

“Constitutional Rights of Children in Child Protection Cases”

Presented by:

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ABA Model Rules of Professional Conduct

Rule 1.1

Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

ABA Model Rules of Professional Conduct

Rule 1.3

Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

RIGHT TO PROTECTION AND PROPER CARE – CASE LAW

- *DeShaney v. Winnebago Cty. Dept. of Social Servs.*, 489 U.S. 189 (1989)
- *Doe v. New York City Dept. of Social Servs.*, 649 F.2d 134 (2d Cir. 1981), after remand, 709 F.2d 782, *cert. denied sub nom., Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983)
- *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc). *cert. denied*, 489 U.S. 1065 (1989)
- *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990)
- *Yvonne L. v. New Mexico Dept. of Human Servs.*, 959 F.2d 883 (10th Cir. 1992)
- *T.D. v. Patton*, 868 F.3d 1209, 1212 (10th Cir. 2017), *cert denied, Patton v. T.D.*, 2018 U.S. Lexis 1591 (2018)
- *Norfleet v. Arkansas Dept. of Human Servs.*, 989 F.2d 289 (8th Cir. 1993)

RIGHT TO PROTECTION AND PROPER CARE – CASE LAW

- *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012)
- *Braam v. State*, 81 P.3d 851 (Wash. 2003)
- *Griffith v. Johnston*, 899 F.2d 1427, 1437 (5th Cir. 1990)
- *Hernandez ex rel. Hernandez v. Texas Dept. of Protective & Regulatory Services*, 380 F.3d 872, 880 (5th Cir. 2004)
- *Jasinski v. Tyler*, 729 F.3d 531, 538 (6th Cir. 2013)
- *Butera v. District of Columbia*, 235 F.3d 637, 648-49 (D.C. Cir. 2001)
- *M.D. v. Abbott*, Memorandum of Opinion and Verdict, 152 F.Supp.3d 684 (S.D. Tex. 2015); Interim Order Regarding Special Masters' Recommendations, 2017 U.S. Dist. LEXIS 2939 (S.D. Tex. 2017); Final Order, Case 2:11-cv-00084, Doc. 559 (S.D. Tex. 2018).

RIGHT TO PROTECTION AND PROPER CARE – AS INTERPRETED BY THE COURTS

- Right not to be abused in a foster care setting
- Right to be free from infliction of unnecessary pain
- Right to physical safety
- Right not to be placed with a foster parent likely to abuse or neglect the child
- Right to have the state take steps to prevent the child from deteriorating physically or psychologically as a result of maltreatment or the frequency of placement changes
- Right to be reasonably safe from harm
- Right to be free from an unreasonable risk of harm
- Right to adequate food, clothing, shelter, medical care, treatment, services, protection, and supervision
- Right to reasonable security and reasonably safe living conditions
- Right to be free from state action that creates or increases the risk of exposure to private acts of violence
- Right to be free from state action that creates a special danger

RIGHT TO PROTECTION AND PROPER CARE – PRACTICAL APPLICATION

- Seeking treatments or evaluations that are not on the “laundry list” of state’s services
- Overcoming objections to a needed service because of policy, practice, or funding limitations
- Advocating that a child’s mental health services must be provided by trained professional using trauma-informed treatment modalities
- Put pressure on system to increase availability of trained professionals, especially appropriately trained mental health professionals
- Protect a child against an unsafe placement
- Making court aware that child’s needs have constitutional ramifications, especially when seeking protections, evaluations, treatments, and services

Judge Janis Graham Jack
(M.D. v. Abbott) – Right to Counsel

The court held in the Interim Order and confirmed in the Final Order that children in the PMC of the State are **“constitutionally entitled to representation of counsel at each stage of their legal proceedings and at every court hearing”** and **“at every step of their journey through the Texas foster care system.”** Interim Order at 35, 38.

Judge Janis Graham Jack
(M.D. v. Abbott)

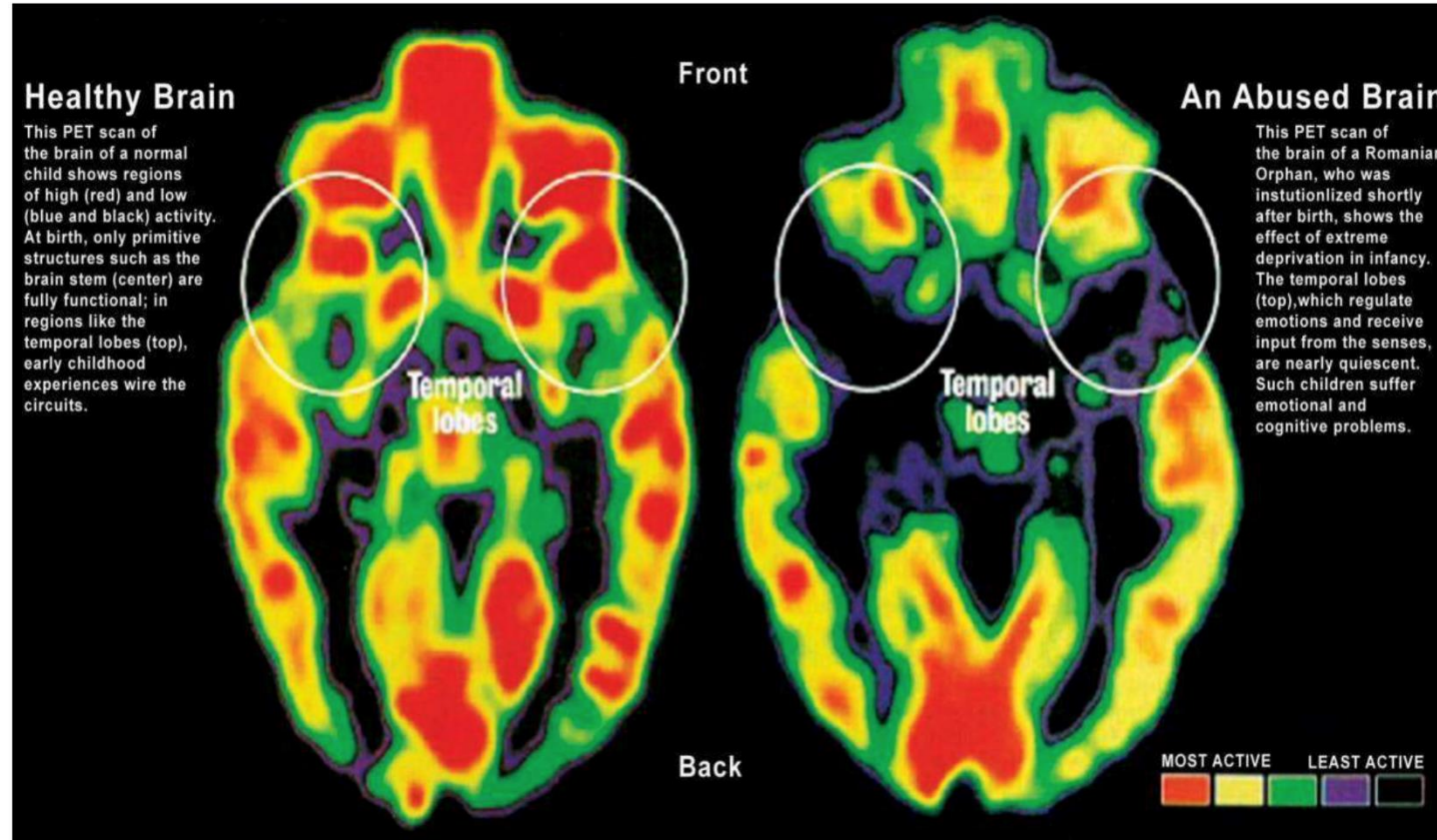
“Children often enter foster care at the Basic service level, are assigned a carousel of overburdened caseworkers, suffer abuse and neglect that is rarely confirmed or treated, are shuttled between placements, often inappropriate for their needs throughout the State, are migrated through schools that makes academic achievement impossible, are medicated with psychotropic drugs, and then age out of foster care at the Intense service level, damaged, institutionalized, and unable to succeed as adults.”

Trauma affects a child's:

- Brain
- Biology
- Body
- Beliefs
- Behavior

(The “5 B’s” from Karyn Purvis, Ph.D.)

How childhood trauma affects the brain



Center for Disease
Control &
Protection;
United Way

Overlapping symptoms of child trauma and psychiatric disorders

Psychiatric Disorder	Overlapping Symptoms
Anxiety Disorders	avoidance of feared stimuli, physiologic and psychological hyperarousal upon exposure to feared stimuli, sleep problems, hypervigilance, and increased startle reaction
ADHD	restless, hyperactive, disorganized, and/or agitated activity; difficulty sleeping, poor concentration, and hypervigilant motor activity
Bipolar Disorder	hyperarousal and other anxiety symptoms mimicking hypomania; traumatic reenactment mimicking aggressive or hypersexual behavior; and maladaptive attempts at cognitive coping mimicking pseudo-manic statements
Major Depressive Disorder	self-injurious behaviors as avoidant coping with trauma reminders, social withdrawal, affective numbing, and/or sleep difficulties
Oppositional Defiant Disorder	a predominance of angry outbursts and irritability
Panic Disorder	striking anxiety and psychological and physiologic distress upon exposure to trauma reminders and avoidance of talking about the trauma
Psychotic Disorder	severely agitated, hypervigilance, flashbacks, sleep disturbance, numbing, and/or social withdrawal, unusual perceptions, impairment of sensorium and fluctuating levels of consciousness
Substance Abuse Disorder	drugs and/or alcohol used to numb or avoid trauma reminders

Downward Cycle of Harm



Leads to more trauma for the child in care

How do we prevent re-traumatization & promote resiliency?

Trauma-Informed Care—

- 1) Creates safety** (physical & psychological);
- 2) Builds connections & relationships;**
- 3) Guides child to regulate emotions & behavior;**

Builds child's sense of **self worth and resiliency** for the ups and downs of life.

The Most Basic Rule

- A child-focused, trauma-informed system looks at the **needs of *this particular child*** and causes the system to adjust to meet those needs
- As advocates for children, we have an **ethical duty and moral responsibility** to advocate for what our child-clients need not merely what the system can currently provide

Resources for Trauma-Informed Practice

- **Karyn Purvis Institute of Child Development, TCU:** training for caseworkers, caregivers, educators, legal professionals
 - <https://child.tcu.edu/>
- **Child Trauma Academy:** training for mental health practitioners & educators
 - www.childtrauma.org
- **National Child Traumatic Stress Network:** online resource center
 - www.nctsnet.org
- **California Evidence-Based Clearinghouse for Child Welfare:** identifies interventions that have been proven to be effective for traumatized children
 - <http://www.cebc4cw.org/>

RIGHT TO MAINTAIN FAMILY RELATIONSHIPS – CASE LAW

- *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)
- *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)
- *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)
- *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)
- *Troxel v. Granville*, 530 U.S. 57 (2000)
- *Smith v. Org. of Foster Families for Equality and Reform, et al.*, 431 U.S. 816 (1977)
- *Franz, et al., v. U.S.*, 707 F.2d 582 (D.C. Cir. 1983)
- *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982)

RIGHT TO MAINTAIN FAMILY RELATIONSHIPS – PRACTICAL APPLICATION

- Promoting visitations between child and parents or other close family members
- Ensuring adequate time to allow for bonding with parents, especially when children are ages 0-3
- Overcome claims of inadequate funding for lengthier visitations
- Support a request for family therapy
- Promote diligent efforts in searching for potential appropriate relative placements
- Support arguments to extend placement opportunities to fictive kin, where appropriate

RIGHT TO SIBLING ACCESS – CASE LAW

- *Aristotle P. v. Johnson*, 721 F.Supp. 1002 (N.D. Ill. 1989)

Citing –

- *Moore v. East Cleveland*, 431 U.S. 494 (1977)
- *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979)

RIGHT TO SIBLING ACCESS – PRACTICAL APPLICATION

- Seek visitation for a child with siblings because of a child's right to preserve integrity and stability of family
- Overcome claims that efforts related to sibling visitations are too costly or cumbersome
- Recognition of right to incentivize state to increase funding to promote sibling access

RIGHT TO BODILY INTEGRITY – CASE LAW

- *Doe v. Taylor I.S.D.*, 15 F.3d 443 (5th Cir. 1994) (en banc), *cert. denied*, *Lankford v. Doe*, 513 U.S. 816 (1994)
- *Jefferson v. Ysleta I.S.D.*, 817 F.2d 303 (5th Cir. 1987)
- *United States v. Giordano*, 442 F.3d 30 (2d Cir. 2006)
- *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607 (8th Cir. 1999)
- *Plumeau v. Sch. Dist. #40*, 130 F.3d 432 (9th Cir. 1997)
- *Doe v. Claiborne*, 103 F.3d 495 (6th Cir. 1996)

RIGHT TO BODILY INTEGRITY – CASE LAW

- *Abeyta v. Chama Valley I.S.D.*, 77 F.3d 1253 (10th Cir. 1996)
- *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1988)
- *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980).
- *Hackett v. Fulton County Sch. Dist.*, 238 F. Supp. 2d 1330 (N.D. Ga. 2002)
- *Hinkley v. Baker*, 122 F. Supp. 2d 48 (U.S. Dist. Me. 2000)
- *Bucher v. Richardson Hospital Authority*, 160 F.R.D. 88 (N.D. Tex. 1994)
- *Doe v. Eason, et al.*, 1999 U.S. Dist. LEXIS 22292 (N.D. Tex. Aug. 4, 1999)

RIGHT TO BODILY INTEGRITY – PRACTICAL APPLICATION

- Asserting children's right to physical safety beyond the foster care setting
- Preventing child from having to participate in deposition if it would result in physical or psychological harm
- Protecting foster child's identity if disclosure would violate constitutional right to bodily integrity

RIGHT TO NOT BE DISCRIMINATED AGAINST BASED ON RACE, RELIGION, SEX, SEXUAL ORIENTATION, OR GENDER IDENTITY – CASE LAW

- *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003)
- *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142 (D. Mass. 2011).
- *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)
- *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481-84 (9th Cir. 2014)
- *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, *Bogan v. Baskin*, 135 S.Ct. 316 (2014)
- *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff'd* 133 S.Ct. 2675 (2013)
- *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)
- *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004).
- *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Dist. Ct. Oct. 11, 2000), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000); *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003)

RIGHT TO NOT BE DISCRIMINATED AGAINST BASED ON RACE, RELIGION, SEX, SEXUAL ORIENTATION, OR GENDER IDENTITY – CASE LAW

- Protect children from discriminatory practices in placement
- Advocate for protections for youth (e.g. gender non-conforming)

Collaborate to Protect Children's Rights

- Share expertise across your state to safeguard children's constitutional rights.
- Connect, equip, and mobilize legal professionals to improve case outcomes for abused and at-risk children.
- Learn more at www.ChildProtectionConnection.org