "out of control" since the divorce.

The court's order just hardened Father's refusal to cooperate. With no third party available to take custody, it became minor's counsel's challenge to work with Veronica, her mother, and the LCSW to put together a successful parenting plan without any cooperation from Veronica's father.

But the court's new orders got Veronica's mother's attention. She immediately enrolled in a co-parenting class to learn the "parallel parenting" skills necessary to raise a child with an uncooperative ex-spouse.<sup>80</sup> Cooperative parenting is the optimal

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neglect).

78. Veronica may thereby have dodged a bullet. A recent study questions whether CPS has produced any net improvement anywhere in the lives of children. Kristine A. Campbell et al., *Household, Family, and Child Risk Factors After an Investigation for Suspected Child Maltreatment: A Missed Opportunity for Prevention*, 164 ARCHIVES PEDIATRIC ADOLESCENT MED. 943, 947 (2010); see *infra* Part III.

79. It is California's public policy to preserve the relationship between the child and both parents. CAL. FAM. CODE § 3011(c) (West 2013); *id.* §§ 3020(b), 3040, 3047 (West 2004). In allocating custody, California's "friendly parent" statute requires family courts to consider "which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent." *Id.* § 3040(a) (West 2004). Social science research strongly supports this policy and law. See Fabricius et al., *supra* note 62, at 195 (2011) (concluding that "[t]he strength of the association between PT [i.e. parenting time] with [the noncustodial parent] and ES [i.e. emotional security of the child] is substantial." Both the chapter and the book as a whole strongly endorse 50/50 custody arrangements in ordinary cases.).

80. Social scientists use the term, "parallel parenting," to describe a style of parenting in which parents take turns raising the child separately, both doing the best job they can do during the time the child is in their care. It is to be distinguished from, "cooperative parenting," the style used "by families in which conflict is low and parents can effectively communicate about their child." PHILIP M. STAHL, PARENTING AFTER DIVORCE: A GUIDE TO RESOLVING CONFLICTS AND MEETING YOUR CHILDREN'S NEEDS 31 (2000); see *id.* at 31-39; Joan B. Kelly, *Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce*, 19 J. AM. ACAD. MATRIM. LAWS. 237, 252 (2005).

mode after a divorce, but children can thrive without it so long as they are sheltered as much as possible from continuing conflict.<sup>81</sup> Veronica's mother also immediately found Veronica a math tutor who agreed to babysit when she was out of the house.

These things have made a difference. Several weeks after the court date, Father had Veronica call her mother several times during her co-parenting class to rearrange a visit. The teacher overheard these calls and used them as teachable moments. The teacher coached Veronica's mother to clarify what Veronica was asking and promise to call her back. Veronica started escalating, demanding that her mother tell her yes or no right then. It turned out that this was the second time that day that Father had asked for changes through Veronica.

With the teacher's prompting, Veronica's mother managed to tell Veronica that she would be emailing Father through OFW to resolve the issue. Veronica continued to push for compliance with the change. The teacher told Veronica's mother to hold fast, tell her, "I love you," and hang up, which is what she did. Her mother was on her way. She is learning that listening is an important skill for parents, but it is a parent's job to make parental decisions, and she can do that job with or without Father's cooperation.

Veronica's strong preference for her father and determination to put this preference into effect were separate but related issues. Veronica seemed to have CPS on speed dial, and she promised to keep calling CPS until it removed her from her mother's custody and replaced her with her father.

Veronica was not above manipulating a situation to put her mother in a bad light. One morning, for example, she refused to go to school, urging her mother to leave her home alone. The LCSW tried

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81. Researchers conventionally divide divorced and separated parents into three categories based on the nature of their relationship:

Approximately [twenty-five to thirty percent] of parents have a cooperative co-parental relationship, characterized by joint planning, flexibility of schedule, provision of some parenting support to each other, and coordination of children's activities and schedules. The majority, more than half, settle into parallel parenting in which emotional disengagement, low conflict, and minimal communication about their children predominate. While this is less optimal for children than cooperative co-parenting, children do thrive in these arrangements, particularly when the quality of parenting in each home is nurturing and adequate. The remaining parents, about [twenty percent], have a continuing conflicted relationship, with poor communication and little if any cooperation.

Kelly, *supra* note 80, at 252 (citations omitted).



to intervene without success. Minutes after her mother left for work, Veronica called her father to report that she was home by herself. Father called CPS, which arrived minutes before Veronica's babysitter.

Veronica also seemed to be learning how to trigger her own panic attacks. When upset with her mother or seeking to gain the attention of her father, Veronica would begin to cry, breathe in a very shallow manner, and engage in negative and irrational self-talk. She would continue this process until her body took over and exhibited all the classic signs of a panic attack. This is in contrast with and in addition to the seemingly uncontrollable panic attacks that she would suffer multiple times weekly related to high-conflict interactions between her parents.

Veronica has a strained relationship with her mother for several reasons.<sup>82</sup> But Father was not wrong to trace part of the problem to parenting styles. In sessions with Veronica, the LCSW learned that Veronica's mother had developed a very authoritarian parenting style in a determined but fruitless attempt to raise Veronica's grades and gain compliance at home. Her mother made rules that she did not explain, relied on punishments rather than rewards, and spent a lot of time and energy nagging and scolding Veronica.<sup>83</sup>

Father's parenting style was precisely the opposite. He told the LCSW that he refused to waste his limited quality time on Veronica's homework. Explaining her preference for her father, Veronica used an example: If Veronica wanted chicken, and her mother was on the phone, she would tell Veronica to wait until she got off the phone. Her father, by contrast, would hang up and get her

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82. An enormous amount of research in recent decades has gone into children who are estranged from a parent. *See, e.g.*, Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums*, 48 FAM. CT. REV. 10, 11 (2010). There are many pathways that can lead to a postseparation estrangement from a parent, "including *normal developmental preferences* for one parent, *alignments* that are reactions to the specific circumstances of the divorce, and *estrangement* from a parent who has been neglectful or abusive," and *alienating* behavior by the other parent. Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research & Social Policy Implications for the Alienated Child*, 38 FAM. L.Q. 757, 762 (2004) (emphasis added); *see also* Parenting Plan Evaluations: Applied Research for the Family Court (Kathryn F. Kuehnle & Leslie M. Drozd eds., 2012) (summarizing the social science research); John HARTSON & BRENDA PAYNE, CREATING EFFECTIVE PARENTING PLANS: A DEVELOPMENTAL APPROACH FOR LAWYERS AND DIVORCE PROFESSIONALS 203–04 (2006) (developing a checklist of relevant considerations to help practitioners distinguish among these situations).

83. *See infra* note 119 (regarding authoritarian parenting).

chicken. If there was no chicken in the house, then her father would go to the store and get some.<sup>84</sup>

To help Veronica's mother develop more productive strategies and to prevent more panic attacks, the LCSW and Veronica's mother's therapist worked collaboratively and scheduled several sessions with Veronica's mother to teach the principles suggested in Susan Stiffelman's *Parenting Without Power Struggles: Raising Joyful, Resilient Kids While Staying Cool, Calm, and Connected*<sup>85</sup> and Sharon Ellison's and Ami Atkinson's audio book, *Taking Power Struggle out of Parenting*.<sup>86</sup> A virtue of the latter is that parents get to hear what they sound like when they are nagging and scolding their children. Both the LCSW and the coparenting teacher therapists remain available to Veronica's mother in times of "crisis" so that they can coach her and support her through the use of techniques taught in these resources.

The goals in working with Veronica have been twofold: improve her relationship with her mother and decrease anxious and defiant behavior. Much of the work with her mother has been to help her understand the dynamics of trauma and loss in divorce, learn skills to help Veronica cope with her emotions, learn appropriate parent/child boundaries, and develop a more authoritative parenting style.<sup>87</sup>

The LCSW has also worked with Veronica and her mother to improve communication, develop skills to more effectively address problems that arose in their relationship, and engage in attachment building exercises to improve their bond. Individually, the LCSW has worked with Veronica to develop anxiety reduction skills, grieve the loss of her parents' marriage, improve communication with her mother, and work through the trauma she experienced through the course of her parents' high conflict divorce.

Veronica's mother is changing as of the date of this article. She is putting up stronger boundaries between herself and Father. She is

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84. See *infra* note 120 (regarding permissive parenting).

85. SUSAN STIFFELMAN, *PARENTING WITHOUT POWER STRUGGLES: RAISING JOYFUL, RESILIENT KIDS WHILE STAYING COOL, CALM, AND CONNECTED* (2012).

86. SHARON ELLISON & AMI ATKINSON, *TAKING POWER STRUGGLE OUT OF PARENTING* (2007).

87. For extensive discussions of the benefits to children of an authoritative parenting style, see ROBERT E. LARZELERE ET AL., *AUTHORITATIVE PARENTING: SYNTHESIZING NURTURANCE AND DISCIPLINE FOR OPTIMAL CHILD DEVELOPMENT* (2013).

becoming authoritative, not authoritarian, with Veronica.<sup>88</sup> And she is learning to disengage when Veronica's emotions threaten to spiral out of control. Father has done nothing to change, and so is still the same.

Veronica's strong preference for her father has not changed, and she still does not express much warmth toward her mother. But she is generally compliant at home with her mother, does not call CPS as a means of control, is no longer having panic attacks, and continues to engage in communication and attachment-related work with her mother. Her grade point average on her most recent report card was 3.2.

### C. Vickie Cienfuegos<sup>89</sup>

In probate court, as in family court, justice can require more than a custody-and-visitation schedule.<sup>90</sup> Justice in probate court for Vickie Cienfuegos required a plan that would give her a chance to break out of a family culture that had produced at least three straight generations of welfare grifters and substance abusers.<sup>91</sup> Probate courts can order plans like that.<sup>92</sup> But they almost never do.<sup>93</sup>

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88. See *id.*; *infra* note 119 (regarding authoritative and authoritarian parenting).

89. This Article uses pseudonyms for all parents and children and does not cite documents in any court file. *Supra* note 3.

90. See *supra* notes 57–58 (explaining substantive justice in family court). Section 1514, subdivision (b) of the California Probate Code imports the same standards into probate court guardianship-of-the-person proceedings. CAL. PROB. CODE § 1514(b) (West 2002).

91. For a review of some of the literature on substance abuse and parenting, see Linda C. Mayes, *Substance Abuse and Parenting*, in 4 HANDBOOK OF PARENTING 329 (Marc H. Bornstein ed., 2002).

92. A guardian is “subject to the regulation and control of the [probate] court in the performance of the duties of the office.” CAL. PROB. CODE § 2102 (West 2002). Citing a prior version of section 2102 in *Guardianship of Reynolds*, the court held that the probate court’s jurisdiction is a continuing one, and “as an arm of the court the guardian . . . acts under the authority of the supervision of the court which appointed him.” *In re Reynolds’ Guardianship*, 141 P.2d 498, 502 (Cal. Ct. App. 1943). California’s Attorney General has concluded from this that “the probate court in the exercise of its continuing jurisdiction . . . [may] issue instructions providing for the mental and physical welfare of [a ward].” 65 OPS. CAL. ATT’Y GEN. 417, 420 (1982).

93. See Weisz & McCormick, *supra* note 32. California Family Code section 3026 causes confusion in this area when it says, “[f]amily reunification services shall not be ordered as a part of a child custody or visitation rights proceeding.” CAL. FAM. CODE § 3026 (West 2016). Section 3026 fails to define the services that are prohibited, and no trial court has been reversed under this section. See *id.* Section 3026 can be harmonized with the statutes cited *supra* at note 60 authorizing the court to make counseling and related orders by construing section 3026 to address the purpose of services, rather than the services themselves. This construction would allow trial courts to make orders addressed to parents’ deficiencies and children’s needs so long as the orders are not for the purpose of “family reunification.”

Vickie lived with her maternal great grandmother, grandmother, and aunt in a matriarchy of women with long histories of substance abuse. All the adults stayed home and collected welfare. Nobody showed any interest in getting a job to support herself or Vickie.<sup>94</sup> The grandmother was Vickie's legal guardian. She swore that she had no interest in Vickie's welfare check. It later turned out that the grandmother needed Vickie's check to support herself because she had exhausted her own welfare eligibility.<sup>95</sup>

At the same time, everybody in Vickie's family is smart. Vickie's mother wrote a long autobiography when she was all of nineteen years old. As dark and personal as it is, the autobiography can be read as the autobiography of a large subset of her generation. When counsel met Vickie's mother, she was unemployed, "tweaking" methamphetamine,<sup>96</sup> alienated from the family, and living alone in a shack without running water or electricity. Vickie's father had absconded to Texas to avoid arrest for gang-related activities.<sup>97</sup>

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94. In this respect, Vickie's caretakers were not fulfilling the role of "parents," whose "primary responsibility" is to "provid[e] for the adequate and reasonable needs of their children." *In re Marriage of Padilla*, 45 Cal. Rptr. 2d 555, 560 (Ct. App. 1995) (footnote omitted). "This duty rests on fundamental natural laws and has always been recognized by the courts in the absence of any statute declaring it." *Lewis v. Lewis*, 163 P. 42, 44 (Cal. 1917).

95. The main welfare program in California for families with children is called CalWORKs. With exceptions that are beyond the scope of this Article, section 11454 of the Welfare and Institutions Code, imposes a lifetime eligibility limit on adults of 48 months. CAL. WELF. & INST. CODE § 11454 (West 2014). There is no time limit on benefits to children. Unemployed parents without savings who have exhausted their lifetime limit must live off their children's benefits.

96. Professor Robert C. Fellmeth at the University of San Diego School of Law reports that methamphetamine addiction of parents is increasingly the major factor leading to child removals in dependency court. He believes that more than 50 percent of the neglect cases in the courts of the highly populated California counties implicate such addiction by one or both parents. "This correlation, although shocking, is generally not popularly known—partly because of the generally concealed format of those courts and cloaking the plight of those children." Interview with Robert C. Fellmeth, Professor, University of San Diego School of Law, in San Diego, Cal. (Feb. 15, 2015).

97. In 2014, the child poverty rate was 45.8 percent for children in single-parent households. Rachel Sheffield, *Child Poverty Rate Five Times Lower in Married-Parent Homes*, DAILY SIGNAL (Sept. 26, 2014), <http://dailysignal.com/2014/09/26/child-poverty-rate-five-times-lower-married-parent-homes>. For children in married-parent households, the child poverty rate was nearly a fifth of that amount, or 9.5 percent. *Id.* "For children living with a single parent . . . income is the single most important factor in accounting for their lower well-being as compared with children living with both parents." SARAH McLANAHAN & GARY D. SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 134 (1994). As common sense would suggest, "[c]hild poverty . . . adversely impacts health across the life course and into adulthood." *AAP Agenda for Children Strategic Plan Poverty and Child Health*, AM. ACAD. PEDIATRICS, <http://www.aap.org/en-us/about-the-aap/aap-facts/AAP-Agenda-for-Children-Strategic-Plan/>

None of the adults in the family demonstrated more than a casual commitment to the truth. Vickie's house was a wreck with debris piled to the ceiling and pushing up against the doors. Relationships within the house were also a wreck. Vickie's great grandmother was in her late fifties. Only her name was on the lease, a fact she used for leverage over everyone else in the family.

The probate court reappointed<sup>98</sup> counsel for Vickie when she was four, after her mother filed a petition to terminate the grandmother's guardianship.<sup>99</sup> As the probate court has traditionally seen these cases, its choices were either to leave Vickie with her grandmother, appoint another family member as successor guardian, or send Vickie back to her mother. None of these options would have produced much benefit for Vickie, since the family members were all pretty much the same.

Like a child in juvenile dependency court, Vickie needed a case plan<sup>100</sup> to resolve the family's parenting issues. Problems like substance abuse, lying as a way of life, refusing to work, and disorganization cannot be resolved by passing custody back and forth within the family when all the adults for at least three generations have more or less the same problems.<sup>101</sup>

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Pages/AAP-Agenda-for-Children-Strategic-Plan-Poverty-Child-Health.aspx (last visited Aug. 22, 2016); see Jason M. Lindo & Jessamyn Schaller, *Economic Determinants of Child Maltreatment*, *Encyclopedia of Law and Economics*, ENCYC. L. & ECON. (forthcoming 2016), [http://people.tamu.edu/~jlindo/EncyclopediaChildAbuse\\_PrePubVer.pdf](http://people.tamu.edu/~jlindo/EncyclopediaChildAbuse_PrePubVer.pdf). See generally *infra* notes 147, 149, and 201 (addressing some of the ways that poverty puts children at risk).

98. Los Angeles County's probate court uses a form of "limited scope representation." See *supra* notes 7, 30, and 49; *infra* notes 180-181 and accompanying text. The court appoints counsel for children for specified purposes, "relieves" counsel after he or she has served those purposes, and reappoints counsel as the need arises. Once counsel has been relieved, children like Vickie are at the mercy of their caretakers. It does not have to be that way. Some counties appoint "court visitors" to track and review guardianships. See Judicial Council form GC-248 (explaining "court visitors"). In Vickie's case, the court had relieved counsel after appointing her maternal grandmother as guardian, and reappointed counsel when Vickie's mother filed her petition to terminate the maternal grandmother's guardianship.

99. The court may terminate a guardianship "if the court determines that it is in the ward's best interest to terminate the guardianship." CAL. PROB. CODE § 1601 (West 2002); *In re Guardianship of L.V.*, 38 Cal. Rptr. 3d 894, 901 (Ct. App. 2006) (holding that "the best interest of the child is the sole criterion for termination of a guardianship."). The burden is upon the parent "to show sufficient overall fitness to justify the termination of the guardianship." *Guardianship of Simpson*, 79 Cal. Rptr. 2d 389, 392 (Ct. App. 1998). The trial court must evaluate the parent's fitness in the context of whether changed circumstances justify a change in custody. *Guardianship of Kassandra*, 75 Cal. Rptr. 2d 668, 675 (Ct. App. 1998).

100. See *supra* note 43 and accompanying text.

101. See Marieke Van de Rakt et al., *Association of Criminal Convictions Between Family Members: Effects of Siblings, Fathers, and Mothers*, 19 CRIM. BEHAV. & MENTAL HEALTH

Although she was still bright and sometimes sweet, Vickie was already going downhill: She was defiant. She would have tantrums, scream at adults, get violent, and destroy property. She could not focus at preschool. “I will not” was her signature phrase. She was Veronica Beltran in the making. The first step on the road to change was to find—or make—better parents to raise her right.

Vickie’s court-appointed lawyer hired Veronica’s LCSW to develop a case plan and to work with Vickie and her relatives. The LCSW cares about these kids at least as much as their lawyer, and once again charged very little. The LCSW persuaded Veronica’s mother to dismiss her petition and refile it after completing the case plan. The case plan required her mother to complete a course called “Positive Parenting Program” with good reviews from the clinician,<sup>102</sup> complete a specified drug treatment program, submit clean random drug test results at least once a week for not less than six months, get a job,<sup>103</sup> and rent a habitable home apart from the grandmother and great grandmother.

Positive Parenting Program takes an evidence-based<sup>104</sup> therapeutic approach to teaching parenting skills. It is a systematic protocol designed to prevent and treat behavioral and emotional problems in children and teenagers. Its goal is to create family environments that encourage children to realize their potential—something that could make a contribution to the world in Vickie’s case, given her native intelligence.<sup>105</sup>

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94–108 (2009) (concluding that a “cycle of deprivation” reproduces undesirable behaviors through the generations and that children learn most of their behaviors by imitating or modeling the behaviors of their parents or primary care giver); Van Meurs et al., *supra* note 68 (reporting research finding that children reared in unstable environments surrounded by drugs, alcohol, sexual abuse or domestic violence are much more likely to create similar environments for their children because that kind of environment seems right to them); *infra* note 133 (discussing neighborhood effects); *see also supra* note 12 and *infra* notes 145, 154–155 and accompanying text (noting possible impacts on children of socioeconomic factors such as parental education, income, and incarceration).

102. For a description of the program, see *Triple P in a Nutshell*, TRIPLE P, <http://www.triplep.net/glo-en/find-out-about-triple-p/triple-p-in-a-nutshell> (last visited Aug. 20, 2016), and *supra* notes 59, 71–72. *But see* Olga Khazan, *Welcome to Parent College: Can Parenting Classes Help End America’s Disgraceful Child-Abuse Epidemic?*, ATLANTIC (Mar. 16, 2015), <http://www.theatlantic.com/health/archive/2016/03/welcome-to-parent-college/473484> (questioning data supporting effectiveness of Positive Parenting Program).

103. *See supra* note 97 and accompanying text regarding the risks that poverty presents to children.

104. *See supra* note 72 and *infra* note 105 regarding the importance of evidence-based therapy.

105. For resources on evidence-based therapeutic intervention, *see Tools and Resources*,

Positive Parenting taught Vickie's mother that she and Vickie are a dyad. As a mother, her responsibility is to provide a peaceful, structured environment in which Vickie can grow up. Behavior should produce logical, natural consequences, which should teach children to think before they act. A child learns not to throw toys when she will not get them back for a long time if she does. A child learns to behave better when bad behavior leads to a timeout.

Positive Parenting also taught Vickie's mother to intervene, using skills like redirection and "active ignoring," long before Vickie's behavior spiraled into a tantrum. Redirection involves an active effort to get the child to focus on something other than the cause of the problem. "Active ignoring" restores consciousness. "I am ignoring you," the parent tells the child, "until you get dressed." Or, further down the road, "I'm ignoring you until you stop screaming."

Vickie's mother proved to be a great student because she is smart and naturally peaceful. She completed the drug program and brought along her drug-addicted boyfriend, who also completed the program and tested clean for eighteen months. They both attended outpatient therapy to identify and address the issues that drove them to drug abuse in the first place. Her mother got a job as a baker at an industrial bakery on the eastern fringe of Los Angeles County. And she and her boyfriend rented their own apartment.

Vickie's mother filed a new petition to terminate guardianship after she completed her case plan. The LCSW then mediated a safety plan between Vickie's mother and grandmother designed both to enlist Vickie's grandmother's support and to consolidate and to reinforce the mother's gains during her first six months of custody. The mediation itself was important in enlisting Grandma's support because it showed her that she remained important to Vickie—knowledge she needed in order to support the termination of the guardianship.

Vickie's mother, grandmother, and the LCSW worked out a plan that required Vickie's mother and her boyfriend to continue to submit to random drug tests for another six months, to attend Narcotics Anonymous (NA) meetings with a sponsor at least once a

week, and to meet with the LCSW at her mother's expense as often as necessary, but not less than once a month, for as long as the LCSW deems necessary.

This safety plan became a court order when the probate court attached it to its order terminating guardianship. Vickie's mother continues to test negative for drugs and to attend NA groups at least weekly. The plan has provided Vickie's mother with a level of support and resources in times of difficulty that might otherwise have led to a downward spiral. For example, when one of Vickie's mother's half-brothers unexpectedly died, the LCSW was able to provide emotional support that other family members could not provide. The LCSW was also able to redirect Vickie's mother to her own support network through church, NA, and other friends. When she lost some shifts at work and was concerned about making rent and utilities one month, the LCSW was able to provide referrals for assistance with food, clothing and bills, allowing her to remain confident in her ability to provide for the family. Though Vickie's mother did not avail herself of these resources, the knowledge that she had a soft and safe place to fall has prevented a downward spiral that could have derailed Vickie's life once again.

#### *D. Fess Williams*<sup>106</sup>

Fess Williams was seventeen by the time his parents reached divorce court,<sup>107</sup> with less than a year to go before the family court lost jurisdiction over him.<sup>108</sup> He is a highly intelligent, articulate, and

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106. This Article uses pseudonyms for all parents and children and does not cite documents in any court file. *Supra* note 3.

107. Discord surrounding divorce is usually stressful for children who are faced with conflicted loyalties. Even when the fight for loyalty is not overt, young children often believe that they are somehow responsible for the conflict. *See generally* JUDITH WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000) (showing that one third of children of divorce had serious psychological problems that persisted into adulthood); Marsha Garrison, *Promoting Cooperative Parenting: Programs and Prospects*, 9 J. L. & FAM. STUD. 265, 265–67 (2007) (finding that parental conflict continues to hurt children even after the parents' final separation); Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce & Child Well-Being Across Three Generations*, 67 J. MARRIAGE & FAM. 191, 191–92 (2005) (stating that grandchildren of divorced grandparents show higher rates of marital discord, divorce, and tension in early parent-child relationships, and lower rates of educational attainment); Sharlene Wolchik et al., *Events of Parental Divorce: Stressfulness Ratings by Children, Parents, and Clinicians*, 14 AM. J. COMM. PSYCHOL. 59, 72–73 (1986) (noting that divorce is almost always hard on children).

108. "The family court may . . . make an order for the custody of a child during minority." CAL. FAM. CODE § 3022 (West 2004). Under California law, a minor is an individual who is



insightful young man, but he started to fail classes in middle school. By tenth grade, he had basically stopped going to school. Fess's only sibling, a sister who is two years older than he is, had very similar academic problems.

Divorce has limited relevance to children with two incompetent parents because divorce cannot make either parent competent. Parenting training and counseling can improve the situation for kids like Veronica Beltran and Victoria Cienfuegos. Nonparent caretakers are an option for kids like Anquan Paul and Esteban Santa Cruz. But for Fess Williams, it was too late for any of that.

Fess's school psychologist had ruled out an emotional, behavioral, or psychiatric impairment as the cause of Fess's academic difficulties.<sup>109</sup> Fess attributed his lack of success to "being lazy and procrastinating." In exploring with an LCSW what happened when he attempted to study, however, Fess described a process in which he had difficulty concentrating and lost focus. His mind would wander to the stresses<sup>110</sup> of his family and related losses, which led him to struggle to complete his work. In turn, he felt "bad about [himself]" because he did "not like not doing well in school."<sup>111</sup>

Fess's parents separated shortly before Fess started high school.

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under eighteen years of age. CAL. FAM. CODE § 6500 (West 2013).

109. The psychologist did not attempt to rule out depression even though Fess had experienced not only the loss of his parents' marriage and school but also the loss of close friendships. A student with an emotional disturbance may qualify for special educational services under the Individuals with Disabilities Education Act (IDEA). *See, e.g.*, *Lapides v. Coto*, 1987-88 EHLR DEC. 559:387 (N.D. Cal. 1988). Under 34 C.F.R. § 300.8 (c)(4)(i)(D) (2006), Emotional disturbance under the IDEA includes "a general pervasive mood of unhappiness or depression." 34 C.F.R. § 300.8 (2006). School psychologists who are interested in protecting their schools' budgets have a financial incentive not to find qualifying impairments because special education costs money. Fess could have litigated this issue, albeit not in family court, but Team Decision Making (TDM) went in a different direction. *See infra* note 117 and accompanying text.

110. For research and literature on children and traumatic stress, see *Child Traumatic Stress*, NAT'L CHILD TRAUMATIC STRESS NETWORK, <http://kb.nctsn.org/SPT/SPT-BrowseResources.php?ParentId=183> (last visited Aug. 20, 2016).

111. Academic problems are well documented in children of divorce, especially when parents are poor role models or fail to provide necessary support. Plummeting grades cause a resistance to academics resulting in lowered self-image. This paradigm becomes cyclical: (1) poor grades, (2) self-identification of being "stupid," (3) resistance to school, (4) poor grades as a result of accepting the status quo. If there is no detection or intervention to identify the problem, the behavior may be perpetuated throughout the child's educational experience. School phobias, truancy or actual dropping-out may be the end result if successful intervention does not take place. JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 184 (1980).

Fess and his sister decided to stay with their father. At his father's suggestion, Fess transferred before his junior year to an "Independent Study" school. Fess's father made it his mission to raise Fess's grades if it killed both of them, and Fess did well enough during the first marking period in every class but English, which he failed. But the improvement in his grades came at the expense of Fess's relationship with his father.

Sensing an opportunity to salvage a relationship with at least one child, Fess's mother invited Fess to come live with her and his maternal grandmother, an unemployed woman who had struggled for decades with a serious drinking problem. Fess's mother and grandmother rented a home in a trailer park about 15 miles from the father's home. When Fess accepted his mother's invitation, she proceeded to rent a room for him in what she called a "safe house" near Fess's school, where Fess could wait for her to pick him up after work and bring him home. With the "safe house," Fess would never see his father.

The case arrived in court when Fess's father filed a Request for Order<sup>112</sup> to reverse this situation. The hearing took place after Fess's first semester in his mother's home. Fess's father contended that Fess could not succeed at school in his mother's custody for a variety of reasons. Fess's mother responded that in fact, Fess was attending school and passing all of his classes, which for him would have been a giant step forward.

It turned out that Fess had gotten zeros on most of his assignments in three of his four classes, but the laws governing grades and attendance in Independent Study schools made those zeros irrelevant. Under State law, "attendance" at Independent Study schools has nothing to do with occupying a seat in class. Instead, Independent Study schools award credit for attendance in proportion to "evaluated work." A student can therefore get credit for perfect attendance without ever attending class.<sup>113</sup>

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112. In relevant part, rule 5.92(a)(1) of the California Rules of Court states: "In a family law proceeding other than an action under the Domestic Violence Prevention Act or a local child support agency action under the Family Code, a notice of motion or order to show cause must be filed on a Request for Order (form FL-300), unless another Judicial Council form has been adopted or approved for the specific motion or order to show cause." CAL. R. CT. 5.92(a)(1) (2016).

113. CAL. DEP'T OF EDUC., *Attendance Accounting and the Audit Trail*, in INDEPENDENT STUDY OPERATIONS MANUAL 8-1 (2014), <http://www.cde.ca.gov/sp/eo/is/documents/chapter>

“The only item[s] that count . . . for . . . evaluated work,” moreover, are assignments “completed . . . by the due dates established in the written agreement” between the student and the teacher.<sup>114</sup> Independent Study schools interpret that passage to mean that zeros do not count against a student’s grade point average or attendance. Fess received credit for perfect attendance because he received passing scores on the work he completed. In theory, these standards allow students to progress at their own pace.<sup>115</sup>

By the standards of a traditional high school, Fess would have flunked every class except one and received the worst overall grade point average of his life. But Independent Study standards allowed Fess to report a passing grade in all four of his classes and perfect attendance while he lived with his mother. By not completing his assignments, however, Fess earned very few academic credits. At Fess’s pace during his semester with his mother, he would have been lucky to graduate from high school before he reached retirement age.

For Fess, the answer was Team Decision Making (TDM).<sup>116</sup> At Fess’s lawyer’s request, the court ordered his parents to retain an LCSW to coordinate TDM, an effective low-cost mechanism to bring together community resources immediately to meet children’s needs.<sup>117</sup> TDM operates on the principle that sometimes “it takes a

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8.pdf [hereinafter *Attendance Accounting*]; see CAL. EDUC. CODE §§ 51740, 51745–51749.5 (West 2006); CAL. CODE REGS. tit. 5, § 11700 (2016) *et seq.* For a fuller understanding of independent study in California’s public schools, see *Independent Study*, CAL. DEP’T EDUC., <http://www.cde.ca.gov/sp/eo/is/> (last visited Aug. 22, 2016). See *Independent Study—CalEdFacts*, CAL. DEP’T EDUC., <http://www.cde.ca.gov/sp/eo/is/cefindependentst.asp> (last visited Aug. 22, 2016); *Independent Study Operations Manual*, CAL. DEP’T EDUC., <http://www.cde.ca.gov/sp/eo/is/isoperationsmanual.asp> (last visited Aug. 22, 2016).

114. *Attendance Accounting*, *supra* note 113, at 8–1.

115. *Id.*

116. “[U]nauthorised absence [from school] is an ongoing concern that has generally proved remarkably resistant to all kinds of innovative approaches, especially in the most severe cases.” Carol Hayden, *Family Group Conferences—Are They an Effective and Viable Way of Working with Attendance and Behaviour Problems in Schools*, 35 BRIT. EDUC. RES. J. 205 (2009). Children with the most problems with school are “likely to need support that recognizes the wider influences on these issues.” *Id.* Team Decision Making is “a viable approach . . . that may be effective in individual cases.” *Id.*; see *infra* note 117.

117. Team Decision Making, sometimes called Family Group Decision Making and Family Group Conferencing, seeks to expand the concept of “family” to include anyone with a significant relationship to the child in order to gain a broader range of perspectives and increase the potential supports available to the family. See generally FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE (Joe Hudson & Gale Burford eds., 2000) (discussing “community-centered” approaches to child welfare services).

whole village to raise a child.”<sup>118</sup>

Through the TDM process, it became immediately apparent that inappropriate parenting largely explained the disparity between Fess’s aptitude and his grades. Fess’s father had an authoritarian parenting style, combining high expectations for compliance with parental rules and directions with low regard for input from the child who was subject to those rules.<sup>119</sup> He attributed Fess’s success during his last semester under his care to this parenting style, citing examples in which he “basically forced” Fess to complete school work. Fess’s father is a very straightforward man who calls it “like it is.” He called Fess a “fuckhead” during a disagreement, for example, because that is how he viewed Fess’s behavior. Fess’s father expressed tremendous frustration with Fess’s lack of school performance; he had no patience for Fess’s “mood swings.”

Fess’s mother, by contrast, presented with a permissive parenting style, making few demands, being lenient, and taking on the status of a friend more than that of a parent.<sup>120</sup> She was also permissive with herself. Both her home and her life were in disarray. She admitted to relying on Fess for support both during and after the marriage. Fess was “the man of the house.” He felt it was his role to support his mother as she had few friends and needed his support.

What Fess needed was supplemental parenting.<sup>121</sup> Through the TDM process, the LCSW found it at Fess’s church, in the person of a youth pastor. Churches are an existing but underused low-cost community resource. Fess and the pastor agreed to meet weekly with two peers with similar issues. The pastor insisted that Fess start small, doing little things first before they snowball into big things. He focused on expectations, scheduling, and consequences. He

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118. HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE* (1996) (quoting an Igbo and Yoruba (Nigerian) proverb in discussing children and family values). Aaron H’s biography, summarized *infra* at Part III, would support the opposite conclusion: that it can take a village to ruin a child.

119. Authoritarian parents fail to explain the reasoning behind their rules. If asked to explain, the parent might simply reply, “Because I said so.” These parents have high demands but are not responsive to their children. Diana Baumrind, *The Influence of Parenting Style on Adolescent Competence and Substance Use*, 11 *J. EARLY ADOLESCENCE* 56, 73 (1991).

120. Permissive parents rarely discipline their children because they have relatively low expectations of maturity and self-control. They often take on the status of a friend more than that of a parent. *Id.*

121. For a discussion of a child’s need for outside support when parents are inept, see SUNAR L. LUTHAT ET. AL., *RESILIENCE AND VULNERABILITY: ADAPTATION IN THE CONTEXT OF CHILDHOOD ADVERSITIES* 203, 299, 524, 538 (2003). See *supra* notes 49, 71–73 and 102–105 regarding the importance of well-structured parent education.

wanted to know what Fess has done, not why he did not do it. He developed rules and guidelines for Fess to follow, and helped Fess identify previously effective study skills, such as breaking down each two weeks' worth of assignments into daily tasks for completion.

Fess's parents agreed to enroll in therapy to address parenting issues and ideally to adopt the same—or at least compatible—parenting styles. Both parents also agreed to engage in parallel parenting as opposed to co-parenting.<sup>122</sup> The parents have not done these things, but they have stopped asking Fess to share what happened in the home of the other parent, and now redirect any discussion of his difficulties with the other parent to his church supports or the LCSW.

For the last two marking periods, Fess has completed all of his assignments and passed all of his classes with scores ranging from 84% to 98%. He has begun to visit his father. And he continues to see the LCSW as needed.

#### *E. Gerard Doherty*<sup>123</sup>

Team Decision Making also makes it possible to incorporate collateral relatives into a parenting plan to keep a child safe and ensure that parenting arrangements remain appropriate.

When his lawyer first met him, Gerry Doherty looked just like the boy in the old Oscar Mayer commercial for bologna, only cuter (“My bologna has a first name. It’s O-S-C-A-R . . .”). But he was and is a wary little boy. He thinks carefully before answering questions, and he avoids issues that make him uncomfortable.

Both of his parents denied problems with drugs, but public databases showed that Gerard's mother had been convicted of a series of drug-related theft crimes leading to a six-month prison term in 2011. Gerard's father presented a certificate from federal court purporting to show that he had no criminal contacts, but public databases showed that in fact he had six arrests. The docket sheet in the most recent case showed that he had completed a formal diversion program to avoid a drug conviction.

At minor's counsel's request, the family court ordered both

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122. See *supra* notes 81–80 and accompanying text.

123. This Article uses pseudonyms for all parents and children and does not cite documents in any court file. *Supra* note 3.

parents to submit to random drug testing.<sup>124</sup> Gerard's mother was arrested for possession of opiates the day before the next hearing in family court, and she spent most of the next two years in prison. Gerard's father had completed only one random test by the next family court hearing, but somehow persuaded the test site to report that he was in full compliance with the court's testing orders. The one test was negative.

So on June 4, 2012, the court awarded sole legal and physical custody to Gerard's father. Because Gerard was now alone with his father under questionable conditions, minor's counsel tracked down Gerard's paternal grandfather in another state to ask for suggestions. He sent counsel a letter that reads in part:

Gerard lived in our home for approximately 7 months Oct 2010 to May 2011 to aid in the recovery of [Gerard's father] from drugs and alcohol. Upon arrival to our home . . . , Gerard was in quite a distressed state for such a young child. Extremely . . . frightened, scared that he would be left alone, and constantly worrying about both his parents. His diet consisted of 6-8 hard-boiled eggs a day, with cereal occasionally.

If his behavior were corrected, he would run and hide in his room behind his bed or behind the curtains. He could not play a board game (shoots [sic] and ladders) without knocking game board over and throwing himself on the ground and pouting. He would panic when he went in the car . . . . "We are not going on freeway are we??" Then he would cry. This was from his experiences of being used to Pan Handle at the Glendale mall with his parents.

During the seven months he was in our home, [Gerard's father] was preoccupied and left in early am and returned in the midnight hours daily . . . . He [was] so exhausted at night that he refuse[d] to get up and use the restroom. He

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124. When it finds by "a preponderance of the evidence" that there is the "habitual, frequent, or continual illegal use of controlled substances" by a person seeking custody, a family court or probate court may order the "least intrusive" method of drug testing. CAL. FAM. CODE § 3041.5 (West 2004). Test results may not be used for any purpose other than to assist the court in allocating custody and visitation. *Id.*

urinate[d] in drinking glasses.

Gerard [and Gerard's father] returned to California around the end of May or early June 201[1], as [Gerard's father] was drinking again, took my car, left Gerard someplace and came home intoxicated with Gerard smelling [of] alcohol and was told that he would not be allowed to drive our vehicles any longer.

During the time that Gerard was here . . . , we often had visits by [the maternal grandparents and maternal aunt.] Their love for Gerard is without question . . . . They made every possible effort to keep in touch. They called almost every day and sent pictures and photo albums of visits, along with biweekly video chats with his aunt.

After reading this letter, Gerard's lawyer contacted Gerard's maternal relatives, gave them a copy of the paternal grandfather's letter, and directed them to the free Self-Help Center at the courthouse for help filing a petition for visitation rights.<sup>125</sup> The following week, a team comprising Gerard's maternal and paternal grandparents, father, and lawyer worked out a regular visitation schedule for his maternal relatives based on the understanding that Gerard's safety comes first. Like churches, extended family members are an existing but underused low-cost community resource.

Almost exactly two years later, in June 2014, an anonymous caller called 911 to report that a man had overdosed on drugs and was lying face down inside his house. The man was Gerard's father. When help arrived, Gerard was alone with his unconscious father. Gerard's parenting plan was no longer appropriate.

Gerard's maternal relatives contacted his lawyer the next day. They had heard what happened, and could not find Gerard. Suspecting that Gerard would turn up in juvenile dependency court,<sup>126</sup> minor's counsel advised them to call the Child Abuse

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125. The Los Angeles Superior Court operates "Self-Help & Resource Centers for Self-Represented Litigants" to provide education and assistance to parties who do not have attorneys and need to complete documents and court procedures on their own. *Los Angeles Superior Court Resource Center for Self-Represented Litigants*, L.A. SUPER. CT. (2016), <http://www.lacourt.org/laselfhelp/UI/index.aspx?model=1>.

126. Juvenile dependency courts operate behind an iron curtain of confidentiality. California Welfare and Institutions Code sections 346 and 827 and California Rule of Court 5.530 establish

Hotline immediately, and to drive to dependency court that day and every day for the next three days to see what they could discover.<sup>127</sup>

Gerard's maternal relatives were waiting in juvenile dependency court when his case arrived. The court placed Gerard with them, where he remains to date. The transition was seamless.

#### IV. A LIFE IN THE BALANCE

Michael Lewis' *The Blind Side: Evolution of a Game*<sup>128</sup> meets Nina Bernstein's *The Lost Children of Wilder*<sup>129</sup> in the biography of Aaron H.<sup>130</sup> If ever a child were the product of his environment, then Aaron is. Ironically, it is the environment that Los Angeles County's juvenile dependency system chose for him when he was nine days old<sup>131</sup> and ratified every six months until the court washed its hands

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who has automatic access to juvenile dependency court files and proceedings as well as the process for other parties to follow to request access. Gerard's relatives did not have automatic access, and did not have time to petition the court to find out what was happening with him. *See* CAL. WELF. & INST. CODE §§ 346, 827 (West 2016); CAL. R. CT. 5.530 (2016).

127. A county's department of child protective services (CPS) must file a petition in juvenile dependency court within 48 hours of a child's removal from his or her home, not including non-judicial days, to "declare" the child a dependent of the court, or release the child to his or her parents. CAL. WELF. & INST. CODE § 313 (West. 2016). The juvenile court must hold an "initial hearing" (known as a "detention hearing") no later than the next judicial day. *Id.* § 315; CAL. R. CT. 5.501–.504, 5.668 (2016).

128. MICHAEL LEWIS, *THE BLIND SIDE: EVOLUTION OF A GAME* (2006).

129. NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE* (2001).

130. This Article uses pseudonyms for all parents and children and does not cite documents in any court file. *Supra* note 3.

131. In its 1999–2000 report, the Los Angeles County Civil Grand Jury excoriated the County's foster care system, observing that "[t]he best interests of the child are rarely paramount in considering the placement options for children in the system." 1999–2000 L.A. COUNTY GRAND JURY FINAL REP. (2000), <http://grandjury.co.la.ca.us/x1z2.pdf>. In April 2012, Los Angeles County's Children's Special Investigations Unit delivered to the Board of Supervisors the *Report Regarding DCFS Recurring Systemic Issues*, which identified at least 13 child deaths that might have been prevented if Respondents had taken basic steps to assess risks. CHILDREN'S SPECIAL INVESTIGATION UNIT, L.A. CTY. BD. OF SUPERVISORS, REPORT REGARDING DCFS RECURRING SYSTEMIC ISSUES 1, 11 (2012), <http://documents.latimes.com/report-severe-problems-los-angeles-county-department-children-and-family-services>. The report said the situation was akin to "the blind leading the blind," with workers rarely held accountable for "egregious" errors. *Id.* at 66, 69. As recently as April 18, 2014, Los Angeles County's Blue Ribbon Commission on Child Protection issued a report concluding that "judges confirmed that the judicial system operates under the burden of too many cases and, at times, incomplete or inaccurate information." L.A. CTY. BLUE RIBBON COMM'N ON CHILD PROT., THE ROAD TO SAFETY FOR OUR CHILDREN i (2014), [http://ceo.lacounty.gov/pdf/brc/BRCCP\\_Final\\_Report\\_April\\_18\\_2014.pdf](http://ceo.lacounty.gov/pdf/brc/BRCCP_Final_Report_April_18_2014.pdf). One recent study questions whether foster care has produced any measurable improvement anywhere in the lives of children. Kristine A. Campbell et al., *Household, Family, and Child Risk Factors After an Investigation for Suspected Child Maltreatment: A Missed Opportunity for Prevention*, 164 ARCHIVES PEDIATRIC ADOLESCENT MED. 943 (2010).



of the case eleven years later.<sup>132</sup>

Whatever else they might be, the south and east sides of Los Angeles are also gang territory. In many of their neighborhoods,<sup>133</sup> the gang participation rate for teenagers and young adults approaches one-hundred percent.<sup>134</sup> Gang “participation” covers a broad spectrum of involvement, but it’s never a good thing.<sup>135</sup> Very few issues matter more to the children who live in gang-infested neighborhoods.<sup>136</sup>

One neighborhood in south Los Angeles is called “Death Alley” because it has the highest homicide rate in the County.<sup>137</sup> The dependency court placed Aaron H. at ground zero on Death Alley, less than two blocks from the corner of Century Boulevard and

132. Aaron’s foster care file would undoubtedly confirm this chronology, but DCFS’s records may not be excerpted without the permission of the juvenile court, and those records must be filed under seal in family court. CAL. WELF. & INST. CODE § 827 (West 2016); *see id.* § 827.10. The juvenile court granted the author’s request to review Aaron’s court file on the condition that he not take any notes.

133. *See* Dafna E. Kohen et al., *Neighborhood Disadvantage: Pathways of Effects for Young Children*, 79 CHILD DEV. 156, 164 (2008).

[N]eighborhood disadvantage manifests its effect via lower neighborhood cohesion, which, in turn, may interfere with processes that promote parenting practices associated with child competence and positive adjustment.

[R]esidence in a poor and disorganized neighborhood was associated with maternal depression and family dysfunction. Compromised parental and family well-being, in turn, were associated with lower quality parenting (i.e., less stimulation, less consistency, and more punitiveness) and negative child outcomes. Thus, our findings reveal that neighborhood-level economic and social hardship operate in a similar fashion to family-level disadvantage in creating conditions that stress the family unit and ultimately impact children.

*Id.* (citations omitted); *see infra*, note 149.

134. *See A Call to Action: A Case for a Comprehensive Solution to LA’s Gang Violence Epidemic*, ADVANCEMENT PROJECT, <http://advancementprojectca.org/ap-publications/a-call-to-action-the-case-for-comprehensive-solutions-to-l-a-s-gang-epidemic> (last visited Aug. 22, 2016) (including contributions from 47 subject matter experts, this report concludes that “the petri dish of Los Angeles’ high crime neighborhoods has spawned a violent gang culture unlike any other” (internal quotation marks and citation omitted)).

135. Only a very small percentage of school-aged gang members engage in serious or violent crimes that would get them arrested or listed on law enforcement databases. *See* James C. Howell et al., *The Changing Boundaries of Youth Gangs*, in GANGS IN AMERICA 3–1 (2002); G. David Curry, *Self-Reported Gang Involvement and Officially Recorded Delinquency*, 38 CRIMINOLOGY 1253 (2000).

136. Interview with Rafer Owens, Pastor, Faith Inspirational Missionary Baptist Church in Compton, California and for the last twenty-two years, Deputy Sheriff for the County of Los Angeles stationed in Compton (Feb. 15, 2015).

137. Nicole Santa Cruz & Ken Schwenke, *South Vermont Avenue: L.A. County’s Death Alley*, L.A. TIMES (Jan. 19, 2014), <http://homicide.latimes.com/post/westmont-homicides> (reporting that “[s]ixty people have been killed along this corridor since 2007, most shot to death.”).

Vermont Avenue,<sup>138</sup> in the same home where his father grew up. Aaron's mother and his other possible father grew up nearby.

Aaron's mother and both men who could be his father have extensive histories of substance abuse. The man that Aaron calls his father spent large chunks of Aaron's childhood in prison. Aaron has never met Alan John,<sup>139</sup> his other possible father, who would be about seventy-two years old and is sometimes seen on Manchester or Slauson Boulevards in south Los Angeles, sometimes in the city of Chicago.

Aaron's mother nods when she talks, which may be a side effect of the psychotropic medication she takes for bipolar disorder, depression, and chronic anxiety.<sup>140</sup> She has been in and out of jail, and insists that "a chemical imbalance" causes her to falsely test positive for PCP whenever she smokes a cigarette. She has never had a job that she could do with her clothes on. Foster care kept Aaron's mother at a safe distance, but Aaron has not been in foster care since he was eleven.

In 1994, three years before Aaron was born, DCFS opened a dependency case against his parents for the "severe neglect" of Aaron's four siblings. Aaron personally entered foster care when he was nine days old. The juvenile court placed all five siblings with their paternal grandmother and her boyfriend in a home where Aaron's father still lived when he was not locked up. Both the grandmother and the boyfriend were hard-core alcoholics who died young of alcohol-related causes.<sup>141</sup> When Aaron was eleven, after both his grandmother and her boyfriend had died, the juvenile court terminated its jurisdiction and awarded sole legal and physical custody<sup>142</sup> to his father.

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138. See Gene H. Brody et al., *Neighborhood Disadvantage Moderates Associations of Parenting and Older Sibling Problem Attitudes and Behavior with Conduct Disorders in African American Children*, 71 J. CONSULTING & CLINICS PSYCHOL., 211 (2003) (concluding that the negative effects of disadvantaged neighborhood structural factors and social organization may operate through unsupervised peer group activities, "siblings with deviance-prone attitudes," as well as "harsh" and "non-nurturant-involved" parenting.).

139. This Article uses pseudonyms for all parents and children and does not cite documents in any court file. *Supra* note 3.

140. See BILL EDDY, *THE FUTURE OF FAMILY COURT: STRUCTURE, SKILLS AND LESS STRESS* 77 (2012) (reporting that child custody disputes frequently involve one or more family members with a mental health problem).

141. Aaron's father's theory is that his mother's boyfriend lived longer than he might have because alcohol gave him a reason to live.

142. Under the current statutory scheme, legal and physical custody are either "joint" or

Foster care did nothing positive for Aaron; apart from keeping his mother at bay for a while, foster care really did nothing at all.<sup>143</sup> Aaron and his father still live in the same home. Situated on an alley, it has one bedroom in about 250 square feet. Sometimes the house has a stench, sometimes it smells better. Aaron's father inherited his mother's Section 8 certificate<sup>144</sup> but remains in the same hut because he cannot find another landlord to rent to him. That could be because of all the mistakes he has made over the years, starting in high school. After he lost interest in football, Aaron's father joined the "Athens Park Bloods" and embarked on a dissolute life. Aaron's father says that his own father offered both a role model and a cautionary tale, which may help explain Aaron's father's complex relationship with Aaron. Aaron's paternal grandfather spent Aaron's father's entire childhood in prison.<sup>145</sup>

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"sole"; "joint physical custody" means that each of the parents shall have significant periods of physical custody." CAL. FAM. CODE § 3004 (West 2016). "Sole physical custody" means that a child shall reside with and be under the supervision of one parent, subject to the power of the court to order visitation." *Id.* § 3007. Joint legal custody "means that both parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." *Id.* § 3003. "Sole legal custody" means that one parent" alone has that "right and responsibility." *Id.* § 3006.

143. Children who grow up in foster care are "more likely than their peers to suffer from homelessness, be involved in criminal activity, be uneducated, be unemployed, experience poverty, and lack proper healthcare." Melinda Atkinson, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183 (2008). California foster children are no exception. See Kristine A. Campbell et al., *Household, Family, and Child Risk Factors After an Investigation for Suspected Child Maltreatment: A Missed Opportunity for Prevention*, 164 ARCHIVES PEDIATRIC ADOLESCENT MED. 943 (2010). See generally Sylvia Junn & Jennifer Rodriguez, *Out on Their Own: California's Foster Youth and the Inequalities of the Independent Living Program*, 6 U.C. DAVIS J. JUV. L. & POL'Y 189 (2002) (reporting on California's attempts to address some of the challenges that children face when they grow up in foster care).

144. Section 8 of the United States Housing Act of 1937 provides a comprehensive program of federal housing assistance for low-income persons. Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1437 *et seq.*). The policy is generally implemented by direct subsidies to owners of apartments who certify that their tenants meet the income requirements of the Act. For a discussion of this provision, see *Holbrook v. Pitt*, 643 F.2d 1261, 1266-69 (7th Cir. 1981).

145. Low levels of positive parenting behaviors and high levels of negative parenting behaviors have consistently been associated with child behavior problems. Eleanor Emmons MacCoby & John A. Martin, *Socialization in the Context of the Family: Parent-Child Interaction*, in 4 HANDBOOK OF CHILD PSYCHOLOGY 1-101 (1983). Parents can transmit these problems from one generation to the next. Gerald R. Patterson & Karen Yoerger, *A Developmental Model for Early- and Late-Onset Antisocial Behavior*, in ANTISOCIAL BEHAVIOR IN CHILDREN AND ADOLESCENTS: A DEVELOPMENTAL ANALYSIS AND MODEL FOR INTERVENTION 147-72 (2002). Regarding the effects of parental imprisonment, see *supra* notes 12 and 101 and *infra* notes 154-155 and accompanying text.

Aaron's brother, Hector Douglass,<sup>146</sup> has pointed a way out. After earning a football scholarship to a Big 10 university, Hector Douglass graduated in 2013 with degrees in sports medicine and sociology. He remains in his university town, and he wants no part of Los Angeles, Aaron, or the rest of the family he left behind.

Like his brother, Aaron has above average intelligence and prodigious football ability: He was the MVP of the Los Angeles Unified School District's middle school league. His father has the trophy to prove it. Aaron can also play some basketball. He can rap, and he has some rhymes online even though he does not own any electronics, much less any musical instruments. He also has a blog even though he does not own a computer. Both the raps and the blog make outstanding use of metaphors, though the themes and language are deplorable.

Aaron's life might have been different if his parents had been able to get jobs and stay together, off drugs, and out of prison. When DCFS removed Aaron from his parents' custody immediately after he was born, it might have made sense to place him with foster parents who did not have so many problems of their own.<sup>147</sup> But none of that happened. His life might have been different if the judges, lawyers, and social workers in the juvenile dependency system had actually done something for him, but that did not happen, either.<sup>148</sup> Aaron's life would be different now if he would maintain a decent grade point average. But Aaron has not maintained the grade point average necessary to play high school sports, much less graduate.<sup>149</sup>

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146. This Article uses pseudonyms for all parents and children and does not cite documents in any court file. *Supra* note 3.

147. Poverty can perpetuate poverty "generation after generation, by acting on the brain." Madeline Ostrander, *What Poverty Does to the Young Brain*, NEW YORKER (June 4, 2015), <http://www.newyorker.com/tech/elements/what-poverty-does-to-the-young-brain> (citing studies showing that "substandard housing, separation from parent(s), exposure to violence, family turmoil, and other forms of extreme stress—can be toxic to the developing brain, just like drug or alcohol abuse"); *see supra* note 97; *infra* notes 149, 154–155, 201.

148. In fairness, even the most competent dependency lawyers and social workers with the best of intentions have enough on their plates in Los Angeles to choke a horse. In *E.T. v. George*, the plaintiffs documented that staff attorneys for the non-profit agency that serves as court-appointed counsel for dependent children in Sacramento County carry as many as 395 cases at a time. 681 F. Supp. 2d 1121, 1156 (E.D. Cal. 2010), *aff'd*, 682 F.3d 1121 (9th Cir. 2012). The same agency represents children in Los Angeles.

149. Academic difficulties are closely correlated with neighborhood and poverty. For a comprehensive review of research on the effects of neighborhood poverty and child and adolescent well-being, see Tama Leventhal & Jeanne Brooks-Gunn, *The Neighborhoods They*

The family court appointed a new lawyer for Aaron in the spring of 2013, when his mother filed a parentage action in family court. By then, Aaron was sixteen and hard to help. His new lawyer pointed Aaron to the excellent charter school operated by Soledad Enrichment Action in his neighborhood.<sup>150</sup> Aaron's father ruled that out, saying that a boy from his block would not be safe there. School personnel confirmed that it would not be safe for Aaron to walk across the few blocks between his house and the school.

So Aaron's new lawyer provisionally arranged for him to attend Bishop Mora Salesian High School,<sup>151</sup> a Catholic college preparatory school in Boyle Heights. Aaron seemed to like it. He raced his lawyer from building to building, up and down the knolls. He found a trove of snacks, which the school was happy to share. "[F]or the past several years, all of [the school's] students in every graduating class have chosen to continue their education, with over 90% of them going on to four-year universities."<sup>152</sup> Tuition would have been free because the school charges on a sliding scale according to family income, and Aaron's family had almost no income.

But neither Aaron nor his father completed their parts of the application for admission. Instead, Aaron transferred to Rancho Dominguez Preparatory School, a newer high school in Long Beach

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*Live in: The Effects of Neighborhood Residence on Child and Adolescent Outcomes*, 126 PSYCHOL. BULL. 309 (2000). See also Robert H. Bradley, *Environment and Parenting*, in 2 HANDBOOK OF PARENTING 281 (2002) (the ways that a family's social and physical environment can shape parental interactions with children); John E. Richters & Pedro E. Martinez, *Violent Communities, Family Choices, and Children's Chances: An Algorithm for Improving the Odds*, 5 DEV. & PSYCHOPATHOLOGY 609 (1993) (presenting data concerning the early predictors of adaptational success and failure among children attending elementary school in a violent Washington, D.C. neighborhood); *supra* notes 97, 133, 147 and *infra* notes 154–155, 201 (addressing impact on some children of socioeconomic factors such as neighborhood, education, income, and parental incarceration). See generally SANDRALUZ LARA-CINISOMO & ANNE R. PEBLEY, LOS ANGELES COUNTY YOUNG CHILDREN'S LITERACY EXPERIENCES, EMOTIONAL WELL-BEING AND SKILLS ACQUISITION: RESULTS FROM THE LOS ANGELES FAMILY AND NEIGHBORHOOD SURVEY (2003), <https://www.rand.org/content/dam/rand/pubs/drafts/2006/DRU3041.pdf> (discussing the negative correlation between poor neighborhoods and literacy); ANNE R. PEBLEY & MARY E. VALANA, IN OUR BACKYARD: HOW 3 L.A. NEIGHBORHOODS AFFECT CHILDREN'S LIVES (2002), [https://www.rand.org/content/dam/rand/pubs/monograph\\_reports/2005/MR1470.pdf](https://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR1470.pdf) (comparing how the Culver Marina, East L.A., and Windsor View neighborhoods affect the quality of life of the children who reside in them).

150. *Programs and Services*, SOLEDAD ENRICHMENT ACTION, <http://www.seacharter.net/charter-schools/programs-services.html> (last visited Aug. 22, 2016).

151. See *Mission & Philosophy*, BISHOP MORA SALESIAN HIGH SCH., [http://www.mustangs-la.org/apps/pages/index.jsp?uREC\\_ID=306041&type=d&pREC\\_ID=707881](http://www.mustangs-la.org/apps/pages/index.jsp?uREC_ID=306041&type=d&pREC_ID=707881) (last visited Aug. 21, 2016).

152. *Id.*

operated by the Los Angeles Unified School District.<sup>153</sup> Once again, Aaron proceeded to flunk just about everything.

In September 2015, Aaron transferred to a charter school in Watts as a fifth-year freshman. He will never make a legal living on the road he's on.<sup>154</sup> He will either collect government benefits for the rest of his life, like his parents and grandparents before him, or he will make an illegal living.<sup>155</sup>

#### V. FAMILY CODE § 3153: A PARTIAL ANSWER TO LIMITED SCOPE REPRESENTATION AND THE § 2030 CONUNDRUM

The children in the cases described above had counsel, which makes them exceptional. Except in Aaron's case, counsel made an important difference. Family Code section 3150 and Probate Code section 1470 give family and probate courts discretion to appoint counsel for every poor at-risk kid at public expense,<sup>156</sup> but most courts never exercise that discretion.<sup>157</sup>

In fiscal year 2010, Los Angeles County's Superior Court received claims for payment from attorneys appointed to represent poor children in family court totaling more than \$5.5 million.<sup>158</sup> That would have been less than one percent of the Court's total budget for

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153. See *Mission and Vision*, RANCHO DOMINGUEZ PREPARATORY SCH., <http://rdps-laUSD-ca.schoolloop.com/mission> (last visited Aug. 22, 2016).

154. See Van de Rakt, *supra* note 101 (one study has revealed that "fathers are the most important relative when it comes to predicting the criminal behavior of their sons"); see also *supra* notes 12 and 145 and *infra* note 155 (discussing the effects of parental imprisonment); *supra* notes 95, 133, 147 and 149 and *infra* notes 155 and 201 (providing details on the effects of parental education, poverty, and neighborhood).

155. Parental education and other family factors are closely correlated with achievement in the next generation. Analyses have repeatedly found that mother's education, father's education, the number of siblings in the family (fewer is better), family income, family health care, the number of books in the home, and other, less easily measured characteristics (such as parental relationships with the child) together have a major impact on student achievement. Of all these factors, the educational attainment of the mother seems to be the single most important, because it so directly affects the care the child receives at home. See Derek Neal, *How Families and Schools Shape the Achievement Gap*, in *GENERATIONAL CHANGE: CLOSING THE TEST SCORE GAP* 10 (2006); see also *supra* note 12 (discussing potential negative impacts of parental incarceration).

156. See *supra* notes 5–9, 49 and accompanying text.

157. See *infra* note 169. Public records show that the family courts in many of California's counties never, or almost never, appoint counsel for children whose parents cannot or will not pay. A table showing the counties' expenditures between FY 2008 and FY 2011 is on file with the authors.

158. Letter from Superior Court of California, County of Los Angeles, Sylvia White-Irby, Administrator, Administrative Records Requests, to Christina Riehl in response to a Public Records Act Request (Apr. 9, 2015) (on file with author).

fiscal year 2014–2015,<sup>159</sup> but it proved to be more than the County was willing to spend on access to justice for at-risk children at the center of custody disputes.

On April 19, 2011—without performing any kind of needs assessment—Los Angeles County’s Board of Supervisors directed the Los Angeles County Auditor-Controller to work with the Los Angeles Superior Court to reduce the cost of minors’ counsel.<sup>160</sup> By fiscal year 2014–2015, the family court had cut the cost to \$1,525,544.<sup>161</sup> Comparable figures for probate court are not available.<sup>162</sup>

With some justification, the court offers budgetary explanations for this reduction.<sup>163</sup> According to the State Judicial Council’s website, “mandated public service reports and periodic surveys reflect the severe and growing impact of budget cuts since 2008.”<sup>164</sup> These impacts include fifty-two courthouse closures and 202 courtroom closures, a reduction of hours at public service counters in thirty courts, and limited court service days in fifteen courts.<sup>165</sup>

Budgetary explanations, however, obscure at least as much as they reveal. The courts<sup>166</sup> and the counties<sup>167</sup> fund children’s counsel

159. See Los Angeles Superior Court: Annual Report 2015, SUPER. CT. OF CAL. 24 (2015), <https://www.lacourt.org/newsmedia/uploads/2015LASCAnnualReport.pdf> (reporting a “Total Budget” of \$627.3 million). The Court also receives funds from other sources. See, e.g., *infra* note 167.

160. Letter from the County of Los Angeles County Dep’t of Auditor-Controller to Los Angeles County Board of Supervisors (July 28, 2011), [http://file.lacounty.gov/auditor/audit\\_superior%20Court/cms1\\_163896.pdf](http://file.lacounty.gov/auditor/audit_superior%20Court/cms1_163896.pdf) (last visited Aug. 22, 2016).

161. See *supra* note 158; *infra* note 169 and accompanying text.

162. *Id.* For a possible explanation, see *infra* notes 166–167.

163. See *infra* note 169.

164. See *In Focus: Judicial Branch Budget Crisis*, JUD. BRANCH CAL., <http://www.courts.ca.gov/partners/1494.htm> (last visited Aug. 21, 2016).

165. *Id.*

166. Since the Legislature passed the Lockyer-Isenberg Trial Court Funding Act of 1997, Assemb. B. 233, 1997 Leg. Reg. Sess. (Cal. 1997), the Judicial Council has distributed court funds to the presiding judge of each county, who has sole authority to control expenditures for “court operations,” as defined in California Government Code section 77003 and California Rule of Court 10.810. CAL. GOV’T CODE § 77003 (West 2005); CAL. R. CT. 10.810 (2016). Under California Government Code section 77003(a)(4) and California Rule of Court 10.810(a)(4), “court operations” includes “counsel appointed by the court to represent a minor pursuant to Chapter 10 (commencing with Section 3150) of Part 2 of Division 8 of the Family Code.” CAL. GOV’T CODE § 77003(a)(4) (West 2005); CAL. R. CT. 10.810(a)(4) (2016). See generally William C. Vickrey et al., *Access to Justice: A Broader Perspective*, 42 LOY. L.A. L. REV. 1147 (2009) (encouraging courts to enact a comprehensive and long-term strategy—rather than engaging in reactive responses to short-term concerns—to enhance the independence of the judicial branch).

167. The cost of counsel appointed for a child in probate court remains payable by the county, not the court. CAL. PROB. CODE § 1470(c)(3) (West 2008). The counties therefore continue to

in family court and probate court with money they receive from the taxpayers through the Judicial Council and county governments.<sup>168</sup> In recent years, the Judicial Council and the counties have refused to part with the tax funds necessary to give poor children access to justice<sup>169</sup> because their priorities are elsewhere.<sup>170</sup>

It is not just some parents' behavior, but also the court system's spending priorities that suggest the disquieting questions in the epigraph that opens this article.<sup>171</sup> According to California's State Auditor, for example, the Judicial Council was prepared to spend up

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receive certain court collections to fund these expenditures. Los Angeles County's "Comprehensive Annual Financial Reports" therefore continue to show expenditures for counsel appointed for indigent litigants, but do not break out specific expenditures for counsel appointed for children in probate court. *Los Angeles County Comprehensive Annual Financial Report (CAFR)*, DEP'T OF AUDITOR-CONTROLLER, [http://auditor.lacounty.gov/wps/portal/ac!/ut/p/b0/04\\_Sj9CPykyssy0xPLMnMz0vMAfGjzOJdDQwM3P3dgo3cHYOdDTx9nAPMLQ2NDC18TPQLsh0VAcAGwL0!](http://auditor.lacounty.gov/wps/portal/ac!/ut/p/b0/04_Sj9CPykyssy0xPLMnMz0vMAfGjzOJdDQwM3P3dgo3cHYOdDTx9nAPMLQ2NDC18TPQLsh0VAcAGwL0!) (last visited Aug. 20, 2016).

168. See *supra* notes 166–167.

169. Phone conversation on February 20, 2015 between author Christina Riehl and Julia Weber, JD, MSW, Supervising Attorney, Center for Families, Children & the Courts, Operations and Programs Division Judicial Council of California, indicating most courts across the state say they can no longer fund the appointment of counsel for kids at the center of custody disputes (contemporaneous notes on file in the author's office). Under our tripartite system of government, however, it is the court's special responsibility to protect people like poor children who have little or no political power. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 203–04 (1952). In *Corenevsky v. Superior Court*, 682 P.2d 360 (Cal. 1984), the California Supreme Court held that governmental agencies must comply with requirements governing the appointment of counsel for poor people, regardless of budgetary constraints: "We are aware of the [financial] burden these [requirements] may impose . . . . Nevertheless, relief . . . must come through statewide legislation designed to ease such burdens . . . relief cannot be attained through retreat from established rules designed to implement indigent [people's] constitutional right [to counsel]." *Id.* at 362; see *infra* notes 170 and 191.

170. For several years now, the judicial system has balanced its budgets on the backs of poor children whose families are disintegrating. Ed Howard of the Children's Advocacy Institute at the University of San Diego believes that this pattern persists "[b]ecause the kids [cannot] vote . . . and because the awful consequences happen in secret. You can get straight-up cynical about power equaling results." Sasha Abramsky, *The Children Left Behind*, CAL. LAW. (Dec. 2013), [http://ww2.callawyer.com/clstory.cfm?eid=932274&wteid=932274\\_The\\_Children\\_Left\\_Behind](http://ww2.callawyer.com/clstory.cfm?eid=932274&wteid=932274_The_Children_Left_Behind). *But see* *Scott v. Cty. of L.A.*, 32 Cal. Rptr. 2d 643, 654 (Ct. App. 1994) (holding that "[f]inancial limitations of governments have never been, and cannot be, deemed an excuse for a public employee's failure to comply with mandatory duties imposed by law.").

171. In a Rosh Hashanah message posted on September 21, 2014 on the Los Angeles County Bar Association's family law listserv, Alexandra Leichter wrote:

My experience has taught me that we cannot turn our backs on others who are less fortunate than we are. We cannot forget those who cannot afford our fees and our legal talents. We cannot walk off happily ensconced with paying clients while there are myriads who can afford not even a single hour of our time. That is why I ask each and every one of you to look at yourselves and your families and your practices, and your good fortune, and let just a little bit of it trickle down to those who have none of that.

Posting of Alexandra Leichter, Alexandra@LLMFamilyLaw.com, to Los Angeles County Bar Association family law listserv (Sept. 21, 2014) (on file with author).



to \$1.9 billion on an effort to engraft a uniform computer system onto the state's trial courts before scrapping it. The Auditor's report, entitled "The Statewide Case Management Project Faces Significant Challenges Due to Poor Project Management" (February 2011 Report 2010-102), questioned not only the cost but also the utility of the project.<sup>172</sup>

A separate state audit released on January 7, 2015 found that "court leaders" had spent \$30 million over the preceding four years on "questionable" expenses and salaries.<sup>173</sup> For example, the Judicial Council paid each of its nine office directors more than the salaries for the governor and his top administration staff who "have much broader responsibilities."<sup>174</sup> The audit questioned several specific expenditures, including an unexplained fleet of sixty-six vehicles across the state.<sup>175</sup>

At roughly the same time, the Legislature passed legislation to enable Los Angeles County's judges to keep expensive benefits packages.<sup>176</sup> These extra benefits cost Los Angeles County approximately \$21 million in fiscal 2007<sup>177</sup> and presumably continue to cost the county similar amounts every year. Some of the funding for current benefits comes from the money the County saves by not appointing counsel for at-risk kids. It matters not whether money for judges' benefits comes directly or indirectly from money saved by denying children access to justice, since money is fungible.

The courts also continue to provide enormous incomes to many

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172. Maria Dinzeo, *Scathing Audit Blasts \$1.9 Billion Court Computer Project in California*, COURTHOUSE NEWS SERV. (Feb. 8, 2011), <http://www.courthousenews.com/2011/02/08/34000.htm>. On March 27, 2012, the Sacramento Bee reported that the Judicial Council had canceled the system. Dan Walters, *California Judicial Council Halts Court Case Management System*, SACRAMENTO BEE (Mar. 27, 2012), <http://blogs.sacbee.com/capitolalert/latest/2012/03/california-judicial-council-halts-controversial-court-case-management-system.html>.

173. CAL. STATE AUDITOR, REPORT 2014-107, JUDICIAL BRANCH OF CALIFORNIA 1 (2015), <https://www.auditor.ca.gov/pdfs/reports/2014-107.pdf>.

174. *Id.* at 20.

175. *Id.* at 32–33. For a summary of the report, see Patrick McGreevy & Maura Dolan, *Audit Finds \$30 Million in 'Questionable' Court Spending and Salaries*, L.A. TIMES (Jan. 7, 2015, 8:19 PM), <http://www.latimes.com/local/california/la-me-courts-audit-20150108-story.html>.

176. CAL. GOV'T CODE §§ 68220–68222 (West 2005). See generally Skylar Curtis, *Government: Chapter 9: Superior Court Judges Allowed to Keep Their Job "Perks" from the Counties*, 41 MCGEORGE L. REV. 581 (2010) (examining the legislation allowing California state court judges to retain their extra benefits).

177. *Sturgeon v. Cty. of L.A.*, 84 Cal. Rptr. 3d 242, 246–48 (Ct. App. 2008) (reporting that Los Angeles County judges received as much as \$249,413 in salary and benefits in 2007, comprising a base salary of \$192,386 plus state benefits, county benefits, and other contributions that could be exchanged for cash.).

parents' lawyers. No one has cumulated the money that parents' lawyers extract from the family and probate courts, but the total must dwarf the money paid to the Judicial Council, judges, and administrative staff. Market data on billing rates for lawyers who practice in family and probate courts are hard to find, but researchers at the University of Houston and the Brookings Institution, summarizing data from what they believe to be the first publicly available comprehensive data base on attorneys' fees, concluded that the national mean hourly rate for family lawyers was \$302.47, with a standard deviation of \$86.48.<sup>178</sup> Recently, California's Court of Appeal affirmed a rate of \$1,000 per hour for an attorney in a family law case.<sup>179</sup>

The Legislature has enabled parents' lawyers to maintain these rates by creating private-sector mechanisms to support them, ostensibly in deference to parents' due process rights.<sup>180</sup> The main mechanisms are: (1) California Rule of Court 5.425, which authorizes "limited scope representation" in family court, and (2) Family Code sections 2030 *et seq.*, which authorize the court to order one parent to pay the other parent's attorney's fees.<sup>181</sup>

"Limited scope representation" enables lawyers for parents to "unbundle services," i.e., to represent parents for limited purposes. Parents are alleged to benefit on the theory that this enables them to pay attorneys' regular rates for as long as their funds hold out, even if they cannot afford to hire a lawyer to handle the whole case.<sup>182</sup> Once parents exhaust their funds, their attorneys are free to withdraw from the case, whether or not they have produced any actual benefit

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178. See Vikram Mahershri & Clifford Winston, *An Exploratory Study of the Pricing of Legal Services*, 38 INT'L REV. L. & ECON. 169, 169–73 (2014).

179. *Chodos v. Borman*, 190 Cal. Rptr. 3d 889 (Ct. App. 2015).

180. See S. Judiciary Comm., Bill Analysis, Assemb. B. 939, 2009–2010 Leg. Reg. Sess. (Cal. 2010) (amending section 2030 of the California Family Code to enable family courts to award attorney's fees and costs to one parent when he or she has less money than the other parent because "due process protections" entail "[a]ccess to justice"). See generally *Kevin Q. v. Lauren W.*, 124 Cal. Rptr. 3d 676, 684 (Ct. App. 2011) (holding that trial courts must ensure that "each party has access to legal representation").

181. Section 2030(a) of the California Family Code authorizes the court to order "one party, except a governmental entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." CAL. FAM. CODE § 2030(a) (West 2016); see *infra* note 184.

182. Julie MacFarlane, *Forrest Mosten's Collaborative Divorce Handbook: Effectively Helping Divorcing Families Without Going to Court—The Past, Present, and Future of Collaborative Law*, 48 FAM. CT. REV. 566 (2010).

for the client—or the client’s children.<sup>183</sup>

Family Code sections 2030 *et seq.* almost require trial courts to order a parent who has counsel to help pay the other parent’s attorney’s fees<sup>184</sup> at market billing rates<sup>185</sup> when the other parent cannot afford to do so. The “purpose is parity: a fair hearing with two sides equally represented.”<sup>186</sup> The results, however, can be more like the common-law offenses of barratry<sup>187</sup> and “maintenance.”<sup>188</sup> Unnecessary strife between parents is exactly what their children do not need.<sup>189</sup> That is the section 2030 conundrum—by enabling litigation, the courts may be harming the children they should be protecting.<sup>190</sup>

Whether children have constitutionally protected interests at stake in family and probate court is an open question.<sup>191</sup> However that question is resolved, Family Code section 3153 could do for some children what Family Code section 2030 does for some parents. Section 3153 authorizes the family courts to appoint counsel for *children* at their parents’ expense—i.e., at no cost to the

183. CAL. R. CT. 5.425(e) (2016).

184. The California Family Code authorizes the court to order one parent to pay the other parent’s attorney’s fees, and identify factors and issues for the court to consider when deciding to make such an order. CAL. FAM. CODE §§ 2030, 2032, 3121, 3557, 7505, 7640 (West 2016).

185. *See Hayes v. Ward*, 4 Cal. Rptr. 2d 365 (Ct. App. 1992) (holding that a “fees award . . . should be determined at the reasonable market rate”); *see also Blum v. Stenson* 465 U.S. 886, 895 n.11 (1984) (noting that lawyers are entitled to “rates . . . in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate”).

186. *Alan S. v. Superior Court*, 91 Cal. Rptr. 3d 241, 252 (Ct. App. 2009).

187. Black’s Law Dictionary defines “barratry” as “the offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise.” Barratry, BLACK’S LAW DICTIONARY 954 (6th ed. 1990). For a discussion of barratry in a family law context, *see Bidna v. Rosen*, 23 Cal. Rptr. 2d 251, 259 (Ct. App. 1993) (Crosby, J., concurring in part and dissenting in part).

188. Black’s Law Dictionary defines “maintenance” with respect to lawsuits as “an officious intermeddling in a lawsuit . . . or assisting either party, with money or otherwise, to prosecute or defend the litigation.” Maintenance, BLACK’S LAW DICTIONARY 954 (6th ed. 1990). For a general discussion of barratry and “maintenance,” *see Jason Lyon, Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571 (2010).

189. *See supra* notes 61–68 and accompanying text.

190. *See Janet Weinstein, And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997) (describing the “inherent conflicts” between the “adversarial process” and the “‘best interest’ goal”).

191. *See Pellman, Jacobs, & Reiner, supra* note 9, at 88–98 (arguing that children do have constitutionally protected interests in safe, secure and sufficient parenting, citing cases including *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (contending that “to the extent [that] parents and families have fundamental liberty interests . . . so, too, do children have these interests . . .”).

taxpayers.<sup>192</sup> Fees from more affluent parents could be combined with county, court, and Judicial Council funds creatively and efficiently to do more for less affluent parents' children.

Family Code section 3153, unlike Family Code section 2030, presents very little risk of barratry or maintenance. To the contrary, “[c]hildren’s attorneys direct the parents’ focus back on their children, and away from disputes with each other.”<sup>193</sup> The American Bar Association’s Standards of Practice for Lawyers Representing Children in Custody Cases require children’s lawyers to “attempt to resolve [custody disputes] in the least adversarial manner possible.”<sup>194</sup>

Furthermore, no law permits children’s lawyers to withdraw from a case before they finish the job the court appointed them to do. As has been demonstrated, children’s lawyers should arrange for a full range of necessary services<sup>195</sup> while cutting litigation costs by reminding parents that their interests and their children’s interests are generally two sides of the same coin.<sup>196</sup>

Construing section 3153 of the Family Code in *In re Marriage of Metzger*,<sup>197</sup> California’s Second District Court of Appeal upheld an order requiring affluent parents to pay a \$100,000 retainer to counsel appointed for their child about three months before trial. The

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192. California Family Code section 3153 reads in full:

If the court appoints counsel under this chapter to represent the child, counsel shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. Except as provided in subdivision (b), this amount shall be paid by the parties in the proportions the court deems just.

Upon its own motion or that of a party, the court shall determine whether both parties together are financially unable to pay all or a portion of the cost of counsel appointed pursuant to this chapter, and the portion of the cost of that counsel which the court finds the parties are unable to pay shall be paid by the county. The Judicial Council shall adopt guidelines to assist in determining financial eligibility for county payment of counsel appointed by the court pursuant to this chapter.

CAL. FAM. CODE § 3153 (2016). Rule 5.241(b) of the California Rules of Court and Standard 5.10 of the Standards of Judicial Administration, entitled, “Guidelines for Determining Payment for Costs of Appointed Counsel for Children in Family Court,” identify factors and issues for the court to consider in deciding whether to make such an order.

193. See Josanna Berkow, *Court Appointed Attorneys for Children*, 1 J. CTR. CHILD. & CTS. 131 (1999).

194. See Am. Bar Ass’n, *Section of Family Law, Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131 (2003) (also stating that a child’s lawyer should “[p]articipate in, and, when appropriate, initiate negotiations and mediation.”).

195. *Id.* at 136.

196. See *In re Angelia P.*, 623 P.2d 198 (Cal. 1981) (“In general, children’s needs are best met by helping parents achieve their interests.”).

197. *In re Marriage of Metzger*, 169 Cal. Rptr. 3d 382 (Ct. App. 2014).

court explained that the parents could not agree whether their child had “special needs,” and “counsel was needed to provide an unbiased perspective.”<sup>198</sup>

To put this sum in perspective, Los Angeles County’s probate court has established a *prima facie* billing limit of \$1,500 for lawyers who represent poor children in guardianship-of-the-person cases.<sup>199</sup> At almost sixty-seven times the probate court’s *prima facie* billing limit, the *Metzger* award might be enough to appoint lawyers for poor children in almost 67 guardianship cases.<sup>200</sup> Like the *Metzger* case, many poor families’ cases involve children with special needs. Poverty, moreover, can interact with special needs in the way that an accelerant interacts with combustible materials.<sup>201</sup> Yet many courts never appoint counsel for poor kids, regardless of those kids’ needs. Too many courts do nothing at all for them.<sup>202</sup>

## VI. CONCLUSION

As we all know, every child is unique. But the cases discussed in this article suggest that all children have the same goals when custody is at issue: to be safe, healthy, and happy; to get what they need to make the most of themselves; and to have the best possible relationship with both parents.

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198. *Id.* at 389. Many of the children at the center of the cases studied in this Article unquestionably have “special needs.” Many are also poor, which compounds their needs. *See supra* notes 97, 147, 149; *infra* notes 202–203.

199. *See* General Order Re: Probate Volunteer Panel Appointments at 3 (L.A. Super. Ct. May 2, 2015), <http://www.lacourt.org/division/probate/pdf/GenOrderRePVPApppts.pdf>.

200. The adequacy *vel non* of this *prima facie* limit is beyond the scope of this Article. Low fees virtually entail large caseloads, however, which may help explain why the lawyers and social workers accomplished nothing positive for their client in Aaron H.’s dependency case. *See* Am. Bar Ass’n, *supra* note 194, at 159 (exhorting courts to “control the size of court-appointed caseloads, so that lawyers do not have so many cases that they are unable to meet [the ABA’s] Standards”).

201. *See supra* notes 97, 147, 149; *see also* Glenn Flores & Bruce Lesley, *Children and U.S. Federal Policy on Health and Health Care: Seen but Not Heard*, 168 JAMA PEDIATRICS 1155 (2014) (noting that child poverty in America was at its highest point in 20 years, and concluding that as a result, millions of children were at increased risk of injuries, infant mortality, and premature death); Joan Luby et al., *The Effects of Poverty on Childhood Brain Development: The Mediating Effect of Caregiving and Stressful Life Events*, 167 JAMA PEDIATRICS 1135 (2013) (providing data on the mechanisms by which poverty can negatively impact childhood brain development).

202. *See supra* notes 5–9, 20, 32, 49, 169 and accompanying text. Two family law journals have published special issues expressing concern about the ways that family courts across the country address “special needs children.” *Symposium on Special Needs and Disability in Family Law*, 46 FAM. L.Q. 177, 177–311 (2012); Donald T. Saposnek et al., *Special Needs Children in Family Court Cases*, 43 FAM. CT. REV. 566 (2005).

This Article also shows that some children need lawyers to have any chance at all to get what they need in court. Children's advocates must do more than go through the motions, since kabuki representation accomplishes nothing. When necessary, children's lawyers should work with other professionals to incorporate generally accepted social science principles into multi-disciplinary representation. Children's lawyers should also work with relatives, churches, and other community groups to make better use of existing resources.

Family court and probate court are Barmecide feasts for too many children, especially poor children with special needs. When they fail to adjudicate the salient issues in children's cases, courts engage in what Judge Henry Friendly called "nonadjudication" or "evisceration and tergiversation."<sup>203</sup> Existing law makes it possible for the courts to do better. For a small fraction of the money that family and probate courts now spend to accomplish next to nothing for the children who need help the most, the courts could make much more complete and better informed custody-and-visitation orders, dramatically improve parenting ability, turn D and F students into A and B students, put at-risk children on the road to success, and even save some kids' lives.

Since most children cannot identify the salient issues in their cases and generally do not have standing in family and probate court, much less lawyers to represent them,<sup>204</sup> it becomes the court's responsibility in every case to identify the issues relevant to children's best interest<sup>205</sup> and decide whether multidisciplinary representation is indispensable to justice.<sup>206</sup>

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203. Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS: SELECTED PAPERS BY AN EMINENT FEDERAL JUDGE* 210–12 (1967) (addressing rule of statutory construction enabling courts to avoid adjudication of constitutional issues). The case studies in this Article show how tergiversation enables courts to eviscerate children's rights by avoiding adjudication of the issues that matter most to children involved in custody disputes. *See supra* note 4.

204. *See supra* notes 5, 8, 49, and 169.

205. *Cf.* Natalie Anne Knowlton, *The Modern Family Court Judge: Knowledge, Qualities, and Skills for Success*, 53 *FAM. CT. REV.* 203 (2015) ("Family court judges . . . must leverage . . . services . . . and coordinate with interdisciplinary professionals to ensure that services are adequately delivered.").

206. This Article will not suggest a mechanism for family courts and probate courts to use to make this determination. Juvenile courts, however, conduct arraignment hearings in all dependency, delinquency, and termination-of-parental-rights cases to decide whether to appoint counsel for children. *CAL. WELF. & INST. CODE* §§ 317(c), 727.31 (West 2016); *id.* § 633 (West

Given budgetary and political realities, trial courts should use triage principles to decide whether to appoint counsel for at-risk children at the center of custody disputes in family and probate court.

This article shows that the following factors are relevant:

1. Child abuse or neglect, domestic violence, or substance abuse is alleged or reasonably suspected;
2. A parent seems incapable of meeting a child's basic needs;
3. A parent or a child is reasonably suspected of gang activity;
4. A parent or a child has a significant criminal record;
5. The family is living in poverty, and the parents have no substantial connection to the labor force;
6. There is a family history of serious dysfunction;
7. A parent suffers from a disorder that affects parenting;
8. A child is failing in school, or has special physical, mental, or emotional needs;
9. There is intense conflict between the parents; and
10. A child requests counsel.<sup>207</sup>

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1961); CAL. R. CT. 5.534 (2016). These arraignments take several minutes, and cannot be expensive. Juvenile delinquency courts also offer a precedent for the use of questionnaires to identify relevant issues and facts. See *In re Gladys R.*, 464 P.2d 127, 133 (Cal. 1970).

207. Steve Baron explained:

In Santa Clara County, Family Court Services regularly requests appointment of an attorney for the children in cases where both parents appear to have parentally debilitating issues (i.e., serious substance abuse/dependency and/or domestic violence, child abuse, or neglect) and in which the child welfare department declines either to file a petition or to provide services.

Baron, *supra* note 57, at 122. Rule 5.240(a) of the California Rules of Court lists the following factors for all trial courts to "take into account" when deciding whether to appoint counsel for a child in family court:

- (1) The issues of child custody and visitation are highly contested or protracted;
- (2) The child is subjected to stress as a result of the dispute that might be alleviated by the intervention of counsel representing the child;
- (3) Counsel representing the child would be likely to provide the court with relevant information not otherwise readily available or likely to be presented;
- (4) The dispute involves allegations of physical, emotional, or sexual abuse or neglect of the child;
- (5) It appears that one or both parents are incapable of providing a stable, safe, and secure environment;
- (6) Counsel is available for appointment who is knowledgeable about the issues being raised regarding the child in the proceeding;
- (7) The best interest of the child appears to require independent representation; and
- (8) If there are two or more children, any child would require separate counsel to

Children, finally, receive no benefit from cronyism, and they are oblivious to the mere appearance of due process. They need real advocates who really will do as much as they possibly can to help them. To protect every child's interests, to guard against careless decisions and cronyism, and to preserve public confidence in the appointment process, trial courts must exercise their discretion to appoint counsel on a case-by-case basis and create a record sufficient to enable appellate review.<sup>208</sup>

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avoid a conflict of interest.

CAL. R. CT. 5.240(a)(1)–(8). This list has proven less than useful in practice, possibly because most contested matters present at least one of the specified criteria, and possibly because California Family Code section 3150 gives family courts discretion to refuse to appoint counsel in all cases, even when they find that all of these criteria are met. *See* CAL. FAM. CODE § 3150 (West 2016).

208. *See supra* note 10.