
**JUSTICE FOR CHILDREN, ADULTS
WITH DISABILITIES AND THE ELDERLY:
REFLECTIONS FROM 15 YEARS AS AN
ATTORNEY WITH THE OFFICE OF
THE PUBLIC GUARDIAN OF
COOK COUNTY, ILLINOIS**

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*How far you go in life depends on your being
tender with the young, compassionate with the
aged, sympathetic with the striving and tolerant of
the weak and strong. Because some day you will
have been all of these.¹*

—George Washington Carver

I. INTRODUCTION

For the past 16 years, I have had the privilege of representing abused and neglected children, adults with disabilities and the elderly as an attorney with the Office of the Public Guardian of Cook County, Illinois. The Public Guardian's Office has about

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¹ NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, GEORGE WASHINGTON CARVER NATIONAL MONUMENT 7 (2007).

350 personnel, including about 150 attorneys.² The largest division represents some 10,000 children in abuse and neglect proceedings in Juvenile Court. Another division serves as guardian for about 800 adults with disabilities.³ Most of our adult wards are elderly and have an age-related dementia such as Alzheimer's, though we have a substantial number of younger wards with developmental delays, head trauma injuries and other disabilities. Our office is guardian of last resort, so all of our wards either have no family to serve as guardian or have family members who are abusive, financially exploitative or otherwise inappropriate. Our domestic relations division represents children in the most contentious custody battles in divorce cases. We have an appellate division that brings appeals designed to expand the rights of children and the disabled. Finally, we have an impact litigation division that has been involved in institutional reform class action cases and prosecutes money damages lawsuits and civil rights actions on behalf of children harmed in the foster care system.

Over the years, I have had the fortune to represent hundreds of children and adults with disabilities in all of our divisions. These are truly voiceless populations, whose stories are not told.

In this article, I will endeavor to give voice to these vulnerable clients. These are some of their stories. This article will discuss what happened to these individuals, efforts to achieve justice on their behalf and institutional challenges to achieving justice within the legal system. The names and certain identifying information of the clients have been changed to protect their privacy.⁴

In Section II, the article discusses institutional problems in the child welfare system and resultant harm to children. Section III

² Productivity Analysis of the Cook County Budget, E-9 (2007).

³ Cook County Public Guardian, <http://www.publicguardian.org/ag.htm> (last visited Aug. 25, 2007).

⁴ In order to maintain the anonymity of the Office of the Cook County Public Guardian's clients, case names have been deleted throughout this article.

addresses the adult-focus of divorce courts and how such a focus results in injustice to children. Section IV discusses elder abuse, financial exploitation of the elderly, the right to community placement and related social justice issues. That section discusses how laws and judges assume that litigants enjoy mental cognition and the injustices that occur when this is not the case. Section V offers some concluding thoughts.

One caveat is warranted. The reader of this article may be left with the impression that the majority of social workers and foster parents are inept, have questionable motives or worse. This is not the case. The majority of foster parents and social workers with whom I have worked over the years are hardworking, caring and dedicated professionals. But some are not, and as explained below, the system does a poor job of weeding them out with sometimes disastrous consequences. Institutional and structural biases in the legal and child welfare systems also exist, resulting in harm to children and other vulnerable persons; these biases are discussed below.

II. CHILDREN ABUSED BY THEIR PARENTS AND THEN ABUSED AGAIN BY THE FOSTER CARE SYSTEM

Most people realize that child abuse and neglect is widespread in our society. What many do not realize is the extent to which children are re-abused by the foster care system that is intended to protect them. These are the stories of a few foster children represented by the Public Guardian's Office over the past 16 years. In addition to relating these children's stories, this article will attempt to highlight some of the structural problems in the child welfare system that cause harm, injury and injustice for children who have already been abused or neglected by their biological parents.

Failure to Follow Rules, Regulations and Social Work Standards

Problems occur when social workers and bureaucrats in the child welfare system fail to follow their own rules and regulations, which are promulgated to protect foster children. In most instances, the rules and regulations are simply codifications of social work norms and standards, which are rather common sensical.

For example, social workers are required to complete a criminal background check on persons applying to be foster parents. Of course, this is to ensure that children who are already vulnerable due to abuse and neglect at the hands of their biological parents are not placed with convicted rapists, pedophiles or other inappropriate care providers.

Sometimes, however, the bureaucrats fail to follow their own common sense regulations and social work norms, with disastrous consequences for children. This occurred to Nicole H. and also to Tanya, Nancy and Robert. A., who are siblings.

Nicole H.

Nicole was born to parents who started to abuse her physically when she was a young girl. When Nicole was ten, the Juvenile Court removed her from the custody of her parents and placed her in the custody of the Illinois Department of Children and Family Services (DCFS). DCFS, in turn, assigned the case management and social work responsibilities for Nicole's case to a private social services agency.

Having never performed the mandated criminal background check on the foster father, the agency placed Nicole in a foster home. Had it bothered to do so, the agency would have learned that the foster father was a convicted rapist. In addition, while the licensing application was pending, he was convicted of drug dealing. He served part of his 11-month sentence while foster

children were living in the home. The foster mother also had a criminal history, including weapon and drug offenses.

Nicole had just turned 11 when she was placed in this home, and the foster father had recently been released from prison for the drug dealing offense. Shortly thereafter, the foster father – who was a convicted rapist – started to sexually molest Nicole. The sexual abuse began by his kissing Nicole and progressed to the point at which he would force Nicole into a bathroom in the early morning hours, make her remove her clothes, stuff a towel in her mouth and force her to engage in penile-vaginal intercourse. He would sometimes force Nicole to perform oral sex on him before he raped her genitally. He threatened Nicole with physical violence if she ever told anyone. When Nicole told her foster mother, instead of coming to Nicole's assistance, the foster mother slapped her and told her she was lying.

After four months of the sexual molestation, Nicole worked up the courage to tell a classmate at school. With the support of her classmate, Nicole was able to reveal the abuse to her school counselor, who called the child abuse hotline. Nicole received medical treatment, and two hospitals made positive physical and medical findings consistent with sexual abuse.

Nicole was then removed from this home and placed in a loving, nurturing foster home, where she thrived. The abusive foster father was eventually convicted of criminal sexual assault and served time in prison.

The Public Guardian's Office sued the private agency for money damages to compensate Nicole for her injuries. The litigation was lengthy and costly. The private agency advanced numerous legal arguments, including that it was obligated to perform a criminal background check on the foster mother only and not the foster father, that it enjoyed public official sovereign immunity for its malfeasance, that it was a state actor that could be sued only in the Court of Claims, and that no causation existed between its failures in the case and the sexual abuse that Nicole suffered. After lengthy and costly litigation, the trial

court rejected these defenses, and the case settled for a large sum.⁵ Nicole is now in her 20s and doing well. She graduated from high school with good grades and was accepted to college, where she is pursuing a degree in nursing. Nicole also works part-time for a child welfare agency.

Tanya, Nancy and Robert A.

Another example of bureaucrats failing to follow common sense regulations resulting in harm to children is the case of Tanya, Nancy and Robert, who are siblings.

DCFS is required to visit its foster homes at least once every month. During the visit, the worker is required to speak with each child in the home and to interact with non-verbal children. This is a common sense, social work standard to ensure that the children are safe, that they are not being abused and that their clinical and other needs are being met.

Tanya, Nancy and Robert were abused and neglected by their parents, and the Juvenile Court placed them in DCFS's custody for their safety when they were nine, two and one, respectively. DCFS placed the children in a foster home; however, the assigned case worker either failed to visit the home for 11 months or failed to perform even the most superficial interaction with the children. For an 11-month period, the foster mother had a relationship with a man who was beating the children. Nancy, who was two years old, received most of the abuse. The boyfriend would hold her upside down by her ankles and beat the naked soles of her feet with various blunt objects until Nancy's feet were bleeding. When the children were finally rescued from the home, Nancy was diagnosed with third-degree burns to the soles of her feet. She was unable to walk. The injuries to Nancy's feet were so deep and extensive that she required surgery for skin grafts to the bottom of her feet. Nancy and Robert were

⁵ Dismiss by Stipulation or Agreement, No. 95L006397 (Cir. Ct. Cook County 1999).

both severely malnourished and received beatings and other physical abuse. Robert had open wounds, both old and new, on his buttocks, legs, head and back. In addition to the wounds on her feet, Nancy had open wounds on her buttocks, legs, hands and face and was diagnosed with non-organic failure to thrive. Nancy was hospitalized for several weeks, and Robert was hospitalized for several days.

Tanya was ten years old during this period when the physical abuse and neglect were occurring. Tanya did not receive as much direct physical abuse or neglect as Nancy or Robert, but to this day, she is psychologically scarred. She had to watch the boyfriend beat her younger brother and sister. Tanya blames herself for what happened to Nancy and Robert. Although she was only ten years old and not in a position to protect them, she agonizes about what she might have been able to do.

An irony in this case is that the children's biological father – who lost custody due to adjudications of abuse and neglect to the children – rescued them from this foster home. He had a history of sporadic visitation, showing up a few times and then not coming again for months. He showed up at the foster home to take the children out for a visit, immediately realized that they were abused and malnourished and took them to a police station. The police took the children to a hospital, where they were admitted and treated for their injuries.

The Public Guardian's Office sued the assigned DCFS worker in federal court for civil rights violations on behalf of the children. Years of discovery and litigation ensued. During this time, DCFS refused to settle, and the case went to trial before a jury. The trial lasted two weeks, and the jury awarded \$3.3 million to the children.⁶ We at the Public Guardian's Office believe that

⁶ Judgment on Jury Verdict, No. 97C001634 (N.D. Ill. 2001).

this is the largest federal jury verdict in the Northern District of Illinois for a civil rights case of this nature.⁷

Nancy and Robert were eventually adopted into a warm, loving home and are doing well. Tanya still struggles with severe guilt and other issues. She has disabilities related to the trauma she suffered, and the Public Guardian's Office now serves as her adult guardian.

This case illustrates an inherent shortfall of litigation as a tool for achieving justice for children and others. One of the public policy purposes of money damages lawsuits is to obtain compensation for the victim's injuries that were caused by the malfeasance of another. In some instances, such as the instance of Nancy and Robert, as well as Nicole, the money recovered through litigation has served this purpose well. This money is helping Nicole pay for college, as well as for therapeutic assistance to help her cope with her ordeal and thereby become a contributing, productive member of society. The money recovered for Nancy and Robert has likewise helped pay for their extensive therapeutic and medical needs and will help finance their educations. Tanya, however, is not doing as well. The money recovered for Tanya may not be helping her at all. Ongoing guardianship of Tanya has shown that the money may have diminished her ambition to work and be productive. Tanya is now a young adult with great promise and potential, and time will tell how the money recovered for her will shape her future.

***Missing the Forest for the Trees — Blind Adherence
to Regulations***

Ignoring common sense regulations can have disastrous consequences for children, but injustices for children are also perpetrated by blind obedience to regulations resulting in absurd and

⁷ This belief is based on informal review of jury awards published in the *Cook County Jury Verdict Reporter* and informal monitoring of civil rights litigation on behalf of foster children in Illinois.

unintended consequences. Indeed, when I was a young, brand new lawyer at the Public Guardian's Office, some of my first cases were Tasha H. and Maria W., two cases that illustrate this problem. More than 15 years later, the problem persists.

Tasha H.

One of the children in my caseload when I first started as an Assistant Public Guardian 16 years ago was Tasha H. She was perhaps ten or eleven years old at the time. One morning I received a call from Tasha's foster mother. Tasha had just had an eye checkup and needed new glasses. The foster mother was getting the runaround from DCFS and asked if I could intervene.

I was still a bit naive at the time and figured that a simple phone call to the assigned social worker would do the trick. However, the social worker claimed that a protocol provided for children to get eyeglasses only once a year. Of course, this protocol is intended to protect children, to ensure that at least once every year, they receive an eye examination and, if needed, new glasses. This rule is intended as a minimum requirement to protect children, but this bureaucrat was interpreting the policy as a maximum, which served to harm children. Resolution of the problem required a motion in court and litigation to get a new pair of eyeglasses for this little girl. The litigation no doubt cost DCFS more money in terms of legal time than the cost of the glasses.

Maria W.

Another example of losing the forest for the trees in the dense child welfare regulations is illustrated by Maria W.'s case. When Maria was 15, she came to Chicago from Honduras with her mother and stepfather. The family did not have documentation. Maria's stepfather had been sexually abusing Maria for several years. Maria became pregnant with her stepfather's child. When

the stepfather found out, he beat her and returned to Honduras with Maria's mother, leaving Maria pregnant, homeless, penniless and alone on the streets of Chicago.

Maria found her way to a social services agency, which filed a petition on her behalf in the Juvenile Court to have Maria adjudicated an abandoned child. The court made the necessary findings and appointed DCFS as Maria's temporary custodian pending a full trial and dispositional hearing. The court then continued the case for 90 days for the trial and dispositional hearing.

Before Maria's mother and stepfather returned to Honduras, they had signed a voluntary departure order on Maria's behalf, giving her 30 days to leave the country. The "voluntary" departure order was due to expire shortly after DCFS became Maria's temporary custodian.

There is an immigration law through which DCFS can apply for an immigration visa for its wards.⁸ However, when I called a DCFS administrator about the visa application, she cited a policy purportedly providing that DCFS is to apply for this visa upon being appointed full guardian after the trial and dispositional hearing. Of course, this protocol is intended to protect children by requiring that DCFS apply for an immigration visa on behalf of all of its wards. The rule does not require that DCFS delay applying until its appointment as full guardian. In Maria's case, she potentially faced deportation before the abandonment trial and dispositional hearing in three months. It required the threat of litigation to persuade DCFS to apply for the visa.

Maria's case also demonstrates some of the injustices that children experience in the immigration process, which is adult-focused. After DCFS applied for the immigration visa for Maria, the Public Guardian's Office filed a petition with United States Immigration and Naturalization Service (INS) to expedite its

⁸ 8 U.S.C. § 1101(a)(27)(J) (2006).

ruling on the application to ensure that it would be considered prior to expiration of the voluntary departure order signed by Maria's parents. INS claimed that it had no legal authority to expedite a visa application in cases where a voluntary departure order had already been signed. Of course, nothing was "voluntary" about the departure order signed by Maria's sexually abusive stepfather before he beat her and then abandoned her in a strange country. The Public Guardian's Office prepared an emergency federal mandamus lawsuit against INS, as well as a press release and gave the immigration agency 48 hours to reconsider its position before we would file the lawsuit and hold a press conference. We also secured the intervention of Congressman Luís Gutiérrez.⁹ INS reconsidered and granted the immigration application on an expedited basis the following day.

***Fragmentation of Service Delivery:
The Right Hand of the Bureaucracy Not Talking
to the Left Hand***

More than 16,000 children are in the foster care system in the State of Illinois.¹⁰ Consequently, DCFS is a large bureaucracy with different specialized departments and divisions, including intake, or the Division of Child Protection (DCP), foster care licensing, residential licensing, direct services and follow-up for children in placement, specialized service departments, administrative reviews and other layers, divisions and subdivisions of bureaucracy. This is sometimes referred to as fragmentation of service delivery. Sometimes one department is unaware of the actions of other departments. This bureaucratic lack of coordination can result in injuries to children such as Kimberly W. and Tom B.

⁹ Democrat, United States Congress Representative for the Fourth Congressional District of Illinois.

¹⁰ Illinois Department of Children and Family Services, <http://www.state.il.us/dfs/index.shtml> (follow "Foster Care" hyperlink) (last visited Aug. 25, 2007).

Kimberly W.

When Kimberly was seven, the Juvenile Court removed her from the custody of her parents pursuant to adjudications of abuse and placed her in DCFS's custody. The assigned DCFS case worker placed Kimberly in a foster home. An older foster child in the home, Larry, beat and raped Kimberly on three occasions.

What Kimberly's DCFS case worker did not know when she placed Kimberly in this home was that, about six months earlier, Larry had sexually assaulted a different foster child, Helena, in the same home. Helena was six years old at the time. In fact, Larry was adjudicated delinquent for sexually assaulting Helena and served 30 days in juvenile detention. When he was released to serve two years probation, Larry's case worker placed him back in the same foster home (Helena had since been placed elsewhere). The court order releasing Larry to DCFS required that DCFS not place any girls under 12 years old in that foster home. Larry's case worker dutifully noted in Larry's file that the foster mother was unable to supervise foster children but did not convey this information to anyone else within DCFS, including the licensing department. Nor did Larry's case worker convey to licensing or anyone else at DCFS that the court had ordered that no young girls be placed in the home with Larry.

Larry pleaded guilty to the aggravated sexual assault of Kimberly. The court this time sentenced Larry to six years imprisonment in the Department of Corrections.

The Public Guardian's Office sued Larry's case worker and others in federal court on behalf of Kimberly for civil rights violations. Kimberly's grandmother subsequently substituted in as next friend on behalf of Kimberly. The DCFS defendants sought to dismiss the case, claiming that their conduct did not constitute a civil rights violation, that their conduct did not rise to the level of "deliberate indifference" required for civil rights recovery and that they were shielded from liability by qualified public of-

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ficial immunity. Following much litigation, the court denied the motion to dismiss, and the case ultimately settled.¹¹

Bill R.

An even more egregious example of the right hand of the bureaucracy not communicating with the left hand resulted in injury to Bill R. Bill's was the first civil rights money damages lawsuit that I worked on at the Public Guardian's Office. Bill's biological parents abandoned him when he was ten months old, and the Juvenile Court appointed DCFS as his guardian.

The assigned DCFS worker placed and maintained Bill in a foster home for three and a half years, during which he was tortured with an electric cattle prod, beaten and malnourished. When he was finally rescued from this home, Bill was suffering from post-traumatic stress disorder. He was five years old and did not know how to use the bathroom, brush his teeth, comb his hair or wash his face. Bill was not enrolled in preschool. The home itself was utterly deplorable, infested with dog and cat feces and urine, bugs, insects and roaches. The house smelled of urine and excrement.

Perhaps the most remarkable aspect of this case is the number of notices, going back to 1960, given to different arms of DCFS that the foster mother was abusive. In 1960, the foster mother was in the newspapers because she had imprisoned her adopted daughter, Marge, for a two-year period.¹² The foster mother kept Marge locked in her bedroom all day, every day. There were bars on Marge's bedroom window, and the door to her bedroom was locked from the outside. Marge was 15 to 17 years old during this period. Marge was allowed to leave the room only twice a day to use the bathroom. She was permitted to

¹¹ The district court's opinion denying the defendants' motion to dismiss is published at 908 F. Supp. 533 (N.D. Ill. 1995).

¹² See, e.g., *'Caged Girl' Case: Tragic Tale of Human Error*, CHI. TRIB., Sept. 18, 1960, at 1F.

bathe only once weekly. Marge was rescued from the home in 1960, but starting in the 1970s, DCFS began using this home again as a foster care placement for children.

Conditions in the home were so bad that, during the 1980s, three unrelated foster children attempted suicide in separate incidents. Each of these children was removed from the home, but DCFS kept placing different children in the home. The information regarding each suicide attempt, which was known to the case workers for the respective children involved, was not conveyed to the case workers for the other children in the home. Nor was the information communicated to DCFS's licensing department so that the other children could be rescued and the foster care license revoked.

Shortly before Bill was placed in the home, the foster mother had refused to relinquish custody of Richard, an infant who was severely malnourished. DCFS social workers had to call the Chicago police for assistance in taking custody of the infant. The foster mother threatened to have her dogs attack the police officers if they entered the house, so the police canine unit was called to the scene. Only after officers threatened to shoot the foster mother's dogs did she allow authorities access and relinquish custody of Richard. By that time, seven squad cars were on the scene. When the authorities finally entered the house, they found the uninhabitable conditions in which Bill later lived.

Remember Marge, the imprisoned adopted child from 1960? By the time of the incident involving Richard, Marge was a dispatch officer with the Chicago Police Department. Marge heard the police radio broadcasts involving the rescue of Richard and could not believe that DCFS was again using this woman as a foster parent. Marge called DCFS and reported that she had dispatched seven squad cars to rescue a malnourished infant from the same home in which she had been imprisoned as a teenager in 1960. None of this information was conveyed to the case workers for the other children in the home so that they could be rescued. The information was, likewise, not communi-

cated to the licensing department so that the foster care license could be revoked. Five months after the fiasco involving Richard, DCFS placed Bill in this same foster home.

When Bill had been at the home for about three years, a telephone technician was in the house to repair a telephone outlet and witnessed the foster mother abusing a foster child and also saw the conditions of the home. This technician called the DCFS child abuse hotline. He had been a telephone technician for 24 years, had been inside literally thousands of homes and had never before felt compelled to report child abuse. Unfortunately, the child abuse hotline did not convey this information to the licensing department or to Bill's case worker, and Bill remained in the home.

Shortly after the hotline report by the telephone technician, three separate private social workers, independently of one another, reported child abuse and the conditions of the home to DCFS. The information was not conveyed to Bill's case worker, to the workers assigned to the other children in the home or to the licensing department.

Finally, after he lived in this home for three and a half years, a social worker removed Bill from the home. DCFS revoked the foster care license shortly thereafter.

The Public Guardian's Office filed a civil rights lawsuit on Bill's behalf against various DCFS officials. DCFS vigorously litigated several defenses. First, DCFS alleged that no abuse or neglect had occurred. DCFS also argued that Bill was not harmed by the torture, abuse, malnourishment or the environmental conditions to which he had been subjected. The officials also claimed that they had no knowledge of the abuse and neglect nor of the deplorable conditions of the home. After extensive discovery and litigation, the trial court rejected these defenses. The case settled for a large sum.¹³

¹³ Order Case Dismissed by Settlement, No. 92CV001283 (N.D. Ill. 1995).

I am still in touch with Bill. He is now in his 20s and lives in a state neighboring Illinois. He still struggles with issues related to the abuse he suffered in this foster home. The foster mother is now deceased.

III. THE ADULT-FOCUS OF THE DOMESTIC RELATIONS LEGAL SYSTEM AND RESULTANT INJUSTICES FOR CHILDREN

Unfortunately for the children, child welfare laws and immigration laws are adult-focused. The child involved is sometimes forgotten. This is true in divorce laws, as well. The legal system largely assumes that the divorcing parents take into account the interests of their young children. Too often, this is a legal fiction, and the adult-focus of the divorce courts results in injustice for children. This problem is well illustrated by the story of Timothy.

Timothy S.

When Timothy was six years old, he found himself in the middle of a custody battle that threatened to irrevocably sever his relationship with the person he knew and loved as his father.

Timothy's father was born as a female but identified as a male from an early age, a condition sometimes referred to as gender dysphoria.¹⁴ He began hormone therapies and changed his name to Harold at the age of 21. Since then, he has had the appearance of a man, including facial and body hair, male pattern baldness, a deep voice, hypertrophied clitoris, broad male torso, and increased muscular and body mass. Harold also underwent a total abdominal hysterectomy and a bilateral salpingo oophorectomy,¹⁵ which removed his uterus, fallopian tubes and ovaries.

¹⁴ *Dorland's Illustrated Medical Dictionary*, 2003, s.v. "dysphoria," available at <http://www.xreferplus.com/entry/4165673> (last visited May 2, 2007).

¹⁵ *Merriam-Webster's Medical Desk Dictionary*, 2007, s.v. "salpingo oophorectomy," available at <http://www.credoreference.com/entry/5162069> (last visited July 16, 2007).

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He then obtained a new birth certificate designating his gender as male.

When Harold was in his 20s, he met Janet. During their courtship, Harold advised Janet of his gender dysphoria. Harold and Janet fell in love, got married and decided to have children.

Janet underwent artificial insemination from an anonymous donor, which resulted in Timothy's birth. Harold is listed as Timothy's father on the birth certificate. Harold and Janet signed an artificial insemination contract, wherein they agreed that Harold was and always would be Timothy's father. Both Harold and Janet always held out Harold as Timothy's father to Timothy and the community. Harold raised Timothy with Janet. Harold loved and supported Timothy as a son, and Timothy loved Harold as his father.

Unfortunately, Harold and Janet's relationship became tumultuous and began to deteriorate. When Timothy was six, they sought a divorce.

In the divorce proceedings, Janet took the position that her marriage with Harold was void as violative of public policy and, therefore, the usual presumption of parentage for children born in a marriage did not apply. She also took the position that Harold had no biological claim to parentage because Timothy was the product of artificial insemination from an anonymous donor. As for the artificial insemination contract wherein Janet agreed that Harold was, and would always be, Timothy's father, Janet alleged that the contract was void against public policy. The divorce judge appointed the Public Guardian's Office to represent Timothy.

The case proceeded to a lengthy trial. Much of the evidence presented at trial was parent-focused and irrelevant to Timothy's interests. For example, Harold and Janet each had medical experts testify at length about gender dysphoria, Harold's physical appearance, the appearance of his genitalia and the like—in other words, whether Harold was a man or a

woman. Harold's attorneys argued that he was a man; therefore, the marriage and the insemination contract were valid, Timothy was born into the valid marriage, Harold was presumed as a matter of law to be Timothy's father and the insemination contract governed. Janet argued that Harold was really a woman and that same-gender marriages were not recognized in Illinois; therefore, the court could make no presumption of parentage, the contract was invalid and Harold also had no biological claim to parentage of Timothy. Both parties' evidence and arguments focused on Harold's gender, as opposed to the interests of their young child, Timothy.

Our office tried to redirect the focus of the case from Harold's genitalia to where it belonged – on Timothy. We argued that whether Harold was a man or a woman did not matter. What mattered was that Timothy knew and loved him as his parent and that it would be devastating to Timothy to abruptly sever this relationship just because Harold and Janet no longer got along. Such an outcome would violate Timothy's rights of association, familial integrity, privacy, substantive and procedural due process and equal protection under the federal and Illinois constitutions.

After a lengthy trial, the court ruled that Harold was a woman. The court, therefore, denied the petition for dissolution of marriage on the ground that no marriage existed to dissolve because it was void *ab initio* as a same-gender marriage. The court awarded sole custody of Timothy to Janet and ruled that Harold lacked parental rights or standing to seek custody; however, the court did rule that liberal visitation would be in Timothy's best interests and ordered visitation. Harold, Janet and our office cross-appealed various aspects of the ruling, and the appellate court affirmed. The parties sought review in the Illinois Supreme Court, which was denied.¹⁶

¹⁶ The appellate court decision is published at 825 N.E.2d 303 (Ill. App. Ct. 2005), *rehearing denied*, 2005 Ill. App. LEXIS 343 (Ill. App. Ct. 2005), *appeal*

IV. JUSTICE FOR THE ELDERLY AND ADULTS WITH DISABILITIES

The Public Guardian's Office of Cook County, Illinois is the only office in the country that combines representation of children in abuse and/or neglect and divorce proceedings with guardianship services for adults with disabilities. We have about 80 personnel in the adult guardianship division, including attorneys, case managers, home care personnel, property managers, bookkeepers, public benefits experts and an intake department. We have a consulting RN-level nurse on staff and also consult with outside physicians, psychiatrists and other professionals.

We are guardian of the estate and/or person for about 800 adult wards. Many of our wards have been financially exploited prior to our appointment. Other wards have been abused by family members. Moreover, many laws – such as the laws governing collection of judgments and tax deed sales – assume that the litigants enjoy mental cognition. Judges make similar assumptions. When this is not the case, injustices can occur. These are the stories of some of our adult wards.

Financial Exploitation of the Vulnerable

Financial exploitation of the elderly and disabled is becoming a more common and widespread problem in our society. The growth of this abuse is due largely to the demographics of our aging population. As the baby boomers age, more potential victims exist to scam.

We estimate that about a third of our new intake cases have at least some financial exploitation component. Most of our adult wards are elderly and have an age-related dementia such as Alzheimer's disease. Moreover, we serve as guardian of last resort, so all of our wards either have no family or significant

denied, 839 N.E.2d 1024 (Ill. 2005), *second appeal denied*, 839 N.E.2d 1037 (Ill. 2005).

others to serve as guardian or have family members who are abusive, financially exploitative or otherwise inappropriate. As a result, many of our wards have been isolated from the community and are in need of help, sometimes for years, before authorities learn of their plight and refer the case to our office. During this time, they are preyed upon by unscrupulous people who often plunder their entire life savings.

The exploiter can be literally anyone. In recent years, the Public Guardian's Office has recovered assets in cases in which the exploiters were family members (including children, nieces and nephews, siblings, grandchildren, etc.), neighbors, "friends," tenants, landlords, guardians, attorneys, business associates, someone with power of attorney, police officers and strangers. The problem is so widespread that we have three attorneys who focus their full-time practice on complex financial exploitation recovery litigation. Below are the stories of Delores M., whose life savings were plundered by her longtime attorney, and Brad H., who was ripped off by a neighborhood police officer.

Delores M.

Delores never married or had children, and she outlived all of her family members, other than a few out-of-state relatives. Delores and her family members all were working people with modest savings. As various family members passed away, Delores inherited their estates. Delores' last living relative in Chicago, her brother, died when she was 66. After inheriting her brother's estate, Delores had about a third of a million dollars in investment accounts and also owned her longtime home. Delores needed this money to last for the rest of her life.

After her brother died, Delores had no family in Illinois to look after her. When she reached her early 70s, Delores developed Alzheimer's disease and was soon unable to protect her interests.

Delores started to rely more and more on the family's long-time, trusted attorney to help her with her finances. At a time when Delores lacked capacity to understand what she was doing, the attorney had her sign a very broad power of attorney agreement granting the attorney virtually unfettered access to all of her moneys.

Shortly after the attorney had Delores sign this instrument, he started to plunder her funds. He helped himself to \$176,000 of Delores' accounts over an eight-year period. He also squandered large portions of Delores' pension and social security. When Delores' savings and investment accounts were gone, the attorney sold her longtime home to his friend and client for far less than its market value. He then helped himself to much of the remaining sale proceeds.

When the attorney sold Delores' home, he moved her to a very small apartment on the other side of town, away from the neighborhood where she had lived her entire life. At this point, neighbors became suspicious and called the police, who referred the case to our office. We subsequently became Delores' guardian and sued the attorney for recovery of Delores' home and the moneys he stole. We also reported him to the attorney registration and disciplinary commission. After more than a year of litigation against the attorney, the case settled, and Delores' house and her savings were returned to her.¹⁷ We were able to move her back into her longtime home, where she lived the last years of her life until she died. The attorney lost his license to practice law.¹⁸

¹⁷ Agreed Order Approving of and Authorizing the Public Guardian to Enter into Settlement Agreement, No. 96P003923 (Cir. Ct. Cook County 1999).

¹⁸ *In re Don Carrillo*, Commission No. 02 CH 45 (Ill. Attorney Registration and Disciplinary Commission 2004).

Brad H.

Brad was a lifelong bachelor. He put in 30 years with the Chicago Transit Authority (CTA) and was able to retire with a modest pension. During his life, Brad was frugal and was able to pay off his house and accumulate small savings, which he kept in certificates of deposit.

When Brad entered his 80s, he had no family in Chicago and became afflicted with dementia. He started to exhibit strange behaviors. When he was 85, Brad mistakenly entered a neighbor's home, believing it was his home. Brad would not leave. Not knowing what to do, the neighbor called the police. A beat officer responded and took Brad home.

The police officer then proceeded to take advantage of Brad's dementia to enrich himself. The officer had Brad sign documents designating the officer as the primary beneficiary of Brad's CTA retirement death benefit. The officer also had Brad name him as the beneficiary of Brad's certificates of deposit. The officer then had Brad execute trust documents naming him as beneficiary, under which he would receive Brad's entire trust estate, both real and personal. He had Brad execute a pour-over will, leaving all of his real and personal property to the trust.

Brad had a nephew who was an attorney on the East Coast. As it happens, the nephew was a law school classmate of mine. The nephew came to Chicago to visit his uncle and some friends and take in a Cubs game. When the nephew visited Brad, the police officer was in the home. The nephew became suspicious, began to investigate and discovered what had occurred to his uncle's estate.

The nephew called me to relate what had happened to his uncle. After our office investigated the situation, we petitioned the Probate Court to become Brad's guardian. The petition was granted, and our office sued the police officer to invalidate the above transactions.

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After lengthy and contentious litigation, the case went to a week-long trial before a judge in the Probate Court. At the conclusion of the trial, the judge invalidated all of the transactions. The judge also awarded \$1 in nominal damages and \$50,000 in punitive damages. The police officer appealed, and the appellate court affirmed.¹⁹ The officer then sought review in the Illinois Supreme Court, which declined to hear the case.²⁰

There is an additional interesting factor in Brad's case. Brad was not the first elderly, disabled person whom this particular police officer had swindled. During the course of investigating Brad's case, our office uncovered two additional cases in which this same officer had plundered the estates of vulnerable people. Both prior incidents were reported to the Chicago Police Department of Internal Affairs, but nothing had happened. Only after the court's judgment in Brad's case was the officer stripped of his badge and gun and criminally charged.

The cases of Delores and Brad illustrate a common theme in many of our financial exploitation cases: the exploiter is often someone in a position of trust and authority who abuses this power for financial gain. While some of our cases involve strangers who exploit the vulnerable, the majority of our cases involve people who are uniquely positioned to take advantage of the disabled person, such as fiduciaries, family members and so forth.

Laws and Courts that Presume People Have Mental Cognition, With Adverse Consequences for the Disabled

Our laws are written with the assumption that all relevant actors enjoy mental capacity. Judges also presume that litigants appearing before them are mentally competent. Sometimes, however, this is not the case.

¹⁹ 854 N.E.2d 774 (Ill. App. Ct. 2006).

²⁰ 861 N.E.2d 655 (Ill. 2006).

Sandra Z.

Sandra Z. battled paranoid schizophrenia and other psychiatric conditions for decades, but they became more debilitating as she got older. By the time she was in her 60s, her psychoses had taken over her life, and she could not function effectively on her own.

Around that time, a surgical center sent Sandra a bill for \$3916. By then, Sandra was frequently not paying her bills due to her disabilities, and the surgical bill went unpaid. The surgical center sued Sandra. Due to her psychoses, Sandra did not respond to the summons, and the center obtained a default judgment against her for \$3916. The center then sold its default judgment to a judgment scavenger for \$392 (ten percent of the face value of the judgment).

An Illinois legal procedure allows successful plaintiffs to collect judgments by forcing a judicial sale of the judgment debtor's home.²¹ This procedure is intended to protect successful plaintiffs against deadbeat defendants, but it can have unintended consequences if the defendant is not a deadbeat but instead is lacking in mental cognition.

The scavenger used the judgment sale procedures to force a sale of Sandra's home of 22 years, which was paid in full and had no mortgages, liens or encumbrances. Due to Sandra's disabilities, she was unable to understand any of the papers served on her regarding the forced sale. As a result, Sandra lost her long-time home, worth about \$150,000, at a forced sale over a judgment of only \$3916, which the scavenger had purchased for only \$392.

Sandra came to the attention of authorities when the scavenger attempted to evict her from her home, and they contacted our office. After we were appointed as Sandra's guardian, we sued the scavenger and others to recover the home.

²¹ 735 ILL. COMP. STAT. 5/12-101 *et seq.* (2007).

During discovery, it became clear that the scavenger knew of Sandra's disabilities. When notice of the forced sale was published in the *Chicago Daily Law Bulletin*, a different scavenger investigated the property. He immediately became suspicious when he discovered that the house was worth \$150,000 with no mortgage, liens or encumbrances and was being sold at a judicial sale over a judgment of only \$3916. This is highly unusual because homes lost at forced sales typically have many liens and encumbrances and, as a result, have little or no equity. The second scavenger went out to the home and met Sandra and immediately realized that she was disabled and did not understand what was occurring. This scavenger called the initial scavenger and told him this information, but the initial scavenger proceeded with the forced sale anyway.

After written discovery and depositions, a bench trial commenced. During the trial, our office sought to introduce evidence regarding the scavenger's actual knowledge that Sandra was disabled for the purpose of seeking punitive damages, and the scavenger objected. Shortly after the judge ruled in our favor on this issue, which allowed for the potential of punitive damages, the scavenger agreed to settle the case by returning title of the house to Sandra.²²

Sandra continues to live in her home. Clinically, she is doing well.

As an aside, our office later sued this same scavenger in another case for similar misconduct, preying on an elderly and disabled man who subsequently become our ward. The latter case involved facts similar to Sandra's. In the latter case, this scavenger fought return of our disabled ward's house all the way to the Illinois Supreme Court.²³

²² Order to Approve Settlement and Mutual Release, No. 98P001404 (Cir. Ct. Cook County 2001).

²³ The Illinois Supreme Court's decision, affirming the trial and appellate courts' rulings returning title of the house to our ward, is published at 802 N.E.2d 1216 (Ill. 2003), *rehearing denied*, 2004 Ill. LEXIS 1009 (2004).

Frances L.

Frances L. was first diagnosed with chronic schizophrenic disorder in the 1960s. Her condition worsened with time, and Frances would have particularly severe episodes following incidents of stress, such as the loss of her parents and the loss of her long-time companion.

Frances owned a house with her companion. She had lived in this house for 20 years. The mortgage was paid in full, and no liens or encumbrances on the house existed.

Frances' companion paid the bills, took care of financial matters, and helped Frances receive the medical attention she needed when she would have acute episodes. Her companion died when Frances was 68. Shortly thereafter, Frances suffered a severe breakdown. Police found her wandering naked in the streets of Chicago on a freezing cold January night. When the police took her home, they found the decomposing body of her deceased companion, whom Frances believed was still alive. Police took Frances to a psychiatric hospital, where she remained for the next 16 months.

During this time, Frances' property taxes were sold to a tax scavenger for nonpayment. The scavenger proceeded to force a tax deed sale of Frances' longtime home for the nonpayment of the taxes. The property taxes at issue amounted to \$347.

The notices of the tax deed sale were directed to Frances' home, but she was residing at a state mental health hospital. This fact was known to Frances' neighbors and to the postal carrier; therefore, the postal carrier returned the tax sale notices to the sender with the notation "Person is Hospitalized" written on the face of the envelopes. She also wrote her initials and route number on the envelopes. The postal carrier would testify that if anyone had followed up on her notations and called her, she would have told them that Frances was psychiatrically hospitalized and would have also told them the state mental health facility where she was hospitalized. No one ever called her or

anyone else at the Post Office about the notations on the returned envelopes.

Even though the scavenger knew that the notices of the tax deed sale of Frances' longtime home had been returned unserved and even though important clues as to Frances' whereabouts were written on the faces of the returned envelopes, the scavenger proceeded with the forced tax lien sale and obtained a tax deed to Frances' home. The trial judge involved in the forced tax sale would later testify in an affidavit that if this information had been disclosed to him, he would not have approved the forced sale.

Shortly after the tax sale, our office was appointed on behalf of Frances. We immediately moved to vacate the tax deed. We argued that Frances had never received the returned notices that she was about to lose her home due to unpaid taxes. We also presented uncontroverted expert medical evidence that, even if Frances had received the notices, she would have been helpless to understand their import or act to protect herself, due to her mental illness. We argued further that the scavenger was obligated to follow up on the notations on the returned envelopes. Finally, we argued that the notations on the returned notices, along with the fact that a valuable house with no mortgage, liens or encumbrances was being lost over a mere \$347 in unpaid taxes, put the scavenger on notice that something was amiss.

After a lengthy trial, the court denied our motion to vacate the tax deed. The court agreed that Frances did not receive the notices. The court also agreed with our expert psychiatrist that, even if she had received the notices, Frances would not have been able to understand their meaning or to act. However, the court held that, although the scavenger was on notice that Frances was hospitalized, he was not on notice that she was hospitalized due to a mental disability. In addition, the court opined that the scavenger was under no legal obligation to follow up on the information on the returned notices.

Our office appealed, and the appellate court affirmed. We then appealed to the Illinois Supreme Court, which also affirmed.²⁴ We then partnered with the law firm of Jenner and Block, which worked on the case on a *pro bono publico* basis, to seek review in the United States Supreme Court. The United States Supreme Court granted *certiorari*, vacated the decision of the Illinois Supreme Court and remanded the case for reconsideration in the Illinois Supreme Court.²⁵ After supplemental briefing and argument, the Illinois Supreme Court again affirmed the trial and appellate courts.²⁶ As this article goes to press, our second petition for *certiorari* is pending in the United States Supreme Court.²⁷

***Family Members Who Are More Concerned With Their
Inheritance than With the Quality of Care for Our Ward***

We also encounter family members who are so eager to inherit that they cannot wait for the relative to die to start spending their money. As soon as Alzheimer's or dementia begins to take its toll, these family members start plundering their relatives' bank accounts, take out mortgages on the homes, squander the mortgage proceeds and so forth.

We also see a somewhat more subtle variation of this. Some relatives object when our office seeks to spend our ward's own money for the ward's care and comfort. One particularly egregious example was the son of our ward Edith H.

²⁴ 838 N.E.2d 907 (Ill. 2005).

²⁵ The order of the United States Supreme Court is published at 126 S. Ct. 2287 (2006).

²⁶ 867 N.E.2d 941 (Ill. 2007).

²⁷ The author wishes to acknowledge the outstanding attorneys at Jenner and Block who worked tirelessly and zealously on this important case for no compensation: Jerold S. Solovy, Barry Sullivan, Benjamin K. Miller, Denise Kirkowski Bowler, Anders C. Wick and Benjamin M. Vetter. These attorneys exemplify the concept of *pro bono publico* in the legal profession.

Edith H.

Edith had advanced Alzheimer's disease. The court selected our office to be Edith's guardian, even though she had a son, because the court was concerned about the son's care plan for his mother. The court was also concerned about some of the son's conduct in court.

While we were Edith's guardian, we were constantly litigating expenditures we made on Edith's behalf. For example, Edith's condition made it clinically appropriate for her to live in her home with come-and-go home care services, and she derived happiness from living in her longtime home. Edith's son, however, objected and wanted us to move Edith to a nursing home in order to save money. He opposed remodeling the home to make it more accessible for Edith. The son objected to our purchase of medications prescribed by Edith's physician, wanting us to purchase less expensive drugs. Of course, it was Edith's own money we were spending for her care and comfort – not the son's money. But like the children of many of our wards, he believed that he had some sort of entitlement to the money, even while his mother was still alive and even if it meant sacrificing the quality of his mother's care.

***Litigation to Keep Our Wards in Their Homes and
Communities When Clinically Appropriate***

Our office is proud that we are able to keep about a third of our wards in their homes in the community. This is the highest percentage of any guardianship office, public or private, of which I am aware. We work hard and try to be creative to keep our wards in the community when clinically appropriate. For example, if one ward has a home but no stream of income to pay for utilities and home care expenses, and another ward has income but nowhere to live, we might be able to place the wards together as roommates if their needs are clinically harmonious.

We apply for all public benefits for which our wards qualify, including benefits to help finance home care expenses. We use special needs trusts to insulate the ward's assets so that the ward can qualify for such public benefits. Sometimes reverse mortgages are appropriate.

One critical tool in being able to keep wards in the community is a program administered by the Illinois Department on Aging (DOA) called the Community Care Program (CCP). This program helps pay for home care expenses for people who qualify financially and in terms of their level of disability. Unfortunately, however, in the past, the DOA has been stingy with these funds, and we have had to sue the DOA several times on behalf of our wards. The irony is that, if the DOA's stinginess with CCP funds means that an indigent person is forced out of his or her home and into a nursing facility, the DOA will end up paying far more for that person's care in the nursing home.

One of the first impact litigation cases I worked on at the Public Guardian's Office was one of our class action lawsuits against the DOA over CCP funds. This lawsuit addressed the DOA's use of a test called the Determination of Need (DON) to ascertain the level of services an individual required to live safely in his home. The problem with the DON was that it accurately captured physical disabilities and resultant need for services, but not mental disabilities. For example, the bureaucrat administering the test would ask the applicant to walk across the room. When the person did so, the bureaucrat would note that the person was able to go for walks independently. What the test ignored was that, if the applicant had advanced Alzheimer's disease, he might get lost and not find his way back home. As another example, the bureaucrat administering the test would ask the applicant to turn on the stove. If the person was physically able to do so, the tester concluded that the person could cook independently. What the test failed to capture was that the applicant might forget to eat, might be unable to distinguish be-

tween fresh and spoiled foods or might leave the food cooking on the stove for hours after it was ready to eat.

We filed a class action lawsuit against the DOA over its use of the DON test. After several years of litigation, we entered into a consent decree under which our wards qualify for the appropriate level of in-home services. This allows us to keep our wards in their own homes and communities when clinically appropriate.²⁸

V. CONCLUSION

Too often, the law, judges, social workers and bureaucrats assume that everyone is an adult without disabilities. As the examples of so many of our clients and wards show, these assumptions result in injustice for children, the elderly and persons with disabilities.

A story attributed to the humorist Robert Benchley goes that when Benchley was a student at Harvard, he took a course in admiralty law. The final exam question concerned a complex fishing rights dispute between England and Norway. Benchley stared blankly at the exam book and realized that he did not know the answer. He proceeded to write a brilliant essay that began something as follows: "This important question has been studied by legal scholars, judges and practitioners from the point of view of the British. This question has also been written about by academicians, the judiciary and practitioners from the point of view of the Norwegians. However, this perplexing legal question has never before been studied from the point of view of the fish." Benchley then proceeded to write a brilliant essay about whether the fish would prefer to be fished upon by the British or the Norwegians. Of course, Benchley went on to get an "A" in the class.²⁹

²⁸ Class Action Voluntary Dismissal, Nonsuit or Dismissed by Agreement, No. 92CH07165 (Cir. Ct. Cook County 1995).

²⁹ PATRICK T. MURPHY, WASTED: THE PLIGHT OF AMERICA'S UNWANTED CHILDREN 13 – 14 (1997).

Though humorous, the Benchley story contains a valuable lesson. In court proceedings involving children, the elderly and persons with disabilities, the actors involved often forget about the child or the disabled person. Walk into a divorce court or an abuse and neglect courtroom, and you will hear lawyers offering masterful arguments about the rights of the mother, the rights of the father, the visitation rights of grandparents, the rights of the assigned child welfare agency, the economies of various property division proposals, and the like. But these proceedings need to be focused like a laser on the point of view of the child and the rights of the child. The same is true for proceedings involving the elderly and adults with disabilities.

The young, the aged and the weak are voiceless populations. Their stories are seldom heard. It is my hope that by sharing the stories of a few of our clients at the Public Guardian's Office from the past 16 years, the legal system and society will remember to consider their point of view and their rights. For, in the words of George Washington Carver, someday we will have been all of these.