

CHILD AS A PARTY TO THEIR DEPRIVATION CASE
DISCUSSION I
APRIL 20, 2006

EXECUTIVE SUMMARY

There was general consensus that under Georgia law, a child is a party to their deprivation case. While it was noted that there are ambiguities in the statutes and some participants believe that Judge Shoob's order does not have statewide application, Georgia case law appears to establish that a child is a party to a deprivation case.

More difficult are the issues regarding the impact of party status on the child's role in the proceeding. A number of the participants expressed the desire to see formation of a committee to pursue these issues further and to draft legislation to clarify children's rights in deprivation cases.

Participants identified three primary areas of concern:

1. Representation.

It was the opinion of a number of participants that the ideal model would be to provide every child with counsel and a CASA or lay GAL; however, a number of issues relating to the child's representation were identified:

- Is every child entitled to both an attorney and a guardian ad litem and if not, what factors should be considered in determining the type of representation that should be provided?
- Should there be a bright line presumption that a child above a certain age is entitled to counsel, while a GAL should represent a child below that age?
- What are the roles and responsibilities of the child's representative? (e.g. Must the representative meet with the child—when, how often? Is the representative required to do an independent investigation? Should a GAL/attorney call and cross-examine witnesses, and give a closing argument or only make a recommendation to the court regarding the child's best interest?)
- Should a child's attorney act under a client-directed or best-interest model of representation—and if client-directed, how does that work for pre-verbal children or children who lack the ability to direct counsel?
- If a GAL/attorney identifies a conflict between child's wishes and child's best interest, is it an adequate solution to provide that the GAL/attorney will ask court to appoint a separate GAL?
- Is it appropriate for the same person serve both as child's attorney and GAL—specifically, do the ethical obligations of a child's attorney (e.g. to preserve confidentiality, to avoid conflict of interest, to advocate for what the client wants and to avoid acting as a witness) preclude the attorney from acting as GAL (obligated to represent the child's best-interest, regardless of the child's wishes, to reveal the results of his/her investigation to the parties and the court, and to testify if called by the court or the parties.)?

- Does the GAL need to be an attorney or can/should a CASA or other lay advocate fulfill the GAL role?
- Should children's representation be modeled on GPDSC—county agencies in a statewide network that provides quality assurance and training?

2. Child's Participation in the Proceedings

Does the child have a right to be present and to testify during some or all of the proceedings, and if not, is it advisable to allow the child to be present under certain circumstances.

There appeared to be general agreement that a child should be permitted to convey his or her wishes to the court, although some participants believed that this could be accomplished through the CASA's report or through the child's participation in Citizens' Panel Reviews. Several participants emphasized research and anecdotal findings that many foster children report that their views were not considered in their deprivation cases and that they had no meaningful participation in the processes.

The following issues were raised in conjunction with the discussion regarding a child's participation in the proceedings:

- Under current law, does a child 14 or over have an absolute right to be present?
- Should there be a presumption to allow or disallow a child's presence and/or testimony based upon the age of the child or the nature of the proceeding—adjudication, disposition, permanency, judicial review or citizens' panel review?
- If the child is permitted to be present during a hearing, how can the court protect the child from evidence that might be harmful to the child?
- On what bases (e.g. recommendation of the child's counsel, CASA, therapist or caseworker, wishes of the child, evidence-based research, judicial discretion) should a court determine to allow or disallow a child to be present during a particular proceeding?

3. Evidentiary Issues

The participants had a number of concerns regarding the evidentiary implications of designating the child as a party.

- Are the child's out of court statements admissible under the Georgia exception to the hearsay rule for statements of a party? What is the relationship between the party hearsay exception and the child hearsay statute?
- Must the child be subject to cross-examination, or can the court exercise its discretion to prohibit cross-examination.
- If a child is a party in a deprivation case, is that the same or different from an adult being a party in a personal injury case—if not, why not and how can we insure that designating a children as parties will not have unintended, detrimental consequences.