

## LAWYERING FOR CHILDREN IN HIGH-CONFLICT CASES<sup>‡</sup>

James C. May\* and Alexander W. Banks\*\*<sup>†</sup>

### INTRODUCTION

In June 1998, the Vermont Supreme Court charged the Commission on the Future of Vermont's Justice System (Futures Commission) to examine the effectiveness of the state's judicial system and to recommend steps for its optimal future functioning.<sup>1</sup> Issuing its report in September 1999, the blue-ribbon panel found as part of its "Assessment of the Judiciary Today":

If there is a crisis in Vermont's court system, it is in Family Court. . . . An especially troubling development is the growing number of litigants who do not have attorneys. They do not understand the law or court procedures, and expect to be assisted by staff and judges, straining court resources at all levels.<sup>2</sup>

The Futures Commission's Committee on Justice for Families and Children (Children's Committee) noted a critical aspect of this problem earlier that year in a report to the Futures Commission. This report highlighted the need for adequate representation for children involved in high-conflict divorce and parentage actions.<sup>3</sup> The Children's Committee was particularly concerned about the many cases in which a "subgroup of parents divorce or separate in a manner that is particularly brutal for their children" and where "[t]oo often, the commotion surrounding these

---

<sup>‡</sup> This Article was previously published in the *Vermont Bar Journal*. James C. May & Alexander W. Banks, *Lawyering for Children in High-Conflict Case*, *Vt. B. J.* (Winter 2007), at 51.

\* Professor, Vermont Law School; Director, South Royalton Legal Clinic; Director, Legal Services Law Line of Vermont, 1996–present; Staff Attorney, Vermont Legal Aid, 1977–1983; J.D. 1977, Boston University School of Law.

\*\* Assistant Professor, Vermont Law School; Project Coordinator, Children First! Legal Advocacy Project, South Royalton Legal Clinic; Staff Attorney & Managing Attorney, Northwestern Legal Services, Pennsylvania, 1987–1995; J.D. 1987, Vermont Law School. In November 2005, Professor Banks was awarded a Certificate of Recognition by the Vermont Supreme Court and the Family Court Oversight Committee for his service to the Vermont Family Court.

<sup>†</sup> The authors wish to thank Kevin F. Ryan, Esq., Director of Education and Communication, Vermont Bar Association, for his assistance with the initial publication of this article in the *Vermont Bar Journal*.

1. COMM'N ON THE FUTURE OF VERMONT'S JUSTICE SYSTEM, THE FUTURE OF VERMONT'S JUSTICE SYSTEM 7–8 (1999), available at <http://www.vermontjudiciary.org/Dockets/pdf/vtfuture.pdf> [hereinafter FUTURES REPORT].

2. *Id.* at 7–8.

3. COMM'N ON THE FUTURE OF VT.'S JUSTICE SYSTEM, SUMMARY OF THE REPORT OF THE COMMITTEE ON JUSTICE FOR FAMILIES AND CHILDREN 11 (1999), available at <http://www.vermontjudiciary.org/courts/family/Pamphlets/famChld.pdf> [hereinafter JUSTICE COMMITTEE REPORT].

combative parents drowns out the suffering of children in these families.”<sup>4</sup>

Taking heed of this concern, the Futures Commission, as part of its wide-ranging recommendations, envisioned “a future in which . . . [t]he needs and interests of children are represented in court by lawyers who are trained to advocate for the welfare of children, and who are properly funded and valued for their services.”<sup>5</sup>

This Article describes two efforts undertaken in Vermont since 2000 to provide counsel for children who are the subjects of difficult and often bitterly contested family legal disputes. First, the South Royalton Legal Clinic (SRLC) created the Children First! Legal Advocacy Project (CF!) in 2000. Second, the Vermont judiciary created the Attorneys for Children program in 2002. This Article concludes with suggestions for increasing the availability of representation for children in such cases.

### I. PRO SE NATION

The lack of free or low-cost legal representation for children in family-related cases vitally affecting their lives mirrors the unavailability of such representation for adults. The numbers are startling. In its 2001 report, the eleven-member Committee on Equal Access to Legal Services found that “the number of *pro se* litigants appearing in Vermont courts has significantly increased.”<sup>6</sup>

The Report on Need cited a recent study, which:

looked at the level of representation in Vermont’s Family Court at a point sixty days after the filing of the divorce or parentage complaint for the period from July 1, 2000 to June 30, 2001. It found that in 70% of the domestic cases involving dependent children neither litigant was represented by an attorney. A similar percentage (67.7%) was found in domestic cases without dependent children. In only about 14% of the cases were both sides represented by an attorney. Similarly high numbers of *pro se* litigants are reported in the other Vermont courts.<sup>7</sup>

---

4. *Id.*

5. FUTURES REPORT, *supra* note 1, at 13.

6. COMM. ON EQUAL ACCESS TO LEGAL SERVS., REPORT ON INVESTIGATION OF NEED AND ASSESSMENT OF RESOURCES 3 (2001), available at [http://www.nlada.org/DMS/Documents/1003937509.62/VT\\_FINALRPT.pdf](http://www.nlada.org/DMS/Documents/1003937509.62/VT_FINALRPT.pdf) [hereinafter REPORT ON NEED].

7. *Id.* (citations omitted). The Vermont Office of the Court Administrator report from which the cited statistics were derived, entitled “Representation for Domestic Cases Filed During FY 2001,” found that in cases involving dependent children, where one party had counsel and the other was *pro se*,

The Report on Need noted that, in addition to pro se litigants not receiving necessary legal advice critical to protecting their interests, the judiciary spent a significant amount of time assisting unrepresented litigants.<sup>8</sup> The Report stated that “[m]ore than a quarter of Vermont’s judges and magistrates reported that they spent a quarter or more of their time explaining procedures or law to *pro se* litigants in the courtroom.”<sup>9</sup>

As of 2005, family-court pro se representation rates remained very high<sup>10</sup> despite the prodigious efforts of the two statewide legal-services organizations, Vermont Legal Aid (VLA) and Legal Services Law Line of Vermont (Law Line).<sup>11</sup> These two organizations provide free legal assistance to indigent Vermonters. As of 2003, together they served about 11,000 individuals annually.<sup>12</sup> VLA provides services through staff attorneys and paralegals working in seven specialized projects focused primarily on adult clients concerning issues such as poverty and domestic violence, disability, mental health, senior citizens, medicare, health care, and long-term care.<sup>13</sup> Law Line provides services to pro se individuals by telephone, including the provision of model pleadings, general and specific legal information, and occasional staff representation in court.<sup>14</sup> Law Line also administers the Vermont Volunteer Lawyers Project, which actively encourages volunteerism among attorneys for contested court matters,

---

just 2.8% of all cases featured plaintiffs being represented, and defendants acting pro se; and just 13.2% of all cases involved plaintiffs acting pro se, with represented defendants. *Id.* The overall rate of Vermont cases in which one party was pro se, and the other represented, was therefore 16%. Similarly, since in only 14% of cases were both plaintiff and defendant represented by counsel, 86% of all domestic cases involving children involved *at least* one pro se party. This measurement is in line with figures elsewhere in the United States. See Deborah J. Chase, *Pro Se Justice and Unified Family Courts*, 37 FAM. L.Q. 403, 403–05 (2003) (displaying ranges from 72 to 90% for Arizona, Washington, Massachusetts, Oregon, California, and Maryland). The Vermont Supreme Court established the Committee on Equal Access to Legal Services and charged it with “assess[ing] the extent to which civil legal problems are not being addressed because of lack of funds to hire professional counsel or inability to effectively proceed pro se.” REPORT ON NEED, *supra* note 6, at 1 (emphasis removed).

8. REPORT ON NEED, *supra* note 6, at 14–15.

9. *Id.* at 15.

10. The most recent available statistics show that in 58% of all newly filed divorce and parentage cases, both parties were pro se. In another 8%, one party was represented by an attorney, and the other was pro se. E-mail from Honorable Amy M. Davenport, Admin. Judge for Trial Courts for the State of Vt., to James C. May, Director, S. Royalton Legal Clinic, Vt. Law School (Dec. 11, 2006, 17:51 EST) (on file with *Vermont Law Review*). Note that the point in time for this more recent measurement is the date of filing, rather than filing plus sixty days, which was used in the 2001 Report on Need.

11. The public education outreach of the two organizations has included creation and support of a website, <http://www.vtlawhelp.org/>, which, in 2005, had 31,073 “page views” of community education materials, and 5918 “page views” of pro se-assistance legal forms. Interview with Thomas F. Garrett, Exec. Dir., Legal Servs. Law Line of Vt. (Dec. 18, 2006).

12. VT. LEGAL AID, 2003 REPORT TO THE COMMUNITY 3.

13. *Id.* at 4.

14. Legal Servs. Law Line of Vt., <http://www.lawlinevt.org/> (last visited Dec. 7, 2008).

generally on behalf of adult litigants.<sup>15</sup>

Children who are not afforded counsel in contested custody cases suffer legal disadvantages, as discussed below.<sup>16</sup> These disadvantages are compounded by the negative emotional and behavioral effects upon children of having to adjust to the divorce process itself and to post-divorce realities. Recent research assigns increasing weight for many aspects of children's post-divorce maladjustment to high-conflict, pre-divorce home life,<sup>17</sup> and offers hope that there are relatively few long-lasting effects of divorce as children move into adulthood and middle age.<sup>18</sup> A substantial body of research appears to establish that, in the short- and medium-run, compared with children having continuously married parents, "children with divorced parents achieve lower levels of success at school, are more poorly behaved, exhibit more behavioral and emotional problems, have lower self-esteem, and experience more difficulties with interpersonal relationships."<sup>19</sup> One recent study finds multiple far-reaching effects, based upon a twenty-five-year study of the children of divorced parents:

From the viewpoint of the children, and counter to what happens to their parents, divorce is a cumulative experience. Its impact increases over time and rises to a crescendo in adulthood. At each developmental stage divorce is experienced anew in different ways. In adulthood it affects personality, the ability to trust, expectations about relationships, and ability to cope with change.<sup>20</sup>

The legal profession has a moral obligation to do all within its power to ensure that the adjudication process takes into account the vulnerable emotional states of children involved in family contests, and to provide them with an effective voice before the court whenever possible.

---

15. Legal Servs. Law Line of Vt., Who We Are, <http://www.lawlinevt.org/vvlp.html> (last visited Dec. 7, 2008).

16. See *infra* Part II.

17. See Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, 39 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 963, 964–65 (2000) (discussing the effects of direct and indirect marital conflict on post-divorce child adjustment).

18. *Id.* at 967–68; Ronald L. Simons et al., *Explaining the Higher Incidence of Adjustment Problems Among Children of Divorce Compared with Those in Two-Parent Families*, 61 J. MARRIAGE & FAM. 1020, 1029–31 (1999) (finding that effective parenting practices, with avoidance of hostile exchanges in the presence of the children, can substantially reduce children's post-divorce developmental difficulties, although boys tend to experience more depression than girls despite such parenting).

19. Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis*, 15 J. FAM. PSYCHOL. 355, 366 (2001).

20. JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25-YEAR LANDMARK STUDY 298 (2000).

## II. LAWYERS FOR CHILDREN

Forty years ago the U.S. Supreme Court held that children facing potential loss of liberty in delinquency cases have a right to counsel.<sup>21</sup> This decision marked a major milestone in the evolution of the rights of children who were traditionally silent onlookers in litigation affecting their interests.<sup>22</sup> Since *Gault*, there have been calls to provide representation to children in a wide array of civil-case types, as well as for adoption of clear professional guidelines for lawyers who represent children.<sup>23</sup> The high quality of the work dedicated to these ends is exemplified by a conference held at Fordham University School of Law in 1995. The Conference on Ethical Issues in the Legal Representation of Children involved over seventy participants collaborating to produce recommendations on practice standards for children's representatives.<sup>24</sup> As a result of the conference, the Fordham Law Review dedicated a special issue entitled *Ethical Issues in the Legal Representation of Children*.<sup>25</sup> The Foreword to this issue graphically sets out the scope of the problem of lack of representation:

Each year, courts determine the basic needs and future prospects of millions of children. Lawyers represent hundreds of thousands of these children. . . .

Children are the silent presence in courtrooms adjudicating hundreds of thousands of cases of domestic

---

21. See, e.g., *In re Gault*, 387 U.S. 1, 41 (1967) (holding that juveniles must be afforded the right to counsel if they are unable to afford counsel).

22. See generally, MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES, at xii (1994) (positing that historically, the status afforded women by society and the law is a critical factor in explaining wide swings in custody law over the last 300 years). Mason notes: "Perhaps the reason that [the] mothers' status has been so determinative in custody issues is that children have no voice of their own. In this story of child custody children are seen but rarely heard." *Id.* at xv.

23. See, e.g., Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. REV. 939, 944 (1995) (arguing that existing guidelines apply to the representation of "sophisticated individuals and businesses" but not to "personal family relations"). This is not to say that the call for reform was universal within the profession. See Robert D. Felner et al., *Party Status of Children During Marital Dissolution: Child Preference and Legal Representation in Custody Decisions*, 14 J. CLINICAL CHILD PSYCHOL. 42, 42 (1985) (examining a survey of judges and attorneys about their attitudes and practices regarding the role of children in the custody-litigation process and explaining that the survey yielded several "striking features," including "the lack of widespread support for routine representation of children in the custody process, as well as the fact that a majority of legal professionals failed to endorse the child's best interests as among the criteria they consider most critical in making custody decisions.").

24. Bruce A. Green & Bernadine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1283 (1996).

25. *Id.*

violence each year, and are the subjects of increasing judicial attention in family law matters of divorce, custody, visitation, and adoption. Children appear in legal settings involving grave issues of termination of parental rights and adoption, involuntary civil commitment, and health decisions ranging from surgery and abortion to the right to die and organ donation. Children live in prison including on death row. They are expelled from school, and need or are inappropriately forced into special education or home schooling. Children are the *raison d'être* but not participants in child support, parentage, and social security disability proceedings. Children have First Amendment speech, association, and religious rights which spill into litigation, as well as search-and-seizure and privacy concerns. They are parties to deportation proceedings. They are parties to class actions. They are witnesses in judicial proceedings. In short, except in large-scale commercial litigation, children are frequent petitioners or defendants, or the primary nonparty subjects in a huge array of legal matters involving lawyers and judges.

....

Lawyers matter in this process. . . . No one would imagine that children can adequately fend for themselves in judicial proceedings—certainly not our own children. Few would presume that judges will make decisions that best serve the interest of children without benefitting from the perspective of representatives who speak on the children's behalf. That is especially true given the enormity of decisions judges must make. If anyone needs legal assistance, children do.

Yet, the legal needs of children are vastly underserved.<sup>26</sup>

After noting the array of ways in which children obtain lawyers outside the context of delinquency proceedings—through statute or discretionary judicial appointment, and in differing roles such as attorney for the child, non-lawyer guardian ad litem (GAL) for the child, and attorney GAL—the article sets out multiple examples of the “immediate, frequent, and palpable” ethical questions that confront children's lawyers.<sup>27</sup> For example, even given the existence of objective professional standards designed to provide guidance, it is difficult to discern the lawyer's role in solving some

---

26. *Id.* at 1284–86 (citations omitted).

27. *Id.* at 1287.

of the following dilemmas: When may a lawyer violate a child's confidences? On whose judgment should a lawyer rely in determining the child-client's best interests when that client is an infant, or a child determined to take actions arguably dangerous? What is the lawyer's role in representing multiple children (for example, siblings) in the same case?<sup>28</sup> Related dilemmas for the child's representative include understanding what kind of training to undertake in order to be able to provide competent representation, and how to establish a meaningful relationship with a child who had no input or consultation into the fact of the lawyer's appointment, or choice in who the lawyer would be.<sup>29</sup>

Experienced lawyers know all too well that parents involved in litigation affecting their children cannot always (or even most of the time) be counted on to act, separately or together, in their children's best interests. Litigating families are typically families in crisis, with the parents experiencing stress. This stress—very possibly rooted in financial crisis, substance abuse, behavioral dysfunction, or a combination of these—can cause parents to blindly equate their children's best interests with their own self-interest. Situations with a high likelihood of differing interests between parents and children include civil commitment proceedings initiated by the parents; emancipation proceedings; cases involving abortion; contested divorce proceedings in which custody and/or visitation are disputed, with financial consequences dependent on the outcome; proceedings in which the state is a party and the child is in state custody; and proceedings of any type in which communication between the parents and child is flawed, or in which the parents, even if having interests coincident with the child, themselves lack legal representation.<sup>30</sup> Unrepresented children in custody contests are also at risk of having the contours of their future placements determined by the parent who has managed to secure legal representation, where the other parent remains unrepresented.<sup>31</sup>

---

28. *Id.* at 1288–89.

29. *Id.* at 1289–90.

30. Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 *FORDHAM L. REV.* 1571, 1579–86 (1996).

31. Maria Cancian & Daniel R. Meyer, *Who Gets Custody?*, 35 *DEMOGRAPHY* 147, 153 (1998). In their article, the authors analyzed a sample of divorce final judgments in twenty-one Wisconsin counties between 1986 and 1992. *Id.* at 149. The analysis revealed that “[c]ases in which only the father has legal representation are more likely to result in shared custody or father-sole custody, while cases in which only the mother is represented are more likely to result in mother-sole custody.” *Id.* at 153. Plaintiff status also favorably affected the outcome for that party. *Id.* A second study by the same authors (plus two additional authors) examined trends in shared placement in Wisconsin for the period from 1996 to 1998 compared to 1990 to 1993. MARIA CANCIAN ET AL., *PLACEMENT OUTCOMES FOR CHILDREN OF DIVORCE IN WISCONSIN* i (2002), available at <http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/placeoutcomes.pdf>. The authors concluded:

III. REPRESENTATION OF CHILDREN IN FAMILY LAW  
AND GUARDIANSHIP CASES IN VERMONT

There is no Vermont statute or rule of court requiring appointment of an attorney for a child who is the subject of a contested family or court action.<sup>32</sup> Title 15 of the Vermont Statutes Annotated, section 594(b), however, requires such an appointment if the child is to be called as a witness.<sup>33</sup> Otherwise, the statute allows the court to appoint an attorney “to represent the interest of a minor or dependent child” in matters involving child support and determination of parental rights and responsibilities.<sup>34</sup> Title 15 allows the appointment of a GAL for a minor in all cases involving parental rights and responsibilities.<sup>35</sup> The purpose of the GAL is “to represent the best interests of the child.”<sup>36</sup> Vermont’s Family Court Rule 7 specifies that the court may assign counsel for a minor child in all proceedings under Family Court Rule 4.<sup>37</sup> Rule 7 specifies that any GAL appointed “may be an attorney but shall not serve as the child’s attorney,”<sup>38</sup> and delineates the role of the GAL in any proceeding under Rule 4. In probate court, representation for parents is required in cases of involuntary guardianship of children and termination of parental rights; appointment of attorneys for children in these circumstances is within the presiding judge’s discretion.<sup>39</sup>

---

Placement outcomes varied dramatically only when we examined legal representation. When only the father had an attorney, the proportion of mother sole placement cases was only 52 percent in the early cohort and 42 percent in the later cohort; father sole placement accounted for 28 and 32 percent, respectively. When only the mother had an attorney, mother sole placement accounted for 87 and 82 percent, respectively; the likelihood of the father being awarded placement dropped to 2 percent and 4 percent.

*Id.* at ii.

32. See VT. STAT. ANN. tit. 15, § 594 (2008) (failing to include a requirement to appoint an attorney for children in contested family or court action). To the contrary, children who are the subjects of either juvenile delinquency or Children in Need of Services petitions are afforded legal representation as a matter of course through the Office of the Defender General. 1 WILLIAM A. NELSON, VERMONT CRIMINAL PRACTICE 6–7, n.45, n.46 (1993).

33. VT. STAT. ANN. tit. 15, § 594(b) (2008).

34. *Id.* § 594(a).

35. *Id.* § 669.

36. *Id.*

37. VT. FAM. P. R. 7(a).

38. VT. FAM. P. R. 7(c).

39. VT. FAM. P. R. 6(c)(2).



IV. CHILDREN FIRST! LEGAL ADVOCACY PROJECT  
OF THE SOUTH ROYALTON LEGAL CLINIC

In Spring 1999, SRLC staff held regular discussions about expanding the program into a new area while maintaining the core program and existing special projects in domestic violence. The most favored area was work with juveniles, based upon our experience in working with children in divorce, parentage, guardianship, and juvenile cases. In June 1999, Professor Maryann Zavez of SRLC attended Vermont Judicial College and became acquainted with the draft of the Justice Committee Report. With its description of pro se problems in family court, and call for increased representation for children, the report resonated with staff, as it matched many of our perceptions of the situation, and lent strong authority to our making a case for work in this area. In Fall 1999, we developed our funding proposals for a new project, The Children's Advocacy Project (renamed Children First! Legal Advocacy Project in 2002), designed to provide no-cost representation to children involved in particularly contentious or otherwise-difficult parentage proceedings.<sup>40</sup> The Project began operation in April 2000. One attorney serves half-time as project coordinator and project attorney, and is supported by a part-time administrative assistant. Referrals are received from the family-court managers for Windsor and Orange Counties, SRLC's primary service area. In 2007, the Washington County family-court manager began making referrals as well. The project attorney accepts as many referrals as possible, subject to his ability to manage the Children First! (CF!) caseload as well as another unrelated, half-time caseload. Priority factors that tend to make case acceptance more likely include families with a history of domestic violence, families with one or more members who suffer substantial mental-health or substance-abuse issues, cases involving pro se litigants, and cases that are highly contentious. Once project staff have agreed to accept a referral, it is up to the presiding judge to decide whether to appoint counsel to represent the child or children.

The project's ability to represent a substantial number of children is enhanced by the supervised involvement of energetic and compassionate clinical students in each case. These students enroll in SRLC for one semester, and generally receive CF! cases by requesting these assignments at the conclusion of the Clinic's intensive three-week classroom-and-simulations segment occurring at the beginning of the fall and spring

---

40. Full-blown divorce cases, and then guardianship cases, were soon added.

academic terms.<sup>41</sup> The project attorney and clinical students receive support from work-study students each semester, and work-study students staff the SRLC over the summer.

By definition, these are multi-problem clients and cases. A random group of project cases that were litigated in family court was recently analyzed with these results: In 43% of the cases, at least one member of the child's household suffered from a substantial mental-health problem, and in 52% of the cases, at least one member of the child's household experienced a serious substance-abuse problem.<sup>42</sup> The percentages for mental-health and substance-abuse problems were even higher for the cases in probate court, and higher still for those cases in the sample from juvenile court.<sup>43</sup>

With such characteristics, the Clinic's caseload is both complex and intense, with each case typically featuring numerous issues and multiple hearing and negotiation sessions. In the six-month period ending June 30, 2006, CF! staff carried forward thirteen existing cases, added eleven new cases, closed six cases, attended sixty-five hearings, entered into twenty-four stipulated agreements of various types, and agreed to cancel six hearings due to settlement.<sup>44</sup> Over the course of the period, CF! staff represented thirty-eight children.<sup>45</sup>

One of the strengths of student involvement is that the cases can generally "be followed wherever they go" in the civil system. Because issues involving substance abuse, criminal conviction, mental health, and

---

41. Vermont Law School students may enroll in the South Royalton Legal Clinic for one semester, on either a full-time (13-credit) or part-time (6-credit) basis. VT. LAW SCHOOL, THE SOUTH ROYALTON LEGAL CLINIC BROCHURE, available at <http://vermontlaw.edu/x1395.xml>. Up to twenty students per semester, closely supervised by four Clinic attorneys, represent Clinic clients in a wide array of civil "poverty law" cases, involving issues relating to public benefits, family law, juvenile law, housing law, consumer law, and immigration law. REPORT ON NEED, *supra* note 6, at 12. Eligibility for Clinic services is based upon income levels compared to the federal poverty guidelines. Clients include not only indigent individuals, but also a substantial number of working poor persons. The clinic serves about 1000 such persons each year through both actual representation and provision of legal information. The Clinic does not have separate tracks or concentrations for students, all of whom take the same three-week introductory course, after which they are assigned cases in two or more areas of interest. VT. LAW SCHOOL, THE SOUTH ROYALTON LEGAL CLINIC BROCHURE, available at <http://vermontlaw.edu/x1395.xml>.

42. Memorandum from Alexander W. Banks, Project Coordinator, S. Royalton Legal Clinic, Vt. Law School, to James C. May, Dir., S. Royalton Legal Clinic, Vt. Law School (Nov. 18, 2006) (on file with *Vermont Law Review*). These results, and those that follow in the paragraph of text, are based on a non-scientific analysis of information contained in the client case files by the Project Coordinator. Assessment of the existence of a mental-health or substance-abuse problem was based upon significant indicators of these problems in the evidence.

43. *Id.*

44. VT. LAW SCHOOL S. ROYALTON LEGAL CLINIC, CHILDREN FIRST! LEGAL ADVOCACY PROJECT MID-YEAR REPORT 1 (2006) (on file with *Vermont Law Review*).

45. *Id.*

dire poverty are often more or less present in the same matter, students frequently pursue these issues with parole officers, therapists, public-benefits workers, and school personnel. They have represented clients in hearings related to the CF! case-in-chief not only in a variety of courts (juvenile, family, and probate), but also in administrative settings, principally juvenile administrative reviews, plus individualized education plans (IEP), juvenile-treatment team meetings, and housing-authority meetings.

Students enjoy remarkable learning experiences of many types in the course of representing CF! clients. Students successfully interact with the client—from very young to age seventeen, from communicative to taciturn, from reasonably well-adjusted to disastrously neglected—discovering facts, working with expert witnesses, preparing for and executing trial strategies and negotiation sessions, and drafting settlements. They also learn the incredible responsibility that comes with deciding whether and how to advocate for an outcome that will profoundly affect the rest of a young client's life, as well as the lives of the child's parents, siblings, and other relatives. The learning is a two-way street. Our young clients come to realize that their student advocates are energetic, friendly, and trustworthy. Their interactions open up avenues of communication and possibilities for action that might not have been realized without student involvement. For our students, there are types of learning that transcend simply mastering the skills needed for the case at hand. According to Anne Kennedy, Vermont Law School, Class of 2007:

It really opened my eyes. In my other cases I saw only my client's perspective; in representing [XY], I listened to one party and thought she was on point, then I listened to another, and I started to wonder, and then finally I listened to my client and saw there were many and very different views of the same set of experiences.<sup>46</sup>

Another student, Sara Davies, Vermont Law School, Class of 2004, found it exhilarating to be entrusted with protecting the legal interests of a very young child and, as she noted in a case-transfer memo, found it to be “a real joy to represent a client that I can pick up and hug.”<sup>47</sup>

---

46. Telephone interview with Anne Kennedy, Vermont Law School, Class of 2007 (Fall 2006).

47. VT. LAW SCHOOL S. ROYALTON LEGAL CLINIC, CHILDREN FIRST! LEGAL ADVOCACY PROJECT YEAR-END REPORT 2 (2003) (on file with *Vermont Law Review*).

## V. ATTORNEYS FOR CHILDREN PROGRAM OF THE VERMONT JUDICIARY

In 2002, the Vermont Legislature allocated \$50,000 to the Vermont Judiciary to start the new Attorneys for Children Program.<sup>48</sup> The Administrative Judge for Trial Courts (AJTC) allocates funds to each county's family court based on a variety of factors.<sup>49</sup> The presiding judge may appoint an attorney to represent a child without getting prior administrative approval so long as there are sufficient funds remaining in the county's allocation.<sup>50</sup> If the county has exhausted its allocation, a judge may still seek approval to make an appointment. In either case, the maximum payment to an appointed attorney is capped at \$750 per case.<sup>51</sup> There is no formal roster of attorneys from which appointments are made; selection of attorneys is up to the presiding judge in consultation with the court manager.<sup>52</sup> Judges are encouraged to order the parties to pay a portion of the attorney's fee based upon ability to pay; there is no cap on what a litigant may be ordered to pay.<sup>53</sup>

The Honorable Amy Davenport, AJTC, tracks appointments and billings submitted by attorneys. She notes with some pride, however, that "many attorneys . . . appointed through this program . . . end up doing the work pro bono. . . . [W]e never get billed for the services."<sup>54</sup> There is increasing demand for appointment of attorneys through the program. For instance, Windsor County's budget was stretched thin in 2006 due to the appointment of five attorneys that year and the carrying forward of two cases from 2005.<sup>55</sup> As a result, some requests for appointment were denied.<sup>56</sup> Tari Scott, Windsor Family Court Manager, says the court is experiencing an increase in filings, particularly in the Relief from Abuse area, and sees a "need for additional funding for this program."<sup>57</sup> Judge Davenport says that the program is not utilized as much as might be

---

48. E-mail from Honorable Amy M. Davenport, Admin. Judge for Trial Courts for the State of Vt., to James C. May, Dir., S. Royalton Legal Clinic, Vt. Law School (Oct. 27, 2006, 17:02 EST) (on file with *Vermont Law Review*) [hereinafter Davenport-May Oct. 27, 2006 e-mail].

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. See E-mail from Theresa Scott, Windsor Family Court Manager, Windsor County, Vt., to Honorable Amy M. Davenport, Admin. Judge for Trial Courts for the State of Vt. (Nov. 28, 2006, 17:57 EST) (on file with *Vermont Law Review*) (addressing the financial needs for Windsor Family Court's Attorneys for Children allotment).

56. *Id.*

57. *Id.*

expected in Vermont's largest county, Chittenden, due to the county's long tradition of appointing family-law attorneys as GALs, who serve pro bono.<sup>58</sup> Although not advertised by the judiciary (due to budget constraints), judges, family-court managers, and family-law attorneys appear to be well aware of the Attorneys for Children program—enough cases have been assigned under it that at the 2005 Vermont Bar Association meeting, awards were made to attorneys who had taken a significant number of the cases.<sup>59</sup>

#### VI. FAVORABLE REACTION FROM THE BENCH

Judges have responded positively to the increasing presence of attorneys representing children in their courtrooms in cases in which the adult parties are proceeding pro se.<sup>60</sup> The administrative impact is very noticeable. Judge Davenport notes that attorney involvement makes the case more manageable and helps promote settlement, thus saving court time and findings time.<sup>61</sup> In those cases that go to trial, the attorney “can help narrow the issues and keep the testimony relevant.”<sup>62</sup> The Honorable Paul F. Hudson, now retired, noted that hearings conducted with the benefit of counsel are qualitatively improved:

Where both parents are pro se and children are involved, the kids' attorney is a Godsend. Parents are usually lay persons, and have no idea what the court needs to hear on child support and the best interests criteria. Too often, they tend to turn the children into pawns in their power and control match. . . . Specifically, on the “administration” of justice, a component of fairness must be included for “justice” to appear in the decision. The judge can ask adequate questions of the pro se litigants to decide the case fairly. But the added consideration of children throws the case out of balance. They cannot speak for themselves, thus a GAL and attorney complete the fairness component. Now all three critical interests are represented.<sup>63</sup>

---

58. Davenport–May Oct. 27, 2006 e-mail, *supra* note 48.

59. *Id.*; see also E-mail from Honorable Amy M. Davenport, Admin. Judge for Trial Courts for the State of Vt., to James C. May, Dir., S. Royalton Legal Clinic, Vt. Law School (Oct. 30, 2006, 10:30 EST) (on file with *Vermont Law Review*) [hereinafter Davenport–May Oct. 30, 2006 email].

60. See E-mail from Honorable Amy M. Davenport, Admin. Judge for Trial Courts for the State of Vt., to Alexander W. Banks, Project Coordinator, S. Royalton Legal Clinic, Vt. Law School (May 1, 2006, 13:46 EST) (on file with *Vermont Law Review*) [hereinafter Davenport–Banks May 1, 2006 e-mail] (noting the court does not advertise the program due to limited resources).

61. See *id.* (noting that judges feel that hearings are more efficient and focused when the parties have counsel).

62. *Id.*

63. Letter from Honorable Paul F. Hudson, Vt. Dist. Court Judge (ret.), to Alexander W.

Although neither judge would hazard an opinion as to whether such attorney involvement resulted in either an increase or decrease in the number of motions filed in a typical case, they agreed that, due to attorney involvement, the motions that do get filed are often an improvement in quality and merit over those filed by pro se parties.<sup>64</sup> Similarly, the hearing process itself is more focused on key issues than might otherwise be the case. For instance, Judge Hudson mentioned that he “would much rather try to determine parental fitness than who gets the Tupper Ware.”<sup>65</sup> Judge Davenport and Judge Hudson agree that contested hearings are conducted more efficiently than might otherwise be the case. According to Judge Hudson:

With the children represented as full third parties, the case disposition is not only more efficient, but also fairer and generally more enduring. A successor judge is less likely to upset a well-reasoned order from a contested case, than from an uninformed stipulation where, despite the case manager’s efforts, there was out-of-court pressure employed.<sup>66</sup>

Neither judge noted an increase in formal, third-party mediated settlements as a result of the involvement of children’s attorneys, but they agree that such involvement tends to increase settlement between the parties themselves.<sup>67</sup> Judge Hudson notes:

Case managers are at times seen by litigants as having a vested interest in disposing of the case, but the attorney can make it clear that if we don’t resolve it together out here our way, we’ll go before that person in a black robe in there, and it will get decided their way.<sup>68</sup>

Does having an attorney for the children assist the court in making the right decision? Both judges answer in the affirmative. Judge Davenport states: “Absolutely! It is the increase in the quality of the decision making and the quality of the information presented to the judge that is the real benefit of

---

Banks, Project Coordinator, S. Royalton Legal Clinic, Vt. Law School (April 17, 2006) (on file with *Vermont Law Review*) [hereinafter Hudson–Banks letter].

64. See Davenport–Banks May 1, 2006 e-mail, *supra* note 60 (stating that pro se litigants “often inundate the court with senseless motions”); Letter PH/AB, *supra* note 62 (“[W]ith the children’s attorney added, I see a great improvement in the quality and merit of the pleadings.”).

65. Hudson–Banks letter, *supra* note 63.

66. *Id.*

67. Davenport–Banks May 1, 2006 e-mail, *supra* note 60; Hudson–Banks letter, *supra* note 63.

68. Hudson–Banks letter, *supra* note 63.

having an attorney represent the children.”<sup>69</sup> Judge Hudson finds attorney and GAL involvement “vital for a fair outcome. I have always viewed kids as citizens before the court; [sic] who have the same constitutional right as their parents to be heard by counsel. Because of their age, the law will not let them speak for themselves. The lawyer and GAL even those odds.”<sup>70</sup> The judges agree that the involvement of a child’s lawyer can help bring about results that protect the child client from harm. “Especially,” says Judge Davenport, “if there is a GAL together with the attorney, I have more confidence that all the facts which could potentially have an impact on the children have been discovered and carefully thought through.”<sup>71</sup> Judge Hudson emphasizes that attorneys are trained to separate out key facts from inconsequential ones, and effectively present them to the court, thus helping the court to avoid “the judge’s nightmare. How many nights have I wondered . . . ‘What have I missed?’ I only see the litigants for a few minutes, hours, or days.”<sup>72</sup>

#### VII. IMPROVING ACCESS TO JUSTICE FOR VERMONT CHILDREN

Children First! and Attorneys for Children are resource-limited efforts. CF! is a half-time clinical project, and the judiciary’s program has budgetary limitations. Nonetheless, together they have provided legal representation when most needed in hundreds of cases, and each program has significant attributes that would be valuable in an expanded effort. Attorneys for Children is funded by “hard money,” that is, an appropriation from the state legislature.<sup>73</sup> It has an existing level of administration, oversight, and evaluation provided by the office of the AJTC, and has received strong encouragement from the Vermont Bar Association.<sup>74</sup> CF! is supported entirely with “soft money.”<sup>75</sup> It is administered by a law-school legal clinic with oversight from Vermont Law School, and, like the clinic itself, is fully integrated into a statewide system of delivery of legal

---

69. Davenport–Banks May 1, 2006 e-mail, *supra* note 60.

70. Hudson–Banks letter, *supra* note 63.

71. Davenport–Banks May 1, 2006 e-mail, *supra* note 60.

72. Hudson–Banks letter, *supra* note 63.

73. Davenport–May Oct. 27, 2006 e-mail, *supra* note 48.

74. See Anna E. Saxman, *The President’s Column*, VT. B.J. (Spring 2004), at 3 (devoting a portion of her monthly column to describing the program, and encouraging attorneys to volunteer and participate in it).

75. See Open Memorandum from the S. Royalton Legal Clinic, Vt. Law School (June 7, 2006) (on file with *Vermont Law Review*) (summarizing project grants that the Clinic received from 1991 to 2006).

services.<sup>76</sup> The program has likewise received strong support from family court judges, family-court managers, and others.<sup>77</sup>

Given the attorney's fee cap of \$750 per case for the state-funded program, and CF! pro bono representation, these programs are cost-effective. Presented with a realistic assessment of need, the Vermont Legislature should continue its commitment to fund the Attorneys for Children program at a level that significantly addresses the need "to have children represented by counsel in contested custody and visitation cases, so that they have a voice before the court and all key evidence gets presented."<sup>78</sup> CF!, which has been supported by the Vermont Bar Foundation and a number of private foundations, should be considered for inclusion as a recipient of some of these appropriated funds in order to relieve some of the pressure it faces in having to constantly seek private resources to keep operating. This would also enable it to undertake coordinated efforts with the judiciary's program.

Through coordination of efforts, CF! and Attorneys for Children could work through existing entities such as the Vermont Volunteer Lawyers Project (VVLP), the Vermont Bar Association, county bar associations, and other entities to enlist more attorneys to participate in the statewide Attorneys for Children program,<sup>79</sup> plus pro bono efforts. The CF! project

---

76. SRLC has a cooperative relationship with both Vermont Legal Aid and Legal Services Law Line, in addition to a number of other legal services providers such as Vermont Protection and Advocacy and Have Justice—Will Travel. REPORT ON NEED, *supra* note 6, at 10–12; Memorandum of Understanding among Vermont Legal Aid, S. Royalton Legal Clinic, et al., on their joint application for a Legal Assistance for Victims grant (Feb. 28, 2008) (on file with *Vermont Law Review*); Resolution of Vermont Law School, urging the Vermont Legislature to reject funding decreases for Vermont Legal Aid (Mar. 10, 2005) (on file with *Vermont Law Review*). Vermont Law School is a member of the statewide Access to Justice Coalition, created in 2004 to improve the delivery of legal services to Vermont's low income population. ROBERT B. HEMLEY, THE ACCESS TO JUSTICE COALITION: CARRYING ON WITH THE WORK OF THE COMMITTEE ON EQUAL ACCESS TO LEGAL SERVICES 1, available at <http://www.vtbar.org/Images/Journal/Journalarticles/Spring 2004/The Access to Justice Coalition.pdf>. The Coalition also includes representatives from the Vermont Supreme Court, Vermont Bar Association, Vermont Bar Foundation, Vermont Legal Aid, and Legal Services Law Line of Vermont. *Id.*

77. Several letters of support of this type, typically required as supporting documentation in grant applications, are on file with *Vermont Law Review*. See, e.g., Letter from Susan Eastman, Clerk, Windsor County Family Court, to authors (Dec. 20, 2002) (on file with *Vermont Law Review*) (referring to CF! as an "invaluable resource"); Letter from Honorable Paul F. Hudson, Family Court Judge, Dist. Court of Vt., Windsor Circuit, to authors (May 14, 2002) (on file with *Vermont Law Review*) (stating that CF! provides representation to children that would otherwise go unrepresented).

78. Interview with Honorable Amy M. Davenport, Admin. Judge for Trial Courts for the State of Vt., to James C. May (Dec. 18, 2006) (on file with *Vermont Law Review*).

79. These recommendations are conceptually in line with the "Possible Solutions" set out at the end of the *Report on Need*. REPORT ON NEED, *supra* note 6, at 17–19. The committee, having found that "[t]he last twenty years have seen a steady erosion of support available to meet the need for general legal services in Vermont," concluded that "[t]he one strategy that most effectively focuses on this critical



attorney, supported by legal-clinic students, and working in conjunction with the office of the AJTC, could prepare training modules for volunteer attorneys.<sup>80</sup> Training is essential in this area due to the certainty that ethical issues will arise frequently; it may be significantly more productive now than in past years due to the fact that in 2003 the American Bar Association formally adopted Standards of Practice for Lawyers Representing Children in Custody Cases (Standards).<sup>81</sup> Analysis of the Standards is far beyond the scope of this article, but it is worth noting here that they apply to attorney appointment and performance in a wide array of case types—divorce, parentage, domestic violence, contested adoptions, and contested private-guardianship cases—involving issues such as custody, visitation, and parenting plans. Significantly, a “Child’s Attorney” is defined as “[a] lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.”<sup>82</sup> This definition informs the balance of the Standards, which cover such topics as role, independence, meeting with the child, pretrial responsibility, hearings, appeals, ethics and confidentiality, and client decisions, with detailed treatment given to diminished capacity and the preverbal child.<sup>83</sup> The Standards give valuable guidance to attorneys seeking to comply with both the letter and spirit of the Vermont Rules of Professional Conduct.

---

need is to increase funding for civil legal services.” *Id.* at 17. Complementary to that prime solution are two other solutions: provision of improved pro se assistance by court personnel, and increased, targeted efforts to develop pro bono representation by volunteer Vermont lawyers. *Id.* at 17–19.

80. See Davenport—May Oct. 30, 2006 email, *supra* note 59 (discussing training modules for volunteer attorneys). A modest version of this model was set to commence in 2007 in Washington County, where the CF! attorney and legal clinic students would provide training for attorneys newly volunteering to represent children in Washington Family Court. *Id.* The experimental program involves coordination with VVLP (attorney recruitment) and the Attorneys for Children program. *Id.* This builds upon previous trainings the CF! attorney has done in the past. *Id.*

Over the past decade, the Court Administrator’s office has sponsored various day-long training programs for family-law attorneys, judges, and GALs, and in the 1990s had a series of training programs for attorneys in the so-called “project courts” (Washington, Caledonia, and Bennington, and later, Chittenden and Windsor) which, among other things, trained attorneys to become visitation masters. *Id.* One training session involved an expert from Boston addressing parent–child contact issues, and another involved a collaboration with the Brattleboro Retreat on child development issues. *Id.*

81. STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES (Am. Bar Ass’n, Section of Family Law 2003), *reprinted in* 37 FAM. L.Q. 131 (2003).

82. *Id.* at 133.

83. For a thorough analysis of the Standards, with comprehensive reference to prior commentary and prior adoption of related standards in this area of the law, see generally Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105, 107–25 (2003) (discussing how the standards have helped clarify the attorney’s role in child-client representation).

## CONCLUSION

Progress has been made in Vermont in the past seven years in providing legal representation for children involved in contentious family- and probate-court disputes over custody and related issues. CF! and Attorneys for Children have enabled hundreds of children to benefit from direct, effective legal representation. Yet the need for such representation outstrips the resources of both programs. We know from the work of CF! that a single half-time attorney, even with the help of eager law students, and factoring in the existence of the Attorneys for Children Program, does not come close to meeting the need for children's representation in our two-county area of operation. Working together, these and other law-related programs in Vermont, the Vermont legislature, and Vermont attorneys can substantially improve the availability and quality of legal representation for children involved in contentious courtroom disputes.