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The Things We Think And Do Not Say

by Jim and John Walsh

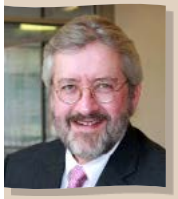
Jim and John Walsh are twin brothers who have been working in children's law for more than 20 years. They graduated Florida State University together with degrees in Film and Law. In 2001 they (with lots of help) created the **Foster Children's Project**, Florida's first children's law office dedicated to representing children in state care. They have spoken, written, and taught on children's representation. They have appeared on national television and been featured in the book "Democracy's Local Heroes" for their work with foster children. They continue to run the office together. They blame their mother for dressing them alike as children.

Our profession—children's law—has grown by leaps and bounds in the last 20 years. States where there were no children's attorneys now have fully staffed programs. States that have always provided children counsel have taken steps to professionalize their case management, lower case loads and refine their recruiting methods. Throughout our relatively brief history as a profession, we have had little opportunity to assess ourselves. For maybe the first time we are starting to ask fundamental questions about what we do, how we do it, and even why we do it. The conversation is ongoing and seems to be building towards... something. From the Chapin Hall Study performed on our office, the Foster Children's Project/Legal Aid Society in Palm Beach, to the National Quality Improvement study on child representation to the American Bar Association sponsored symposiums held at Nova University and the University of Washington, and the ongoing conversation at the NACC Conferences, we are taking the time to look in the mirror.

> *Could it be that our field is reaching a turning point? As a young specialty area, should we be assessing to what extent we are a part of the problem or a part of the solution when the national conversation turns towards child welfare? Are we even a part of the larger debate, and should we be?*

That's a lot of questions and we aren't going to answer any of them. All we can do is share our perspective on the issue. We already know →

EXECUTIVE DIRECTOR'S MESSAGE:



The Power of Your Ideas

Take a closer look at this issue of the *eGuardian*. It's **bigger** and **better** because of you; when we harness our collective power, we go farther. In this issue alone, we have valuable practice tips from Dawn Post, a personal reflection from Brooke Silverthorn and an important statement on unaccompanied minors from Mekela Goehring and Abbie Johnson. Jim Walsh and John Walsh give us a refreshing and provocative take on representing children in child welfare. The next step is for you to be one of our authors.

Together, NACC members understand every nuance of practice, policy and law for children and families in our country's legal systems. We know where the law needs to develop, and how courts can better serve the troubled and disadvantaged families that encounter these systems. From ICWA to LGBTQ to ICPC to IV-E, we know what needs to change because we're working these cases every day. →

The NACC envisions a justice system that protects the rights of children by ensuring their voices are heard through the assistance of well-trained, well-resourced, independent lawyers.

some people may disagree with what we say, and that's okay. In the final analysis, how you practice is as individual as you are. In that sense, it's almost an art form, right? You decide how you interact with the other parties, with your client, when to negotiate and when to litigate, etc. All these small choices make you the advocate you are. But what informs all those small decisions, we would suggest, is how you perceive your role in the larger child welfare system. That's what we want to talk about.

As a children's attorney, no doubt you've been told that you represent the "whole child."

Now, who is going to say no to that? Of course we MUST represent the whole child! Who would leave any child behind, or any part of a child? Education problems? Bring them on! Delinquency charges? We should be there too! Mental health? I've had some training on that! Let me in there! After all, many children in foster care will often say that their attorney is the most consistent presence in their life. We must be that constant presence!

Hold it. Just stop. Before we are children's attorneys, we are attorneys. What do attorneys do? They advocate for individuals within the context of a specific legal problem. For example, if a person comes into your office and seeks a divorce, are you bound to handle their criminal case when they get arrested for stalking their ex-spouse? What if your client needs to go back to school to become more employable following the divorce? Is it your duty to advocate for them in the student loan setting? No. And we would submit that to do so would make you a less effective advocate for them in the divorce setting, which is the real reason they came to you. And that is so because you, like all living beings, have a limited amount of hours in the day in which you can accomplish things. So you need to use them wisely.

The same is true of children's attorneys. We recognize our clients are children and need help in all these areas because of the very fact that they are not adults. But unless you are a specialist in that area, it is not your job to be the one to help them. It is your job to find someone to help them. (We recognize that there are childen's attorneys who specialize in certain subject areas and provide a valuable service. This article is addressing the attorney who is appointed to generally represent a child simply because of the state's involvement in the child's life.)

If you think about your own childhood, it is clear who helped you with all of your issues. If you had trouble with school, your parent stepped in. If you got arrested, you called mom or dad. If you struggled with physical, emotional or mental health issues, your parents were probably the first place you turned.

We need to remember this—a child can best function within the family unit. Group homes, residential treatment centers and even foster families are all artificial constructs cobbled together to be as "family-like" as possible. But they make poor substitutes in most cases. So what your client needs to help him or her with their education, mental health, or other issues is a parent. Feel free to pursue advocacy in all these other areas—in your "spare time." Indeed, children's attorneys often have no choice but to do so. Very often you open a new file and →

EXECUTIVE DIRECTOR'S MESSAGE FROM PREVIOUS PAGE:

So get out that pen, warm up the keyboard and pick up the phone. Every month we publish the *eGuardian*, and every week begins with a Monday morning posting of our **Children, Families and the Law** blog. You may agree or disagree with NACC positions, and you may find a colleague's opinions to be revelatory or stupefying. Whatever your take, don't keep those thoughts to yourself. If you have something important to contribute that your colleagues need to hear, call me at 303-864-5322 and let's schedule your next article or blog post.

Kendall Marlowe
Executive Director

IN THIS ISSUE:

the patient is on the table, bleeding. You have to triage the situation as soon as possible. But know that triage is all you are really doing. For as long as that child does not have a family, you can bet those issues you triaged will resurface.

So if we really want to help the "whole" child, we need to be advocating for the only thing that will really make them "whole" again—being ***someone's*** child. The focus of our work should be that, and nothing more. You are not trained to become your client's best friend or parent figure. When we hear child welfare professionals, often judges, refer to clients as "my kids", we cringe. That paternalism takes you out of your role as a professional with a job to do. Unless you are planning to adopt them, you should not think of them as your kids. When we started the Foster Children's Project it was the first (and still only) children's law office in Florida that was appointed to represent all foster children. To be honest, we had no idea how we were going to represent infants. On one of our first staff tours we found ourselves in a group shelter facility for two year olds. Within minutes of entering the facility, little ones were grabbing our legs and raising their arms to be held. We looked around and saw that every one of our staff was holding a child. That moment helped crystallize our purpose as advocates. Our clients were telling us very clearly what they needed—someone to hold them, to parent them. No doubt the law in your state lays out pretty specific time frames in which that should happen. It seems to us a good children's attorney is one who is keenly aware of this, and understands that those time frames are put in place for a very good reason. That reason is: bad things happen to kids in foster care, and the longer you stay, the more likely something bad could happen. As a side product, the longer kids stay, the more crowded foster care gets, and that exponentially increases the chances of something bad happening. And the single worst thing that can happen to a child is happening on a constant, almost daily basis—the little affirmations that tell the child that nobody wants them, or that it was their fault things fell apart, or that they are somehow different and defective. This is the real damage of foster care.

So we choose to look at each of our clients as having the exact same legal problem: they are in the custody of the state and they need to be in the custody of a family. Preferably their birth family but, failing that, something permanent within the time frames laid down in the law. That, distilled down to its essence, is the job. If we can advocate for that end result, then our representation of our client should be focused, brief and laser sharp. This may sound counter-intuitive, but in order to remain focused you may have to ignore some of the outside noise. You can't afford to get distracted by other issues where your advocacy may temporarily improve a situation if doing so distracts from your ultimate goal in the case.

What this requires is focus. Every decision you make on a case needs to be filtered through the permanency question—how will this affect my client getting a permanent home as quickly as possible? You should be thinking about their permanent home the very first time you meet a client and at every event in the case thereafter. If your every action on a case is directed towards a permanent home you will start to see clients get home quicker, as we did. The University of Chicago Chapin Hall Center studied our office and found it was so.

Our goal as a child's attorney is to go beyond the triage tent and get to the surgery. We do not want to be the most consistent presence in the child's life. Instead we'd like the child and their family to look back on us as the surgeon who came in during a life threatening situation and fixed things quickly and for good.

If we could, as a profession, somehow focus our efforts collectively in one direction, there is little doubt that we would see the results of our labor and children's attorneys would be seen as part of the solution, if not the solution, to the unsolvable child welfare problem of America. ■

Why I Became a Child Welfare Law Specialist

by **Brooke Silverthorn, JD, CWLS**, NACC Staff Attorney

When I was first asked to write this article, I thought about the many things that I could say. For instance, I could say that I became a CWLS because I want to be at the top of my game, or because it will distinguish me as an attorney in this field. I could say that I became a CWLS because I thought it would likely open doors and provide opportunities for me to advance in my career that may not otherwise be available to me. Heck, I could also say that I became a CWLS in the hope that I will be paid more. And while all of those reasons are true, they don't really capture the essence of why I became a CWLS. I became a CWLS quite simply because I believe that the families I work with deserve my very best every single day.

I started working when I was 15 years old as a "bagger" in my local grocery store. Since that time my work experience has taken many different paths. Those paths are important in this discussion because they have helped shape my perspective as a Child Welfare Law Specialist. I used to deliver pizza for Dominoes, back in the day when they promised that your pizza would be delivered in 30 minutes or less or the pizza was free. A really bad day at that job usually meant that I was late getting the pizza to the customer which made them angry and unwilling to tip, despite the free pizza. When I worked at a bookstore, a bad day at that job meant that a customer came in and asked me for assistance with a book or an author that I had never even heard of before.

When I decided to become a CWLS, I was an attorney representing the Department of Family and Children Services in a metropolitan Atlanta county. A bad day at that job could very well mean that something I did or didn't do had a negative, or even devastating impact on a child or family. This is not unique, it's the case for all of us who practice in this field, no matter what role we play. But I can say that this realization has had a profound impact on the way I view my role in the system and the thought and care that guide my decisions. One of those decisions was to become a CWLS. Because when I put my job as a child welfare attorney in that perspective, it became crystal clear that becoming a CWLS was not just a good idea for my career, it was vitally important for me as a person who cares about helping families. This is not to say that becoming a CWLS means that I no longer have any bad days—wouldn't that be great? But it does mean that I own my part of the responsibility to minimize the risk of bad outcomes in my cases.

Now the million dollar question is: has it reduced the bad outcomes in my cases? I think it has—at least as it relates to the things I can control. I became a CWLS in the summer of 2009, along with 10 of my Georgia colleagues, and just celebrated my 5 year CWLS anniversary. We were the first attorneys in Georgia to achieve the CWLS distinction. We all made a conscious decision to raise the bar for ourselves and each other and in doing so, we raised the bar for child welfare law as a whole. Because let's face it, when you hold yourself out as a specialist, the expectation for your performance naturally increases. In that regard, being a CWLS has increased the depth with which I use my knowledge and skills to solve problems. I ask better questions now in order to get to root issues. I have a broader knowledge base to suggest and implement solutions. I find that my colleagues come to me more often for advice and dialogue, which pushes me to continue to learn more.

Becoming a CWLS doesn't mean that I suddenly care more about the children and families I work with, or that I care more than someone who isn't a CWLS. BUT, given that I do care deeply about the children and families I work with, it absolutely means that I have positioned myself to able to more effectively offer solutions. In other words, a "bad day" doesn't have to mean a "devastating" day.

In July, I began a new journey as the most recent staff attorney for the NACC. It seemed a natural progression for me from being in the courtroom day in and day out to playing a more supportive role and using my experience in the courtroom, and as a CWLS, to assist other child welfare attorneys with their practice. Becoming a CWLS is a very personal decision and one that we all have to make for ourselves. I am not trying to "sell" CWLS—I truly believe it has made me a better attorney. I truly believe it will make any one of you a better attorney. If you want to hear more about my decision or talk about any issues or barriers you may feel about becoming a CWLS, please feel free to contact me, and I am happy to work through it with you. So, what are you waiting for? ■

Practice Tips for High-Conflict Custody/Visitation Cases

by Dawn Post, Esq.

In my experience, having practiced both as a child protective and custody/visitation attorney, I have found that the emotional abuse that children suffer in high conflict custody/visitation cases to be far more intentional, insidious and wide spread than in cases in which parents have been charged with abuse or neglect. For example, no matter how severe the abuse or neglect allegations, I had only a handful of children who stated that they did not wish to see a respondent parent. In stark contrast, the number of children who want to limit or suspend contact with a parent is a large percentage of many attorney for children's ("AFC") caseloads in custody and visitation cases. It is no surprise that children of high conflict parents are three times more likely to develop psychological distress than children of low conflict parents and are also more likely to suffer from behavioral problems as they are growing up.[1] These cases, which account for the largest number in family court, demand greater attention and expertise. When interviewing a child, do you know what to look for to determine if a child is being influenced by one parent against the other? Here are a few practice tips:

1. Bala, N. and Bailey, N. (2004). Enforcement of access and alienation of children: Conflict reduction strategies and legal responses. *Canadian Family Law Quarterly,* 23, 1–61.

» The Power of Names

- The child tells you that they want to change their last name to that of their step-parent or the preferred parent or begins informally using it
- The child's name has unilaterally been changed in medical or educational records
- The child refers to the targeted parent by their first or last name
- The child refers to their step-parent as mom or dad

» The Power of Words

- The child uses language beyond their years or legal language
- The child mocks the targeted parent
- The child threatens the targeted parent with court
- The child tells you what happened in the court proceedings
- The child talks about child support and other financial information
- The child says "we" or "us" aligning themselves with their favored parent
- The child uses very black and white language

DAWN POST is Co-Borough Director at The Children's Law Center New York. She is an expert in children's rights, adv ocacy and litigation, and the central theme of her work is that children and adolescents are entitled to have a voice and representation in legal proceedings that have a significant impact on their lives. To that end, she promotes cultural competence to address the underlying issues of poverty and social exclusion based upon race and socio-economic status in the legal and foster care systems in the United States.

» The Power of Memory

- The child relays incidents they would have no knowledge or independent memory of
- The child cannot tell you any positive memories or feelings about the targeted parent
- The child repeats dated information
- The child places undue importance on frivolous information
- The child has "borrowed" scenarios

It is important for the AFC to possess as much information as possible from collaterals as well as the parties. One of the most important roles of the AFC is to gather a lot of information in order to play a facilitative role and to help mediate and negotiate on behalf of our client. Information is important to be able to assess dynamics as well as aid resolutions. In the process, AFCs use the role to educate the parents and attorneys about how the conflict is impacting children. ➜

THE BEST OF BOTH WORLDS:

The Power of Uniting Immigration Attorneys with Family Law Attorneys to Protect Children

by **Mekela Goehring, Esq.** and **Abbie Johnson, Esq**

One of the very first cases I worked on as a new attorney with the Rocky Mountain Immigrant Advocacy Network (RMIAN) stays with me to this day. Just seventeen years old, Jose made the courageous decision to come to the U.S. to be with family members who could protect him from the abuse and violence he had suffered in Honduras as a child. Disabled from a childhood illness, Jose's decision to leave all he knew behind and embark on a perilous journey still reminds me of the incredible courage, strength, and resilience of the human spirit against nearly impossible odds.

I first met this strong and open-hearted teenager when he was three weeks shy of his eighteenth birthday, after he had been taken into custody by immigration officials and placed in a youth detention facility in a remote part of Colorado. It was clear that Jose was eligible for Special Immigrant Juvenile Status (SIJS), a special protection created by Congress in 1990. Yet, success in his case depended entirely on the effective collaboration of an immigration attorney and a family law attorney.

Special Immigrant Juvenile Status (SIJS) is a form of immigration relief that allows undocumented children who have been abused, abandoned, or neglected, where reunification with one or both parents is no longer a viable option, to obtain lawful permanent residency or a "green card." *See generally* 8 U.S.C. § 1101(a)(27)(J), *see also* William Wilberforce Trafficking Victims Reauthorization Act of 2008 (TVPRA), amending the statutory definition. The foundation of an SIJS case, which allows a child to apply for legal immigration status, is a court order from a presiding juvenile court containing specific findings of fact. A court having the proper jurisdiction to make the necessary factual findings for SIJS is defined as "a court located in the United States having jurisdiction under State law to make judicial decisions about the custody and care of juveniles." 8 Code of Federal Regulations (C.F.R.) § 204.11(a). Accordingly, a "juvenile court" could include guardianship, dependency and neglect, delinquency, and domestic relations proceedings, depending on the judicial scheme within the state.

This predicate state court order must contain the following findings: the child is under 21 years of age and unmarried; the child is juvenile court ➜

MEKELA GOEHRING, ESQ. is the Executive Director for the Rocky Mountain Immigrant Advocacy Network (RMIAN) and ABBIE JOHNSON, ESQ. is the Managing Attorney of RMIAN's Children's Program. RMIAN is a nonprofit organization in Colorado that provides free immigration legal services to children, as well as to individuals in immigration detention in Colorado. Every year RMIAN's Children's Program represents hundreds of children who have been victims of abuse, persecution, or other violence and are eligible for immigration protections. RMIAN provides free training on immigration law issues affecting children to attorneys, child welfare professionals, and community members. RMIAN exponentially increases its impact by training, mentoring, and referring hundreds of cases to pro bono attorneys throughout Colorado. More information, including materials from a recent legal training on representing unaccompanied migrant children, is available at www.rmian.org.

» The Best of Both Worlds, from previous page

dependent or the court has legally committed the child to, or placed the child under the custody of, an agency or department of the state, or an individual or entity appointed by the state court; reunification with one or both of the child's parents is not a viable option due to abuse, neglect, or abandonment or a similar basis under state law; and it is not in the child's best interest to be returned to his or her country of nationality or last habitual residence. Proposed orders for SIJS findings may be prepared by Guardians *ad Litem*, juvenile defense attorneys, family law attorneys, or county attorneys, but should be reviewed by an immigration attorney before submission to the juvenile court. Orders should contain enough factual information to show that the state court has a reasonable basis for making the SIJS findings, but overly detailed motions are not necessary.

In these cases, after obtaining the predicate order, a child must submit a petition to U.S. Citizenship and Immigration Services (USCIS) for Special Immigrant Juvenile Status. Based on the petition for SIJS, the child must also apply for lawful permanent residency. The two applications can be filed together if the child is applying affirmatively. If the child is in removal (deportation) proceedings before the immigration court and applying defensively, the SIJS petition is submitted first, and the child must move to terminate immigration proceedings before submitting the application for residency. SIJS is often the only path to true safety and permanency for many clients. Being granted lawful permanent residency allows children to live and work permanently in the United States, and to secure the safety and opportunities they were previously denied.

In Jose's case, I reached out to an attorney in the family division at a legal services provider and she quickly agreed to represent Jose in state court proceedings. A state court judge issued the predicate SIJS order, an order that allowed Jose to apply for Special Immigrant Juvenile Status with U.S. Citizenship and Immigration Services. Ultimately, U.S. Citizenship and Immigration Services approved Jose's application for Special Immigrant Juvenile Status and his application to adjust his status to lawful permanent resident. I still remember navigating Denver International Airport with Jose after his petition was approved. He was on his way to reunite with his family on the East Coast. It was one of the most powerfully rewarding experiences I have ever had as a lawyer. Several weeks later, Jose called to tell me he was safe and enrolling in a GED program. It was a beautiful beginning for an incredible young man.

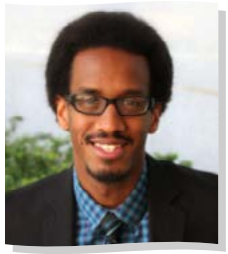
In the midst of the current humanitarian crisis involving thousands of children fleeing violence and other persecution in their home countries and seeking refuge in the United States, I am reminded of Jose's story and outcome. Jose ultimately won the protection he so desperately deserved because an immigration attorney and a family law attorney worked together to unite the immigration legal system and the child welfare system. As advocates across the country work to protect the due process rights and legal protections for children in our communities, we must work to ensure the collaboration of immigration lawyers and family lawyers in order to achieve the positive legal outcomes and secure futures we want for all children. ■

» Practice Tips, from page 5

Furthermore, it is important is to make sure that orders are thorough, clear and unambiguous and set out clear expectations. The order must provide for mechanisms for enforcing the orders and allow for rapid intervention if the court orders are not complied with. Temporary orders must be as carefully crafted as final orders. Even using language as seemingly straightforward as "M" and "F" in order to designate parenting time can be problematic as in the case of Ariana, age 4, whose mother convinced a police officer, who had been called by the father to help enforce the visitation order, that "M" and "F" stood for male and female, not mother and father as it is commonly used and understood in family court. With respect to final orders, all issues related to custody and visitation should be addressed in order to limit or prevent future litigation which could prove harmful to the child.

Finally, custody and visitation cases can take years. For the AFC, it is critical to identify high conflict cases early on and accelerate the process for a forensic evaluation and trial. Legal and therapeutic interventions should be geared toward fostering full reconciliation in the shortest possible time. When it comes to parental contact, rather than taking a wait and see approach, it's critical to keep moving forward. ■

Case



IN RE INTEREST OF SHAYLA H. ET AL., 22 NEB.APP. 1 (2014)

by William Cory Ford, NACC Legal Intern; Valparaiso University School of Law, JD Candidate 2016

On appeal from the Juvenile Court of Lancaster County, the Court of Appeals of Nebraska, reviewed three issues regarding dependency proceedings of Indian children: (1) whether the reasonable efforts standard for reunification should be applied instead of the Indian Child Welfare Act's (ICWA) active efforts standard; (2) whether the ordered dispositional plan was warranted when appellant was not the underlying reason for the adjudication; and (3) whether an order changing the family therapist was justified.[1] The court held the ICWA active efforts standards should be applied throughout all stages of cases involving Indian children, the court erred in the application of certain non-material provisions in parenting plan, and permitted the order changing the family therapist.[2]

Appellant, David H., is the father of three minor children: Tanya H., born in September of 2004, Shania H., born August of 2003, and Shayla H., born August of 2001.[3] At the time the case proceeded, the three children were eligible for enrollment with the Rosebud Sioux Tribe through their father, but only Tanya and Shania became members.[4] Appellant and his three daughters lived together with his girlfriend Danielle R. and her three children.[5]

On January 17, 2013, a complaint was submitted to the Department of Health and Human Services (DHHS) by a school representative after Shayla showed signs of abuse from a "dark purple hand-print bruise" on her right cheek.[6] Shayla claimed the bruise was caused when Danielle held her down and slapped her.[7] On January 18, the DHHS took custody of both David and Danielle's children.[8] On January 22, DHHS filed a petition alleging "lack of proper care by reason of Danielle's faults and habits."[9]

On January 29, 2013, all children except for Shayla were returned to the custody and home of David and Danielle.[10] After the March 9, 2013 temporary custody hearing, Shayla was returned home.[11]

The Court notified the Rosebud Sioux Tribe of the dependency proceedings through an affidavit and notice by the State on January 31, 2012.[12] The tribe then filed notice of intervention and on April 2, 2012, and the court granted the tribe leave to intervene as a party.[13] The tribe did not appear at the adjudication or the disposition hearings.[14]

On May 31, 2013, the court issued an order finding that Shayla, Shania, and Tanya at risk of harm due to Danielle's inappropriate discipline.[15] The court did not exercise jurisdiction in the hearing over Danielle's children, reasoning that there was no evidence of Danielle's inappropriate discipline to her children and her children were older than David's.[16]

On July 11, 2013, at the first dispositional hearing, DHHS Children and Family Service Specialist, Silvia Cole, testified regarding her observation of David and Danielle since February of 2013.[17] Cole stated David and Danielle would simulate the school's method of removing Tanya and separating her from the class to adjust her behavior by having her sit in a closet with the door open.[18] Cole further recommended a replacement of the family therapist in order to make sufficient progress in the girls' behaviors.[19] She noted that the case should not be closed due to Shania's possible eating disorder and Tanya consistently running away from home after visiting with her mother.[20]

1. *In re Interest of Shayla H. et al.*, 22 Neb.App. 1, 4 (2014).
2. *Id.* at 2, 10.
3. *Id.* at 2.
4. *Id.*
5. *Id.*
6. *Shayla H. et al.*, 22 Neb.App. at 3.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Shayla H. et al.*, 22 Neb.App. at 3.
12. *Id.* at 4.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Shayla H. et al.*, 22 Neb.App. at 4.
17. *Id.*
18. *Id.* at 4-5.
19. *Id.* at 5
20. *Shayla H. et al.*, 22 Neb.App. at 5.

» Case, from previous page

Denying the objections made by David regarding recommendations made by Cole and DHHS, the court orally accepted DHHS's recommendations to change therapist.[21] Further, by written order, the court found that reasonable efforts had been met by the State to return the children to the custody of David.[22] Nevertheless, the court did not see it beneficial to the children's welfare to grant custody to David and imposed a specific order to David.[23] The court ordered David to: (1) cooperate with DHHS and service providers in his home; (2) allow drop-in services and access to children by the DHHS at all times; (3) only discuss children's mother and visitation in therapeutic settings; (4) only use physical discipline that was approved by DHHS and not place any child in the closet as a form of discipline; (6) provide children access to mental health care as appropriate; (5) cooperate with the arranged family therapy; (7) schedule and attend the children's regular medical, dental, and vision examinations; (8) schedule an appointment for Shania's speech and language evaluation; and (9) ensure the children are adequately supervised at all times.[24]

The Appeals Court first considered whether the juvenile court erred in applying the reasonable standards efforts rather than ICWA's active efforts standard in the decision to return legal custody to David.[25] The State argued ICWA did not apply to cases in which physical custody of the minor children remains with the parent, but only applied when the State seeks foster care placement or termination of parental rights of an Indian child.[26]

The court considered the purpose of ICWA as enacted in 1978 and the Nebraska Indian Child Welfare Act (NICWA).[27] In enacting NICWA, the legislature declared it a policy of the state to cooperate with the Indian tribes to enforce the provisions of ICWA for the protection of the rights of Indian parents, tribes, and Indian children in disposition proceedings.[28] Pursuant to NICWA, "any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child... shall satisfy that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the efforts have been unsuccessful."[29]

The court further considered an *amici curiae* brief filed by the Nebraska Appleseed Center for Law in the Public Interest and the Nebraska ICWA Coalition, including the Ponca Tribe of Nebraska, Winnebago Tribe of Nebraska, Omaha Tribe of Nebraska, and Santee Sioux Nation.[30] The brief disputed the State's active efforts argument.[31] The *Amici* brief asserts that the plain language of ICWA requires that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family."[32] The Amici noted that a temporary foster care placement could occur at any time in involuntary proceedings.[33] Furthermore, the child could be removed multiple times and the rights of the Indian parents to demand return of the child are removed in the involuntary proceedings.[34]

The court held active effort standards for reunification should be applied at the start of removal from home and prior to the adjudication and disposition hearing.[35] Furthermore, until the case is dismissed by DHHS, there remains a possibility that the children could be removed at any time because they were still under the legal custody of DHHS.[36] By not applying ICWA standards throughout the case, the possible progression of the case to foster care placement and parental termination would be problematic.[37] Therefore, active effort requirements contained in ICWA should have applied in ➜

21. *Id.*
22. *Id.*
23. *Id.* at 5-6.
24. *Id.*
25. *Shayla H. et al.*, 22 Neb.App. at 7.
26. *Id.*
27. *Id.* at 7-8.
28. *Id.* at 8.
29. *Id.* (*citing* Neb.Rev.Stat. § 43-1505(4)).
30. *Shayla H. et al.*, 22 Neb.App. at 6.
31. *Id.* at 12.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Shayla H. et al.*, 22 Neb.App. at 13.
36. *Id.*
37. *Id.*

» **Case**, from previous page

determining the successful return of legal custody to David.[38]

Next, the court considered whether a rehabilitation plan appropriate for David, when he was not the cause for adjudication.[39] The court held the portions of the rehabilitation plan requiring David's cooperation with DHHS services, family therapy, and provisions regarding discipline and supervision of the children to be reasonable.[40]

When analyzing the reasonableness of a plan, courts must address whether the "provisions in the plan tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained."[41] Danielle's discipline of Shayla was the material issue of the adjudication.[42] Because David and his children live together with Danielle, it would require cooperation of David with DHHS.[43] Therefore, the provisions requiring David to cooperate were reasonable to allow DHHS to work efficiently at correcting the reason for the adjudication.[44]

The court further held that the provisions requiring David not to use any unapproved physical discipline, refrain from placing children in the closet, and ensure the children had adequate supervision at all times were material to the case.[45] Even though David was not the direct cause of the adjudication, applying these provisions were necessary in order to improve the issues of the physical discipline, and prevent repeat situations by properly supervising.[46] The court removed the remaining immaterial provisions from the plan.[47]

The Court concluded that the active efforts standards of ICWA should apply the instant DHHS becomes involved, and the juvenile court erred in adopting provisions in the rehabilitation plan that were not material to the issue of adjudication.[48] Lastly, the order changing the family therapist was justified in order to enhance the change of the children's behavior and aid the issue of disciplinary actions by David and Danielle.[49] ■

38. *Id.* at 14.
39. *Id.* at 15.
40. *Id.* at 16.
41. *Id.* at 15 (*citing In re Interest of J.S., A.C., and C.S.*, 417 N.W.2d 147 (1987)).
42. *Id.* at 16.
43. *Id.*
44. *Id.*
45. Shayla H. et al., 22 Neb.App. at 16.
46. *Id.*
47. *Id.* at 17.
48. *Id.* at 18.
49. *Id.*

Amicus Curiae

B.H. V. SAN BERNARDINO

by Kelsey Till,
NACC Legal Intern;
SUNY Buffalo Law School,
JD Candidate 2016

The National Association of Counsel for Children, and signatories the National Center for Youth Law, Advokids, the Fresno Council on Child Abuse Prevention, Legal Advocates for Children and Youth, and Michael Gates filed an *amicus curiae* brief in support of Plaintiff-Appellant B.H. and his guardian ad litem, L.H., before the California Supreme Court.[1]

The Court is ruling on an interpretation of California's Child Abuse and Neglect Reporting Act (CANRA).[2] CANRA aims to counter "individual and systemic participation" in the silence surrounding child abuse, so that children are better protected.[3] It does so through a system of reporting requirements.[4] The statute designates mandated reporters, imposes criminal liability for failing to report, ➜

1. Brief for National Association of Counsel for Children, et al. as Amicus Curiae Supporting Petitioner, B.H. v. San Bernandino (2014) (No. S213066).
2. *Id.* at 1.
3. *Id.*
4. *Id.*

and provides immunity for reporting.[5] Under § 11166(a)(1), a mandated reporter must report when "'it is objectively reasonable for a person to *entertain* a suspicion' of abuse."[6] Under this standard, the mandated reporter would imagine a room of colleagues and decide if any one of those colleagues could reasonably consider a suspicion of abuse or neglect.[7] This very low bar is aimed at gathering as many potential cases of abuse and neglect as possible.[8]

CANRA § 11165.9 requires child welfare agencies and law enforcement to accept all reports of suspected abuse "'whether offered by a mandated reporter or another person.'"[9] Under § 11166(j-k), the agency that obtains the report must then immediately cross-report to the other agency.[10] Law enforcement and child welfare agencies use different investigative tools and respond differently to reports. This requirement ensures that every report is received by both agencies and that all resources are utilized to protect children.[11]

The brief cites social science research that reveals that there is a "systemic failure" to identify abused children.[12] Complying with CANRA's requirements is a prerequisite to early intervention in child abuse cases.[13] Violating CANRA by not reporting increases the chance that a child will undergo severe maltreatment.[14] CANRA is additionally vital to the prevention of child death.[15] CANRA counters inaccurate beliefs about what comprises child abuse, and what the risk factors are.[16] The four categories of underreporting are: (1) babies and young children, (2) children whose families are involved in custody disputes, (3) children exposed to domestic violence, and (4) children who are trafficked.[17]

In this case, B.H. was vulnerable to underreporting because he was two years old, and his family was entrenched in a "high-conflict custody dispute."[18] B.H.'s case also had all four risk factors for severe child maltreatment.[19] He was under the age of four, and had minor physical injuries from abuse, a prior report of maltreatment, and a parent in early to mid-twenties.[20] A 911 call of suspected child abuse of B.H. was received by the San Bernardino County Sheriff's Department, but the County did not cross-report to the child welfare agency, violating § 11166(k).[21] A deputy was dispatched to investigate, but after the investigation she did not file a report under § 11166(a).[22] Defendants' own witnesses admitted that the evidence "should have led a reasonable officer to suspect abuse," if viewed in a light most favorable to Plaintiff.[23] B.H. suffered permanent disability that was caused by this alleged child abuse.[24] B.H. asserts that a failure to report a suspicion of abuse as required under CANRA resulted in his injuries.[25]

The brief argues that § 11166(k) requires mandatory immediate cross-reporting under Government Code § 815.6, and that a failure to report results in liability.[26] Defendants' contention in this case is that § 11166(k)'s reporting requirement is not mandatory because it involves employment of discretion.[27] *Amici* assert that the use of the word "shall" in the statute is obligatory language that no other factors of CANRA counter.[28] There is also no requirement in the statute to evaluate the reporter's suspicions before the agency reports.[29] No discretion is required, as the task of reporting is purely administrative.[30] Investigation commences after the cross-reporting.[31] The brief contends that the Court of Appeal erred in its conclusion that an agency's duty to report is only prompted when an officer has completed an investigation and agrees with the reporter's suspicion.[32] This misreading of the statute transfers the "reasonable suspicion" standard from § 11166(a) onto subsection (k), but (k) is a separate, mandatory duty to cross-report.[33] CANRA § 11166(k) ensures that the collective judgment and potential services from all agencies are provided to children.[34]

The brief also emphasizes that § 11166(a) obliges a mandatory reporter to file a report when there is "reasonable suspicion" of abuse based on the facts.[35] "Reasonable suspicion" is *any*

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5. *Id.* at 5.
6. *Id.*
7. Brief for the Petitioner, B.H. v. San Bernandino (2014) (No. S213066), at 6.
8. *Id.*
9. *Id.* at 7.
10. *Id.*
11. *Id.* at 7-8.
12. *Id.* at 8.
13. Brief for the Petitioner, B.H. v. San Bernandino (2014) (No. S213066), at 10.
14. *Id.*
15. *Id.* at 11.
16. *Id.*
17. *Id.* at 12-20.
18. *Id.* at 2.
19. Brief for the Petitioner, B.H. v. San Bernandino (2014) (No. S213066) at 14.
20. *Id.* at 13.
21. *Id.* at 2.
22. *Id.*
23. *Id.*
24. *Id.* at 22.
25. Brief for the Petitioner, B.H. v. San Bernandino (2014) (No. S213066) at 49.
26. *Id.* at 21.
27. *Id.* at 22.
28. *Id.* at 24.
29. *Id.* at 25.
30. *Id.*
31. Brief for the Petitioner, B.H. v. San Bernandino (2014) (No. S213066) at 26.
32. *Id.* at 25.
33. *Id.* at 26.
34. *Id.*
35. *Id.* at 29.

reasonable suspicion; certainty or a specific medical indication is not required.[36] This standard is objective, not subjective, as Defendants argue.[37] *Amici* assert that the Court of Appeal misread this section as well.[38] Discretion only comes into play after the report is filed.[39] Because § 11166(a) is not a reasonable doubt standard, but a much lower standard based on reasonable officers in like circumstances, an arrest or removal is not the inevitable result of a mandated report of child abuse.[40] The brief then argues that the Court of Appeal's summary judgment of B.H.'s § 11166(a) claim should be vacated because there were issues of material fact.[41] Under the objective standard of § 11166(a), the Court should have determined whether it was objectively reasonable for the deputy to ignore B.H.'s bruised face and body, and should have acknowledged the disputed facts about how he procured the bruises.[42] The Court did neither.[43]

Amici assert that the deputy is liable for failing to comply with § 11166(a) and the County is vicariously liable under Government Code §§ 815.2 and 820, because they are not entitled to discretionary immunity.[44] Defendants argue that the deputy is entitled to immunity because she had to "make complex decisions and... exercise professional judgment."[45] But if the decision does not amount to a policy or planning decision, the public employee is not immune.[46] The tasks involved under § 11166(a) are purely operational and involve no policy determinations, so there is no reason for immunity under the objective standard.[47] *Amici* propose that when a public official makes complex daily decisions and may have difficulty foreseeing possible consequences, the issue under § 11166(a) is not the application of discretionary immunity, but whether there was a breach of a duty.[48] If public employees were given immunity for their negligence out of fairness concerns, that would disregard the unfairness experienced by those harmed by these officials.[49] Unfairness would also result from denying B.H. relief for his injury, and holding private sector mandated reporters liable but not government reporters.[50]

The brief further argues that Government Code § 821.6 is also inapplicable here, in that Defendants are not insulated under its prosecutorial immunity.[51] This section only protects actions taken by a public employee in furtherance of his or her duty, and does not protect omissions.[52] A person's failure to comply with CANRA's duty to report is therefore not covered by § 821.6.[53] The cases that the Defendant relied on confirmed that courts have only applied § 821.6 to commissions in child welfare investigations, not omissions.[54]

The NACC, NYCL, Advokids, FCCAP, LACY, and Michael Gates recognize the importance of CANRA in protecting California's children who are most susceptible to child abuse and neglect.[55] They acknowledge that holding reporters and agencies liable for violating CANRA's reporting requirements is necessary to improving the outcomes for child welfare.[56] *Amici* encourage the California Supreme Court to atone for the Court of Appeal's erroneous interpretations of §§ 11166(a) and (k), and to hold that § 11166(k) includes a mandatory cross-reporting duty.[57] They also urge the Court to reverse the Court of Appeal's application of prosecutorial and discretionary immunity.[58] These clarifications of CANRA would promote interagency cooperation and guarantee that neglected and abused children have access to a vast array of services. These holdings adopting NACC's position would establish that enforcement of mandatory reporting requirements is paramount to the protection of vulnerable children like B.H.

The brief was submitted to Court on May 7, 2014 by counsel of Keker & Van Nest LLP, on behalf of the NACC and its signatories.

The case is pending. *Amicus curiae* brief available at: NACCchildlaw.org. ■

36. *Id.*
37. Brief for the Petitioner, B.H. v. San Bernandino (2014) (No. S213066), at 32.
38. *Id.* at 31.
39. *Id.*
40. *Id.* at 32.
41. *Id.* at 33.
42. *Id.* at 34.
43. Brief for the Petitioner, B.H. v. San Bernandino (2014) (No. S213066), at 34.
44. *Id.* at 35.
45. *Id.*
46. *Id.*
47. *Id.* at 38-39.
48. *Id.* at 41.
49. Brief for the Petitioner, B.H. v. San Bernandino (2014) (No. S213066), at 42.
50. *Id.* at 43.
51. *Id.* at 44.
52. *Id.* at 45.
53. *Id.* at 45-46.
54. *Id.* at 47.
55. Brief for the Petitioner, B.H. v. San Bernandino (2014) (No. S213066), at 50.
56. *Id.*
57. *Id.*
58. *Id.*

NACC Awards

NACC is honored to present the **Lifetime Achievement Award** to

John Ciccolella, JD

and the **Outstanding Young Lawyer Award** to

Daniel Senter, JD

Congratulations to you both!

Awards will be presented Tuesday, August 19, 2014 at our 37th National Child Welfare, Juvenile, and Family Law Conference Luncheon in Denver, CO

John B. Ciccolella is a sole practitioner in his law firm, Ciccolella Family Law, P.C., Colorado Springs, Colorado. John has a significant practice in custody, including intrastate, interstate, international custody and parental abductions. He specializes in high conflict divorces, including complex property division claims. In addition to his law practice, he is the Municipal Judge for the towns of Palmer Lake and Monument, Colorado.

John is a member of: El Paso County Bar Association and Colorado Bar Associations, 1973-Present; National Association of Counsel for Children, 1978–Present (Member Board of Directors, 1979–1980, 2005–2013); Colorado Municipal Judges Association, 1975–Present; ABA Child Custody and Adoption Pro Bono Project Advisory Committee; Office of Colorado's Child Protection Ombudsman Advisory Committee, 2012–2103; Colorado Department of Human Services, Child Protection Ombudsman, Rules and Regulations Work Group, 2013–2014.

John is a recipient of the El Paso County Bar Association's Lohman Award for significant contribution to Children's welfare, 2014; Stephan Cahn Award, Career Achievement in Juvenile Law, National Association of Counsel for Children, 2002; the Seraph Award, Pikes Peak Children's Advocates, 1987; Special Recognition Single Accomplishment Award for Outstanding Contribution in the Field of Child Advocacy, Pikes Peak Children's Advocates, 1981.

John is the co-author of "A Study of Colorado Law and Procedures in Dependency and Neglect Proceedings," Portland State University, 1979; Editor, "Legal Representation of the Maltreated Child", National Association of Counsel for Children, 1980.

John is listed in Best Lawyers in America, 2013–2014, his firm is listed in U.S. News and World Report as one of the Best Law Firms in America (Colorado, Family Law), 2014 and carries an AV Peer Review Rating in Legal Ability and Ethical Standards with Martindale-Hubbell.

Daniel Senter is Staff Attorney, East Bay Children's Law Offices. Daniel directs the Education Advocacy Project at the East Bay Children's Law offices in Oakland, CA. He provides direct legal advocacy to improve the educational outcomes of court-involved youth. Daniel represents clients in education proceedings including Individual Education Plan (IEP) meetings and disciplinary hearings. He leads a policy committee on foster youth school discipline reform and oversees a student-run clinic at Berkeley School of Law. Daniel was awarded the Jefferson Award in 2013 and named a Pro Bono Hero by Berkeley Law School in 2012. Before entering the legal field, Daniel was a special education teacher in Oakland, CA and a nonprofit consultant in Boston, MA. He holds a BA from Harvard University and a JD from USC Gould School of Law.

A Message from Donald Bross, JD, PhD

NACC founder and Board Member Emeritus

John Ciccolella joined the National Association of Counsel for Children even as it was being incorporated in 1977, and immediately began to improve its chances both to survive as an organization and to contribute to better child advocacy. John had been described to me as one of the two best attorneys working on behalf of children and battered women in divorce and child protection proceedings in Colorado Springs, and I called him to talk about the direction of the NACC. As soon as he learned that the NACC's first national conference would be held in November, he asked if we would be including a trial notebook for conference participants.

It will be helpful to provide context before describing what John did next. In the beginning of the NACC everything was done by volunteers. Expenses to support advertising, conference space, and handouts were loaned to the NACC by the Colorado Trial Lawyers Association. The fee for the one day national meeting was $50 and for that amount participants received back-to-back presentations from high-level experts in the law, medical, casework and therapeutic aspects of litigation of child protection cases. For example, Barton Schmitt, MD, presented on "Visual Diagnosis of Non-Accidental Trauma," was also the author of the American Academy of Pediatrics module on the topic. Aside from the Dr. Schmitt and Associate Justice of the Colorado Supreme Court, Jim Carrigan, the luncheon speaker, everyone who spoke was asked to make a $50 contribution to the NACC (and they did)!

John Ciccollela ended up editing the first NACC conference manual, which contained within its three ring binder not only many brief articles, cases and a copy of pertinent statures for appearing in child protection proceedings, but fifty legal forms, many of them specifically created by members during their own practice and turned over to John's publication. All of the conference manuals not provided to the 150 participants from twelve states who attended, were later sold to lawyers who weren't able to attend but wanted the materials John had brought together and edited. The Colorado Trial Lawyers Association loan was paid off, and there was a small balance to report to the IRS after the NACC's first year.

John has taught me and others a great deal over many years on how to do the work of child representation well. Having represented an abused infant whose parent left the military and succeeded in having the child protection case in Colorado dismissed, John received a call from St. Louis, Missouri, informing him that his client had been abused again. John bought his own ticket, traveled to St. Louis, and appeared in the court where his client's case was introduced. With no license to practice in Missouri, and a judge asking him who he was and why he was there, he turned to the caseworker and asked if he could work with her on the case. She nodded yes, and John proceeded to tell the judge he was there as a friend of the caseworker and that he had information for the court that the judge would wish to hear! The judge decided to listen.

John has taught us a great deal on how to do the work of child representation well

John concluded many years ago that it was difficult to practice law and also manage all of the family dynamics and psychological aspects of the families involved in his cases. He has employed one or more social workers on his staff over many years, and they allow him to focus on the legal needs of the clients he represents. Despite being severely injured by the ex-husband of one of his clients, John has been able to return to work and continue to advocate for children and battered wives. I hope you will have the good fortune to meet John Ciccolella if you haven't already done so, and appreciate not only who he is but, throughout the entire existence of the organization, what an extraordinary representative John has been of children, and the membership and meaning of the National Association of Counsel for Children. ■

Making Way for Gray in the Legal Analysis of Human Trafficking

by **Amanda Huston**

Human trafficking, particularly sex trafficking,[1] has captured the spotlight in our modern landscape of social advocacy. Numerous organizations, and even our President, have pursued awareness regarding the issue using powerful buzzwords like "slavery" to refer to a nationwide "epidemic" of forced commercial sex.[2] Yet, while the strength of this defining language is effective and even appropriate in some cases, it may have a negative effect on the world of legal advocacy by unnecessarily simplifying the criteria by which a person, especially a minor, is classified as a "victim."

Sex trafficking sits on a spectrum of gray: it is legally defined, at the federal level, as the "recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act;"[3] it is defined and addressed, though not consistently, by the laws of forty-eight different states;[4] and a growing body of case law addresses ambiguities in these laws more every day.[5] Yet, there remains a disconnect between the harsh, black-and-white language of "force, fraud, or coercion"[6] harkened by fervent advocates and reality, where the question of victimization vs. volition is blurred by a host of dialectic tensions; circumstances often inform both conclusions, straddling a nearly impossible line between the two.

On a moral spectrum, the line between victimization and volition may be drawn in different places. But regardless of how personal convictions may advise the defining moment at which a person is afforded the legal status of "sex trafficking victim,"[7] the law must present a uniform framework with which to address the question. But are we, as a nation of advocates, ready to face the reality that instances in which sex trafficking may be implicated are riddled with gray areas? More specifically, is there a line in the sand with regard to determining those who qualify as sex trafficking victims? And, if so, what specific facts patterns fulfill our legal expectations of these victims?

While traveling to Peru for a relational-trade coffee initiative in 2011, I encountered a 15-year-old girl, Maria, working in a video bar. She had been physically kidnapped from the jungle and forced to provide sexual services to patrons of the bar. This is a classic black-and-white case of sex trafficking; both the law and social advocacy groups would have no qualms with calling this particular scenario sex trafficking and classifying Maria as a victim.

Fast forward to 2013, however, where a 19-year-old girl has been providing sexual services to viewers on the web since the age of eleven. She still colors in coloring books; she desperately needs her baby blanket; and she communicates through wild tears that she wants to start a new life, free from her "perpetrator." In the end, she continues making sex videos for this "perpetrator," who has filled the shoes of her missing father figure since he first solicited her at a young age. The choice to remain in the "business" is her prerogative; she is legally an adult, though arguably bereft with regard to "meaningful choice." Here, while she was most certainly a "victim of a severe form of sex trafficking"[8] under applicable federal law during her years making sex videos →

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1. Addressing sex trafficking separately from labor trafficking for purposes of identifying difficulties with regard to legal frameworks by which to assess sex trafficking victims; *but see* Rebecca L. Wharton, A New Paradigm for Human Trafficking: *Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act*, 16 Wm. & Mary J. Women & L. 753, 757 (2010) (arguing that federal law should not differentiate between sex trafficking and other types of human trafficking).
2. Anna Makatche, *The Commercial Sexual Exploitation of Minors, the First Amendment, and Freedom: Why Backpage.com Should Be Prevented from Selling America's Children for Sex*, 41 Fordham Urb. L.J. 227, 241, 245-246 (2013).
3. 22 U.S.C.A. § 7102(10) (2013).
4. Makatche, *supra* note 2, at 241, 245-46.
5. *See* People v. Cardenas, 2014 COA 35, WL1254880, at *4 (2014) (concluding that the Colorado trafficking statute "prohibits the sale, exchange, barter, or lease of a *child*, but not the sale, exchange, barter, or lease of a child's *services*").
6. Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 Am. U. J. Gender Soc. Pol'y & L. 1247, 1295 (2011).
7. 22 U.S.C.A. § 7102(15) (2013).
8. 22 U.S.C.A. § 7102(14) (2013).

as a minor, should she still be classified as a victim now that she has reached the age of majority and is consenting to these actions? Is her choice meaningful enough to make her a volitional actor?

Even more questionable is a situation in which an 18-year-old female is working in a gentlemen's club, providing more than dances to patrons. She chose this particular lifestyle because her grandmother and mother were both prostitutes, and her mother's boyfriend "talked her into" exotic dancing to pay bills when she was 16, after her mother became addicted to methamphetamines. Of course, she appears happy, talks about how she makes her own decisions, and boasts of the wads of money she can earn during a "good night." Is she a victim or a volitional actor? Can she be both?

Each of these related examples tells a story; a story of individuals engaged in commercial sex. And each story represents a complicated interplay between vulnerability, choice, and coercion. The gray area in potential human trafficking cases is often implicated with regard to this delicate interplay. How much was the 19-year-old porn star consenting to her lifestyle before and after she reached the age of majority? Or how much did economic need and family pressure influence the stripper's choice to sell her body for sex as a minor and beyond? And even so, are these pressures and vulnerabilities sufficient to qualify as coercion, and therefore render these young women "victims?"

These questions of vulnerability, choice, and coercion become especially important in the context of minors. While research has shown that factors such as poverty, poor family environment, previous sexual abuse, mental illness, etc. make individuals more susceptible to being victims of sex trafficking,[9] age proves to be a moving target; we struggle to determine how much age should be considered in the discussion of whether or not an individual engaged in commercial sex is a victim or volitional actor. In response to this dilemma, many states have enacted safe harbor laws immunizing only minors involved in commercial sex acts from prosecution; other states automatically prosecute both minors and adults involved in commercial sex.[10] It must be argued, however, that the facts warrant more than an automatic classification, where eighty percent of young women engaged in sex for money began before the age of eighteen,[11] and traffickers in fact target minors because they prove more susceptible.[12] For years, we have recognized that minors are somehow different with regard to their ability to act maturely,[13] yet, in a manner that is reminiscent of old rape laws requiring proof of force, we often reinforce the expectation that every sex trafficking victim be a physical slave. Such automatic categorizations for both minors and adults, however, can prove dangerous.

The legal definition of modern-day human trafficking, along with our expectation of victims, has evolved over time to reflect changes in national sentiment. Originally, the relevant law described an act that involved crossing state lines,[14] then broadened in 2000 with the depiction of human trafficking as forced slavery involving physical bondage. Finally, the law expanded to include a more broad understanding that trafficking exists along a spectrum of various forms of exploitation, involving physical and non-physical coercion.[15] As the definition of human trafficking broadened, the number of persons who qualified as victims within the parameters of the law has also increased.

The particular definitions and factual boxes we assign to sex trafficking therefore shape how we distinguish victims from volitional actors. The problem here is that we make these determinations in a more automatic rather than informed, fact-specific manner. As a result, our mold for qualifying victims is plagued with both under and over inclusiveness. For example, if we expect a sex trafficking victim to be a kidnapped slave, like the girl from Peru, our legal analysis stops when we do not see a sign of physical force. Here, we may ignore a real victim, because we find ourselves wondering "why [they] did not just get up and leave?"[16] This becomes especially dangerous when discussing minors and their vulnerability to "physiological servitude" after being groomed by predators.[17] On the other hand, we may assume that every person committing a commercial sex act as a result of persuasion and certain "vulnerability" factors is a victim. This is also not true. While many individuals suffer various levels of vulnerability and are persuaded into the sex industry by numerous factors, there is a legal point along the spectrum of gray where these factors are no longer considered coercion, and individuals must be held accountable for their actions. The question is one of proper balance.

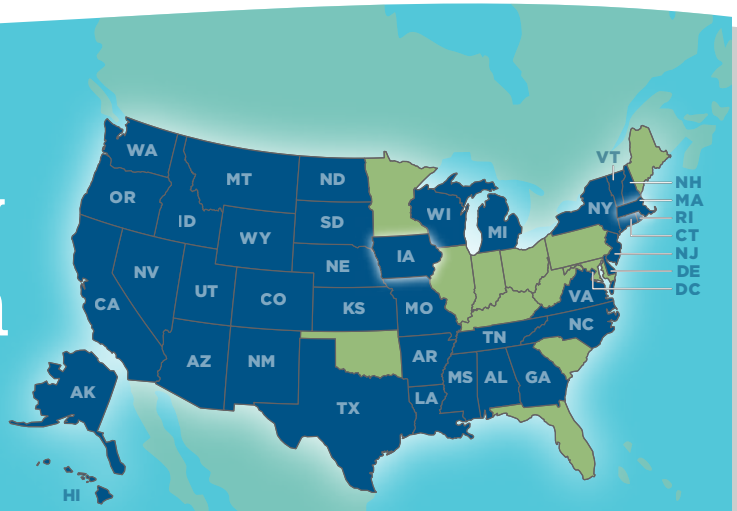
How then should we appropriately qualify a sex trafficking victim? The answer is to remove the ➜

9. Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. Mem. L. Rev. 1013, at 1020-1023 (2013).
10. *See* Polaris Project, 2013 *Analysis of State Human Trafficking Laws* (2013), available at http://www.polarisproject.org/storage/2013-Analysis-Category-6-Safe-Harbor.pdf.
11. Parker & Skrmetti, *supra* note 9, at 1020.
12. *Id.*
13. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012) (discussing factors that make youth constitutionally different from adults and therefore concluding that mandatory life without parole for minors is unconstitutional).
14. Mattar, *supra* note 6, at 1250.
15. *Id.* at 1257-62.
16. Parker & Skrmetti, *supra* note 9, at 1019.
17. *See* Kyle Cutts, *A Modicum of Recovery: How Child Sex Tourism Constitutes Slavery Under the Alien Tort Claims Act*, 58 Case W. Res. L. Rev. 277, 304 (2007).

autopilot classifications and engage the gray areas. Analysis of a potential human trafficking situation is not automatic. Therefore, legal and social advocates cannot expect a scenario to fit neatly into categories of "slave" or "free," which proves more of a rhetorical poster child than an exercise in justice. A proper analysis must be holistic, fact-specific, and fully engage the circumstantial gray areas and context of each case in its own right. The law must provide flexible "frameworks," not criteria, to weigh vulnerabilities in each case against the coercive factors present, and it must do so within the context of a potential victim's individual capacity for meaningful choice; we cannot rely on mere objective expectations personifying an ideal victim.

Not every sex trafficking victim is kidnapped, drugged, or physically forced into commercial sex, and public outcry over sex trafficking as a form of mere physical slavery, has often perpetuated this black-and-white expectation with regard to the perfect victim. On the other hand, not everyone is a victim. Their choice to engage in commercial sex may have teetered on the persuasion of some economic vulnerabilities or bad experiences, but they remain a volitional actor in their respective choices. Engaging the gray areas to analyze sex trafficking cases is therefore a messy process. But, if we are not willing to wade knee deep into messy facts, we forfeit the opportunity to effectively advocate, and ultimately, we miss the mark of justice. When young girls in strip clubs or escort services fail to fit the mold of an enslaved victim, our social and legal processes must push past automatic classifications, and first be inclined to take a closer look—a look into the gray. ■

Child Welfare Law Certification



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Next Steps

NACC is in the process of applying to **Minnesota** and **Pennsylvania**.

CWLS & CWLS Applicant Reception in Denver

Our Child Welfare Law Specialists will have a special reception on Sunday, August 17th from 5:00pm to 6:30pm, preceding the 37th National Juvenile and Family Law Conference at the Hyatt Regency Denver. This year, CWLS applicants who are attending the Red Book Training and Conference are invited join us. Come meet your fellow specialists and soon-to-be specialists from all over the country!

Register now for the conference or contact us to add on to your existing registration. ■

For more information, please visit our **Certification** page at

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or contact **Daniel Trujillo**, 303-864-5359, or Daniel.Trujillo@childrenscolorado.org

The NACC Training Landscape

Over the past twelve months, NACC has doubled its efforts to provide rigorous legal trainings for attorneys practicing dependency, delinquency, and family law. Despite our name, NACC is committed to high-quality representation for all parties, not just children. Our training program develops foundational knowledge, refines practical skills, and teaches attorneys how to extend their ability beyond the courtroom and push for system reform. Whether it's a specific topic that is hot in your state, or a traditional skill set required of all capable attorneys, NACC can custom build a curriculum to suit your state-specific needs. Feel free to contact Senior Staff Attorney Andrew Yost to get an idea of what NACC can do.

by D. Andrew Yost, JD, MA
NACC Senior Staff Attorney

Professional Curriculum Design

Let's face it. A law degree doesn't necessarily qualify you to teach. NACC's curriculum design team couples content mastery and classroom experience to produce cutting edge courses. Our delivery is not lecture-based. Gone are the days of talking heads and PowerPoints. Utilizing technology and creativity, each course includes differentiated instruction like role-modeling, skills practice, breakout sessions, and pre and post class assessments. We're not afraid of technology, so don't be surprised when you attend an NACC training and see Prezi, SlideDog, or Haiku Deck rather than a projector and slide show. And we are currently developing tools for long-term, measured learning. We're not just interested in whether trainees know the material eight hours later; we want to change behavior for the long haul.

Measured Outcomes

NACC instructors are teachers first, and attorneys second. Our faculty knows the law and how to teach it (not tell it) to a room of trainees. We build into our curriculum continuous assessments to measure training effectiveness. During the class, trainees can expect peer reviews, live feedback, assessments, and on-going instructor-trainee discourse. Following the class NACC will work with trainees to encourage enduring understanding. Contact NACC to discuss ways to measure outcomes and induce changes in the way we actually practice law.

Intentional Instruction

It's time to say goodbye to 'spray and pray' approaches to training. Organizations are savvy enough to know that deliberate and focused trainings coupled with learning measurement tools are the cornerstones of effective pedagogy. NACC gets that too. In the past year NACC has worked with Louisiana, South Carolina, Montana, Illinois, Arkansas, Iowa, and a host of other states to address specific needs in specific states. We begin at the end: with learning objectives, then work backwards to develop rigorous methods to achieve those objectives.

Think We Can Help?

If you think we can help in your state, reach out. Whether it's a *pro bono* consultation on curriculum design, or a week-long trial skills program, we're here as a resource for all practitioners. NACC Staff Attorneys Andrew Yost, JD, MA, and Brooke Silverthorn, JD, CWLS are one call (or email away) to help you take your practice to the next level. ■

National Association of Counsel for Children

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NACC Mission

As a multidisciplinary membership organization, we work to strengthen legal advocacy for children and families by:

- Ensuring that children and families are provided with well resourced, high quality legal advocates when their rights are at stake
- Implementing best practices by providing certification, training, education, and technical assistance to promote specialized high quality legal advocacy
- Advancing systemic improvement in child-serving agencies, institutions and court systems
- Promoting a safe and nurturing childhood through legal and policy advocacy for the rights and interests of children and families


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