

A Ringing Endorsement of Lawyers, and the Most Important Development in Child Protection Law

Author : Josh Gupta-Kagan

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Lucas A. Gerber, *et al.*, *Understanding the effects of an interdisciplinary approach to parental representation in child welfare*, 116 **Child. & Youth Serv. Rev.** 105163 (2020), available at [SSRN](#).

Two empirical studies demonstrating the impact of vigorous family defense legal work on child protection cases bookended the 2010s. In 2012, Mark Courtney and Jennifer Hook found that cases in which a specialized interdisciplinary law office (ILO) represented parents had faster reunifications, guardianships, and adoptions than similar cases with different parental representation, though it did not explore how those results were obtained.¹ In 2019, Lucas Gerber, Yuk Pang, Timothy Ross, Martin Guggenheim, Peter Pecora, and Joel Miller found that, compared to solo and small office practitioners, ILOs in New York City hastened reunification and guardianships for their clients, leading to 118 fewer days in foster care per child on average, without any negative child safety outcomes.²

The New York City study also led to a 2020 qualitative study³ offering insight into what made these specialized ILOs so impactful and helping define what makes for high-quality parent representation (known as “family defense”). The answer: traditional lawyering, done aggressively and in collaboration with an interdisciplinary team.

Gerber *et al.* compared cases handled by interdisciplinary law offices where lawyers specialized in family defense and collaborated with staff social workers and parent advocates with similar cases handled by solo and small office practitioners who generally had much experience but lacked the ILOs’ non-lawyer supports. After documenting the empirical differences in 2019, they interviewed parents who had a child protection case filed against them, lawyers from both models of family defense, lawyers for other parties in these cases, and judges, designed to measure what ILO attorneys did differently from solo and small office practitioners. The ILO lawyers demanded more formal procedures for their clients, pushing back against an ethos that downplayed the need for such advocacy – an ethos that commentators have long observed in family courts.⁴ ILO lawyers advocated more aggressively, filing more motions and insisting upon more evidentiary hearings than other lawyers. In addition, ILO lawyers better met basic hallmarks of quality legal representation – especially frequent client contact and preparation for all court hearings.

ILO lawyers also leveraged their interdisciplinary teams, which represented clients in out-of-court case conferences and then helped clients find the services they need to follow these plans and regain custody of their children. Notably, Gerber *et al.* describe even this social work in terms which made clear their status on their clients’ team. Non-lawyer members of the team advocated for clients at case conferences with agency representatives, ensuring case plans were individualized and not more burdensome than necessary. When they helped clients obtain social services, they empowered clients to find services they want and free themselves of dependency on CPS agencies.

What to take from the 2020 qualitative study? First, Gerber *et al.* offer a ringing endorsement of lawyers acting in their adversary role as essential to the rule of law and functioning of any legal system, even one (like family courts) historically designed to operate less adversarially. This study throws cold water on the notion that traditional lawyering prevents systems from doing what they need to do. (Indeed, the authors report the views of some child protection agency attorneys that vigorous family defense merely slows the process down through unnecessary litigation.) The 2019 study empirically rejected this view, and the 2020 follow-on contribution explains how strong adversarial lawyering helps family courts act with greater accuracy and with limiting interventions into individual liberty.

Second, and more pointed to the next decade of work in the child protection system, the 2020 study takes a significant

step toward defining the elements of high-quality family defense. America's patchwork of state and local family defense systems now can consider how to use newly-provided federal assistance to expand or improve with a guide for what a model system looks like. That guidance is essential because family defense systems generally fall far short of the standard set by New York City ILOs. In South Carolina, where I teach, no such offices exist, and authorities are just figuring out how to ensure parents have attorneys to represent them at court hearings held days after a child is removed, and most of the nation's family defense systems resemble South Carolina's rather than New York City's.

Defining high-quality family defense is particularly important now. In 2019, in perhaps the most important child protection legal development in the past decade or longer, the federal Children's Bureau [opened federal foster care funding](#) to support the provision of legal representation and advocacy for parents.⁵ That dramatically expanded funding for legal services – which have largely depended on meager state and local funding – provides states the opportunity to improve their family defense models.

This opportunity begs the question – how should states improve their family defense systems? How much must those systems improve to get comparable results to those found in the New York City studies? Must they get all the way to the NYC ILOs, or is some intermediate step sufficient? The best way to answer this is through more quantitative and qualitative research in more jurisdictions like what Gerber *et al.* have done.

1. Mark E. Courtney & Jennifer L. Hook, *Evaluation of the impact of enhanced parental legal representation on the timing of permanency outcomes for children in foster care*, 34 *Child. & Youth Services Rev.* 1337 (2012).
2. Lucas A. Gerber, *et al.*, *Effects of an interdisciplinary approach to parental representation in child welfare*, 102 *Child. & Youth Services Rev.* 42 (2019).
3. The full list of authors for the 2020 contribution is Lucas A. Gerber, Martin Guggenheim, Yuk C. Pang, Timothy Ross, Yana Mayevskaya, Susan Jacobs, and Peter J. Pecora.
4. *E.g.* Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 *Law & Psych. Rev.* 55 (2010); Amy Sinden, "Why Won't Mom Cooperate?": *A Critique of Informality in Child Welfare Proceedings*, 11 *Yale J.L. & Feminism* 339 (1999).
5. In this season of political transition, it is worth noting that this federal funding for family defense came from the Trump Administration – and that this is one area where the Biden Administration should continue changes enacted by its predecessor.

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