

ABA National Conference on Children and the Law

**INNOVATIONS IN LAWYER ENGAGEMENT IN
CHILD WELFARE PROCEEDINGS AND SYSTEMIC
REFORM**

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BACKGROUND

The Nebraska Appleseed Center for Law in the Public Interest (Nebraska Appleseed) is a nationally recognized non-profit, nonpartisan public interest law firm that works for equal justice and full opportunity for all Nebraskans. Established in 1996, Nebraska Appleseed seeks to create widespread systemic reform to assist low-income and underrepresented Nebraskans. Nebraska Appleseed uses litigation, public policy reform, and community education to positively impact low-income families, immigrants, children in foster care, and access to health care. Nebraska Appleseed is comprised of four major programs: Low Income Self-Sufficiency, Immigrant Integration and Civic Participation, Health Care Access, and Child Welfare System Accountability. Nebraska Appleseed is a part of the national network of Appleseed centers across the country.¹

In 2003, Nebraska Appleseed established its Child Welfare System Accountability Program (CWSAP). The CWSAP is focused both on strategies that will lead to broad-based, comprehensive systemic reform of Nebraska's child welfare system, and incremental approaches that will address specific systemic issues through litigation and public policy. The CWSAP was created in direct response to Nebraska's failing child welfare system, which at that time, had witnessed an alarmingly high rate of child deaths. Between 1997 and 2003, 33 children were victims of non-accidental deaths in Nebraska. Even more troubling was that 19 of these 33 children had been reported to either Child Protection Services or the police and at least three of the children were wards of the State of Nebraska at the time of their deaths. Other reports corroborated a systemic problem in which the State was failing to fully investigate child abuse and neglect reports. For example, research conducted by the Nebraska Foster Care Review Board, in a sample of 6,000 child abuse/neglect intake calls to the Nebraska Department of Health and Human Services (NDHHS) between July 2002 and 2003, found that even though 40% of the calls should have had further contact, only 25% actually had follow up.² At the same time, Nebraska had one of the highest rates of children in out-of-home placement per capita in the nation during this period, with 14.5 children per 1,000 in 2004 and 14.4 children per 1,000 in 2005.³

Nebraska Appleseed established the CWSAP to ensure the enforcement of constitutional, federal, and statutory requirements and to help foster improvements in Nebraska's failing child welfare system. The CWSAP is the only legal organization in Nebraska dedicated to system level change within the child welfare system. The CWSAP is modeled on Nebraska Appleseed's highly successful Welfare Due Process Project, which is organized

¹ Nebraska Appleseed is affiliated with the Appleseed Foundation in Washington, DC. To find more information on the Appleseed Foundation, visit <http://www.appleseeds.net/>.

² Nebraska Foster Care Review Board, *Nebraska's Lost Children*, (2004), available at http://www.fcrb.state.ne.us/index_html?page=content/lost_children_index.html.

³ Adoption and Foster Care Analysis and Reporting System Data available at http://ndas.cwla.org/data.stats/states/Data_Trends/Nebraska_State_Data_Trends.pdf

to protect the rights of low-income families and children in public assistance, Medicaid, and child care programs. The CWSAP, like all programs at Nebraska Appleseed, uses litigation, public policy reform, and community education. The goal of the CWSAP is to use legal advocacy to support and complement existing policy reform initiatives. When the CWSAP was established, there were many committed child advocates and organizations seeking reform of the child welfare system, but there had been no organized legal advocacy in response to these issues. Many advocates were calling on Nebraska Appleseed to lend its legal expertise to this issue.

CARSON P.

In its inaugural effort to impact Nebraska's child welfare system, the CWSAP focused on creating effective and long-term comprehensive reform. In 2003, the CWSAP partnered with Children's Rights Inc. of New York, a well-established child advocacy group, in an extensive investigation of Nebraska's foster care system which spanned over two years. At the end of this in-depth investigative process, it was determined that litigation was needed to address systemic problems identified in Nebraska's foster care system.

On September 19, 2005, Nebraska Appleseed along with Children's Rights and a dedicated legal team filed *Carson P. et al. v. Heineman*⁴, a federal class action lawsuit against the State of Nebraska on behalf of the over 6,700 children languishing in Nebraska's foster care system.⁵ The goal of the lawsuit was to provide widespread change within Nebraska's child welfare system. The lawsuit alleged that the Nebraska child welfare system violated the constitutional and statutory rights of its foster children by leaving children in state custody too long, overusing institutional care, moving them too frequently and to inappropriate placements, overcrowding in foster homes, allowing placement in emergency shelters and temporary placements for long periods of time, and placing infants and other very young children in emergency shelters. The suit also alleged that these violations of Nebraska's foster children's rights were a direct result of a severe shortage of foster homes, high caseloads and turnover among child protection workers, poor monitoring of child safety, lack of basic services for foster children, poor planning and services to move children out of foster care and into permanent homes, and inadequate payments to foster care providers.

Unfortunately, on August 16, 2006, U.S. Magistrate Judge David Piester issued a Report and Recommendation (R&R) on Plaintiffs' Motion for Class Certification and Defendants' Motion to Dismiss which suggested that Plaintiffs' case be dismissed in its entirety. The Magistrate, in the lengthy R&R, acknowledged the existence of problems throughout the system experienced by the named Plaintiffs, and empathized with their

⁴ Co-counsel included – Children's Rights, a national advocacy group of New York City; Ogborn, Summerlin & Ogborn, P.C. of Lincoln; DLA Piper Rudnick Gray Cary US LLP, Chicago office; "Of Counsel" were the American College of Trial Lawyers, Nebraska Chapter, members from Woods & Aitken and Gross & Welch; and Cline, Williams, Wright, Johnson & Oldfather LLP.

⁵ *Carson P. v Heineman*, 240 F.R.D 456 (D. Neb 2007).

plight.⁶ But the R&R went on to recommend shutting the courthouse door to the rest of the harmed children in the system, and recommended taking away their opportunity to vindicate their constitutional and statutory rights by relegating these children to seek system-wide relief in their individual juvenile cases.

Specifically, after redefining the class, Judge Piester found that the redefined class did not meet the requirements of typicality or commonality. In addition, Judge Piester questioned the motives, integrity, and adequacy of the earnest and caring persons serving as “next friends” for the minor Plaintiffs. With regard to the motion to dismiss, the R&R suggested the district court employ the extraordinary measure of abstaining from the case pursuant to *Younger v. Harris*⁷, arguing, erroneously, we believe, that any injunctive relief the court might grant in this case would unduly interfere with the Nebraska juvenile courts. The R&R also argued that the Plaintiffs’ constitutional claims and the resulting harms could be addressed in the juvenile courts. Finally, the R&R found that there is no private right of action under the federal statutes at issue, with the exception of any claims brought under the Early Periodic Screening, Diagnosis, and Treatment requirements of the Medicaid Act.

Plaintiffs strenuously objected to the R&R and filed objections with the District Court on September 29, 2006. Plaintiffs accepted, with one exception, Magistrate Judge Piester’s redefinition of the class, but argued that the R&R applied a heightened and inappropriate standard to its class certification analysis and recast Plaintiffs’ detailed pleading regarding these common *system-wide* deficiencies and the group harms caused by them as one directed to the *individualized* circumstances of Plaintiff children. Plaintiffs also objected to the recommendation that the court abstain under *Younger*. Plaintiffs’ claims were directed at the actions of the executive agency – NDHHS – and there was a host of injunctive relief that might have been ordered which would not have interfered with the juvenile courts. Even more crucial to the everyday lives of the Plaintiffs and foster children in Nebraska, however, was the R&R’s conclusion that the juvenile courts were equipped to resolve the claims and harms suffered by Plaintiffs. Our contention was that only the District Court could grant relief to address the system-wide issues raised in the class action.

Underlying the entire R&R was the assumption that there were significant reform efforts already underway which make this class action unnecessary. First, the class action device, and Rule 23(b)(2) class actions in particular, are intended to provide a key to the courthouse door for vulnerable populations such as these children. Second, we were and are supportive of additional efforts to improve aspects of Nebraska’s failing foster care system, but these efforts will not address the system-wide problems at the executive agency and resulting harms targeted in the lawsuit. The Plaintiff children were in the federal forum because supposed efforts at reform have failed.

⁶ The full 200-page Report and Recommendation is available at <http://www.neappleseed.org/litigation/carsonp.html>.

⁷ *Younger v. Harris*, 401 U.S. 37 (1971).

Unfortunately, on January 19, 2007, U.S. District Court Judge Richard Kopf issued a Memorandum and Order and Judgment which adopted the R&R and dismissed the case. There are only a few other class actions directed at reforming failing child welfare systems nationally that have been dismissed at this stage.⁸ The legal team chose not to appeal the case.

THE FOSTER CARE REFORM LEGAL RESOURCE CENTER

While deeply disappointing, the dismissal of *Carson P.* refocused the CWSAP's efforts toward systemic change within Nebraska's child welfare system. In its R&R, the court suggested that the widespread reform be sought through individual cases in juvenile court. While Nebraska Appleseed maintains that the federal court's decision in *Carson P.* was erroneous on this point, we believe pushing reform through positive precedent in individual cases, if pursued in a systematic way, can accomplish positive improvements in a number of targeted areas, such as reducing the number of placement moves for foster children, providing necessary and adequate services for families within the system, and reducing the number of children in out-of-home placement. Therefore, the CWSAP established the Foster Care Reform Legal Resource Center (Legal Resource Center or LRC) in January 2007 with the goal of assisting child welfare attorneys engaged in the day-to-day practice of law in promoting systemic change.

The goal of the Legal Resource Center is to assist child welfare attorneys in acting as a powerful force for reform by fostering the development of cases that result in positive precedents and systemic change. We believe hundreds of lawyers asserting the rights of children across the state, with the collective intent of reforming the system, will have a powerful impact. To accomplish this goal the LRC utilizes a variety of tools to engage and assist child welfare attorneys including:

- co-counseling on potentially precedent setting cases;
- filing amicus briefs;
- research assistance;
- various website resources including publications and a Juvenile Document Bank;
- a listserv for attorneys to ask questions, share information and strategies; and
- a regularly released update highlighting a policy issue affecting child welfare and case law and legislative updates.

TOOLS USED BY THE LEGAL RESOURCE CENTER

Listserv

Each of the resources provided by the Legal Resource Center is directed at equipping "front line" attorneys in making positive improvements to the child welfare system through their individual cases. One of the most basic yet fundamental resources the Legal Resource Center provides is a child welfare listserv. The goal of the listserv goes

⁸ *31 Foster Children v. Bush*, 329 F. 3d 1255 (11th Cir. 2003); *Laurie Q. v. Contra Costa County*, 304 F. Supp. 2d 1185 (N. D. Cal 2004); *J.B. v. Valdez*, 183 F. 3d 1280 (10th Cir. 1999).

beyond just maintaining contact with LRC members; it is a forum for attorneys to discuss issues and share legal strategies. Currently this forum consists of 186 attorneys that serve as guardians ad litem and as counsel for both biological and foster parents. These attorneys are engaged in juvenile law practice across the state of Nebraska. Providing this resource is even more crucial in a very rural state such as Nebraska where many practitioners reside and work in small communities and are often in general practices or are solo practitioners. Particularly in these settings, the listserv is helpful in assisting practitioners in maintaining connections with other attorneys practicing juvenile law and in sharing best practices.

The listserv provides attorneys with an opportunity to freely share legal strategies utilized in juvenile court with one another. The importance of maintaining confidentiality in these legal discussions requires the LRC to limit listserv membership to guardians ad litem and attorneys representing parents and foster parents. In sharing successful strategies, it is the goal of the LRC to replicate these strategies across the state and therefore, have a broad impact.

Another benefit of the listserv is that members are able to bring attention to systemic issues that may be on the rise in juvenile courts across Nebraska. This information is useful to Nebraska Appleseed as it helps inform our policy agenda. An example of this is that over the spring and summer of 2008, the LRC began to receive emails from listserv members raising concerns about the Nebraska Department of Health and Human Services' refusal to pay for services (e.g., mental health and substance abuse treatment) ordered by the juvenile court for parents in their efforts to reunify with their children. After receiving more information, the LRC began to investigate this issue and found that NDHHS was regularly denying payment for services and that this appeared to violate the state's obligation make reasonable efforts.

In consulting with attorneys, the LRC identified several strategies used in juvenile court to raise this issue. One of the strategies is filing an Application for an Order to Show Cause. For example, several practitioners reported that they had filed an Application for an Order to Show Cause and were often successful in getting NDHHS to comply with the juvenile court's order without the necessity of an actual Show Cause hearing. Other attorneys reported filing a Motion for Reasonable Efforts which resulted in judges holding review hearings to consider the issue of reasonable efforts and the State's failure to pay for treatment services. The LRC is currently finalizing a Policy Brief on the issue of reasonable efforts in order to assist practitioners with strategies to raise this systemic issue.

Foster Care Reform Update

Another valuable resource provided through the LRC is the Foster Care Reform Update (Update), which is an electronic newsletter that is disseminated to the listserv on a monthly basis.⁹ To date, the LRC has provided 22 Updates to its members.

⁹ Foster Care Reform Updates are available at <http://www.neappleseed.org/lrcarchive/>

The Update provides attorneys with case law and legislative summaries and highlights policy issues that are pertinent and relevant to practitioners. For example, in July 2008, the policy spotlight was entitled “Expanding Children’s Rights after *Amanda C. v. Case*,”¹⁰ which discussed a case decided by the Nebraska Supreme Court and raised the issue of a child’s reciprocal constitutional right to a relationship with their parent. In this case, the juvenile sued her case manager for damages based on a claim that the case worker interfered with her relationship with her father by continuously attempting to seek to have her father relinquish his parental rights, despite the father’s attorney’s request that the case worker not contact his client without his knowledge. In a previous decision, the court awarded damages in the amount of \$ 65,000 to the father based on the same facts. In its’ decision, the court found that the case manager’s wrongful interference with the father’s custody and control over the juvenile established that the case manager also wrongfully interfered with the juvenile’s constitutional right to be in her father’s custody and articulated that children have a reciprocal right to a relationship with their parent in the same way that parents have a constitutional right to the control and custody of their children. Ultimately, the juvenile was awarded monetary damages in the amount of \$50,000. The policy spotlight not only outlined this case but urged attorneys to think broadly about how the court’s articulation of children’s constitutional rights might be utilized in future cases to expand children’s rights in juvenile court.

In addition to the policy spotlight, the Update includes a brief synopsis of current cases decided by the Nebraska Supreme Court and the Nebraska Court of Appeals. The focus is primarily cases from Nebraska but on occasion it is necessary to inform practitioners of cases outside of our jurisdiction if those decisions may have implications for practice in Nebraska or may assist with creating systemic change.

The Update also highlights state and federal child welfare legislation. The goal in providing this information is to inform attorneys of proposed changes in the law that may affect their practices and clients. In some cases, LRC attorneys have testified on bills and provided valuable information to legislative committees who are often eager to hear from those on the “frontline.” Because of their day-to-day involvement with the legal system, practitioners have valuable knowledge and insight on the impact of new child welfare legislation and it is important to have that voice at the table. Even when attorneys are not able to participate directly in the legislative process, their input into proposed legislation assists the LRC in formulating positions on child welfare legislation.

Direct Assistance to Attorneys

With the goal of helping child welfare attorneys in enforcing constitutional and statutory law, the LRC provides direct assistance through co-counseling, case intervention, research, and the development of amicus briefs. Providing assistance through these various means gives attorneys an extra resource to assist with raising sometimes complex systemic issues in their cases. At the same time, this provides an opportunity for the LRC

¹⁰ *Amanda C. v. Case*, 275 Neb. 277, 749 N.W. 2d 429 (2008).

to engage in system changing reform. Since its inception, the LRC has provided direct assistance on 37 cases received from member and non-member attorneys.

An example of direct assistance is the LRC's recent involvement with two amicus briefs involving Indian Child Welfare Act (ICWA) issues. The first brief occurred after the LRC was contacted by a Legal Aid attorney regarding an appeal that was being pursued. The appellant's argument was that the NDHHS failed to make "active efforts." In this case, the NDHHS provided very little in terms of services; the caseworker testified repeatedly that the services provided consisted mainly of "encouragement and referrals." The case, *In re Interest of Walter W.*¹¹, raised, among other issues, the question of what constitutes active efforts. The LRC argued that the requirement to make active efforts pursuant to ICWA requires a higher and different standard than the "reasonable efforts" required in non-ICWA cases. Ultimately, the Nebraska Supreme Court disagreed with the Appellant and affirmed that active efforts had been provided in this case. However, in the decision, the court clarified that active efforts requires more than the "reasonable efforts" required in non-ICWA cases and that active efforts requires some culturally relevant component.

More recently, the LRC organized an amicus brief on another ICWA case with several tribes and other organizations.¹² The case, *In re interest of Elias L. and Evelyn M.*, raises the issue of whether a non-attorney tribal ICWA Specialist may represent the tribe in ICWA proceedings in state court. The LRC's involvement in this amicus is a result of the formation of the Nebraska ICWA Coalition which Nebraska Appleseed organized in the fall of 2008. In addition to Appleseed, coalition members include Native American tribes from across Nebraska, Legal Aid of Nebraska's Native American Project, and the Indian Child Welfare Specialist for the NDHHS. The LRC also engages practitioners by assisting with research involving a juvenile court matter. For example, one attorney, serving as a guardian ad litem, contacted the LRC frustrated with the NDHHS' efforts, or lack thereof, on behalf of a child needing to be placed with an out-of-state relative prior to the start of a new school year. The guardian ad litem was concerned with the time and process that NDHHS claimed it would take to complete an interstate compact. The placement being sought for the child was with a relative with whom the child had spent a substantial amount of time. The LRC researched the issue and found a provision of the NDHHS administrative code that provides an expedited process allowing the child to be moved sooner than initially anticipated because the relative had been in regular contact with the child. The guardian ad litem was able to use this information in court, which led to a better outcome for the child that included being placed with a relative prior to the start of the school year.

¹¹ *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

¹² Co-counsel include Legal Aid of Nebraska, The National Indian Child Welfare Association, the Indian Center Inc., the Santee Sioux Tribe of Nebraska, the Ogallala Sioux Tribe, the Osage Nation, the Sac & Fox Tribe of the Mississippi in Iowa, the Winnebago Tribe of Nebraska, the Omaha Tribe of Nebraska, the Spirit Lake Tribe of North Dakota, and the Rosebud Sioux Tribe.

Other Resources

The LRC provides resources for practitioners to utilize in their everyday practice. These resources include informative publications,¹³ a policy brief series,¹⁴ and a recently added Legal Resource Center Juvenile Document Bank.¹⁵ Each of these resources engages attorneys and promotes systemic change by providing necessary and pertinent information to practitioners that may be used to assist them in raising novel, precedent setting issues in their everyday practice of law.

The policy brief series is a resource that provides an in-depth analysis of a specific topic relevant to child welfare attorneys. The first policy brief covered the issue of relative placement, which came to the attention of the LRC after reports from several attorneys about the NDHHS failing to investigate potential relative placements early in the process. In some cases, the NDHHS was seeking to move children from long-term, stable foster care placements to the homes of relatives whom the NDHHS had failed to contact at the onset of the case. This resulted in unnecessary placement disruptions. After comprehensive research of this issue, which included an Open Records Act Request to the NDHHS, the LRC released its first policy brief, “Relative Placement Policy Brief.” The brief highlights the law and policy reasons for seeking a relative placement for children removed from their parental home. This brief has been utilized in various capacities by members of the LRC and the legal community at large.

Another valuable use of the Relative Placement Policy Brief came through LRC legislative efforts. During the 2008 legislative session, Nebraska Appleseed worked with Nebraska State Senator Annette Dubas to bring legislation regarding the placement of children with relatives soon after removal from their homes. This legislation required the NDHHS, within five days of a child’s removal, to provide a parent with a prepared form to list the names of suitable relatives that may serve as an out-of-home placement. The bill also required that the NDHHS make a diligent search to find a suitable relative within 30 days of the removal. The NDHHS was also required to make and file a report to the court describing the efforts made and the results. Ultimately, as a result of a positive hearing on this bill, the NDHHS agreed to institute the requirements of the bill administratively. The information provided through the Relative Placement Policy Brief was utilized to assist in developing legislation and ultimately provided a change in how the NDHHS had been handling relative placements.

Our state-level work on this issue has recently been enhanced by the Fostering Connections to Success and Increasing Adoptions Act, which became law in the fall of 2008. This federal legislation has a provision requiring that due diligence be made to identify relatives within 30 days of a child’s removal from the parental home. The LRC

¹³ LRC publications are available at <http://neappleseed.org/children/resources.html#publications>.

¹⁴ The LRC “Relative Placement Policy Brief” is available at http://www.neappleseed.org/docs/policy_brief_placement_in_ne_0508.pdf.

¹⁵ The Legal Resource Center Juvenile Document Bank is available at http://www.neappleseed.org/children/resources.html#legal_forms.

will monitor the implementation of this new law in Nebraska which should further strengthen efforts to identify potential relative placements early in the process.

Recently, the LRC developed a new resource, the Juvenile Law Document Bank (Document Bank) which is accessible on the LRC website. The Document Bank provides attorneys with example documents that they can use in their day-to-day practice of law to raise systemic issues. The Document Bank consists of a variety of pleadings that practitioners have used, with a focus on pushing positive reform of chronic problems in the child welfare system.

Outreach

In a continued effort to involve attorneys in policy-level developments, the LRC goes into the community to speak and listen to practitioners on issues they are seeing in their practices. A major effort in this area is a yearly trip to the western part of Nebraska, which provides face-to-face contact with some of the smaller communities in the state. This trip provides the opportunity to speak with practitioners concerning systemic issues and issues they see in their jurisdictions. This helps the LRC to identify emerging trends that might lend themselves to impact litigation.

Trainings

Finally, the LRC provides trainings on child welfare issues across the state. For example, during presentations at the Nebraska State Bar Association's annual meeting, the LRC provided practitioners with a juvenile case law and legislative update and highlighted systemic issues that had been raised by members of the LRC. This year, the LRC also co-sponsored a day-long, multidisciplinary ICWA training. The training focused on ICWA requirements, provided a historical perspective on the law, looked at the impact of foster care on Native children and gave a rare opportunity for interaction with tribal representatives through a panel discussion.

CONCLUSION

The development of the Legal Resource Center was a direct response to the federal court's challenge to seek widespread reform through individual cases in juvenile court. The LRC continues to develop and pursue new and innovative strategies to encourage and assist attorneys in bringing about much needed reforms. It is our belief that Nebraska's children deserve a safe and dependable child welfare system to meet their needs when their family can not. We believe that the engagement of child welfare attorneys in systemic change will help create not just a "better" child welfare system but a model system that benefits all.