Justice Lehrmann encouraging attendees of the 2016 Advanced Family Law Child Protection track to take the first steps toward formation of the new Child Protection Law Section of the bar.

From Left: Lynn Chamberlin, Sandra Hachem, Judge Dean Rucker, Justice Deborah Lehrmann and Judge John Specia.

Chair's Column

The creation of the Child Protection Law Section within the State Bar of Texas (SBOT) became a reality last Friday, January 26, when the Board of the SBOT voted unanimously to form the new section. This significant accomplishment represents decades of hard work on the part of many legal professionals throughout the state who are committed to improving the welfare of children.

The history of child-welfare protection law is relatively brief. Traditionally, children had few rights, with full authority over their lives being vested in their parents. A paradigm shift began in the 1960s with the help of several Supreme Court decisions extending certain constitutional rights to children. During the 1960s, the Department of Public Welfare began to deal head-on with abuse and neglect in Texas. In 1962, the U.S. Congress defined abuse and neglect in the Child Welfare Provisions of the Public Welfare Amendments to the Social Security Act. And in 1974, the federal movement to prevent child abuse and neglect began in earnest with the creation of the Child Abuse Prevention and Treatment Act (CAPTA). This Act created the National Center for Child Abuse and Neglect (NCCAN) and provided federal funding to state child-protection agencies.

Thankfully, the historical treatment of children as chattel has given way to our current recognition that children are individuals worthy of protection. Today society realizes that children are frequently innocent participants in events over which they have no control and from which they must be protected. And they should be respected in the process.

As a jurist who has devoted much of my professional career to helping children, I am proud beyond words of this meaningful action taken by the SBOT. The willingness of the Bar to create and support this section reflects society's move towards recognition of children as autonomous beings with individual needs, desires, feelings, and concerns. I admire the SBOT for rising to the challenge—our children deserve it.

Sincerely,

Debra H. Lehrmann
Justice, Supreme Court of Texas
Inaugural Chair of CPL Section

SBOT Section.

Happy Endings Introduction and explanation

By: Dylan Moench

Representing Parents and Children in CPS cases can be overwhelming and exhausting. The legal complexities lawyers face, coupled with high case loads, system dysfunction, and the trauma inherent in the field can put lawyers at risk for burn out, compassion fatigue, and even secondary trauma.

However it can also been wonderful and empowering experience. Child welfare attorneys help those who are truly in need, they can make a monolithic system recognize unique individual circumstances, and they know that but for their work, children, parents, and families would not have their voices heard.

The purpose of the Happy Endings will be to celebrate that side of child welfare representation. This is an opportunity to share with others your parent's triumphs, your children's victories, your families' successes. If you have story that inspired you, we want to hear it. Please email your submissions to Dylan.moench@txcourts.gov

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The Case against Privatization of Child Protection

F. Scott McCown[1]

Introduction

Our system of protecting children has long struggled from underfunding, leaving children at risk of maltreatment both in their family home and in state care. After several high-profile child deaths, and a federal district court finding that our system subjects children to an unreasonable risk of harm,[2] Governor Abbott called upon the 2017 Legislature to take emergency action to address child protection.

In response, the Legislature added staff, increased pay, and provided more money for kinship care and foster care, but the Legislature insisted it would not put more money into a "broken" system. Instead, through Senate Bill 11, the Legislature mandated an ambitious program to privatize child protection, including case management.[3] This paper is to start you thinking about what privatization means for you in your role as a child welfare lawyer.

Senate Bill 11 envisions a managed-care model that uses performance-based contracting. First, the state will be divided into "catchment" areas composed of a single county or multiple counties. Then, over time, the state will enter into a contract in each catchment area with a general contractor (called the single source continuum contractor, or SSCC) to be responsible for all the children in the area for whom he state is the managing conservator.

The contract will require the SSCC to take all children—"no reject, no eject." The contract will have various performance standards and incentives for reaching certain benchmarks. The

[1] F. Scott McCown is a retired state district judge and a Clinical Professor and Director of the Children's Rights Clinic at the University of Texas School of Law.
[2] *M.D. v. Abbott*, 152 F. Supp. 3d 684, 823 (S.D. Tex. 2015).
[3] The Department of Family and Protective Services publishes a useful website about privatization on which you can learn more and follow events: https://www.dfps.state.tx.us/Child_Protection/Community_Based_Care/ (accessed Nov. 21, 2017).

SSCC will employ various subcontractors, many of the foster care or adoption agencies or other service providers who work with children now. The SSCC will also employ its own caseworkers who will replace the public caseworkers.

Contracting Away the State's Sovereign Power

While the state touts its new model as "community based" and run by local nonprofits, in fact, the nonprofits calling the shots could as easily be from Tampa or Topeka as from Texas. Even if the nonprofit is local, it will be a private entity, not a public entity, governed by a board, not by the state.

Using the state's power and money, but with limited public oversight, the nonprofit named the SSCC will make decisions about placement and services for children and families. It will prosecute the civil court cases against the parents. It will even decide whether to seek the termination of parental rights. While the legal case against the parents will still be in the name of the Department of Family and Protective Services (DFPS), and the District or County Attorney or DFPS attorney will still do the lawyering, public employees will not be in charge of managing the case.

No state official will have any authority to override the private contractor's decisions regarding the best interest of an individual child. The Health and Human Services Commission will monitor minimum operating standards through licensing, and DFPS will monitor aggregate outcomes through performance-based contracting, but neither will monitor individual cases. There will be no public caseworker assigned to an individual case.

DFPS does retain a fig leaf of authority. Under Senate Bill 11, DFPS may, not must, but may, "review, approve, or disapprove a contractor's recommendation with respect to a child's

permanency goal." [4] Naming "the permanency goal," though, is meaningless authority. It does not include the authority to make legal decisions or decisions about placement or services. The nonprofits behind Senate Bill 11 resisted any effort to give DFPS a role in case management. Moreover, as a practical matter, DFPS cannot effectively review even the permanency goal because it won't have sufficient staff.

Worse Outcomes

Currently, only Region 3B, anchored by Fort Worth, is on its way to implementing privatization. DFPS has announced that the second catchment area will be Region 2, anchored by Abilene, and the third will be Bexar County, as a single county. Eventually, Child Protective Services as we know it will cease to exist. This transition from a public to a private system will be difficult at best. Once the transition is complete, the state will be left with a fragmented system of inexperienced and undercapitalized nonprofits that is less transparent and less accountable. Afterwards, as experience in other states shows, outcomes for children and families will be worse, not better.

State that have gone to privatized systems are a mess. In fact, after finding last year that Florida's privatized system is underperforming in critical areas, the U.S. Department of Health and Human Services gave that state 90 days to produce a plan to improve its care of foster children. Florida has three times the rate of child maltreatment in foster care as Texas and three times the percentage of foster children who re-enter foster care within 12 months after going home. Kansas, an early pioneer of privatization, is also a mess.

Privatization is also more expensive. In our low-tax state, we won't be able to pay for this more expensive way of doing business. Consequently, performance will deteriorate. Financial

[4]Section 264.168(a)

pressures may grow so acute that some contractors go under or walk away, seriously disrupting the system.

Increased Turnover

Our main problem, caseworker turnover, will also increase. After taking significant steps to reduce turnover in our public system by raising worker salaries, the Legislature is handing the system over to private providers who will pay less. At the outset, starting salaries may match the current state salary, but without equivalent retirement or health care benefits. As time passes, our low-tax state will not pay adequate contract rates, and private contractors will skimp on salaries, and eventually skimp on staff. Consequently, turnover will increase. Indeed, Florida has significant caseworker turnover.

Increased Removals

But the big cost driver to privatization is likely to be increased removals. Under privatization, DFPS will still be in charge of investigations, but now if a child is removed, DFPS will merely turn the child over to the SSCC under a no-reject, no-eject contract, making the decision to remove too easy. From 2012-2015, removals in Texas increased only 1.20%. In contrast, from 2012-2015, removals in Florida increased a whopping 13.77%. If we increase removals like Florida, it will crash our system.

Conflicts of Interest

Particularly problematic is the serious conflict of interest at the heart of privatization. An SSCC makes more or less money depending on its case management decisions. Moreover, writing performance measures that don't skew case-by-case decisionmaking is difficult. For example, if you pay an incentive for sending more children home, more children are likely to go home, even when it isn't safe.

If you think this concern about a conflict of interest is fanciful, consider what happened right after the Senate passed Senate Bill 11. After having agreed in Senate Bill 11 to carry liability insurance, the nonprofits behind the legislation put their financial interest above the interest of children by executing a classic stealth legislative move to secure extraordinary tort immunity.

Shortly after Senate Bill 11 passed the Senate, they secured passage of a floor amendment to House Bill 5, an unrelated CPS bill. This floor amendment stripped children of their ability to sue an SSCC for its negligence, making the promise of carrying liability insurance illusory.[5] Under the floor amendment, an SSCC would have been responsible only for intentional torts. Fortunately, the House insisted on a compromise that instead merely capped damages, but this episode illustrates the serious conflict of interest at the heart of privatization.[6]

Conclusion

As privatization moves forward, lawyers must understand how it works and be zealous in advocating for their clients in a system compromised by conflicts of interest. Without a public caseworker, the voice of the attorney ad litem and the guardian ad litem for the child will be more important than ever. Parent's attorneys may need to more aggressively challenge removals and placement decisions, perhaps even the very constitutionality of private contractors wielding the state's sovereign authority against their clients.[7] For advocates, there will be many practical and legal problems as the state seeks to privatize child protection.

[5] Amendment F8 by Huffman to House Bill 5 on May 22, 2017.
[6] In addition to state tort liability, nonprofits are subject to federal civil-rights liability. See *Woodburn v. Fla. Dep't of Children & Family Servs*., 854 F. Supp. 2d 1184, 1200 (S.D. Fla. 2011); *Smith v. Beasley*, 775 F. Supp. 2d 1344, 1353 (M.D. Fla. 2011).
[7] *Texas Boil Weevil Eradication Foundation, Inc.*, 952 S.W.2d 454 (Tex. 1997)