

## Kids in Court: Tips for Overcoming Resistance

by Lisa B. Kauffman

**T**raditionally, in Montana, children never attended court hearings and usually never testified following removals from their parents. Local mores deemed it was not in their best interests. Changing practice took a willingness to speak up in the face of resistance and assert children's right to be heard.

If you face resistance to children participating in court proceedings, the strategies I used to secure my child clients' right to participate in their court proceedings may help.

### First, some background

In one case, I represented three children, ages 5, 12 and 13. During my initial meeting with all three, the two oldest wanted to attend the first court hearing. They both had different and clearly articulated reasons for wanting to go to court. I said, "sure" and contacted the department to request that the kids be brought to court. I had no idea the firestorm I created.

I received a strongly worded letter from the department's lawyer advising me the children would not be brought to court because it was not in their best interests. I was also contacted by various therapists and service providers suggesting I was out of line and acting unethically. When I responded that my clients wanted to attend court, I was told I was traumatizing the children and disrupting their therapeutic care and their lives. What to do?

### Follow your ethical duty

As the children's lawyer, I had an ethical duty to represent my clients. I explained their right to be in court (or not), their right to testify (or not), their right to meet the judge, be seen, be heard and of course their right to have me speak for them, and not have to go to court at all. I

offered no judgment on whether they should or should not attend. I answered their many questions like: "Will my therapists be mad at me if I go?" or "Can I get a soda and drink it in court?" or "Will you sit next to me?" (*Note:* It is the view of the ABA Center on Children and the Law and other legal experts that attorneys have an ethical duty to advise their clients and encourage them to come to court, and that in most cases a child's participation is beneficial.)

### Write a letter

I made my demand that the kids be brought to court, sending a strongly worded letter that neither the state nor the providers may interfere with the attorney/client relationship. I also stressed that the law and legal standards encouraged their presence (see below).

### Request a court order

I was told to get a court order, so I filed a motion with the court requesting that the judge sign an "order to Transport" my clients from the department's care (group homes) to court for the hearing. The judge signed the order. You may be wondering if your judges would be so agreeable. I found the legal guidance, discussed next, persuasive.

### Use the law and legal standards

The ABA and the National Association of Counsel for Children have

done considerable research and put together standards for representing children in abuse and neglect cases. The compelling language is:

**"Child at Hearing. In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify."**

Commentary follows:

**"A child has the right to meaningful participation in the case, which generally includes the child's presence at significant court hearings. Further, the child's presence underscores for the judge that the child is a real party in interest in the case. It may be necessary to obtain a court order or writ of habeas corpus ad testificandum to secure the child's attendance at the hearing."**

The Commentary discusses situations where the child might be excluded and I will leave it up to you to read it thoroughly.

Equally compelling are the standards regarding whether the child should testify:

**"D-6. Whether Child Should Testify. The child's attorney should decide whether to call the child as a witness."**

The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination. Ultimately, the child's attorney is bound by the child's direction concerning testifying."

Other laws that children's lawyers might find useful include:

- **Child and Family Services Improvement Act** – Amended Title IV-E to require certain foster care proceedings to include consultation in an age-appropriate manner with the child who is the subject of the proceeding.
- **Fostering Connections to Success and Increasing Adoptions Act** - gives youth the rights to be present and to address the court.

Most states also have statutes and/or court rules related to youth coming to court. Children's lawyers can refer to these for additional legal support.

### Meet with your clients before court, if possible

I showed up early, hoping to meet with my clients before court. After several phone calls, I was advised that my clients were "in the courthouse" where they would be "safe" until the court hearing required their mandated attendance. Despite several forceful attempts to meet with my clients, they did not appear and I didn't get to speak with them before the judge took the bench.

An advance meeting in the courthouse is important to walk your young clients through the courthouse, and introduce them to the clerk, court reporter, or other staff. If possible, I often allow them to sit in the judge's chair or the witness chair and I simulate direct and cross examination questions with them. If there is not time or availability for that, it is still important that they get to court earlier than the scheduled time just to get acclimated to the surroundings.

Some steps I would take in the future to make sure this meeting happens are making my written request to the department for exactly what time and where in the courthouse I would like to meet my client before court. I generally telephone my client the day before court, just

to check in and answer any last-minute questions.

### Let client(s) have their say

My older client testified (as she requested) and the other did not (he only wanted to attend). They had a great sibling visit, spilled pretzels all over the floor and impressed the judge, especially the older one with her ability to articulate what she wanted. The judge granted the relief my clients and I requested, relying heavily on the older girl's testimony.

### In closing

Despite many well-intentioned people trying to fix broken families, we can't lose sight of the basic desires of our young clients to have a say in their cases. Allowing them to be present in court and speak to the judge, if

they want to, are simple steps we can take to ensure they are valued participants in the legal process and their voices are heard.

Throughout the collaborations and competing agendas to determine safety and best interests of children, we must remember that family bonds are primary and meaningful. My older client's words after the hearing were telling — she turned to me and asked, "Would it be okay if I hug my mother?"

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## Plan to attend 2 ABA National Conferences

### 2nd National Child Welfare Parent's Attorneys Conference, July 13-14

*Sample session topics:*

- Representing minor parents
- Brief writing for parents' counsel
- Tips for engaging parents
- Representing parents in co-occurring child welfare and criminal proceedings
- When child welfare, family court, and immigration overlap
- Reinstating parental rights
- Incarcerated parents and their children
- Mothers who use drugs

### 14th National Conference on Children and the Law, July 15-16

*Sample session topics:*

- Children's participation in court—ethical challenges
- Improving educational outcomes for children in care
- Assisting youth who age out of care
- Dependency drug court interventions
- Counseling child clients
- Health care needs of foster youth
- Legal issues for children exposed to domestic violence

**Pre-conference:** *Role of attorneys in safety decisions for children, addressing cultural bias in decision making* (limit 60 people), July 14

**Full conference details:** [www.americanbar.org/groups/child\\_law.html](http://www.americanbar.org/groups/child_law.html)

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