The Role of the Judicial System in Improving the Lives of Texas' Foster Children

BY REBECCA LIGHTSEY & MARCY HOGAN GREER

No child enters or leaves foster care without a court order. A judge decides where the child will live, with whom, and for how long. Every day, Texas courts decide whether a child goes home or to a relative, visits a sibling, or becomes legally free for adoption.[1]

In August, public interest law center Texas Appleseed presented its findings and recommendations to the Texas Supreme Court's Permanent Judicial Commission for Children, Youth and Families regarding children in long-term foster care in Texas. At the request of the Commission, Texas Appleseed and its pro bono partners, led by Fulbright & Jaworski L.L.P., have spent more than a year extensively reviewing one critical component of the state's foster care — the role of the judicial process in managing the lives of children in long-term foster care.

For more than 26,000 children, the State of Texas is their "parent."[2] More than half of these children have been in the foster care system for more than a year, becoming long-term wards of the state.[3] A court has ordered these children into a permanent managing conservatorship (PMC). Every child in PMC has an active court case with required court hearings every six months.

Although they must meet minimum statutory requirements, Texas courts have broad discretion in how they manage these cases and how extensive their oversight is. The purpose of the Texas Appleseed study was to analyze how the judicial system can help improve life for children in long-term foster care.

With the cooperation of the Texas Department of Family and Protective Services (DFPS) and assistance from RPC Consulting, Texas Appleseed conducted an in-depth analysis of DFPS data on children in PMC.[4] To get behind the numbers, Texas Appleseed and its partners extensively interviewed stakeholders in 15 selected diverse jurisdictions across the state.[5] These interviews revealed significant variations in practices, policies, and procedures. The results were disturbing:

- More than 30 percent of children in PMC are in foster care for three or more years.
- Only 20 percent of children who are adopted are over 9 years old.
- Children in PMC for three or more years live in more than 10 different places before they leave the system.
- Most children have four or more caseworkers overseeing their case while in care.

Study Findings

Texas Appleseed and Fulbright's review of the legal oversight for children in PMC found a broken system. A number of key failings in a majority of the 15 jurisdictions included in the study were observed.

1) A lack of urgency to find permanent homes for these children

Almost across the board, the most pressing problem is the lack of urgency to find a permanent home for these children.

The entire tenor of the case changes after the "permanent" placement process is completed and the child enters PMC. It is as if the pressure is off because the child is no longer in temporary custody of the state. Because the most pressing legal issue — whether a child will be returned home — has been determined, there is a sense that the child has achieved some permanency. Even the name of the child's status implies stability; the child is now in "permanent managing conservatorship." Nothing is further from reality.

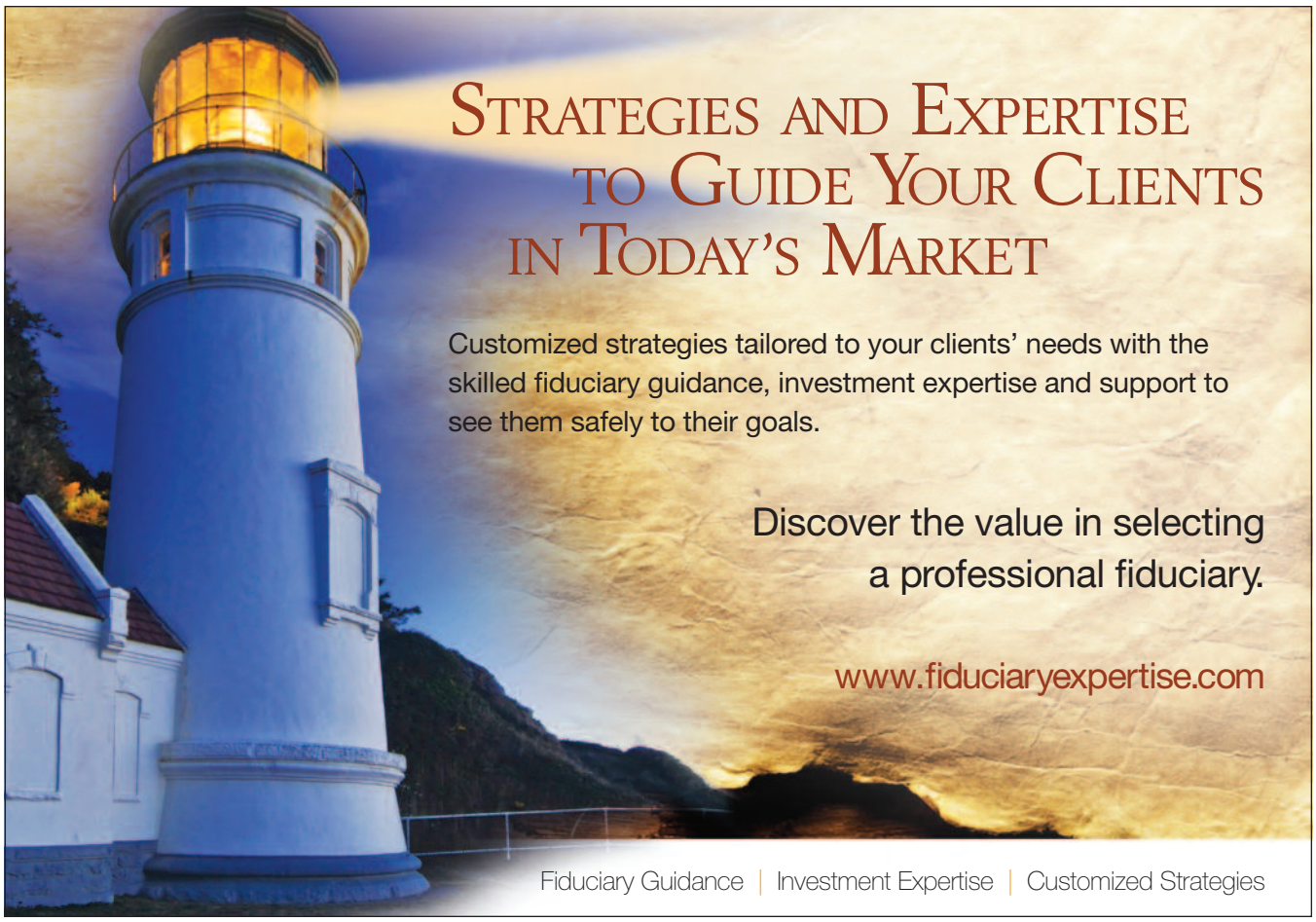
Nearly 20 percent of the children in long-term foster care will never achieve true permanence and end up "aging out" of the system when they turn 18.[6] According to Casey Family Programs, a national leader in foster care initiatives, the children who age out are among the most disconnected youth in America. A 2007 Casey study found that they are twice as likely than their peers (37 percent) to drop out of school. Casey's survey also found that large percentages have mental health disorders (54 percent), live below the poverty line (33.2 percent), report early pregnancies (42 percent), and lack health insurance (33 percent).[7] Another study found that 60 percent of youth aging out of foster care suffered from bouts of unemployment and were incarcerated at twice the rate of the general population.[8]

2) Insufficient resources to adequately address the children's needs

There is widespread acknowledgment that the entire foster care system is under-resourced. In many areas, DFPS and its caseworkers, as well as judges and attorneys ad litem, are overworked, underpaid, or both. In 2009, Child Protective Services (CPS) caseworkers were routinely handling around 30 cases, even though the national standards call for between 15 and 17 cases per caseworker.[9] In the larger urban jurisdictions, caseworkers are commonly assigned 40-plus cases at a time, often involving multiple children in a single case. Judges have seen the number of CPS cases on their dockets grow, and many judges only have 10 to 15 minutes to review one PMC case before moving on to the next one. Court Appointed Special Advocates (CASA) volunteers — who in many cases are the only ones who really know the child — can only represent about half of the children who need their services. When children enter PMC, CASA volunteers are able to represent an even smaller percentage of those children.

3) Little accountability and support for the children's well-being

Most judges expressed frustration with the lack of preparedness of the participants in the PMC process and reported that no one seemed to take ownership of these children. They reported frequently seeing communication issues between the



stakeholders and having difficulty in determining where the impasse lies. One stakeholder characterized the problem as a byproduct of the lack of accountability in the system.

Too often, CPS cases are assigned to inexperienced prosecutors, to attorneys ad litem without foster care experience, and to associate judges who lack the ability to garner the resources they need. In far too many jurisdictions, these cases are not a high priority.

If a child is not doing well in his or her foster home, whose responsibility is it to help him or her? If he or she is falling behind at school, what does he or she need to do to catch up? Is he or she receiving sufficient services, like counseling and special education? Are the providers appropriate and adequate? These are the kinds of issues that courts should be monitoring in PMC cases — ones that require the attorneys, the DFPS, and the judge to have open and active lines of communication and coordination.

4) Confusion surrounding the roles for the legal participants

The judges expressed divergent views of their role in PMC cases. Most continue to see themselves as arbiters of disputed issues, rather than as quasi-fiduciaries charged with protecting the best interests of the child. Texas law recognizes that these children are wards of the state, and, as such, affords the court broad powers to take action to ensure the children's health, safety, and overall well-being, which includes holding the other stakeholders accountable if they are not fulfilling the child's needs.

Further, these cases are being handled under the traditional, adversarial framework, rather than as a collaborative effort to ensure the best interests of the child. Often, if the judge is not presented with a dispute to resolve between the parties, he or she does not see a reason to probe deeper into the case. As a result, hearings are being conducted where the only question asked is whether anything has changed. These cases are not the typical conflict cases most lawyers and judges see; they demand a different type of advocacy, involving collaboration and multiple disciplines. In most jurisdictions, the parties have not fully recognized and adapted to these differences.

5) A sense that the children should not be in court

Even though the Texas Family Code requires the child to attend each review hearing, in most courthouses in Texas, the children are not encouraged, or even invited, to participate. As a result, the court does not have the opportunity to observe and listen to the child first-hand, and the child often has no real voice. Not surprisingly, many children feel completely shut out of the judicial process. Many PMC children reported that they feel that a nameless, faceless judicial machine is deciding the course of their lives and often never know what happened in the hearing — presumably because there is not much to tell. These children feel powerless over their own lives.

6) A void in the courtroom of individuals who really know the child

Those closest to the child, and who know the child best, are often not heard in court. Foster families, relatives, child placement agencies, and others who are required to receive notice of the hearings do not regularly receive those notices, and rarely attend the court hearings. Consequently, their valuable insights are not available to the court.

These and other factors combine to create a system that is failing our children in far too many jurisdictions across the state. But it does not have to remain this way. Fortunately, Texas has a strong statutory framework, judicial leadership, and interdisciplinary teams of experts willing to work together to bring about dramatic positive change in the state's foster care system.[10] Despite the significant challenges Texas faces, the opportunity to make a difference in the lives of these vulnerable children is real — and within reach.

Recommendations for Reform

In addition to the research outlined above, Texas Appleseed collaborated with some of the state's leading foster care experts, including judges, state agency officials, and foundation and child welfare leaders, to examine best practices, as well as quantitative and qualitative data. Sharing their insight and expertise, they worked with Texas Appleseed to formulate more than a dozen policy recommendations.

The general consensus was that the current system needs major changes. Notably, the Texas statute governing the court process for children in PMC is robust[11] and requires many of the practices identified by the National Conference of Juvenile and Family Court Judges, Casey Family Programs, the American Bar Association, and others as critical components of PMC oversight. The statute requires regular reviews of a comprehensive list of issues every six months. Children are required to be present in court, unless specifically excused. Volunteer advocates, attorneys ad litem, foster families, and others are allowed to be present and entitled to be heard at the hearings. A solid legal framework is already in place for children in PMC. But the statute is not being followed consistently. Some of the recommendations proposed by Texas Appleseed would require changes in the Texas Family Code, and others would require additional resources. Most important, most of the recommendations require a recognition that all stakeholders in the child's legal case have a responsibility to protect the child and help him or her find a lasting home.

Benchmark Permanency Hearing Pilot Program

Texas Appleseed recommended that the state should design, implement, and evaluate a two-year pilot program providing a new court framework for hearings for PMC cases. In addition, the Commission should identify at least eight courts (four test and four control) to implement the new hearing structure as part of the pilot study. This Benchmark Permanency Hearing

Pilot Program would be designed to keep the focus on the true goal of the court: assuring the child is safe and finding the child a permanent home.

Recommendations for All Jurisdictions

- Judges must recognize their critical role in the PMC process and hold parties accountable.
- To the extent possible, one judge should be assigned to a youth throughout his or her entire duration in PMC.
- Children and youth must be in court and be encouraged to participate in the judicial process — especially during their adolescent and teenage years.
- Every child should have a volunteer Court Appointed Special Advocate (CASA).
- All parties who are entitled to receive notice of the hearings must actually receive notice.
- In cases where children do not already have an attorney ad litem, attorneys ad litem must be appointed or retained when adversarial legal issues arise and there is a conflict among stakeholders.
- Docket schedules must be composed efficiently so that children and stakeholders can attend.
- Judicial training in specialized areas, such as CPS regulations and requirements, trauma-based care, and disproportionality analysis, is essential.
- Judges need to use Benchbooks or Bench Cards as soon as they become available in this area of law.
- Quantitative data should be used to help judges gauge their improvement in getting children in permanent and safe homes as quickly as possible.

For a full discussion of all the findings and recommendations, see Texas Appleseed's website at **www.texasappleseed.net**. By implementing the recommendations set out in the Texas Appleseed study, many of the children currently adrift in the state's foster care system will be able to find loving, permanent homes.

Notes

1. Texas Supreme Court's Permanent Judicial Commission on Children, Youth & Families, created under the leadership of former Justice Harriet O'Neill, *available at* http://www.supreme.courts.state.tx.us/children.asp.
2. Texas Department of Family and Protective Services (DFPS), *Annual Report and Data Book 2009* at 53.
3. *Id.*
4. Data analysis included: the length of time these children had been in the state's custody, the number of different homes or "placements," the number of caseworkers overseeing their cases, and the ways in which these children exit PMC and other variables. More than 30 different data elements were examined.
5. Texas Appleseed and its pro bono partners conducted nearly 150 interviews with a wide range of stakeholders in these jurisdictions including: judges, CASA staff and volunteers, attorneys ad litem, prosecutors, CPS caseworkers, DFPS officials and attorneys, guardians ad litem, foster parents, child placement agencies, residential treatment centers, as well as foster children and young people who had aged out of the system.
6. Texas Appleseed analysis of DFPS data of all children in PMC in FY2008.
7. Casey Family Programs, *Improving Outcomes for Older Youth in Foster Care* (2008) *available at* http://www.casey.org/Resources/Publications/pdf/WhitePaper_ImprovingOutcomesOlderYouth_ES.pdf.).
8. Texas Foster Care Transitions Project, *All Grown Up, Nowhere to Go: Texas Teens in Foster Care Transition* (Austin: Center for Public Policy Priorities) (2001).
9. DFPS Data Book *supra* note 2, at 32; Child Welfare League of America, Recommended Caseload Standards, *available at* http://www.cwla.org/newsevents/news030304cwlacaseload.htm (last visited June 21, 2010).
10. For a discussion of important court practices across the country, see Casey Family Programs, *Promising Court Practices: Strategies to Achieve Timely Permanency*, Nov. 2009.
11. *See* Tex Fam. Code §263.501.

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