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## COMMENTS

### Oklahoma's Parentless Child: Determining the Best Interests of the Child by Making Multilateral Adoption Decisions\*

*The paramount consideration in all proceedings concerning a child alleged or found to be deprived is the health and safety and the best interests of the child.*<sup>1</sup>

#### *I. Introduction*

In fiscal year 2004, Oklahoma had 12,347 confirmed cases of child abuse and neglect.<sup>2</sup> Of these children, some will be reunited with their parents in the coming months and years and return to a world that is familiar. Others, however, will face the terrifying loss of their mother and father through termination of parental rights. In these cases, the children will be placed for adoption, and home will mean the creation of a new family with new parents who will provide them with the stability that was wanting in their biological homes. That is the hope, at least, of those who work within the child welfare and juvenile court systems.

Despite the hope that adoption provides for Oklahoma's parentless children, the quest for an adoptive home following termination of parental rights can, unfortunately, last for months and evolve into a larger, and arguably more entrenched, battle than the one severing the parent-child relationship. At times, foster parents and extended family members find themselves competing for the opportunity to adopt a child, and in that process, the best interests of the child can quickly become lost in the din of adults fighting an emotional battle. This comment will show that the court, as opposed to the Department of Human Services (DHS or Department), should be the final arbiter of the best interests of the child during adoption and that this placement determination should be based on the collective input of the many entities involved in the juvenile court system.

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\* Winner, 2005-2006 Frank C. Love Memorial Award for Outstanding Second Year Paper. The author would like to dedicate this comment to her family for their love, encouragement, and support and especially to her son Christian, in whose face she sees the face of so many children desperate for a place to call home.

1. 10 OKLA. STAT. § 7001-1.2(B) (2001) (emphasis added).

2. 2004 OKLA. DEP'T OF HUMAN SERVS. ANN. REP. 46, tbl. 13, available at <http://www.okdhs.org/ioppr/ar2003/AR2004Narratives/OKDHSAnRep04.pdf>.

Part II of this comment tracks the issue of child abuse and neglect from the perspective of a community problem once addressed by civic organizations, to its status as a governmental problem within the exclusive province of professional social workers employed by DHS. Part III examines the tension in Oklahoma between the district court and the Department regarding the ultimate authority to make adoption placements pursuant to the best interests of the child. Part IV analyzes the current role of other entities within the child welfare system whose roles and participation in the process are crucial in making a best interests determination. Part V suggests the court should be granted review authority in adoption placements with an associated extension of the roles played by the child's attorney, the guardian ad litem, and the foster parents in a multilateral approach to adoption decisions reminiscent of the historic juvenile court. This comment concludes in Part VI.

## *II. From Dogs to Children: Society's Developing Concern for Abused and Neglected Children*

### *A. The ASPCA and Mary Ellen: Child Welfare Gets Its Start*

In 1874, America awoke to the realization that abused and neglected children were desperately in need of advocates.<sup>3</sup> The story of little Mary Ellen Wilson and her plight stirred the world.<sup>4</sup> The former neighbors of Mary Ellen reported to Etta Wheeler, a Methodist missionary, of the mistreatment that Mary Ellen suffered and asked Ms. Wheeler to look in on the child at her new location.<sup>5</sup> Under the pretext of speaking with the child's guardian about a sickly neighbor, Ms. Wheeler saw firsthand the heart-wrenching condition of the child.<sup>6</sup> Ms. Wheeler was so troubled by the child's condition that her niece urged her to speak with Henry Bergh, president of the American Society of the Prevention of Cruelty to Animals (ASPCA), as the little girl was "a little animal surely."<sup>7</sup>

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3. See Am. Humane Ass'n, *The Real Story of Mary Ellen Wilson*, [http://www.americanhumane.org/site/PageServer?pagename=wh\\_mission\\_maryellen](http://www.americanhumane.org/site/PageServer?pagename=wh_mission_maryellen) [hereinafter *Am. Humane Ass'n, The Real Story*] (last visited June 7, 2006) (extracting the story from AM. HUMANE ASS'N, *HELPING IN CHILD PROTECTIVE SERVICES: A COMPETENCY-BASED CASEWORK HANDBOOK* (2003)).

4. See *id.*

5. *Id.*

6. Am. Humane Ass'n, *The Real Story*, *supra* note 3; ETTA ANGELL WHEELER, *THE STORY OF MARY ELLEN* (1998), [http://www.americanhumane.org/site/PageServer?pagename=wh\\_mission\\_maryellen\\_wheeler](http://www.americanhumane.org/site/PageServer?pagename=wh_mission_maryellen_wheeler).

7. Am. Humane Ass'n, *The Real Story*, *supra* note 3; WHEELER, *supra* note 6.

Within forty-eight hours of speaking with Mr. Bergh, the child was taken to the New York Supreme Court where Judge Lawrence had agreed to hear the case, as juvenile courts had not yet come into existence.<sup>8</sup> There, Mary Ellen recounted her plight, including the physical abuse at the hands of her guardian and her lack of any love or affection.<sup>9</sup> Thus, on Thursday, April 9, 1874, Mary Ellen was “rescued.”<sup>10</sup> More importantly, however, her story generated a new movement for a formalized child protection system. As Etta Wheeler stated, “the time [had] come for a forward movement in the welfare of children and little Mary Ellen’s hand had struck the hour.”<sup>11</sup>

The community and media response to this landmark case inspired a nationwide movement for the protection of children.<sup>12</sup> Following the rescue of Mary Ellen, lead counsel for the ASPCA, Elbridge T. Gerry, launched a Society for the Prevention of Cruelty to Children.<sup>13</sup> Among the members of this new society were prominent members of the New York social elite, including William E. Dodge, Cornelius Vanderbilt, and Theodore Roosevelt.<sup>14</sup> Thus, at the inception of child welfare, the private community and community organizations played a huge role in the developing concern for the needs of abused and neglected children.

#### *B. Creation of the Juvenile Court — A Community Endeavor*

Community involvement in social causes such as Mary Ellen’s case and the resulting community cry for systems to address these concerns were typical of the late nineteenth century. Even with society plagued by timeless societal concerns such as poverty and crime, paid social workers were uncommon and not readily available to give assistance.<sup>15</sup> As such, the community took on the role presently reserved for such workers. Out of this great community endeavor, the first juvenile court system found its support.

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8. *Mr. Bergh Enlarging His Sphere of Usefulness: Inhuman Treatment of a Little Waif—Her Treatment — A Mystery to Be Cleared Up*, N.Y. TIMES, Apr. 10, 1874, at 8 [hereinafter *Inhuman Treatment*]; WHEELER, *supra* note 6.

9. *Inhuman Treatment*, *supra* note 8; Am. Humane Ass’n, *The Real Story*, *supra* note 3.

10. WHEELER, *supra* note 6.

11. *Id.* (alteration in original).

12. *See* Am. Humane Ass’n, *The Real Story*, *supra* note 3; *see also* *Protection for Children: Organization of a Society for the Prevention of Cruelty to Children — Its Scope of Action and Its Objects*, N.Y. TIMES, Dec. 17, 1874, at 3 [hereinafter *Organization of a Society*]. The *New York Times* reported extensively on Mary Ellen, and the community response in creating new organizations to protect abused and neglected children.

13. *Organization of a Society*, *supra* note 12.

14. *Id.*

15. MARGARET E. RICH, *A BELIEF IN PEOPLE: A HISTORY OF FAMILY SOCIAL WORK* 33 (1956).

In her book *A Belief in People: A History of Family Social Work*, Margaret E. Rich described the national “friendly visitor” movement and its connection to the vast network of charitable organizations which addressed societal concerns not yet tackled by a bureaucratic system.<sup>16</sup> The friendly visitor idea stemmed from charity organizations which provided a sympathetic person to befriend a needy individual or family.<sup>17</sup> Rich described this as “a great experiment in citizen participation.”<sup>18</sup> At its core, this movement responded to suffering in America by lending family support.<sup>19</sup>

Josephine Shaw Lowell, a prominent figure in the philanthropy movement at that time, spoke of the importance of the friendly visitor, especially in the area of children, in her papers printed by New York’s Charity Organization Society.<sup>20</sup> In her paper simply entitled *Children*, Lowell proclaimed that “the most important work to be done among the poor is for the children.”<sup>21</sup> Lowell argued that the community had a duty to care for children given the long-term impact on society that stemmed from aiding the very young and vulnerable.<sup>22</sup> Further, Lowell strongly advocated for the creation of a law to remove children from abusive or neglectful homes.<sup>23</sup> Thus, from the charitable organizations’ friendly visitor movement sprang the support for codification of child welfare movement goals.

In 1877, the first of several laws affecting juvenile delinquents was passed in New York at the urging of the Society for the Prevention of Cruelty to Children, Elbridge T. Gerry’s New York initiative.<sup>24</sup> Subsequently, the movement for similar laws captivated the whole country, Chicago in particular.<sup>25</sup> Like the friendly visitors in New York, Chicago’s elite constituted the majority of its charitable organizations and spurred the growth

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16. *Id.* at 31.

17. *Id.*

18. *Id.* at 33.

19. *See generally id.* at 31-36 (discussing the rise of the friendly visitor movement as a response to the condition of the American poor in the late 1800s).

20. *See generally* JOSEPHINE SHAW LOWELL, *THE PHILANTHROPIC WORK OF JOSEPHINE SHAW LOWELL* 142-50 (William Rhineland Stewart ed., 1911) (discussing the role of the friendly visitor and the effect that the visitor can have on work with children).

21. *Id.* at 267.

22. *Id.* at 268.

23. *Id.* at 275-76.

24. TIMOTHY D. HURLEY, *ORIGIN OF THE ILLINOIS JUVENILE COURT LAW* 14 (3d ed. 1907).

25. *Id.* at 14-15. Written shortly after the passage of the Illinois Juvenile Court Law, Hurley’s work described the laws passed in New York and Massachusetts. *Id.* He stated that “[s]uch were the conditions of the laws throughout the country in the year 1898, when the charitable people of the State of Illinois were aroused.” *Id.* at 15.

of a new juvenile court.<sup>26</sup> From public interest and outcry, the first juvenile court act was passed in Illinois in April 1899.<sup>27</sup>

Built with flexibility to address the needs of children and families, the first juvenile court was designed “to operate with great informality.”<sup>28</sup> Every detail of the Illinois Juvenile Court Act (the Act) was couched in terms of working in the interests of children rather than against a child.<sup>29</sup> Further, the Act was designed to safeguard the child’s reputation and protect him from the stigmatizing label that would attach if treated as an adult.<sup>30</sup> As such, flexibility and informality were ideals through which the child would be protected.<sup>31</sup> Furthermore, the juvenile court judge had a prominent role in this new court system. In 1907, shortly after the passage of the Illinois Juvenile Court Act, Timothy D. Hurley described the judge as a “Recording Angel” in his piece *Origin of the Illinois Juvenile Court Law*.<sup>32</sup> The judge was charged with looking into the “past, present, and future of the child” to determine what was in the child’s best interests.<sup>33</sup> The judge was thought to possess the wisdom of Solomon,<sup>34</sup> such that he could “wave his wand of power and bring sunshine and hope and love and light” into the life of a juvenile court child.<sup>35</sup> In short, the judge was the final arbiter of the best interests of the child and fashioned all orders necessary to ensure that those interests were served.<sup>36</sup>

Thus, at its inception, the juvenile court was a community endeavor stemming from the needs of early American society. The court was infused with flexibility wielded by an all-powerful judge. As the juvenile court grew stronger in intervening on behalf of children, the community support which marked its beginning gave way under the pressure for a more professional child welfare system.

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26. *See generally id.* at 14-21 (describing the New York societies that encouraged protections for children within a discussion of the concurrent community surge in Chicago towards the same goal).

27. *Id.* at 41; MONRAD G. PAULSEN & CHARLES H. WHITEBREAD, *JUVENILE LAW AND PROCEDURE* 1 (1974).

28. PAULSEN & WHITEBREAD, *supra* note 27, at 2.

29. HURLEY, *supra* note 24, at 23-24; PAULSEN & WHITEBREAD, *supra* note 27, at 2. *See generally* Juvenile Court Act, 1899 Ill. Laws 131 (current version at 705 ILL. COMP. STAT. 405/1-1 to 405/7-1 (2006)).

30. HURLEY, *supra* note 24, at 23-24; PAULSEN & WHITEBREAD, *supra* note 27, at 2.

31. *See supra* text accompanying note 28.

32. HURLEY, *supra* note 24, at 78.

33. *Id.*

34. *Id.* at 79.

35. *Id.* at 78.

36. PAULSEN & WHITEBREAD, *supra* note 27, at 3.

### C. Professionalization of Child Welfare and the Community Exodus

As in the majority of major American cities, Chicago's friendly visitor campaign saw its demise in the rise of professionalization in child welfare.<sup>37</sup> With the rise of the professional social worker, the concept of community or civic service faded and was replaced by the process of "'buy[ing] out' of civic responsibility" by 1929.<sup>38</sup> The institutions and laws that had grown out of the movement marked by Mary Ellen gave way to this new profession such that "a new technocratic elite had wrested much of the decision-making responsibility from native Samaritans."<sup>39</sup> Responsibility for social reform shifted from the Chicago community to "a new army of professional middlemen."<sup>40</sup>

This shift in systemic support was recognized with enthusiasm by Homer Folks, executive director of New York's State Charities Aid Association for over fifty years.<sup>41</sup> Awarded the Theodore Roosevelt Distinguished Service Medal in 1940 for his work in the field of social justice,<sup>42</sup> Folks was a prominent figure in support of the creation of a professional welfare system.<sup>43</sup> In Folks's paper, *Child Welfare — a Job for Those Who Know How*, Folks announced the emergence of this new profession of social work.<sup>44</sup> Folks considered this shift to be what was best for abused and neglected children and stressed that handling deprived children was "certainly a job for those who know how."<sup>45</sup> Hence, this shift and its effect on child welfare was welcomed, and even heralded.

### D. The Oklahoma Juvenile Court Law and Professionalization

In Oklahoma, the first Juvenile Court Law (the Law) was passed on March 24, 1909.<sup>46</sup> At the time, section 1 of the Law defined a dependent child loosely and addressed a broad range of ill-treatment, extending from abuse and

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37. KATHLEEN D. MCCARTHY, *NOBLESSE OBLIGE* 148 (1982).

38. *Id.* at ix-x.

39. *Id.* at xii.

40. *Id.* at 148.

41. Savel Zimand, *Introduction* to HOMER FOLKS, *PUBLIC HEALTH AND WELFARE: THE CITIZENS' RESPONSIBILITY* xxii (Savel Zimand ed., 1958).

42. *Id.* at xx.

43. *Id.* at xxxii.

44. FOLKS, *supra* note 41, at 452.

45. *Id.* at 455.

46. Juvenile Court Law, ch. 14, art. VIII, 1909 Okla. Sess. Laws 185, 191 (originally codified at 55 OKLA. STAT. §§ 4412-4426 (1910)); *see also Ex parte Powell*, 6 Okla. Crim. 495, 497-98, 120 P. 1022, 1023 (1912). The court inserted the entire text of the Juvenile Court Law of 1909 into its opinion in *Ex parte Powell* so that "a complete understanding [could] be had of the various questions considered" in the case. *Id.* at 498, 120 P. at 1023.

neglect, to homelessness, to the forced use of the child as public entertainment by way of singing or playing an instrument on the street.<sup>47</sup> In section 7 of the Law, children deemed wards of the court were to be awarded to associations or individuals in whose care the child would be prepared for legal adoption; these associations or individuals were then responsible for assenting to the adoption, which the court would authorize.<sup>48</sup> In *Ex parte Powell*,<sup>49</sup> the Oklahoma Criminal Court of Appeals held that the Law “should be liberally construed in favor of the welfare and best interest of the child.”<sup>50</sup> The court was given broad authority in making determinations as to the status of a child and in whose care the child would be placed.<sup>51</sup> This was, of course, reminiscent of the great informality and inclusiveness of the Illinois court.<sup>52</sup>

Since 1907, Oklahoma’s juvenile statutes have been renumbered and modified to adapt to changing notions of the proper way to address and handle dependent children. Now termed “deprived children,” section 7001-1.3(A)(14) of the Children’s Code defines what constitutes abused and neglected children, encompassing those who lack proper parental care or guardianship as well as numerous other dependent conditions.<sup>53</sup> Gone are the references to children making music on the street.

Most significantly, the scant reference to adoption from Oklahoma’s initial Code has been replaced by an entirely separate law applicable to adoption only.<sup>54</sup> This can be attributed to the forward movement in adoption standards advocated by the early child welfare workers. Laura Dester, the first director for Oklahoma Child Welfare, stated that publicity regarding poor adoptive conditions provided the support for “putting more teeth into [adoption] law.”<sup>55</sup>

The work of Dester marked the rise of professional social workers in Oklahoma. In 1937, the first year that a five-county demonstration unit was created, child welfare workers had strong community support and relied on the

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47. 55 OKLA. STAT. § 4412 (1910); *see also Ex Parte Powell*, 6 Okla. Crim. at 498, 120 P. at 1023.

48. 55 OKLA. STAT. § 4422 (1910); *see also Ex Parte Powell*, 6 Okla. Crim. at 502, 120 P. at 1025.

49. 6 Okla. Crim. 495, 120 P. 1022.

50. *Id.* at 508, 120 P. at 1027.

51. *See id.* (describing the authority of the court to make placements for the child).

52. *See supra* text accompanying notes 28-31.

53. 10 OKLA. STAT. § 7001-1.3(A)(14) (Supp. 2005).

54. 10 OKLA. STAT. §§ 7501-1.1 to 7510-3.3 (2001 & Supp. 2005). Today, adoptions involving deprived children are still governed by both the Oklahoma Children’s Code and the Oklahoma Adoption Code. Although the child’s case is still controlled by the juvenile court in applying the Children’s Code, the adoption process itself is governed by the Adoption Code.

55. LAURA DESTER, *THE HALO GIRLS: THE STORY OF OKLAHOMA’S CHILD WELFARE DIVISION 1936-1968*, at 53 (Kay Boone ed., n.d.).

aid of schools, police, and ministers - cornerstones of the community.<sup>56</sup> Dester stated that services, including adoption services, “arose from what can only be termed ‘grassroots involvement.’”<sup>57</sup> As in New York and Chicago, community leaders took positions on committees that examined issues affecting children in their communities.<sup>58</sup> This involvement, however, was largely at the urging of Dester,<sup>59</sup> and these committees did not make final decisions regarding placement of children, as that role had been absorbed by the local child welfare specialists.<sup>60</sup> Thus, the role of the community in Oklahoma was relegated to that of moral supporter.

In the years following the creation of Oklahoma’s burgeoning child welfare system, the role of the juvenile court as delineated in *Ex parte Powell* adapted to reflect the notion of a modernized professional social work system. As the community’s participation in societal concerns regarding children waned, so did the influence of the traditional juvenile court. Further complicating the changing notions of the community’s and the court’s role in the care and placement of deprived children, the Oklahoma Department of Human Services was given the responsibility to care for deprived children.<sup>61</sup> Reflective of the professionalization of the field, the Department’s role was expanded in the area of adoptive placements such that ultimate authority and control was left in its hands rather than in the hands of associations and individuals vaguely referred to in the 1907 Juvenile Court Law.<sup>62</sup> This shift in placement authority was arguably the catalyst to the debates regarding the delineation of authority between DHS and the juvenile court, as well as the excision of community members in the decision-making process.

### *III. Adoption Placements and the Shifting Roles of the District Court and the Department of Human Services*

Despite the historic juvenile court’s ability to influence adoption decisions as discussed above, the authority of the Oklahoma juvenile court in overseeing adoption placements has been tenuous at best.<sup>63</sup> As the Department’s role in

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56. *Id.* at 7-8.

57. *Id.* at 10.

58. *Id.* at 55.

59. *Id.*

60. *See id.* at 53 (noting that for approximately twenty years following the creation of the Child Welfare Division, the Department of Public Welfare - as DHS was called at that time - had the responsibility for adoptive placements).

61. Act of May 3, 1968, ch. 282, § 134, 1968 Okla. Sess. Laws 454 (codified as amended at 10 OKLA. STAT. § 7002-2.1(A) (2001)).

62. *See infra* text accompanying note 66.

63. *See, e.g.,* Carder v. Court of Criminal Appeals, 1978 OK 130, ¶ 36, 595 P.2d 416, 422.

adoption expanded, it not only displaced community involvement, it grew to overshadow and eventually eliminate the role of the juvenile court judge.<sup>64</sup> Beginning with *State ex rel. Department of Human Services v. Colclazier*,<sup>65</sup> however, the balance of power between the Department and the juvenile court began to shift back toward recognizing the importance of the court in placement decisions. This ruling has led to the suggested expansion of the court's role in adoption placements — a suggestion that would be well heeded, as the court should serve as the final arbiter of best interests during adoption.

Prompting the Department's claim of exclusive authority, the Oklahoma state legislature passed a law in 1957 requiring DHS consent before a child could be placed for adoption.<sup>66</sup> This statute was a reaction to the growing number of adoption agencies creating a "gray market" for adoptions in which children were virtually sold to the highest bidder.<sup>67</sup> With this policy justification in mind, one can understand the rationale for having an agency's check on adoptions.

Nevertheless, as professionalization in child welfare and the corresponding agency responsibility grew, so did the displacement of other parties who had previously been involved in adoption decisions.<sup>68</sup> Although the juvenile court judge historically made these decisions,<sup>69</sup> the Department's growing responsibility eroded the court's role of judicial oversight. This resulted in a divisiveness between DHS and the juvenile court that was recognized as recently as 1997 by Justice Simms in his dissent in *Colclazier*, in which he characterized "the battle of wills between the Department and the juvenile courts" regarding placement decisions as "a persistent source of conflict . . . for at least the last twenty years."<sup>70</sup> Thus, recognition of DHS consent authority led to a modern system at odds with its predecessor.

*Colclazier* marked a significant shift in the Supreme Court of Oklahoma's treatment of cases in which DHS argued that it was vested with the exclusive

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Discussing placements generally, the court stated that the Department's autonomy "is an obvious legislative recognition of the vast resources and qualified personnel the Department has available, as well as of the Department's need for 'in-house' decision making power." *Id.* Based on that autonomy, the court concluded that DHS was not bound by a court's suggested placement decision. *Id.*

64. *Id.*; see also *infra* note 82 and accompanying text.

65. 1997 OK 134, 950 P.2d 824.

66. DESTER, *supra* note 55, at 53. See generally Uniform Adoption Act, tit. 10, ch. 2b, § 13, 1957 Okla. Sess. Laws 24-25 (codified as amended at 10 OKLA. STAT. § 7505-5.4 (2001)).

67. DESTER, *supra* note 55, at 53.

68. See *supra* text accompanying note 60.

69. See *supra* text accompanying notes 33-35.

70. *Colclazier*, ¶ 11, 950 P.2d at 832 (Simms, J., dissenting).

authority to make placements for deprived children.<sup>71</sup> In this case, DHS argued that the court did not have the authority to oversee or order DHS placements.<sup>72</sup> The *Colclazier* court responded that judicial review of placement continued until a child was placed in DHS permanent custody, the period following termination of parental rights,<sup>73</sup> or until the child was no longer a ward of the court.<sup>74</sup>

In *Colclazier*, the district judge had ordered that J.U., a child in DHS custody, was to be moved to a foster home.<sup>75</sup> On appeal, DHS argued that the court's order violated the Department's sole authority to render placement decisions based on section 7003-7.1(B)(1) of the Oklahoma Children's Code.<sup>76</sup> Although renumbered as section 7003-7.1(C)(1), the Code provided that DHS "shall determine the appropriate placement of the child" when placed in the custody of DHS.<sup>77</sup> Considering the Children's Code as a whole, the Oklahoma Supreme Court ascertained that the legislature did not intend to exclude placement determinations from judicial oversight.<sup>78</sup> Rather, the court held that a district court had the authority to review placement decisions affecting children "adjudicated deprived" according to the best interests standard, although the Department determined placements in the first instance.<sup>79</sup> While the court was explicit that this placement determination was subject to court approval, it also held that the juvenile court did not have the authority to independently make placement decisions,<sup>80</sup> or to continue in this oversight

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71. *Id.* ¶ 6, 950 P.2d at 826 (majority opinion).

72. *Id.* ¶ 8, 950 P.2d at 827.

73. The Oklahoma Children's Code defines permanent custody as "court-ordered custody of an adjudicated deprived child whose parent's parental rights have been terminated." 10 OKLA. STAT. § 7001-1.3(A)(38) (2001). Nevertheless, it is unclear whether a child automatically enters permanent custody following termination of parental rights or whether a court must make a finding that the child is in permanent custody. This distinction becomes paramount as the permanent custody label coincides with the ability of a court to review placement decisions, or not. *Colclazier*, ¶ 9, 950 P.2d at 827. That this label attaches following termination of parental rights is the only clear requirement.

74. *Colclazier*, ¶ 9, 950 P.2d at 827.

75. *Id.* ¶ 4, 950 P.2d at 826.

76. *Id.* ¶ 6, 950 P.2d at 826.

77. 10 OKLA. STAT. § 7003-7.1(B)(1) (Supp. 1997) (emphasis added) (current version at 10 OKLA. STAT. § 7003-7.1(C)(1) (Supp. 2005)).

78. *Colclazier*, ¶ 8, 950 P.2d at 827.

79. *Id.* ¶ 12, 950 P.2d at 829.

80. *Id.* ¶ 5 n.5, 950 P.2d at 826 n.5. The inability of the court to make placement decisions for children in the Department's custody has now been codified and will be effective November 1, 2006. See Kelsey Smith-Briggs Child Protection Reform Act, H.B. 2840, 50th Leg., 2d Sess. § 5 (Okla. 2006) (enacted) (to be codified at 10 OKLA. STAT. § 7003-6.2(C)(1)). Nevertheless, this new law says nothing of a court's ability to recommend or review DHS placements. See *id.*

capacity once the child entered permanent custody.<sup>81</sup> Nevertheless, this view of judicial oversight was uncharacteristic of the concept of a juvenile court's authority at that time. In two separate opinions, Chief Justice Kauger and Justice Simms stressed that DHS placement decisions were not subject to court approval.<sup>82</sup>

Despite the dissenting opinions, the majority opinion in *Colclazier* marked a shift back to the juvenile court system's prior inclusiveness by recognizing judicial oversight to a limited degree. Although the court's authority terminated at the point a child was placed in DHS permanent custody, the district court was granted the authority to review placement decisions up until that time, thereby restoring a portion of its control over such decisions. Arguably, however, vesting DHS with sole authority to make adoption placement decisions for permanent custody children displaced the court's judicial oversight of these children, designating the court a mere rubber stamp to the Department's adoption determinations.<sup>83</sup>

This termination of judicial oversight, however, conflicts with Oklahoma statute. Justice Wilson, writing for the majority in *Colclazier*, made reference to section 7003-5.5(E) and noted that "the district court's continuing authority over children adjudicated deprived is implicit in the scheme of the Children's Code."<sup>84</sup> Now renumbered as section 7003-5.5(I)(3), the statute indicated that "the jurisdiction of the [district] court shall terminate upon final decree of adoption," occurring after parental rights have been terminated and the child has been placed in DHS permanent custody.<sup>85</sup> It would seem antithetical that a court's judicial oversight capacity would terminate at the point of permanent custody, while its jurisdiction would not end until final decree of adoption. Thus, the text of the statute suggested that a court's review authority continues past the point at which the child is placed in permanent custody, despite, or in addition to, the Department's vested placement authority. In fact, in subsequent court decisions, Oklahoma courts have interpreted this statute to give precisely that review authority to district courts.

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81. *Colclazier*, ¶ 12, 950 P.2d at 829.

82. In a separate opinion, Chief Justice Kauger pointed out that DHS placement decisions were not subject to court approval based on the express language of the legislature stating that DHS shall have placement authority. *Id.* ¶ 4, 950 P.2d at 831 (Kauger, C.J., concurring in part and dissenting in part). Additionally, Justice Simms expressed in his dissent that DHS placement authority was "unqualified." *Id.* ¶ 4, 950 P.2d at 831 (Simms, J., dissenting).

83. See *In re Adoption of D.D.B.*, 2004 OK CIV APP 31, ¶ 3, 87 P.3d 1112, 1119 (Rapp, J., concurring) (stating that the absence of judicial review in adoption decisions "relegate[s] the judiciary to a mere platform to rubber stamp [DHS's] decisions").

84. *Colclazier*, ¶ 10, 950 P.2d at 828.

85. 10 OKLA. STAT. § 7003-5.5(E) (Supp. 1997) (emphasis added) (current version at 10 OKLA. STAT. § 7003-5.5(I)(3) (2001)).

In *In re E.C.B.*,<sup>86</sup> the Oklahoma Court of Civil Appeals reviewed the ability of a district court to entertain and proceed on a petition for adoption despite the Department's withholding of consent.<sup>87</sup> The court held that the district court did not have a mechanism by which to challenge DHS's decision to withhold or grant consent for adoption.<sup>88</sup> In *In re E.C.B.*, the great aunt and uncle of a baby whose parental rights were terminated filed a petition for adoption of the little girl.<sup>89</sup> The district court granted an interlocutory decree of adoption.<sup>90</sup> Upon notification from DHS that it did not consent, however, the district court withdrew this decree and dismissed the petition, and the couple subsequently appealed.<sup>91</sup> The appellate court held that implicit in the grant of authority to DHS under section 7003-5.5(I) is the authority to withhold consent on a proposed adoptive placement.<sup>92</sup> Thus, the district court did not have the authority to order adoption of the child without this consent.<sup>93</sup> The lower court did not, therefore, err in dismissing the petition to adopt.<sup>94</sup>

Only a year later, in *In re Adoption of D.D.B.*,<sup>95</sup> a separate division of the Oklahoma Court of Civil Appeals disagreed with the *In re E.C.B.* decision, choosing instead to view the role of the district court as extending into adoption placement decisions.<sup>96</sup> Relying on the Supreme Court of Oklahoma's 1975 decision in *State ex rel. Department of Institutions, Social & Rehabilitative Services v. Griffis*,<sup>97</sup> the court in *In re Adoption of D.D.B.* held that DHS "may not operate beyond the scrutiny of judicial review" — a statement contrary to the *In re E.C.B.* decision.<sup>98</sup> In *In re Adoption of D.D.B.*, the Jonases, the maternal grandparents of D.D.B. and M.L.R.H., sought adoption of their biological grandchildren following the relinquishment of their daughter's parental rights and the placement of their grandchildren in DHS permanent custody.<sup>99</sup> Following notice that the Department would not consent to adoption by the Jonases, the district court dismissed their petition

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86. 2003 OK CIV APP 5, 62 P.3d 789.

87. *Id.* ¶ 11, 62 P.3d at 792.

88. *Id.*

89. *Id.* ¶ 1, 62 P.3d at 790.

90. *Id.* ¶ 5, 62 P.3d at 791.

91. *Id.* ¶ 6, 62 P.3d at 791.

92. *Id.* ¶ 11, 62 P.3d at 792.

93. *Id.*

94. *Id.*

95. 2004 OK CIV APP 31, 87 P.3d 1112.

96. *Id.* ¶ 23, 87 P.3d at 1118.

97. 1975 OK 164, 545 P.2d 763.

98. *In re Adoption of D.D.B.*, ¶ 12, 87 P.3d at 1115 (quoting *Griffis*, ¶ 23, 545 P.2d at 768).

99. *Id.* ¶¶ 4-5, 87 P.3d at 1114.

to adopt.<sup>100</sup> The Jonases appealed the district court's ruling after the court held that it did not have the jurisdiction to consider the Jonases' petition.<sup>101</sup>

The reviewing court highlighted section 7003-5.5(I) as well as other adoption statutes in its reference to the court's jurisdiction, authority, and responsibility in adoption placements.<sup>102</sup> The court stated that the phrase "upon the final decree of adoption," as found in section 7003-5.5(I), "reinforces the court's continuing supervisory role *until the adoption is completed.*"<sup>103</sup> The court additionally looked to statutory provisions granting review authority over approval of adoptive parents with felony backgrounds as further evidence of this continuing jurisdiction.<sup>104</sup> In short, rather than circumscribing a judge's review authority, the court found that the statutes solidify a judge's role in ensuring that the child's best interests are served.

Finally, throughout the opinion of *In re Adoption of D.D.B.*, the court returned to the issue of a district court's responsibility to safeguard the child's best interests in adoption decisions.<sup>105</sup> The court answered its own question as to "whether DHS is the final arbiter of the 'best interests' of a child in permanent DHS custody" with a resounding no.<sup>106</sup> In harkening back to the *Griffis* decision, the court emphasized the district court's "constitutionally vested jurisdiction" in making decisions regarding adoption placements, going so far as to conclude that the district court *has a duty* to protect a child's best interests.<sup>107</sup> Although it is unclear how the Supreme Court of Oklahoma would treat *In re Adoption of D.D.B.* based on its decision in *Colclazier*, a shift toward granting oversight authority to the court may be occurring in the area of adoptive placement.

Accordingly, the Court of Civil Appeals' opinion in *In re Adoption of D.D.B.* comes closer to the intent and purpose of a judge's authority and role than does prior precedent, which suggests that a judge must not be involved past the placement of children in permanent custody. After all, children entering deprived care are made wards of the court, not the wards of DHS.<sup>108</sup> Thus, while the Department is vested with the care and custody of children,<sup>109</sup> a juvenile court judge continues in an oversight position of these children.

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100. *Id.* ¶ 6, 87 P.3d at 1114.

101. *Id.*

102. *Id.* ¶¶ 13-14, 87 P.3d at 1115-16.

103. *Id.* ¶ 13, 87 P.3d at 1116 (emphasis added).

104. *Id.* ¶ 14, 87 P.3d at 1116.

105. *Id.* ¶¶ 8-9, 87 P.3d at 1114.

106. *Id.* ¶¶ 9-12, 87 P.3d at 1114-15.

107. *Id.* ¶ 18, 87 P.3d at 1117 (quoting *State ex rel. Dep't of Insts., Soc. & Rehabilitative Servs. v. Griffis*, 1975 OK 164, ¶ 20, 545 P.2d 763, 766).

108. 10 OKLA. STAT. § 7003-4.5(A) (2001).

109. *Id.* § 7002-2.1.

Furthermore, because a judge acts as the final, impartial and objective arbiter of legal decisions and disputes,<sup>110</sup> it makes little sense that a judge would not perform that function in decisions affecting the future, permanent placement of children. In short, with the laws currently in place safeguarding the interests of children awaiting adoption and the creation of juvenile courts themselves, the reasoning behind placing final authority in the hands of the Department — to curtail a gray market — seems outdated and unwarranted.

Logically, then, as the role of the court has expanded in the area of placement decisions to include adoption decisions, so too must the role of other entities involved in the case of a permanent custody child. As noted in his concurring opinion in *In re Adoption of D.D.B.*, Judge Rapp stated that “when DHS exercises its consent role, it must do so in accordance with clearly defined criteria, findings, and conclusions” such that the Department’s decision is based on a reviewable record.<sup>111</sup> The Department’s burden in creating a reviewable record for the court supports the court’s duty of protecting the child’s best interests by exercising judicial review over adoption decisions.<sup>112</sup> In order to fully accomplish this, the court must be informed as to the observations and insight provided by other agents in a child’s life, in addition to the findings made by DHS.

#### *IV. Beyond Professionalization: The Role of Other Participants in Modern Juvenile Court Adoption Decisions*

To fulfill its role of making a best interests determination, the court must have information pertinent to the needs and desires of the permanent custody child awaiting adoption. Of the parties involved in the child’s life, apart from the court and the Department, three others have a significant impact on the child, and have, perhaps, the most knowledge regarding the child and his or her best interests: the child’s attorney, the guardian ad litem or Court Appointed Special Advocate (CASA), and the foster parents. As a result, their place in the adoption decision is essential. This part examines the current role of these players in the adoption process. The subsequent part, in turn, suggests

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110. 48A C.J.S. *Judges* § 147 (2005).

111. *In re Adoption of D.D.B.*, ¶ 2, 87 P.3d at 1118 (Rapp, J., concurring).

112. *See generally id.* ¶¶ 1-3, 87 P.3d at 1118-19. In his concurrence, Justice Rapp specifically stated that the “judiciary is the final arbiter of whether the adoption of a child is in that ‘child’s best interest.’” *Id.* ¶ 1, 87 P.3d at 1118. Further, Justice Rapp indicated that the Department is responsible for making a recommendation based on its own record to assure that the adoption decision is both reasonable and rational. *Id.* ¶ 2, 87 P.3d at 1118. Thus, he implied that the Department must first perform this function so that the court can then review the Department’s decision in making the final determination as to best interests. *Id.* ¶ 3, 87 P.3d at 1118-19.

ways in which their input can be expanded to further protect the child's best interests in adoption decisions.

*A. The Child's Attorney: Speaking on Behalf of the Child's Wishes*

Of the attorneys involved in juvenile court, the role of the child's attorney is likely to have the most profound impact on the interests of the child. Unlike the district attorney who represents the State in deprived actions,<sup>113</sup> the child's attorney represents the interests of the child.<sup>114</sup> In Oklahoma, a child is to have separate representation once a petition is filed alleging the child to be deprived.<sup>115</sup> Thus, from the moment the district attorney determines that further action is necessary to safeguard the child, the child's attorney takes on the responsibility of advocating for his client. The role of the child's attorney is supported by Oklahoma statute, Oklahoma case law, and the American Bar Association. Some disagreement, however, centers on the manner in which the attorney should represent the child client.

The Oklahoma Children's Code sets out a number of duties pertaining to the representation provided by the child's attorney.<sup>116</sup> Applicable to the entire deprived proceeding, several duties would appear to extend into the adoption phase. Included in the list, the child's attorney must review all reports, records, and other information relevant to the case.<sup>117</sup> Additionally, he must make recommendations to the court and participate in proceedings in a manner necessary to advocate for his client.<sup>118</sup> Deprived children need the presence of counsel to attend proceedings as well as review documents to ensure that the child client's interests are maintained.

Support for the continuing duties of the child's attorney into juvenile court adoption proceedings arguably exists in *In re Adoption of K.D.K.*,<sup>119</sup> a civil court case appealed to the Supreme Court of Oklahoma. In that case, the court held that the trial court's failure to appoint independent counsel for the child

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113. See 10 OKLA. STAT. § 7002-3.1(A). The District Attorney is specifically charged with the responsibility of bringing civil actions against individuals pursuant to the Children's Code. *Id.* While the role of the District Attorney is crucial for enforcement of laws and protection of children, the District Attorney represents the interests of the State. Thus, while this role is vital to the child welfare system, the District Attorney does not advocate on behalf of the child in the same manner as the child's attorney.

114. Kelsey Smith-Briggs Child Protection Reform Act, H.B. 2840, 50th Leg., 2d Sess. § 3 (Okla. 2006) (enacted) (to be codified at 10 OKLA. STAT. § 7003-3.7(A)(2)(c)).

115. *Id.* (to be codified at 10 OKLA. STAT. § 7003-3.7(A)(1)(a)).

116. See generally *id.* (to be codified at 10 OKLA. STAT. § 7003-3.7(A)(1)(a) to - 3.7(A)(2)(c)) (listing appointment mechanisms and the various responsibilities of the child's attorney).

117. *Id.* (to be codified at 10 OKLA. STAT. § 7003-3.7(A)(2)(c)).

118. *Id.*

119. 1997 OK 69, 940 P.2d 216.

during an adoption proceeding constituted fundamental error.<sup>120</sup> Following a divorce between the mother and father of K.D.K., the paternal grandparents petitioned to adopt the child without the mother's consent.<sup>121</sup> At a hearing on remand from the Court of Civil Appeals, the mother asked that independent counsel be appointed for K.D.K.<sup>122</sup> Nevertheless, the court entered its decree of adoption without making the appointment.<sup>123</sup>

The Supreme Court of Oklahoma stated that failure to appoint an attorney at the adoption stage would effectively mean that a "child [would be] caught in the middle while attorneys for the parties argue from the viewpoints of their clients,"<sup>124</sup> thereby leaving the child as the only party without a voice in the adoption proceeding. Justice Lavender further stated in his concurrence that "the appointment of independent counsel for the minor is essential to protect the child's rights and interests."<sup>125</sup> Debatably, then, while *In re Adoption of K.D.K.* was a civil court case rather than a juvenile court case, the duties of the child's attorney delineated in the Oklahoma Children's Code extend into adoption proceedings. Further, the appointment of independent counsel provides a voice for the deprived child in the creation of his new family.

The attorney's duty to serve the child client throughout the adoption process is also supported by the Family Law Section of the American Bar Association's *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (Standards)*,<sup>126</sup> which were adopted by the ABA House of Delegates in February 1996.<sup>127</sup> In section D-13 of the *Standards*, the ABA states that "the child's attorney should seek to ensure continued representation of the child at all further hearings . . . that result in changes to the child's placement . . . so long as the court maintains its jurisdiction."<sup>128</sup> As already discussed, the district court's jurisdiction does not end in Oklahoma

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120. *Id.* ¶ 3, 940 P.2d at 217.

121. *Id.* ¶ 2, 940 P.2d at 217.

122. *Id.*

123. *Id.*

124. *Id.* ¶ 5, 940 P.2d at 218.

125. *Id.* ¶ 1, 940 P.2d at 218 (Lavender, J., concurring).

126. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES (1996), available at [http://www.abanet.org/family/reports/standards\\_abuse\\_neglect.pdf](http://www.abanet.org/family/reports/standards_abuse_neglect.pdf).

127. *Id.*; see REPRESENTATION OF CHILDREN IN ABUSE & NEGLECT & CUSTODY PROCEEDINGS ACT prefatory note (Nat'l Conference of Comm'rs on Unif. State Laws, Tentative Draft 2005), available at <http://www.law.upenn.edu/bll/ulc/RARCCDA/2005AMRepDraft.pdf>; Linda D. Elrod, *An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases*, 64 *FORDHAM L. REV.* 1999, 2000 (1996).

128. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES § D-13.

until a final decree of adoption is entered.<sup>129</sup> Therefore, the child's attorney may and should, according to the ABA, seek continued representation for his client throughout the adoption phase.<sup>130</sup> In the comment following section D-13, the ABA expresses the tragic reality that the child's attorney may represent the only continuity in the child's case.<sup>131</sup> Case workers, therapists, social workers, and judges may change, and change often, in the course of a deprived case.<sup>132</sup> As detailed by the ABA, the child's attorney may represent the "institutional memory of case facts and procedural history" and best serve the client's interests by remaining involved until the case reaches "an appropriate resolution."<sup>133</sup> As a result, the child's attorney may do a far better job of serving the child's best interests in an adoption proceeding by expressing the needs and interests of a child from a continuing and involved perspective.

While agreement exists as to the importance and responsibility of the attorney's role as expressed in the ABA Standards,<sup>134</sup> what is not as clear is the manner in which the attorney must represent the wishes of his client. Controversy centers on which of two models should be employed in the representation of children in juvenile court.<sup>135</sup> The paternalistic guardian ad litem approach is the traditional approach, in that the attorney advocates for the *best interests* of the child.<sup>136</sup> On the other hand, the child's wishes approach suggests advocating for the *desire* of the child, where the child is old

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129. See *supra* text accompanying note 85.

130. See STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES § D-12 (listing adoption as one issue that the child's attorney may request authority from the court to pursue).

131. *Id.* § D-13 cmt.

132. *Id.*

133. *Id.*

134. See David R. Katner, *Coming to Praise, Not to Bury, the New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 GEO. J. LEGAL ETHICS 103 (2000). Katner encourages the adoption of the new ABA standards governing the relationship between a child and his independent counsel. *Id.* at 104. Even though most statutes provide for the appointment of a guardian ad litem, children still need representation from a lawyer of their own as opposed to one who represents the child's best interests. *Id.* at 107-08. Particularly in viewing the creation of a new family, a child client may very well wish to have an impartial attorney with whom he can confide his desires in this new family arrangement.

135. Symposium, *Children's Rights in the Context of Welfare, Dependency, and the Juvenile Court*, 8 U.C. DAVIS J. JUV. L. & POL'Y 267, 272 (2004).

136. *Id.* at 272-73. "Proponents of the [best interests model] argue that the child's lawyer should advocate in juvenile court for what the lawyer determines is in the child's best interest, even if the lawyer's determination differs from the child's wishes." *Id.* at 272. Leaders in the field acknowledge that the departure really centers on the age of a child and whether children are truly able to express their wishes in a reasonable manner. *Id.* at 272-73.

enough or mature enough to make decisions for himself.<sup>137</sup> The ABA standards fail to clearly articulate which approach an attorney should take, articulating instead a hybrid approach with elements of both models.<sup>138</sup>

Where a child's attorney is to be appointed in this hybrid role, rather than as a guardian ad litem, the proposed uniform code from the National Conference of Commissioners on Uniform State Laws suggests that the attorney should represent the child's wishes.<sup>139</sup> Furthermore, where the child's attorney determines that the child lacks the capacity to make a determination, the attorney may represent the child's best interests only so long as the attorney does not take a position that is "contrary to the expressed objective of the child."<sup>140</sup> Simply put, according to the proposed uniform code, the child's attorney must advocate for the child's wishes even when the attorney does not agree with the child or believes the child's wishes do not further his best interests.<sup>141</sup> Thus, the proposed uniform code suggests a resolution of which approach the child's attorney should take in juvenile court proceedings.

In Oklahoma, it appears that the legislature has adopted the child's wishes model. Attorneys must advocate for the "*expressed* interests of the child."<sup>142</sup> Therefore, at least in Oklahoma, the attorney acts as the child's voice in determining whether a potential adoptive placement is what the child desires. Oklahoma statute, however, does not provide further input in situations where

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137. *Id.* at 272-73. The child's wishes model is premised on two principles: respect for a child's autonomy and doubt over whether an attorney is truly able to decide what is best for a child. *Id.* at 272. Proponents of this model, however, agree that where a child is unable to direct his attorney, the attorney may provide a best interests argument. *Id.* at 272-73; *see also* REPRESENTATION OF CHILDREN IN ABUSE & NEGLECT & CUSTODY PROCEEDINGS ACT § 12 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws, Tentative Draft 2005), *available at* <http://www.law.upenn.edu/bll/ulc/RARCCDA/2005AMRepDraft.pdf> (providing direction for attorneys representing the child's wishes when the child lacks capacity to make a reasonable decision).

138. REPRESENTATION OF CHILDREN IN ABUSE & NEGLECT & CUSTODY PROCEEDINGS ACT prefatory note; Katner, *supra* note 134, at 123-24. Under the ABA standards, "a lawyer should advocate the child's articulated preference, but if a child will not or does not express a preference, the lawyer should advocate the child's legal interests determined by objective criteria." REPRESENTATION OF CHILDREN IN ABUSE & NEGLECT & CUSTODY PROCEEDINGS ACT prefatory note. This suggests that the lawyer should first perform his duties according to the child's wishes model and then implement the best interests approach where the child cannot express his or her interests.

139. REPRESENTATION OF CHILDREN IN ABUSE & NEGLECT & CUSTODY PROCEEDINGS ACT §§ 4(b), 12(c)-(e).

140. *Id.* § 12 cmt.

141. *Id.*

142. Kelsey Smith-Briggs Child Protection Reform Act, H.B. 2840, 50th Leg., 2d Sess. § 3 (Okla. 2006) (enacted) (emphasis added) (to be codified at 10 OKLA. STAT. § 7003-3.7(A)(2)(c)).

the child is incapable of providing the attorney with his or her interests. In such situations, the proposed uniform code arguably provides the best alternative for Oklahoma practitioners. Where a child is too young or too immature to state a preference, the child's attorney should have the ability to express what he feels is in his client's best interests or, in the alternative, remain silent.

In short, the *In re Adoption of K.D.K.* court placed great emphasis on providing a voice for the child in adoption proceedings. Consequently, the new ABA standards, the proposed uniform code, and Oklahoma's statutory provisions provide a construct by which the child can voice his or her own interests regarding adoption via the child's attorney. Where the judge must provide judicial oversight of adoption proceedings, this construct provides further input in the potential success of the placement based on the child's willingness and desire to join a proposed family. After all, a deprived child may prove far better at voicing his or her own concerns regarding a potential adoptive placement than any well-intentioned adult.

*B. The Guardian Ad Litem: Speaking on Behalf of the Child's Best Interests*

Unlike the role played by that of the child's attorney, the guardian ad litem (GAL) advocates for the child's best interests as opposed to the child's desires.<sup>143</sup> Given the clear statutory directive that the child's attorney must represent the child's desires,<sup>144</sup> the child's best interests may not be presented to the court if the child is old enough or mature enough to direct his attorney as to his wishes. This could leave the equally important aspect of presenting best interests in the adoption proceeding to other parties such as the Department or the juvenile court judge herself, both of whom must consider rules, policy, and law in addition to the interests of the child. Thus, the appointment of a GAL ensures that the child is served through the representation of both the child's express wishes and the child's best interests, with best interests being addressed by someone whose only responsibility is to represent those interests alone.

The Oklahoma Children's Code states unequivocally that, when requested,<sup>145</sup> a guardian ad litem "shall be appointed to objectively advocate on behalf of the child and . . . to investigate all matters concerning the *best*

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143. *Id.* (to be codified at 10 OKLA. STAT. § 7003-3.7(B)(4)(b)).

144. *See supra* text accompanying note 142.

145. Kelsey Smith-Briggs Child Protection Reform Act, H.B. 2840, at § 3 (enacted) (to be codified at 10 OKLA. STAT. § 7003-3.7(B)(2)). Per statute, the child, the child's attorney, the Department of Human Services, a licensed child-placing agency, or any other party to the case may request the appointment of a guardian ad litem. *Id.*

interests of the child.”<sup>146</sup> Within this broad role, the GAL has specific responsibilities, including the review of documents, reports, records and other information relevant to the case, as well as the ability to interview any person with relevant knowledge concerning the case or the child.<sup>147</sup> Crucial to a GAL’s role is the additional ability to meet with and observe the child,<sup>148</sup> a role that court personnel, a social worker, or the appointed attorney may not have sufficient time to fulfill.<sup>149</sup> Further, the Code specifically states that the guardian ad litem shall monitor the child’s best interests throughout *any* judicial proceeding and provide written reports that include recommendations as to these best interests.<sup>150</sup> Thus, like that of the child’s attorney, the role of the GAL arguably extends into the adoption proceeding.

Although the guardian ad litem is appointed as a best interests attorney,<sup>151</sup> the role of advocating best interests may be fulfilled by a community volunteer.<sup>152</sup> Thus, in Oklahoma, where a court-appointed special advocate program is available, the legislature determined that priority shall be given to the CASA program to serve as guardian ad litem.<sup>153</sup> Additionally, the terms “guardian ad litem” and “CASA” have the same force and effect.<sup>154</sup> As opposed to best interests attorneys, CASAs are volunteer advocates from the community,<sup>155</sup> and may represent the most significant return to the informality of the historic juvenile court.

The CASA program itself, however, is a relatively new addition to child welfare. Frustrated with the lack of available information about the children whose futures he was determining, Superior Court Judge David W. Soukup launched a pilot program out of Seattle, Washington, in 1977.<sup>156</sup> Following the passage of the Adoption Assistance and Child Welfare Act of 1980, with its emphasis on permanent placement, the need for CASA advocates

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146. *Id.* (emphasis added) (to be codified at 10 OKLA. STAT. § 7003-3.7(B)(4)).

147. *Id.* (to be codified at 10 OKLA. STAT. § 7003-3.7(B)(4)(a)).

148. *Id.*

149. Davin Youngclarke et al., *A Systemic Review of the Impact of Court Appointed Special Advocates*, 5 J. CENTER FOR FAM. CHILD. & CTS. 109, 109 (2004), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/JVol5-Youngclarke.pdf>.

150. Kelsey Smith-Briggs Child Protection Reform Act, H.B. 2840, at § 3 (enacted) (to be codified at 10 OKLA. STAT. § 7003-3.7(B)(4)(d) to -3.7(B)(4)(e)).

151. REPRESENTATION OF CHILDREN IN ABUSE & NEGLECT & CUSTODY PROCEEDINGS ACT § 5 cmt. (Nat’l Conference of Comm’rs on Unif. State Laws, Tentative Draft 2005), available at <http://www.law.upenn.edu/bll/ulc/RARCCDA/2005AMRepDraft.pdf>.

152. Kelsey Smith-Briggs Child Protection Reform Act, H.B. 2840, at § 3 (enacted) (to be codified at 10 OKLA. STAT. § 7003-3.7(C)(1)).

153. *Id.*

154. *Id.* (to be codified at 10 OKLA. STAT. § 7003-3.7(C)(3)).

155. Youngclarke et al., *supra* note 149, at 109-10.

156. *Id.* at 110.

increased.<sup>157</sup> As a result, Soukup's pilot program grew from 110 volunteers advocating for 498 children to a national initiative with 930 CASA programs — at least one in every state, plus D.C. and the Virgin Islands.<sup>158</sup> Approximately 70,000 volunteers advocated on behalf of the best interests of an estimated 280,000 children in 2002.<sup>159</sup> CASA entered Oklahoma in 1984 and has grown to twenty-three independent programs within the state.<sup>160</sup> As evidenced by CASA's fast growth, and the willingness of volunteers to participate, the community has not lost its fervor in protecting the best interests of children.

Coupled with the advocacy of the child's attorney, the GAL or the CASA can achieve greater stability for deprived children via their in-depth knowledge of the child and his or her needs.<sup>161</sup> Perhaps even more so than a best interests attorney, who may have a high caseload, CASA volunteers have the time to get to know the child to an extent not possible by professionals.<sup>162</sup> As a result, the CASA has more information regarding the child and his or her needs, and can provide insight into the child that others may miss.<sup>163</sup> Given the judge's need for a reviewable record in providing judicial oversight in adoption decisions,<sup>164</sup> the information provided by a CASA may complete the picture as to a child's needs in finding a permanent adoptive placement.

In fact, current research indicates that a CASA's effectiveness peaks during the adoption phase. In *A Systematic Review of the Impact of Court Appointed Special Advocates* published in the *Journal of the Center for Families, Children & the Courts*, researchers found that CASAs provided continuity of representation and documentation.<sup>165</sup> Further, researchers indicated that such continuity was particularly important given the high attrition rate among child welfare social workers.<sup>166</sup> Of all outcomes studied, the data indicated that CASAs had the greatest effect in the areas of adoption and reentry into the

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157. *Id.* See generally Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.).

158. Youngclarke et al., *supra* note 149, at 110-11.

159. *Id.* at 111.

160. Oklahoma CASA, About CASA, <http://www.oklahomacasa.org/index.php?page=about> (last visited June 10, 2006).

161. ABA CTR. ON CHILDREN & THE LAW, WHAT I WISH I'D LEARNED IN LAW SCHOOL: SOCIAL SCIENCE RESEARCH FOR CHILDREN'S ATTORNEYS 94 (1997); see also Symposium, *supra* note 135, at 270 (discussing the importance of both the CASA and the child's attorney).

162. Symposium, *supra* note 135, at 270.

163. *Id.*

164. See *supra* text accompanying note 111.

165. Youngclarke et al., *supra* note 149, at 110.

166. *Id.* at 121.

child welfare system.<sup>167</sup> Particularly, children with CASAs were more likely to be adopted, and were less likely by fifty percent to reenter foster care once adopted.<sup>168</sup> In addition to this finding, researchers stressed that statistical analysis showed such success despite the fact that CASAs are traditionally assigned to tougher cases in which children have been more severely abused.<sup>169</sup> Clearly, with this data in hand, the importance of the CASA at the adoption stage cannot be overstated, as the role of the CASA, like that of the child's attorney, extends into this phase of a deprived child's case.

Moreover, given the high attrition rate of child welfare social workers, the input of a CASA, with knowledge pertinent to a child's needs, should not only be welcomed but sought in the final stages of a deprived case. According to the statistics kept by the Oklahoma County CASA Program between the years 2001 and 2004, approximately 82% of the 411 children who received aid from a CASA had the same CASA throughout their adoption experience, whereas only 51% of those children had the same DHS worker.<sup>170</sup> Thirteen percent had four or more DHS workers assigned during this time.<sup>171</sup> Furthermore, per DHS policy, at adoption, a child's case is transferred to the adoption unit where the adoption worker works in tandem with the child's permanency worker,<sup>172</sup> the social worker charged with the responsibility of following the child's case while parental rights are intact. Included in the responsibilities of the adoption worker are selection and preparation of an adoptive placement.<sup>173</sup> Consequently, these duties may fall on someone with little personal knowledge of the child. As a result, the point at which the child is preparing to reenter the world with a new and different family is arguably the point at which the CASA is needed the most.<sup>174</sup>

Thus, the duties assigned to a GAL, which may be fulfilled by a CASA, may provide the greatest input into the child's needs and should extend well into the adoption phase. The responsibility to know the child and provide

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167. *Id.* at 121-22.

168. *Id.* at 122.

169. *Id.*

170. Okla. County CASA Program, Child Assignment Outcome Measures 1/1/2001 to 12/31/2004 (unpublished manuscript on file with author). CASA Case Managers are responsible for inputting information regarding the child's case into a statistical database created by the National CASA Program, which then organizes the information according to outcome measures.

171. *Id.*

172. OKLA. ADMIN. CODE § 340:75-15-8 (Supp. 2005).

173. *Id.*

174. See ABA CTR. ON CHILDREN & THE LAW, *supra* note 161, at 129 ("Children . . . who have dealt with several different workers during the adoption process, have higher rates of adoption disruption.").

input to the juvenile court regarding the child's best interests has been shown to positively impact the child's adoptive chances. Accordingly, the GAL's or CASA's information, coupled with that of the child's attorney, can begin to provide the court with a more complete picture of the child and his or her own particular needs and desires, which may not be fully articulated by the social worker alone.

*C. The Foster Parents: Informing the Court as to the Whole Child*

Completing the picture of the needs of the child, the foster parents may have the best information of all parties. Acting as the child's surrogate parent, the foster parents arguably know the child on a level unparalleled by other entities in the juvenile court process. Responsible for housing, feeding, and caring for the child, the foster parents have the ability to observe the child in a home setting, a setting the child will be asked to permanently enter in the creation of the child's adoptive family. As a result, the information provided to the juvenile court by the foster parents should be given considerable weight.

The importance of the information provided by foster parents is recognized in the Oklahoma Children's Code. Reflective of the weight to be given a foster parent's input, foster parents have the right to receive notice of hearings,<sup>175</sup> and an equivalent right to be heard.<sup>176</sup> Further, foster parents can be considered eligible to adopt a foster child when that child enters permanent custody,<sup>177</sup> the stage at which parental rights are terminated and the child is deemed eligible for adoption.<sup>178</sup> If that child has resided with the foster parents for at least one year, great weight is to be given in considering those parents for adoption.<sup>179</sup> Additionally, in 2005, the legislature took further steps to ensure that foster parents would be provided ample consideration for adoption by amending the language of the statute to read that a foster parent "*shall* be considered eligible to adopt the child," rather than "*may* be considered eligible to adopt."<sup>180</sup> In changing the emphasis of the statutory language, the legislature determined that foster parents must be afforded heightened

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175. 10 OKLA. STAT. § 7003-5.6d(C) (Supp. 2005).

176. *Id.* § 7003-5.6(D).

177. *Id.* § 7003-5.6h(A).

178. *See supra* note 73 and accompanying text.

179. 10 OKLA. STAT. § 7003-5.6h(B).

180. *See* Act of Apr. 19, 2005, ch. 75, § 1, 2005 Okla. Sess. Laws 373 (codified at 10 OKLA. STAT. § 7003-5.6h (Supp. 2005)). *Compare* 10 OKLA. STAT. § 7003-5.6h (Supp. 2005) (emphasis added) *with* 10 OKLA. STAT. § 7003-5.6h (2001) (amended 2005) (emphasis added). Effective November 1, 2006, foster parents will also be entitled to mediate complaints concerning their rights based on the Department's actions or inaction. *See* Kelsey Smith-Briggs Child Protection Reform Act, H.B. 2840, 50th Leg., 2d Sess. § 2 (Okla. 2006) (enacted) (to be codified at 10 OKLA. STAT. § 601.6(B)(3)).

consideration in the first instance and a greater chance of the child's continuation as a permanent member of the foster family.

Clearly, Oklahoma's statutes suggest that the relationship between foster parent and child is so important that it merits increased support once the child is deemed in permanent custody. While supporting the continuation of a positive parental relationship should be encouraged, foster parents, where unable to adopt the child themselves, should also be encouraged to provide input as to what home will best support the child and make the most successful transition into permanency. Case law has provided support for the family relationship between foster parents and child, as well as the need for foster parent input in juvenile court proceedings.

In *Smith v. Organization of Foster Families*,<sup>181</sup> the U.S. Supreme Court indicated in dicta that foster parents have a limited constitutional liberty interest in the foster family relationship.<sup>182</sup> The Court assumed for purposes of its holding that foster parents did, in fact, have such an interest.<sup>183</sup> In *Smith*, foster parents and a foster parent organization brought suit against New York for the manner in which foster children were removed from the foster home.<sup>184</sup> Although foster parents were given the task of daily supervision of the children customary of legal custody, the foster parents were recognized as not having full authority as a custodian.<sup>185</sup> As a result, New York reserved the discretion to move foster children at will.<sup>186</sup> In attempting to resolve the issue of procedural due process,<sup>187</sup> the Court chose to examine the familial relationship between foster parent and child.<sup>188</sup> In discussing this relationship, the Court analogized the relationship between foster parents and child to a marital relationship, reasoning that, although the two relationships were not determined by blood, they were yet still family members.<sup>189</sup> Further, the Court stated that "no one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship."<sup>190</sup> Consequently, the ties between foster parent and child may, in some cases, be "as close as those

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181. 431 U.S. 816 (1977).

182. *Id.* at 842.

183. *Id.* at 847.

184. *Id.* at 819-20.

185. *Id.* at 827.

186. *Id.* at 829.

187. *Id.* at 838.

188. *Id.* at 842.

189. *Id.* at 843.

190. *Id.* at 844.

existing in biological families.”<sup>191</sup> Thus, the Court implicitly recognized that a liberty interest did exist in the integrity of the foster family unit.<sup>192</sup>

This recognition was emphasized by the Tenth Circuit in *Spielman v. Hildebrand*.<sup>193</sup> Relying on *Smith*, the Tenth Circuit noted that “neither biological nor adoptive ties are essential for developing a protected family relationship.”<sup>194</sup> In *Spielman*, the Spielmans brought a claim against the Kansas Department of Social and Rehabilitation Services (Kansas Department) because of the removal of their foster daughter, even though the Kansas Department told the foster family to treat the child as their own.<sup>195</sup> Despite the subsequent return and adoption of the foster child by the Spielmans,<sup>196</sup> the Spielmans brought a due process claim against the Kansas Department for removing the child without a prior hearing.<sup>197</sup> Like the *Smith* Court, the Tenth Circuit examined the private interest between foster parents and foster child before determining whether a due process violation took place.<sup>198</sup> Although the court noted that the status of preadoption may, in fact, confer a more significant familial relationship, the court recognized the emotional ties that exist between foster parents and the children in their care.<sup>199</sup> Thus, federal law suggests that the relationship between foster parent and child equates with that of blood families and should be treated as such.

Given the recognition in statute and case law of the family ties between foster parent and child, and the great weight placed on that relationship, a foster parent’s input should logically extend into adoptive placement decisions. In *In re B.C.*,<sup>200</sup> the Supreme Court of Oklahoma addressed the right of foster parents and parents in loco parentis, persons in the place of parents, to intervene in adoption proceedings involving foster children.<sup>201</sup> While the court held that foster parents should be allowed to intervene as a matter of right, the court additionally concluded that they should “participate as parties in *all* further proceedings.”<sup>202</sup> In *In re B.C.*, the trial court relinquished jurisdiction in a juvenile proceeding so that the former foster parents of B.C. could adopt

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191. *Id.* at 845 n.52.

192. *Id.* at 842.

193. 873 F.2d 1377 (10th Cir. 1989).

194. *Id.* at 1384.

195. *Id.* at 1378.

196. *Id.* at 1380.

197. *Id.*

198. *Id.* at 1383.

199. *Id.* at 1384.

200. 1988 OK 4, 749 P.2d 542.

201. *Id.* ¶ 20, 749 P.2d at 545.

202. *Id.* (emphasis added).

the child.<sup>203</sup> Nevertheless, the trial court denied the petition for leave to intervene filed by the current foster parents, although B.C. had been in their home four years.<sup>204</sup> On remand, the Supreme Court of Oklahoma ruled that the current foster parents should be allowed to intervene.<sup>205</sup> Most importantly, however, the court relied on its holding in *Griffis*, stating that a foster parent's "intervention will better enable the trial court to have before it 'all the evidence concerning the child' in making its final decision."<sup>206</sup> Thus, apart from a foster parent's unequivocal right to be considered as an adoptive placement, a foster parent also has, and must have, the ability to speak on behalf of the child's best interests during the adoption phase.

Where a foster family relationship accords with that of a biological relationship, foster parents have been recognized as performing the role of natural parents. As a result, foster parents have information pertinent to the child which only a parent can know: important events and dates, favorite meals, and a child's ability to cope with stress and changing situations — all of which factor into adoptive placements. The modification of Oklahoma statutes applicable to the rights of foster parents demonstrates that this relationship is recognized by legislators and their constituents. Acknowledging the importance of the foster family, federal and state case law demonstrate the deference and consideration afforded to the emotional ties resulting from this relationship. Where a foster relationship does not lend itself to permanency via adoption, the Supreme Court of Oklahoma has nevertheless recognized the importance of according the foster parents a voice in all proceedings, inclusive of adoption proceedings. Permitting the input of foster parents indicates that the knowledge possessed by these individuals will transfer to the district court in its review of potential placements and, hopefully, to the placement itself.

*V. Room to Grow: Expanding Adoption Placement Dialogue  
to Include Other Parties to the Case*

As the child's attorney, guardian ad litem, and foster parents have information specific to the child's desires and needs, their input is essential in making a successful adoptive placement for the child. While these entities have a place in the current juvenile court system, their position as it relates to the creation of an adoptive family could be strengthened in a number of areas:

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203. *Id.* ¶ 1, 749 P.2d at 543.

204. *Id.* ¶¶ 1, 3, 749 P.2d at 543.

205. *Id.* ¶ 20, 749 P.2d at 545.

206. *Id.* (quoting *State ex rel. Dep't of Insts., Soc. & Rehabilitative Servs. v. Griffis*, 1975 OK 164, ¶ 26, 545 P.2d 763, 768).

safeguards that ensure their continued presence in the adoption phase, recognition of their impact, and participation in criteria staffings. First and foremost, however, a return to the inclusiveness of the historic juvenile court would assist in creating an environment where all persons with information relevant to the child can play a part.

*A. Recapturing the Past: Inclusive Dialogue and an Informal Environment for Adoption Decisions*

As discussed earlier in this comment, one of the most striking aspects of the historic juvenile court was the strong presence of the community.<sup>207</sup> Apart from encouraging the strengthening of social work and the creation of a juvenile court itself, the community, both nationally and here in Oklahoma, laid the groundwork for the burgeoning court system.<sup>208</sup> With the rise of the professional social worker, however, the community was displaced by trained and degreed court personnel.<sup>209</sup> While this shift in decision-making authority has debatably instituted greater, more formalized protections,<sup>210</sup> this shift should not generate an exclusive juvenile court system that gives little regard to the input of those who know the child well.

Quite the contrary, great importance was historically placed on an inclusive court system by influential system reformers who, despite their advocacy for a professionalized system, felt that the community and system professionals should work together. Homer Folks, for example, was one of the foremost advocates of the professionalization of social work during a period of sweeping child welfare reform.<sup>211</sup> Regardless of Folk's support for professionalization, Folks declared that, although "it might seem at first thought that the development of professionals was opposed to the development of volunteer work," quite the opposite was true.<sup>212</sup> Folks stated that professionals and volunteers were each a necessity in social welfare systems and that "experience has proven . . . that each group is necessary to and develops with the other."<sup>213</sup> Furthermore, Folks stressed that one of the primary duties of professionals was the inspiration and edification of volunteers such that "development, progress, growth, [i.e.,] a 'move upon

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207. *See supra* note 26 and accompanying text (noting the public interest that sparked the creation of the first juvenile court).

208. *See supra* text accompanying notes 26 and 57.

209. *See supra* text accompanying note 39.

210. *See supra* note 55 and accompanying text.

211. *See supra* notes 41-43 and accompanying text.

212. FOLKS, *supra* note 41, at 29.

213. *Id.* at 30.

conditions,”” would be evidenced in societal concerns.<sup>214</sup> In fact, Folks seemed to suggest that the necessity of both professionals and volunteers was a given; the only “puzzling” question that remained was “just what relations between the [volunteer] workers and the [professional] workers [would] secure the largest return from the work of both.”<sup>215</sup> Thus, as a leader of system reform, Folks suggested that professionalization should work to strengthen community involvement, not to displace it. Nevertheless, historic proposals for system reform appear to have been accepted in a piecemeal fashion whereby some, but not all, changes have been adopted, thereby creating an exclusive system at odds with its predecessor.

The need for a cohesive child welfare system wherein all entities work together to ultimately improve the community is as relevant today as when Folks made his proposals for system reform. Accordingly, the CASA program and recruitment of foster parents are encouraging signs that community involvement is on the rise. The staggering growth of the CASA program itself, discussed above,<sup>216</sup> provides such an indication, and may represent a significant return to community involvement in adoption decisions reminiscent of the pre-professionalization juvenile court. Further, the input provided by foster parents lends support for the needs of a foster child, and also provides a voice to the neighborhoods that will ultimately come to accept a foster child as a permanent member of their community. As such, the creation of an inclusive environment where such individuals, to include the child’s attorney, can represent deprived children throughout the entire proceeding harkens back to a time when the court could best be described as a fluid environment in which the exchange of ideas was free-flowing. As previously examined, this informality was thought to be an ideal means by which the child could be protected.<sup>217</sup>

Of course, this environment was largely attributable to the impact of the historic juvenile court judge. As previously noted, the judge was seen as a great fount of wisdom who set the tone and pace for the court.<sup>218</sup> In Timothy Hurley’s book *Origin of the Illinois Juvenile Court Law*, written eight years after the first juvenile court act was passed, the judge was depicted as making inquiries and generally permitting the free exchange of ideas.<sup>219</sup> In such an

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214. *Id.*

215. *Id.*

216. *See supra* notes 156-60 and accompanying text.

217. *See supra* notes 28-31 and accompanying text.

218. *See supra* text accompanying note 34.

219. *See generally* HURLEY, *supra* note 24, at 80-83. Hurley described a typical day in deprived court, which generally depicts the judge conferring with parents, workers, and community members in the disposition of each case. *Id.*

environment, parents and neighbors were free to talk openly with the judge as he passed his “wand of power” over the child.<sup>220</sup> As professionalization lessened the impact of the community, it also displaced the role of the juvenile court judge and his ability to oversee adoption decisions.<sup>221</sup> Thus, with the shift to reinvigorate the role of the court in adoption placement decisions, the juvenile court judge could once again shape the tone and pace of adoption dialogue. At a minimum, judicial encouragement and support for the participation of the child’s attorney, GAL, and foster parents would promulgate inclusive dialogue and create a holistic environment, akin to that envisioned by system reformers, wherein the input of all parties would ensure that the best interests of the child are truly paramount.

*B. Legislated Inclusiveness: Statutory Amendment Recognizing the Court’s Oversight of Adoption Decisions and Power to Construct a Cooperative Environment*

Despite the need for a judge-led return to the inclusive tone and pace of the historic adoption process, only incremental steps have occurred in reestablishing the role of the judge in adoption placement decisions.<sup>222</sup> Whereas the *Colclazier* court restored a degree of judicial oversight to placement decisions, the court was clear that this oversight function did not attach to adoption placements.<sup>223</sup> Building on this recognition of judicial authority, however, the *In re Adoption of D.D.B.* court emphasized the district judge’s duty to oversee these decisions.<sup>224</sup> The court did so by extrapolating duties and responsibilities from statutes that were suggestive of judicial oversight during the adoption phase.<sup>225</sup> Nevertheless, as was pointed out in the dissents to *Colclazier*, the statutes would seem to suggest that the Department is vested with sole authority to determine placements, including the authority to oversee them.<sup>226</sup> As a result, a statutory amendment recognizing the function of the juvenile court judge in decisions affecting adoption placements would finally resolve this source of conflict between the juvenile court and the Department, while also setting the stage for truly productive dialogue between all parties.<sup>227</sup>

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220. See *supra* text accompanying note 35.

221. See *State ex rel. Dep’t of Human Servs. v. Colclazier*, 1997 OK 134, ¶ 10, 950 P.2d 824, 828; see also *supra* notes 70-71 and accompanying text.

222. See *supra* Part III.

223. See *supra* notes 73, 80-81 and accompanying text.

224. See *supra* note 107 and accompanying text.

225. See *supra* text accompanying notes 103-04.

226. See *supra* note 82 and accompanying text.

227. Recent amendments to section 7003-6.2(C)(1) of title 10 may hinder rather than help

The inclusion of a broad-based and loosely defined statute recognizing the oversight capacity of the juvenile court would reflect the advance in case law and statute suggestive of this judicial function. One year following the *Colclazier* opinion, the state legislature amended the Oklahoma Children's Code to extend judicial review over adoption placement decisions involving foster parents.<sup>228</sup> These amendments emphasized the role of the court, as opposed to the Department, in determining whether a foster parent could be considered for adoption.<sup>229</sup> As discussed earlier in this comment, this same statute was also recently amended to provide for heightened protections for foster parents interested in adoption.<sup>230</sup> Nevertheless, the oversight capacity of these determinations was not removed from the court. Thus, at least in the case of foster parents, judicial oversight over adoption placement decisions has expanded. Consequently, a statute within the Oklahoma Children's Code expressing the ability of the district court to review *all* placement determinations according to the best interests standard would be a natural step in recognizing judicial oversight where specific legislative amendments affecting adoption placements have yet to be made. Furthermore, a court's ability to review permanent or long-term placements would complement the court's current ability to review certain temporary placements.

Despite language suggestive of the Department's sole authority to make placements, the court has been granted review authority over several placement determinations. Per section 7003-7.1(C)(1), the placement of any child in DHS custody shall be determined by the Department.<sup>231</sup> Lacking from this preliminary statement is any indication of judicial authority in these determinations. As examined by the *Colclazier* court, however, the following two sentences of the statute provide direction as to the role of the court in two

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in clarifying the authority and the role of the court. Effective November 1, 2006, this section will read: "If the child is placed in the custody of the Department, the court may not direct the Department to place the child in a specific home or placement." Kelsey Smith-Briggs Child Protection Reform Act, H.B. 2840, 50th Leg., 2d Sess. § 5 (Okla. 2006) (enacted) (to be codified at 10 OKLA. STAT. § 7003-6.2(C)(1)). Although the court is only instructed that it cannot make a placement, it says nothing of the court's ability to oversee or suggest an adoptive placement. See *supra* note 80 and accompanying text. Nevertheless, some may suggest that this amendment acts to circumscribe a court's review authority over placements, in general and at the adoption phase; this interpretation would represent a significant step back from reestablishing the important judicial oversight function of the court.

228. Oklahoma FOCUS in Foster Care Act, ch. 414, § 18, 1998 Okla. Sess. Laws 2069-70 (codified as amended at 10 OKLA. STAT. § 7003-5.6h (Supp. 2005)) (adding a new statutory section to emphasize the role of the court in foster parent adoptions).

229. *Id.*; see also 10 OKLA. STAT. § 7003-5.6h(B) to -5.6h(C) (Supp. 2005).

230. See *supra* note 180 and accompanying text.

231. 10 OKLA. STAT. § 7003-7.1(C)(1).

placement determinations.<sup>232</sup> First, the statute indicates that prior approval of placement by the court is required when the child is to be returned to his or her biological parents.<sup>233</sup> With the purpose of court involvement being to protect an abused or neglected child,<sup>234</sup> it is understandable that judicial oversight would attach to any placement returning a child to the home which constituted a detrimental risk to the child. Second, apart from this instance of judicial oversight, multiple changes in placement must also occur within parameters placed on the Department via statute.<sup>235</sup> When a child is moved multiple times between court dates, the court must approve those placement changes as well as determine their necessity,<sup>236</sup> as the potential for a detrimental impact on an already fragile child is high.

Thus, the Oklahoma Children's Code currently recognizes judicial oversight of temporary placement decisions but has largely ignored oversight of permanent placements, thereby leaving decisions having significant long-term effects on a child outside of judicial scrutiny. As a result, a statutory amendment predicated on a best interests standard, as suggested above, would ensure that the district court may oversee an adoption if concerns arise, but would not be required to do so in every case. Clearly, judicial oversight is warranted when returning a child to his biological home or when multiple moves occur between court dates. When permanent placement is involved, however, judicial oversight is also imperative.

In addition, a loosely-defined statute granting review authority to district courts would provide a mechanism for individualizing a particular child's case and adoption. Whereas the Department advocates on behalf of the best interests of the child within the confines of Department policy,<sup>237</sup> the child's attorney, guardian ad litem, and foster parents advocate on behalf of the individual child alone. Were a court required to make a determination involving the best interests of the child during the adoption process, the court would need information pertinent to the desires and needs, fears and frustrations of the individual child. This information can only be relayed by those who know the child well.<sup>238</sup> And, as was examined earlier, complete

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232. State *ex rel.* Dep't of Human Servs. v. Colclazier, 1997 OK 134, ¶ 8, 950 P.2d 824, 827.

233. 10 OKLA. STAT. § 7003-7.1(C)(1).

234. See 10 OKLA. STAT. § 7003-1.1(A)(1) to -1.1(A)(2) (2001) (noting that reports concerning the alleged abuse or neglect of a child initiate the process of court intervention).

235. 10 OKLA. STAT. § 7003-7.1(C)(1) (Supp. 2005).

236. 10 OKLA. STAT. § 7003-5.4a(B) (2001).

237. Cf. Roger H. Stuart, Okla. County Special Judge, Address for Oklahoma Lawyers for Children: Top-Down Decision-Making 2 (transcript on file with author) (suggesting that the needs of deprived children and their families are "predetermined and . . . shrouded by the mysteries of the bureaucratic [process]" such that individuality can be lost within that process).

238. *Id.* at 3. Judge Stuart specifically states that "tending to the needs of deprived children

knowledge of the individual child can only be accomplished via the combined information of the Department, the child's attorney, the GAL, and the foster parents.<sup>239</sup> Thus, a statute recognizing judicial oversight would empower a court to shape the decision-making process for each child according to the child's individual needs, thereby encouraging inclusive dialogue between all parties. Before such dialogue can occur, however, the status of the individual parties must be recognized in tandem with the review authority of the court.

*C. Recognition that the Roles of the Child's Attorney and Guardian Ad Litem Continue into Adoption to the Same Extent Recognized for Foster Parents*

Although statute and case law have recognized the continued weight of the foster parents' input in the adoption placement decision, as examined earlier,<sup>240</sup> the same recognition for the child's attorney and the guardian ad litem has not been articulated. In fact, the statutory provisions governing the duties of the child's attorney and the GAL are complicated by the existence of two codes governing adoption, the Children's Code and the Adoption Code, rather than a single, unified code applicable to deprived children alone.<sup>241</sup> As a result, a statutory provision clarifying the continuing responsibility of both the child's attorney and the GAL, like a statute recognizing the role of the court, would ensure their ability to advocate on behalf of the child during all phases of a deprived case, including adoption.

Despite the existence of two codes governing adoption, the duties of both the child's attorney and the GAL are governed by the Children's Code. Section 7003-3.7(E) of that Code, applicable to the duties of the child's attorney and the GAL, states specifically that the provisions of that Code do not apply to adoptions not involving deprived children.<sup>242</sup> Rather, purely private adoptions in which the interests of a child do not require public action via the juvenile court shall be governed by the Adoption Code alone.<sup>243</sup> Conversely, then, the provisions of the Children's Code applicable to the duties of the child's attorney and the GAL would continue so long as the child remains a deprived child. Consequently, the plain language of section 7003-3.7(E) would suggest that the Children's Code is the appropriate code for

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requires specific knowledge of the individuals involved in the case." *Id.*

239. *See supra* Part IV.

240. *See supra* Part IV.C.

241. *See supra* note 54 and accompanying text.

242. Kelsey Smith-Briggs Child Protection Reform Act, H.B. 2840, 50th Leg., 2d Sess. § 3 (Okla. 2006) (enacted) (to be codified at 10 OKLA. STAT. § 7003-3.7(E)).

243. *Id.*

determining the roles played by the child's attorney and the GAL throughout the adoption process.

Nevertheless, the language pertinent to the duties of the child's attorney and the GAL do not specify whether those roles are dependent on the status of the child or the nature of the proceeding. In addressing the duties of the child's attorney, the Children's Code plainly states that an attorney shall be appointed to represent the child, without reference to the status of the child as simply deprived or permanent custody.<sup>244</sup> Likewise, the GAL is merely instructed to "objectively advocate on behalf of the *child*."<sup>245</sup> As to the nature of the proceeding, the child's attorney must participate in proceedings where appropriate,<sup>246</sup> whereas the GAL must monitor the child's best interests "throughout *any judicial proceeding*."<sup>247</sup> Nothing indicates that the role of the child's attorney or the GAL ends once a child is placed in DHS permanent custody. Quite the contrary, the statute would suggest that these roles continue into adoption based on the reference to both the child's status and the proceeding. Thus, the language used to characterize the roles of the child's attorney and the GAL suggest that these roles continue so long as necessary to ensure that the best interests of the child are served.

Despite the generalized nature of the statutory language, an amendment clarifying the continuing role of both the child's attorney and the GAL would ensure that these parties could provide input as to the needs of the child during adoption. Just as the oversight function of the court has been perceived to terminate at permanent custody, the continued presence of the child's attorney and the GAL could be perceived to terminate as well. After all, if the court is not empowered to oversee an adoption placement, it would make little sense that other parties would continue to provide input during this phase. Further, the language used to describe the role of the GAL in *monitoring* best interests does not suggest active involvement on the part of that entity.<sup>248</sup> Thus, like an amendment specifying a court's power to review any decision based on best interests, a statute authorizing the continued input of the child's attorney and the GAL until jurisdiction of the case terminates would ensure that these parties, who know the individual wishes and needs of the child, could continue to represent them.

Recent statutory amendments nearly ensure the continued involvement of these entities during adoption. Effective November 1, 2006, section 7003-6.2A(A) of the Oklahoma Children's Code will read:

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244. *Id.* (to be codified at 10 OKLA. STAT. § 7003-3.7(A)(2)(a)).

245. *Id.* (emphasis added) (to be codified at 10 OKLA. STAT. § 7003-3.7(B)(4)).

246. *Id.* (to be codified at 10 OKLA. STAT. § 7003-3.7(A)(2)(c)).

247. *Id.* (emphasis added) (to be codified at 10 OKLA. STAT. § 7003-3.7(B)(4)(d)).

248. *Id.*

At any hearing pursuant to the provisions of the Oklahoma Children's Code for the purpose of determining the placement of a child[,] . . . the court shall provide an opportunity to a representative of the Department of Human Services, the present foster parent, *the guardian ad litem and the child*, if of sufficient age as determined by the court, to present sworn testimony regarding the placement of the child . . . .<sup>249</sup>

In addition to the Department and the foster parent, both the GAL and the child's attorney, as the child's voice in court, will be permitted to testify regarding placements.<sup>250</sup> As discussed previously, this generalized language also suggests active participation of these entities in placement decisions; nevertheless, specific reference to adoption placements would foreclose any suggestion that these entities operate from an inactive perspective during this phase.<sup>251</sup> Further, the ability to present sworn testimony does little to ensure that an adoption placement is the best possible match for a child if that testimony is not accompanied by a corresponding ability to work with other system professionals beforehand.

In summary, consistent with Oklahoma case law that has clearly expressed the necessity of a foster parent's input at adoption,<sup>252</sup> this same safeguard should be instituted for the child's attorney and the GAL. Further, as the oversight capacity of the court has expanded,<sup>253</sup> the judge should be empowered to review Department decisions according to the best interests of the child. Nevertheless, as indicated above, the ability to review these decisions is predicated on the individualized knowledge of the child — knowledge possessed only by those who know the child well.<sup>254</sup> An amendment recognizing the specific roles of the child's attorney and the GAL at adoption, like the recognition currently afforded foster parents, would ensure that the court's need for individual information would be fulfilled.

#### *D. Criteria Staffing and the Express Inclusion of Other Parties*

As examined earlier, recognition of the court's continued oversight of adoption placements harkens back to a historic juvenile court in which the judge permitted the input of those persons who could inform him as to the

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249. *Id.* § 6 (emphasis added) (to be codified at 10 OKLA. STAT. § 7003-6.2A(A)).

250. *Id.*

251. *See supra* notes 246-47 and accompanying text.

252. *See supra* note 206 and accompanying text.

253. *See supra* notes 228-29 and accompanying text.

254. *See supra* note 238 and accompanying text.

needs of the child.<sup>255</sup> Even so, creating such an environment today can be complicated by a professionalized system that can, at times, obscure rather than ensure the fulfillment of the child's needs.<sup>256</sup> It has even been suggested that new philosophies and further systemization of child welfare, rather than ensuring further success with these children, instead strays from the solution and may represent further back-tracking.<sup>257</sup> As such, based on the statutory amendments above, a court's ability to construct an inclusive environment including all parties with information pertinent to a permanent custody child may provide the best solution to this complex system. Thus, the court must have the ability to require the Department, the child's attorney, the GAL, and the foster parents to engage in dialogue regarding problems or concerns if they arise. The current DHS process of criteria staffing provides a ready-made forum for this dialogue, and consequently, represents a return to the inclusive and informal decision-making process that defined the juvenile court.

The Department of Human Services criteria staffing represents the gateway to adoption for permanent custody children. Criteria staffing serves as a means of determining the appropriate adoptive placement for a child based on a form to be completed by the child welfare worker, supervisor, and various service providers.<sup>258</sup> The criteria staffing includes reference to prospective adoptive placements, barriers to adoption, and the specific needs of the child.<sup>259</sup> Usually, however, the form is accompanied by a meeting during which Department staff and other invited guests discuss prospective adoption for the individual child.<sup>260</sup> This face-to-face gathering and the document itself provide a mechanism for system professionals to begin to converse regarding the potential success of an adoption via consensus as to what information should be included in the form. The identification, however, of who qualifies as a professional or service provider, and thus who may provide input in the form or who may attend the criteria staffing, is not clear from the text of the Oklahoma Administrative Code governing this process.

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255. See *supra* note 219 and accompanying text.

256. Stuart, *supra* note 237, at 6.

257. *Id.*

258. OKLA. ADMIN. CODE § 340:75-15-41 (Supp. 2005).

259. *Id.*

260. Dep't of Human Servs., Instructions to Staff 340:75-15-41, [http://www.policy.okdhs.org/ch75/Chapter\\_75-15/](http://www.policy.okdhs.org/ch75/Chapter_75-15/) (follow "SUBCHAPTER 15. ADOPTIONS" hyperlink; then follow "340:75-15-41. Adoptive placement criteria staffing" hyperlink; then follow the first "INSTRUCTIONS TO STAFF 340:75-15-41" hyperlink) (last visited June 11, 2006) [hereinafter Instructions to Staff]. Under section 1(1) of the Instructions to Staff, the DHS worker is instructed to set the "time and place for the criteria staffing," indicating that the criteria staffing is, in fact, a meeting although the Oklahoma Administrative Code only refers to a form. *Id.* § 1(1).

Currently, however, Department policy indicates that the adoption process as a whole is a “team effort,”<sup>261</sup> suggestive of the necessary participation of all persons with information pertinent to the needs of the child. Further, recent changes to staff instructions accompanying Department policy provide specific reference to the participation of CASA, when assigned, in the criteria staffing process.<sup>262</sup> According to those instructions, the assigned CASA is to review the form once it is completed by the social worker and should receive notification of the upcoming meeting.<sup>263</sup> In addition, these same instructions imply that entities involved in the child’s case may also be included in the process if these parties possess “information that may assist in planning for the child.”<sup>264</sup> While this general invitation is extended upon the action of the social worker, the child’s attorney and the foster parents are not specifically included in the list of who constitutes such persons.<sup>265</sup> Thus, at a minimum, the GAL or CASA should be afforded an opportunity to review the form and receive notification of the criteria staffing. The child’s attorney and the foster parents, however, may not be included despite recognition in DHS policy that adoption is a team effort.

Nonetheless, recognition of the adoption process as a team effort provides a concerned court with a forum for addressing the placement needs of the child. Rather than instructing all parties to gather and come to consensus, the court could order that all parties meet within the context of the criteria staffing to discuss a particular case. Further, this could provide a mechanism for system professionals to discuss placement concerns before providing sworn testimony at a placement hearing, a right that will soon take effect.<sup>266</sup> As such, this forum, tailored to address potential placement, would provide a specific process by which a juvenile court judge could construct an inclusive environment for addressing the best interests of the child.

In short, the current process of criteria staffing provides the court a forum for inclusive dialogue reminiscent of the historic court. Marked by the need to ensure that the best interests of the child are served, the inclusion of all parties who know the child guarantees that the court can, in fact, determine that the appropriate placement decision has been made. As the Department already has a process in place to address the particular needs of an individual child, it is a natural step for a court with oversight authority to instruct all

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261. OKLA. ADMIN. CODE § 340:75-15-41.

262. Instructions to Staff, *supra* note 260, § 1(3).

263. *Id.*

264. *Id.* § 1(4)(A)(ii).

265. *See id.* § 1(4)(A).

266. *See supra* note 249 and accompanying text.

parties recognized as having valuable information regarding a child to work together in that forum to determine the best adoptive match.

#### *VI. Conclusion*

At its inception, the historic juvenile court understood that protecting abused and neglected children was a community endeavor. Further, that court recognized that the creation of a home for a deprived child in the aftermath of losing his own biological parents was a task greater than the court could address alone. The heralded creation of a professional social welfare system was thought to be the solution to the human endeavor of rebuilding families and returning hope to children. But, where familial ties have been broken, the creation of new ones is the greatest work to be done for a child. Such life-altering decisions must be extricated from the confines of a system that grows more entrenched as each participant in a deprived case individually scrambles to determine the best interests of a child. As recognized by many scholars in the field, “the juvenile court needs an overhaul, a return to the informality of an earlier day” that centered on informal discussion inclusive of all parties.<sup>267</sup> As such, the Department, the child’s attorney, the GAL, and the foster parents should work together as a team to determine the best possible adoptive placement for the child so that the court can rule that best interests have, in fact, been served. Thus, where little Mary Ellen’s hands signaled the forward movement of child welfare in America,<sup>268</sup> Oklahoma could signal a return to the influence of that era where the modern system, struggling to improve the life of children, got its start.

*Cara Rodriguez*

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267. Symposium, *supra* note 135, at 281.

268. *See supra* text accompanying note 11.