

SUPREME COURT OF THE STATE OF NEW YORK

-- FOURTH DEPARTMENT --

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NEW YORK STATE UNIFIED COURT SYSTEM
COMMISSION ON PARENTAL LEGAL
REPRESENTATION PUBLIC HEARING

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Supreme Court of the State of New York
Appellate Division, Fourth Department
50 East Avenue
Suite 200
Rochester, New York 14604

BEFORE:

HONORABLE KAREN K. PETERS,
Chair

HONORABLE CRAIG DORAN,
Seventh Judicial District Administrative Judge

HONORABLE KEVIN CARTER,
Erie County Family Court Judge

BETSY RUSLANDER, ESQ
Director of the office for Attorneys
for Children,
Appellate Division, Third Department

REPORTED BY: DIANA M. SMITH, NYACR
Official Court Reporter

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1 PRESIDING JUSTICE PETERS: Good afternoon.
2 I'm Karen Peters, Chair of the Commission on Parental
3 Representation. With me today on the bench are
4 members of the Commission - the Honorable Craig Doran,
5 Administrative Judge for the Seventh Judicial
6 District; the Honorable Kevin Carter, Judge in Family
7 Court of the County of Erie. In addition, we have
8 Betsy Ruslander, who is the Director of the Office of
9 Attorneys for Children, the Appellate Division, Third
10 Department, who serves as a consultant to our
11 Commission.

12 Established by Chief Judge DiFiore,
13 we are tasked with examining the current state of
14 mandated representation and issuing a report by the
15 end of this year. In that report, we are to recommend
16 structural, administrative and legislative reforms to
17 ensure a high-quality, cost-effective parental
18 representation system for our state. This hearing,
19 one of four we are holding across the state, will
20 assist us in acquiring relevant information from
21 government officials, institutional providers,
22 Assigned Counsel Programs and attorneys, clients and
23 other stakeholders.

24 Our ultimate objective is to provide
25 a blueprint for how our state can strengthen the

1 quality and efficiency of our family court. We want
2 to ensure the fairness and effectiveness of our entire
3 justice system for families.

4 Before we hear from the first witness
5 today, I would like to publicly acknowledge the
6 presence of and express my appreciation for the
7 extraordinary contributions of Ms. Janet Fink, Counsel
8 to the Commission; Ms. Shane Hegarty; and our special
9 advisor, Ms. Angela Burton.

10 We are grateful to Presiding Justice
11 Gerald Whelan for the opportunity to hold this hearing
12 today and especially appreciative to Mark W. Bennett,
13 the Chief Clerk of our court, the court that we sit in
14 today, the Appellate Division, Fourth Department, for
15 attending to all the many details attendant to this
16 event.

17 I would like to call in the first
18 witness, please.

19 Ms. Kate Woods, would you come
20 forward?

21 MS. WOODS: Good afternoon.

22 PRESIDING JUSTICE PETERS: Good afternoon.

23 MS. WOODS: My name is Kate Woods. I'm the
24 Deputy Director of Legal Assistance of Western New
25 York. We're one of the largest civil legal services

1 agencies in the state. Our program operates across
2 fourteen counties in this part of the state. We
3 currently serve as the institutional family court
4 assigned counsel provider in three of the family
5 courts.

6 PRESIDING JUSTICE PETERS: Your voice keeps
7 dropping at the end of your sentences.

8 MS. WOODS: I'm sorry.

9 PRESIDING JUSTICE PETERS: Think of us as
10 very far away.

11 MS. WOODS: Okay. I will. I'll talk
12 louder.

13 PRESIDING JUSTICE PETERS: Exactly. That's
14 what we want. Thank you.

15 MS. WOODS: In addition to my administrative
16 role with Law York, I am also an advocate for parents
17 in the Wayne County Family Courts. I defend parents
18 in Article 10 matters, and it's specifically with
19 reference to those cases that I would like to speak
20 today.

21 We do serve a majority of a rural
22 area and there are a lot of issues relevant to rural
23 counties that I think are important to consider.
24 However, I want to use my time today to address some
25 broader systemic issues that I see that affects all

1 the litigants in those cases.

2 The first of which I think deserves a
3 considerable amount of discussion is pre-petition
4 access to counsel. Often, the most critical moment in
5 any Article 10 proceeding is the removal hearing. The
6 outcome of that hearing - whether or not a child is
7 taken from a certain home - dictates the tone of all
8 the litigation that follows. And in my experience,
9 the overwhelming majority of the removal hearings take
10 place before the underlying petition is even filed.
11 Parents are given very little notice of these hearings
12 and sometimes are not even able to attend. And in
13 those instances where the parents are present, they
14 are almost always without counsel.

15 There have been situations in our
16 jurisdiction where parents have requested counsel at
17 removal hearings and been denied. I have read
18 transcripts of removal hearings where parents have
19 repeatedly asked the Court for counsel. They have
20 been told no, no. We will get to that when we're done
21 with this bit of business; that, of course, being the
22 removal of their children. I have read transcripts of
23 removal hearings where parents attempted to represent
24 themselves pro se and question witnesses and they were
25 denied that ability from the bench being told please

1 not now. We don't have time for this.

2 It is unconscionable that this is
3 happening. These are fundamental rights as parents
4 and parents are being denied due process wholesale.
5 The impact on the due process rights of parents cannot
6 be overstated when they are asked to represent
7 themselves pro se at a removal hearing. If parents
8 had pre-petition access to legal representation, it
9 would go a long way in protecting these rights and, I
10 am convinced, would result in far fewer removals. And
11 I can tell you in the instances where I was able to
12 find out about removal hearings and I appeared, more
13 often than not those children were removed.

14 This points to a larger concern
15 shared by parental defense attorneys across the state,
16 and it is that family courts are often treated as
17 legal backwater. These cases, which often involve the
18 most catastrophic outcomes for parents, are simply not
19 taken seriously. At a time when jurisdictions are
20 scrambling to ensure that there is counsel for
21 criminal defendants at their first appearance, we have
22 parents walking into family courts unrepresented and
23 being stripped of their custodial rights. The rights
24 of families are no less important than -- I know it's
25 important -- fundamental than the rights of criminal

1 defendants and yet parents are afforded a fraction of
2 the protection. The rights of parents in family
3 courts have to track with the rights of criminal
4 defendants.

5 I don't know if a parent would say
6 they would rather lose their children forever than
7 spend a year in jail, and to act like these things
8 aren't connected or analogies or similar doesn't make
9 any sense to me. These are some of the most serious
10 cases that are heard in the state and they are not
11 treated with the appropriate gravity at all.

12 Additionally, the backlash as seen
13 from county entities at the suggestion that parents
14 should experience the full measure of due process
15 guaranteed to them by the constitution I say speaks
16 volumes about the attitudes of the agencies bringing
17 these cases. We should be very suspicious of
18 government agencies that balk at the idea of parents
19 having representation at any stage of a matter. This
20 Commission would do well to advocate in the cases in
21 which families can be indefinitely separated, they
22 should be treated with the same gravity as matters
23 where an individual's liberty is at stake.

24 But there is another issue beyond
25 legal process that has to be addressed here if we're

1 going to have meaningful conversations, and it's one
2 which permeates the child welfare system in a wholly
3 pernicious way and that's poverty. These cases are
4 really what it's about. It's really about what it's
5 like to be a poor parent in New York State. Families
6 of means do not lose their children to the foster care
7 system.

8 What conclusions can be drawn from
9 this? Are wealthy parents never neglectful of their
10 children? Are poor parents less equipped to be
11 adequate parents? I think we would all agree that the
12 answers to both of those is no.

13 So what's really going on? What's
14 going on is that we are seeing our own discomforts
15 with the realities of poverty being reflected back at
16 us in these cases. We are uncomfortable with the fact
17 that there are people in this state who are forced to
18 live in deplorable housing conditions. We are
19 uncomfortable with the fact that in a country with so
20 much wealth there are parents who cannot afford to
21 appropriately clothe or feed their children. We are
22 uncomfortable with the fact that despair which comes
23 from being in poverty can be so wholly complete that
24 it drives people to engage in self-destructive acts
25 because they have lost any sense of their own future.

1 We blame the victims of the societal ills, we do not
2 help them and we take their children. It is
3 monstrous. And I'm just an attorney. Imagine the
4 bottomless grief and rage of the families that are
5 actually caught up in this.

6 Truly meaningful change in the child
7 welfare system is change which is desperately needed.
8 It begins with acknowledging that poor families are
9 worth protecting. It begins with the very bold
10 proclamation that living in a rundown, dirty trailer
11 filled with clutter and being a happy, loving family
12 are not mutually exclusive conditions. And if there
13 is intervention required, it should always be done in
14 the service of preserving families and working with
15 them to address the difficulties leading to such need
16 for intervention.

17 And that's my challenge to this
18 Commission, to hold these things in your mind as you
19 work through your process, to not let your own
20 discomfort with the realities of what's happening here
21 with the fact that this is often a very ugly process
22 cloud what I think needs to happen. Positive and
23 life-changing outcomes can arise from that shift in
24 perspective and I am hopeful that we can get there.

25 I am grateful to the Commission for

1 the time today. I appreciate you both listening and I
2 appreciate the opportunity to speak.

3 Thank you.

4 PRESIDING JUSTICE PETERS: Thank you. Oh,
5 don't leave. Don't walk away. I have many questions,
6 but I'm going to ask my colleagues if they have any
7 for you.

8 PRESIDING JUSTICE CARTER: Well, you talk
9 about poverty which I clearly understand it is a major
10 problem and it's one that we should all recognize and
11 consider.

12 Do you have any thoughts about what
13 the Commission can do and what the Commission should
14 do to address that issue?

15 MS. WOODS: The issue of poverty is much
16 bigger than I think this Commission can address on its
17 own. I think we need to be having conversations about
18 this. Right now the fact that it's very clear to me
19 that this is an issue that only poor people deal with
20 is not even talked about. And I think until we
21 actually know this -- and it can't just be
22 defense attorneys talking about it. We've been
23 talking about it for years. Unless we actually have
24 vying from everyone that acknowledges that this is
25 really an issue that needs to be people's access to

1 resources and how they're living and what they can do
2 --

3 PRESIDING JUSTICE CARTER: So it's something
4 you want us to be mindful of, the very fact of
5 poverty?

6 MS. WOODS: Yes.

7 PRESIDING JUSTICE CARTER: Can I ask you one
8 more question as it relates to --

9 PRESIDING JUSTICE PETERS: Before you get to
10 that, can I ask more information on the poverty
11 question?

12 PRESIDING JUSTICE CARTER: Sure.

13 PRESIDING JUSTICE PETERS: You mentioned in
14 your written testimony that living in a trailer
15 doesn't make you a less loving parent.

16 MS. WOODS: Yes.

17 PRESIDING JUSTICE PETERS: Do you think it
18 would be helpful if we strongly suggested that judges
19 and lawyers be mandated to undergo bias training
20 concerning issues such as poverty, race, access to
21 justice, because I agree with you, I think sometimes
22 people make judgments rather on the clothes you wear
23 in the courtroom as compared to what it is that you're
24 saying.

25 MS. WOODS: Absolutely. I think that's a

1 fantastic idea.

2 PRESIDING JUSTICE PETERS: Thank you.

3 Go ahead, Judge Carter.

4 PRESIDING JUSTICE CARTER: Anybody else want
5 to address that issue?

6 PRESIDING JUSTICE PETERS: Go ahead.

7 PRESIDING JUSTICE CARTER: With regards to
8 the suggestion that counsel be provided at the earlier
9 stages, has your agency thought of a process by which
10 that could take place?

11 MS. WOODS: We work on a contract basis
12 with the county. So, we are assigned cases by the
13 clerk. We are sent referrals. We have no mechanism
14 to intervene. We don't even know about the case until
15 it lands in our mailbox.

16 I think in terms of an institutional
17 agency being able to access that without any sort of
18 intervening process is almost impossible. I mean, we
19 could hang out at the court and see what they're
20 doing. Fundamentally we don't know about the cases
21 until we meet our clients.

22 PRESIDING JUSTICE PETERS: So if there's no
23 petition filed, they don't tell you that there is a
24 removal hearing?

25 MS. WOODS: No. No. Even sometimes when we

1 are assigned they don't tell us.

2 PRESIDING JUSTICE PETERS: So, they don't
3 call and say we have a removal hearing coming in at
4 3:00, can you send somebody over?

5 MS. WOODS: No. That may happen in the more
6 populated counties, but in the rural counties, at
7 least in my experience, we have no notice of anything.
8 And even in situations when I am assigned, what will
9 happen is I will get a call from the DSS attorney half
10 an hour before their hearing, bearing in mind it takes
11 longer than a half an hour to get to court from our
12 offices, and the staff will hold hearings on Friday
13 afternoons, we spend ten minutes on them and I will
14 draft the orders before dinner and there is justice.

15 PRESIDING JUSTICE DORAN: I have a couple of
16 questions.

17 First of all, thank you for your
18 passion.

19 MS. WOODS: You're welcome.

20 PRESIDING JUSTICE DORAN: In my humble
21 opinion, that's the first ingredient to making change
22 is that people -- and please keep it up and don't get
23 discouraged because there is a lot -- there are a lot
24 of obstacles to someone who has the passion you do.
25 So, keep that.

1 As the Administrative Judge in the
2 district that you work in, it disturbs me greatly to
3 hear you say that you have experienced many instances
4 where a parent who is the subject of a removal
5 proceeding has not been afforded an opportunity to
6 have counsel assigned. So, I could tell you that I
7 sat in family court for fifteen years and I personally
8 would never have and never did preside over a removal
9 hearing without the parents being represented and I
10 would hold the hearing up for hours, if it took hours
11 to hold the hearing up, until an attorney was
12 assigned.

13 So, sort of as a separate issue, you
14 should keep my phone number handy, which is 371-3752,
15 and you should call me personally if there is an
16 instance where -- because they're entitled to have an
17 attorney at that proceeding in my view. That's not
18 even a fluffy, fuzzy issue for us to be debating here.
19 I believe that's already a requirement that we should
20 be abiding by. So, I want to know about the judges
21 under my supervision who are pushing these hearings
22 through without giving the respondent parent an
23 opportunity to have attorneys represent them.

24 MS. WOODS: It's all of them.

25 PRESIDING JUSTICE DORAN: Well, we need to

1 have a conversation about that in the appropriate,
2 ethical way.

3 MS. WOODS: Absolutely.

4 PRESIDING JUSTICE DORAN: Because there are
5 things we cannot talk about ethically. But, process
6 wise, sort of as an aside, that's something that needs
7 my attention. And my supervising judge of the family
8 courts is Justice Gallagher who I will talk to about
9 it because that shouldn't be happening and it's
10 embarrassing that it does.

11 MS. WOODS: I think a lot of it stems from
12 -- and I did touch on this within my written testimony
13 -- that in the rural counties -- and I know Ontario
14 County, that is a multi-hat jurisdiction, but it has a
15 different feel.

16 PRESIDING JUSTICE DORAN: What do you mean
17 by that?

18 MS. WOODS: I don't know. It just does. I
19 think what happens is sometimes the family court
20 stigma is the court that no one wants to sit in. I
21 feel that way. Absolutely. It is treated as --
22 frankly I can see where hearing most of the custody
23 cases --

24 PRESIDING JUSTICE DORAN: Since nobody is
25 recording this, I can say that --

1 MS. WOODS: They are.

2 PRESIDING JUSTICE DORAN: I see her over
3 there -- I think that family court is the most
4 important court by far, far and above away, over and
5 above anything else we do as judges. So that's also
6 something that troubles me that we are giving that
7 impression to anybody who has anything to do with
8 family court.

9 PRESIDING JUSTICE PETERS: I have a quick
10 question.

11 Have you ever applied for a stay of
12 the removal hearing on the grounds that the individual
13 was denied their attorney?

14 MS. WOODS: I haven't.

15 PRESIDING JUSTICE PETERS: I know you have a
16 limited amount of time and I know you have limited
17 stuff. I was just asking because I would think that
18 would probably be granted pretty quickly.

19 MS. WOODS: Maybe. It's hard not to become
20 disillusioned in these cases.

21 PRESIDING JUSTICE DORAN: We're going to
22 stop that. We're going to fix your disillusion.

23 MS. WOODS: Okay. I'm going to hold you to
24 it.

25 PRESIDING JUSTICE DORAN: I'm going to make

1 that my objective because that's something that
2 shouldn't even need the attention of this Commission.
3 And that point that you raise is something that should
4 be fixed immediately regardless of what else is going
5 on here, and I take that one as my responsibility.

6 PRESIDING JUSTICE PETERS: I can tell you
7 too that I was a family court judge many, many years
8 ago, I'm a retired presiding judge of the Appellate
9 Division, and I was a judge for almost forty years,
10 and even years ago when I was the judge of family
11 court, there was never a removal hearing held without
12 the chief clerk calling all over the county to find an
13 attorney to come and take an assignment to represent
14 the parent. Never. So, yeah, I'm sure that Judge
15 Doran is going to walk out the door and that's going
16 to be his priority for the day.

17 PRESIDING JUSTICE DORAN: In fact, I may
18 make some calls right now. That's inexcusable and I
19 apologize for that.

20 I do have another question.

21 Were you in the middle of something
22 when I interrupted you?

23 MS. WOODS: I don't know. Just go ahead.

24 PRESIDING JUSTICE DORAN: So one of the --
25 you know, harking back to my days on the family court

1 bench where I saw a need for more perhaps involved,
2 energetic, enthusiastic representation by a parent
3 attorney was during the process of permanency, during
4 that long process under a dispositional order where we
5 are struggling to try to put the family back together.
6 That's our mission, that's what we do. And as these
7 folks are, as you correctly pointed out, they are in a
8 bad place, there is a whole lot of weight on their
9 shoulders. And we, the system, have in many instances
10 unrealistic expectations of these folks who live in
11 poverty in rural counties who are in all kinds of
12 stress and turmoil in their lives, that we require
13 them to make all these appointments and do all these
14 things and then penalize them when they don't.

15 And so often I have looked back on a
16 process when ultimately there has been a surrender or
17 there's been a termination proceeding and thought that
18 if we had somehow better communication throughout the
19 process -- and our focus specifically here between
20 attorney -- because that attorney continues to
21 represent those parents throughout that proceeding,
22 not just when we have the permanency hearings. And
23 too often the conversation happens between attorneys
24 and parents fifteen minutes before the permanency
25 hearings and it's a pro forma process. And I often

1 thought that if we somehow built into our system, and
2 I don't know how we would do it, a more robust process
3 during the six months between the permanency hearings,
4 that might help those parents put the pieces together.

5 How can we do that?

6 MS. WOODS: I think -- and I don't want to
7 take anything away from the private bar here, I think
8 it's very important -- I think when these cases are
9 handled by institutional providers that is less of an
10 issue. We have processes in place. I directly
11 supervise other family law units, but it is
12 unacceptable to me for an attorney to drop the ball on
13 a case like that, and there is some accountability as
14 a result of that system. They have a boss, someone
15 who is reviewing their work. These are such important
16 cases and it's very easy for attorneys not to do the
17 right thing. And I think sometimes when these
18 individual attorneys who are handling these cases,
19 it's easy for their efforts to get lost, but I have a
20 lot of confidence with institutional providers.
21 There's more rigor.

22 PRESIDING JUSTICE PETERS: I have a question
23 concerning something you brought up in your written
24 testimony.

25 You talked about the -- and oral

1 action. You talked about the serious challenge that
2 people face in rural counties with transportation.

3 MS. WOOD: Yes.

4 PRESIDING JUSTICE PETERS: And having been a
5 family court judge in a rural county, I remember full
6 well it's impossible for people to get to court
7 because there was no transportation. Our job is not
8 to determine what the problems are, but to provide
9 solutions which is not always so easy. So whenever I
10 think of a problem, when I read testimony, I think
11 what can we do to fix it.

12 Tell me what you think about the idea
13 of appearances, not in our trials necessarily, but
14 appearances of parents in cases, maybe not even
15 Article 10s but at least the other cases, by video
16 from either the town court in the town they live in or
17 the public library in the town they live in?

18 Do you think that would assist in
19 access to justice for individuals and resolution in
20 disputes without making people find their way to the
21 courthouse, appear all the time, potentially lose
22 their jobs because they have to be there so many
23 times?

24 Do you think that's a possibility or
25 do you think that I'm being unrealistic?

1 MS. WOODS: I don't think that's
2 unrealistic. I think that's a possibility. I can
3 tell you in my specific jurisdiction the courts are
4 very liberal with allowing people to appear by
5 telephone, which I appreciate. But it's absolutely
6 true. People have lost their jobs because of having
7 to attend court. People can't get to court. They
8 have default orders entered against them because they
9 can't get there. I think the idea of appearing by
10 video through a site that is local to that particular
11 person makes a lot of sense. It would require some
12 type of structure, but that's okay. But I think that
13 it's a good idea. I think the more options we can
14 give people the better because if you don't have a car
15 and you live an hour away from the courthouse and
16 there is one county bus that comes every three hours,
17 what are you going to do?

18 PRESIDING JUSTICE PETERS: And if you have a
19 witness that you want to have testify on your behalf
20 who lives in that rural area --

21 MS. WOODS: Exactly.

22 PRESIDING JUSTICE PETERS: Thank you.

23 PRESIDING JUSTICE CARTER: On that issue
24 though, have you given some consideration to what
25 could be done to address that issue of transportation?

1 MS. WOODS: Where I see the issue of
2 transportation most difficult -- and I did address
3 this in my written testimony -- is with family service
4 plans that are argulative, they make no sense to me.
5 They are boilerplate. Do all of these things, have
6 five appointments a week, good luck getting to them.
7 I think if we address the issue that way, that reduces
8 a lot of this burden on the parents. I have clients
9 who have to go to parenting class one day, they have
10 to go, you know, to mental health the other day and go
11 to substance abuse the other day, they have to go
12 domestic violence counseling some other day. They may
13 not even have all of these issues.

14 PRESIDING JUSTICE CARTER: That's something
15 that the Court, the judges, presiding judges actually
16 address on a case-by-case basis.

17 MS. WOODS: It could be.

18 PRESIDING JUSTICE PETERS: You're suggesting
19 a dispositional order be tailored to the needs and
20 concerns of the client?

21 MS. WOODS: Not even in the dispositional
22 orders, the interim orders.

23 PRESIDING JUSTICE PETERS: The orders.

24 MS. WOODS: They're all the things that
25 people have to do to, jump through these hoops to get

1 your kid back. Maybe we should be a little more
2 thoughtful about how many hoops they have to jump if
3 the goal is really to provide the people with
4 meaningful services. And I assume it is, then there
5 is, you know, a lot more thought into that process and
6 right now there just isn't and everything is
7 rubber-stamped on the bench.

8 PRESIDING JUSTICE PETERS: You mentioned in
9 your written statement that the lack of dedicated
10 family courts in rural jurisdictions, the judges being
11 three hatters, that they tend to want to do everything
12 but family court.

13 MS. WOODS: Yes.

14 PRESIDING JUSTICE PETERS: Do you have a
15 proposed solution to that problem?

16 MS. WOODS: So, I recently argued a case
17 before the Court of Appeals that never should have
18 gotten there. It was -- and I think that that entire
19 situation could have been avoided if we had more --
20 and I don't to how it works -- more education for
21 judges in terms of Article 10 matters. These are very
22 technical cases. They are complex. In my impression
23 because judges don't have the time to be thinking
24 about these things, these cases are given short
25 shrift. So I don't know that there is a solution in

1 terms of because we have limited resources and rural
2 counties don't -- we're not going to have that in
3 family courts, but I think the bench needs to be made
4 aware of how critical these cases are, given the
5 resources to actually understand them. Because more
6 often than not, I don't always have confidence that
7 the judges understand the laws that they are
8 interpreting.

9 PRESIDING JUSTICE PETERS: Thank you.

10 Ms. Ruslander, any questions?

11 MS. RUSLANDER: I just wondered if at any
12 time in your experience at these pre-petition stages,
13 are there attorneys for the children assigned at that
14 point?

15 MS. WOODS: Generally not, no. The only
16 attorney involved is the agency attorney.

17 MS. RUSLANDER: Thank you.

18 PRESIDING JUSTICE PETERS: Thank you very
19 much. Thank you for your candid testimony.

20 PRESIDING JUSTICE DORAN: Thank you.

21 PRESIDING JUSTICE PETERS: Judge Kohout?

22 JUDGE KOHOUT: Good afternoon, Judge Peters,
23 Judge Doran, Judge Carter, Ms. Ruslander. It's a
24 pleasure to be here. Thank you for giving me the
25 opportunity to speak with you today about something

1 that has been very close to my heart for many years.

2 I started out in the Public
3 Defender's Office here in Monroe County doing criminal
4 and then family, and was the head of the family
5 section for a number of years before I took the bench.

6 I also want to commend to you the New
7 York State Bar Association memo of the import of state
8 funding for parental representation. I trust a copy
9 of that has been provided to you. I think that they
10 did a wonderful job pulling together many different
11 resources and legal supports on this very important
12 issue.

13 To me the biggest problem that we
14 have in this area is the disparities amongst counties,
15 and this is not unique to this area. It has been
16 litigated in the criminal area, it is true in areas
17 concerning public benefits and other services that are
18 addressed concerning mental health that impact all
19 family court cases. The differences in financial
20 support amongst our counties, the difference in the
21 quality of services, do they choose to have an
22 institutional benefit of providing services or
23 assigned counsel or a combination of that, ways in
24 which they have people go through an application
25 process to determine whether or not they're eligible,

1 the eligibility criteria, the caseloads that attorneys
2 have, all of these things have enormous disparities
3 depending on where you are. And if you are a parent
4 in a county that has few resources or has little
5 commitment to this issue, then you will receive fewer
6 legal services.

7 Fortunately we have some civil legal
8 service providers, you heard from one today, that pick
9 up some of the slack when assigned counsel is not
10 robust and not able to assist. But honestly, unless
11 the state comes in and gives the uniformity and
12 provides some additional funding to the counties, I
13 see no hope of these disparities going away.

14 Just to give you two examples from
15 own our county, in Monroe County we're very fortunate
16 to have a strong public detention system. We have a
17 Conflict Defender's Office, and we will hear from Mr.
18 Funk today, we have a Public Defender's Office, an
19 Assigned Counsel Program, all of which provide
20 services to parents who cannot afford their own
21 attorneys in family court. However, our Public
22 Defender, Timothy Donaher, publicly stated that he has
23 different eligibility standards for parents who are in
24 family court and criminal defense.

25 What does that mean? It means that

1 if you are charged with disorderly conduct in one of
2 our lower criminal courts, your eligibility standard
3 under the Public Defender's Office eligibility is two
4 hundred and fifty percent of the federal poverty
5 guidelines. If you have a termination of parental
6 rights case or custody case or a negligent case in
7 family court, it is one hundred and twenty-five
8 percent of the federal poverty guidelines.

9 Now, I suppose you could say the
10 safety net is the judiciary. I would like to think
11 that was the case because the statute says that we can
12 assign counsel whenever parents are financially unable
13 to fund their own attorneys. However, judges are
14 busy, we also have a number of support magistrates,
15 referees who may not feel that they could interject
16 their own discretion in this area. So, what happens
17 is we have variations even within our own courts as to
18 whether parents are going to get attorneys or not.

19 The second area, we had a grant made
20 available to Monroe County not long ago, 2.6 million
21 dollars. It would have provided for one program for
22 the county that would include four more attorneys for
23 the Public Defender's Office, social workers, parent
24 advocates, and the availability of attorneys to come
25 in at the earliest possible stage even before

1 petitions are filed so when that referral is received
2 by CPS, parents could request an attorney to give them
3 advice just as they would if they were living in one
4 of our affluent communities and a CPS worker knocks on
5 their door and they wanted to have their attorney
6 assist them in that regard and they have the means to
7 do so.

8 Unfortunately, our county declined
9 that grant. This has a huge impact on the family
10 court. There isn't a day that goes by that our family
11 court judges and our referees and our support
12 magistrates aren't waiting for attorneys from the
13 Public Defender's Office to come into court and
14 represent people. They are very, very overstretched.
15 We run sometimes sixteen, eighteen parts in family
16 court. This is an enormous number of courts to cover
17 and the logistics of that is daunting. This would
18 have given us more attorneys. It would have also
19 provided the kind of support you were asking the prior
20 speaker about during those periods of time before the
21 removal hearings occur and between permanency
22 hearings, to have parent advocates, to have social
23 workers to monitor those cases and to support the
24 parents to getting into the right treatment programs.

25 We do not have treatment required now

1 in Monroe County. There are many variables. Whether
2 it's chemical dependency or mental health, you have to
3 get on a list, you have to wait. If you do not have
4 the means to do that, you have to hope that there is a
5 sliding scale you can afford or that your judge gets
6 upset enough and requires the county to pay whether or
7 not there is technical eligibility or not.

8 So, having someone on your side as a
9 parent, a social worker for your lawyer, not the child
10 protection worker sitting on the other side of the
11 courtroom prosecuting you, assist you and maybe a
12 parent advocate helping you with your child's problems
13 in school, advocate for special education to deal with
14 the disciplinary issues, these types of things could
15 shorten stays in foster care, could potentially avoid
16 cases come into family court at all.

17 So, these are just two examples of
18 disparities that hit home in Monroe County, but there
19 are numerous ones across the state I'm sure that you
20 will be hearing about.

21 From my point of view, having counsel
22 enter at the earliest possible time, which is when
23 that caseworker gives you a call on the phone, would
24 be the biggest most important change. If we were
25 allowed to have attorneys do that, that were paid for

1 by the government, we really would be doing a service
2 to the children and families.

3 We know, we know that being in foster
4 care is not a good outcome for most children. We know
5 that particularly if you are a male and you are
6 African-American or Hispanic in our community, you do
7 not have a good outcome in foster care especially as
8 the children become older. If we can keep children
9 safe home with their families, if not their parents,
10 with their extended families with some support, we
11 would be doing a wonderful service.

12 The other area I just wanted to touch
13 on is the importance of quality representation,
14 well-trained, well-supported attorneys who can stay on
15 the case from the beginning to end. That's a real
16 issue. We generally don't have that in Monroe County
17 unless we have an A team, B team assigned. Our
18 institutional attorneys are, generally speaking, not
19 able to keep a case from that very first early removal
20 stage to termination of parental rights or placement
21 with family members or returned home. They rotate in
22 and out of the courts. Sometimes it's every year,
23 sometimes it's a little longer. The County Attorney's
24 Office changes every six months. There is some real
25 consequences for children from those changes.

1 The Court Improvement Project did a
2 review of the impact of a change in the judge. This
3 was the judge only. When judges changed in a child
4 protection case, eighteen-month delay in the
5 permanency. Eighteen months.

6 Now, they did not examine what
7 happens if the caseworker changes or the caseworker's
8 lawyer changes or the attorney for the parent changes
9 or the attorney for the child or as happens very
10 frequently, they are all different at the time of the
11 termination of parental rights. The only one in the
12 courtroom who may be the same is the judge and the
13 parents. So, that continuity has a goal and I know
14 it's aspirational, it would be something accompanied
15 by a brief training that I think would have better
16 outcomes as well.

17 And I gave you a very short summary
18 of my concerns. But if there are any questions you
19 have to ask, I'll be here to answer them.

20 PRESIDING JUSTICE PETERS: Judge Doran?

21 PRESIDING JUSTICE DORAN: Thank you.

22 First of all, Judge Kohout, it's
23 always nice seeing you outside of the usual places we
24 see each other.

25 JUDGE KOHOUT: It's always nice to see you,

1 Judge Doran.

2 PRESIDING JUSTICE DORAN: The issue you
3 raised, which frankly is one of the issues that
4 prompted me to be interested in the work of the
5 Commission, seems to me to be looming over a lot of
6 what might be impediments to the best representation
7 we can provide parents. That being -- and I don't
8 know if anyone here is from the county side of the
9 ledger. I don't think we're taking testimony from
10 anybody. I know Mark is the Conflict Defender. The
11 county, if they were here responding to your comments,
12 would saying something like -- and I think this was
13 reported in the media when that grant was rejected --
14 the county would say that they don't -- they would not
15 want the caseworkers that are working for the parent's
16 attorney's office to interfere with the child
17 protective work being undertaken by CPS staff.

18 My view of this would be that it
19 would probably be very, very helpful along the lines
20 of what I asked Ms. Woods before, in the effort to put
21 a family back together and help the parents do what
22 they are being asked to do, if they had a caseworker
23 on their side. The county folks would argue that
24 their caseworker is on their side, you know, that
25 their caseworker's job is to help put the family back

1 together.

2 What would be your response to that
3 area?

4 JUDGE KOHOUT: There are two. First of all,
5 I know of no situation in our county or any other
6 place where in the criminal realm, a county agency,
7 say the DA's Office, could persuade the county
8 administration not to give money to the Public
9 Defender's Office for criminal defense. Everybody
10 knows good criminal defense is important. It's a
11 fundamental right. This isn't the general consensus
12 for knowledge in the community about the importance of
13 the fundamental rights of parents to raise their
14 children and to do it safely.

15 So, I think that's one thing. It's
16 the perception of the role of attorneys in those
17 cases. It's somehow they are not as important as they
18 are in the criminal realm. I've done criminal as you
19 know, I've done family. I think in family court a
20 good attorney is equally supported. That's one point.

21 Another point is that someone
22 intervening early could make a wonderful family plan.
23 Let's take a classic mother who has fallen into
24 addiction and having a social worker, parent advocate
25 and attorney work as a team with that parent early on,

1 perhaps to some extent with input from Child
2 Protection, coming together with a family plan where
3 the child could stay with grandparents, auntie,
4 Godmother, fifth of kin, and then encourage that
5 parent to get into the proper kind of treatment, not
6 just whatever is available, because the caseworkers
7 frankly are not able to get them into treatment. They
8 don't have that capability. They'll make referrals.
9 They'll say go to these places, but they're not
10 trained to do that kind of assessment. They don't
11 have that skill level.

12 A number of years ago we had a
13 different system in our CPS in Monroe County, and I'm
14 old enough to remember it. This is a very different
15 administration. And that administration paid for
16 caseworkers to get MSWs. There was actually an
17 arrangement with Syracuse University that came into
18 Rochester, they set up courses for those caseworkers
19 that the county paid. Professional caseworkers who
20 actually have the clinical ability to advise not only
21 the parents but also perhaps caseworkers they
22 supervise about these issues.

23 We don't have caseworkers who can put
24 together a case plan. I put together the case plans
25 on my cases because every single dispositional plan

1 looks the same. Get a mental health evaluation, get a
2 chemical dependency evaluation, go to parenting, go to
3 domestic violence training, take good care of the
4 children, don't do anything threatening to your
5 children, get them to school. They're all the same.
6 And unfortunately, we don't have caseworkers who are
7 sufficiently trained to do that nor are their
8 supervisors any longer. And in this way, if the
9 parent has a social worker who could kind of nudge
10 things in the right direction, it could be helpful to
11 the county because I do not believe our county wants
12 to put children in foster care. I believe quite to
13 the contrary. They want children to stay with the
14 family. It's just that they don't have the resources
15 either.

16 And I understand what you're saying,
17 but I would also caution that families that have the
18 means, that caseworker knocks on their door, they call
19 their lawyer, their lawyer says I don't think you
20 should talk to the caseworker. I'll talk to their
21 lawyer and see what's going on, maybe we will decide
22 how we're going to handle it. To have that ability.
23 Now, it's only if you don't have the means or the
24 knowledge to get an attorney that you don't have that
25 ability.

1 PRESIDING JUSTICE DORAN: Can I ask a few
2 follow-up questions?

3 I think where the rubber meets the
4 road here just in my own little opinion, and we're in
5 that messy world of where public policy meets the
6 judiciary, justice and political interests and what is
7 popular in view of the public, and I won't speak for
8 people making policy decisions, but just to advance
9 the conversation, would you agree that there are
10 inherent conflicts built into a system that has the
11 same boss and the same source of funds overseeing both
12 sides of the ledger? And I know we --

13 JUDGE KOHOUT: It's a potential, Judge
14 Doran. It is, of course. But that's the way it is in
15 the criminal system.

16 PRESIDING JUSTICE DORAN: I was just going
17 to say. I know it's already in the criminal system as
18 well, but in this instance, and I think that's
19 probably what led to this, and I don't want to speak
20 for the County Legislature and the County Executive,
21 but from my review, you know, my looking at the same
22 account everybody else is looking at, it looks like
23 the interests of Child Protective Services in a time
24 that was politically charged because of some incidents
25 that had occurred won out over the interests of the

1 parents trying to get their kids back or trying to
2 work through a very cumbersome process. And the
3 County Executive and the County Legislature in the
4 system we have now where the money all goes to -- I
5 know Tim Donaher gets his money from the county in
6 large part. What he has depends on whether or not the
7 County Legislature supports, same as Child Protective.

8 As long as you have that system in
9 place, aren't you running the risk when you have the
10 overlay of incidents happening that have a lot of
11 public attention and politics and people having to get
12 reelected, that messy business leads us to a situation
13 where sometimes the less popular in view of the public
14 objective loses?

15 And I dare say it might be
16 controversial and feel free to disagree with me,
17 anybody, that's where the rubber meets the road here.
18 I think we need to take a serious look at the flow of
19 funds. If we want to enhance parental representation,
20 we need to look at eliminating some of the inherent
21 conflicts that exist and where the money comes from
22 and who wins from that battle.

23 JUDGE KOHOUT: I couldn't say that better.
24 Thank you.

25 PRESIDING JUSTICE PETERS: Judge Carter?

1 PRESIDING JUSTICE CARTER: Good afternoon.

2 JUDGE KOHOUT: Good afternoon.

3 PRESIDING JUSTICE CARTER: Nice to see you.

4 JUDGE KOHOUT: Nice to see you, Judge
5 Carter.

6 PRESIDING JUSTICE CARTER: Thank you. It's
7 good to be seen.

8 You know, you talk about the
9 disparity and you use Monroe County as the example and
10 you said that they have a difference or different
11 eligibility standard.

12 Who creates that standard?

13 JUDGE KOHOUT: Well, this was first reported
14 to the press. I actually read it in our Daily Record,
15 you get the Daily Record too perhaps. And it then
16 went to our supervising judge who was confronted with
17 it and made an announcement and this is what he
18 stated. The reason was he didn't have enough staff to
19 man family court if he had an elevated, you know,
20 eligibility. And that was exactly what he did.

21 PRESIDING JUSTICE PETERS: Which is in your
22 written testimony. Thank you.

23 PRESIDING JUSTICE CARTER: So, what can we
24 do to address that kind of issue?

25 JUDGE KOHOUT: State mandates -- that's how

1 we got to the two hundred and fifty percent for
2 criminal -- and state oversight, and ideally state
3 funding.

4 PRESIDING JUSTICE PETERS: Okay. Ms.
5 Ruslander?

6 MS. RUSLANDER: Good afternoon, Judge
7 Kohout.

8 JUDGE KOHOUT: Good afternoon.

9 MS. RUSLANDER: You mentioned quality
10 representation and that training and support for
11 attorneys is part of that. The compensation rate, and
12 you mentioned it in your written testimony, is
13 inadequate to say the least.

14 JUDGE KOHOUT: Correct.

15 MS. RUSLANDER: You know, do you think that
16 that would affect the turnover that you see in your
17 court, be it panel attorneys or county attorneys,
18 whatever?

19 JUDGE KOHOUT: That's a wonderful question.
20 Thank you. I think that when you're talking about the
21 institutional lawyers, paying them what they deserve
22 to be paid so they can pay off their educational loans
23 would increase the longevity of their period of time
24 in court. It's a hard job. It's a very hard job.
25 And to expect that everyone who's talented is going to

1 come and make that their career, we're not being
2 realistic in all honesty.

3 I've been a family court judge for
4 thirty years and I'm an exception, but that's because
5 of my commitment to the Court and to the parties in
6 the court and families. I don't take that in any way
7 to criticize my colleagues who have gone elsewhere,
8 but it's very hard work.

9 I think that also for the 18-B
10 attorneys, that many of our counties rely on 18-B
11 attorneys exclusively, in the Seventh Judicial
12 District as well. And to have, you know, an increase
13 in their rate could make a very great improvement
14 because you would get attorneys who are a little more
15 experienced perhaps who would be willing to take at
16 least some of the cases.

17 MS. RUSLANDER: And given the fact that it's
18 been fifteen years now since there has been a rate
19 increase for panel attorneys perhaps, you know,
20 building in some kind of cost-of-living adjustment so
21 that we don't have to be in this position fifteen
22 years down the road, do you think that that would be
23 something that would attract attorneys?

24 JUDGE KOHOUT: I think it would help. I
25 know that in the federal system they get paid more,

1 and that I understand that there are actually very
2 experienced attorneys willing to take assignments
3 there who are not willing to take from the criminal
4 realm.

5 MS. RUSLANDER: Similarly, you know, given
6 how overworked attorneys are, what would you feel
7 would be an appropriate caseload in terms of, you
8 know, if there were to be a mandate on caseloads?

9 JUDGE KOHOUT: It's hard because family
10 court has so many different kinds of cases and you
11 can't treat a child neglect case the same way as you
12 might a family offense case. That family offense case
13 may be done in three appearances, you may not ever
14 hear any testimony. The child welfare case could go
15 on for many years until there's permanency. Sometimes
16 it's until children reach majority. So, it's hard to
17 make a comparison as to what the caseload should be.
18 But I know there have been attempts to do that on the
19 national level, I know that Mr. Donaher has made some
20 suggestions over time. And no matter what standard
21 you use, both our Conflict Defender's Office and our
22 Public Defender's Office have way too many cases to
23 really give the quality of representation they want to
24 give. They're dedicated and they're talented lawyers,
25 but they're beaten down some days when they have to be

1 in three or four different courts and they have a lot
2 of different clients with very significant needs.

3 PRESIDING JUSTICE PETERS: I have a
4 question.

5 Do you have more?

6 MS. RUSLANDER: No, Judge.

7 PRESIDING JUSTICE PETERS: I have a couple
8 questions about that.

9 Given the fact that a lot of these
10 cases and termination cases do take such an enormous
11 amount of emotional, intellectual energy and time and
12 really require a great deal of experience and
13 understanding, do you think it would be helpful to
14 think about a system in which attorneys who provide
15 services to parents in those types of cases are
16 contracted with?

17 JUDGE KOHOUT: My personal feeling is that
18 one way to avoid caseload burnout with judges and
19 counsel is to have a variety. And I have observed
20 systems and been apart of the systems as judges and
21 lawyers where there has been case assignments that
22 were exclusive to a certain kind of case. I don't
23 think in the long run that it has -- I mean, family
24 court, our cases are like this, they're intertwined.

25 PRESIDING JUSTICE PETERS: That's right.

1 The Article 10 might be you say because it involves
2 the custody and a domestic violence case?

3 JUDGE KOHOUT: That's right.

4 PRESIDING JUSTICE PETERS: So you think the
5 lawyers should be able to handle a variety of cases?

6 JUDGE KOHOUT: I think they should be in an
7 ideal world. And I realize that in the courts with
8 certain types of caseloads and certain volumes, that
9 might not be practical. And in a medium-size court
10 like Monroe County, it is practical.

11 PRESIDING JUSTICE PETERS: So, some of the
12 individuals -- we have a lot of written testimony
13 presented that's not going to be given orally across
14 the state. Many people recommended that we consider
15 parent advocates.

16 Do you think that parent advocates
17 could be of assistance in the family courts?

18 JUDGE KOHOUT: I think it would, depends on
19 who they are. In my view, a good parent advocate is
20 the one who's walked the walk, who is somebody in the
21 neighborhood, somebody who's the auntie down the
22 street who knows the circumstances under which the
23 people live, who is around to speak to them and not
24 intimidated by them and who can guide them and not
25 necessarily do it all for them, but tell them

1 questions to ask. When you go to see that examiner
2 for temporary assistance, make sure you tell them
3 about this, this and this. And when you get to that
4 special education meeting at the school, why don't you
5 ask whether there's some other option for your child
6 and do they have other ways of disciplining your child
7 when your child gets out of control and why don't they
8 all meet when my child is not in class, and ask those
9 kinds of questions. And those advocacy skills is
10 lacking in many of our parents.

11 PRESIDING JUSTICE PETERS: So, you mentioned
12 that you thought it was critical that with regard to
13 Article 10 cases, that an attorney be available at the
14 earliest possible time which would mean --

15 JUDGE KOHOUT: I do.

16 PRESIDING JUSTICE PETERS: -- which would
17 mean an attorney representing the interest of a parent
18 before a petition is filed?

19 JUDGE KOHOUT: Correct.

20 PRESIDING JUSTICE PETERS: Have you thought
21 about how to create a system that allows for that if
22 there is a county with only 18-B since the judge
23 couldn't be assigning the attorney.

24 JUDGE KOHOUT: Well, if you look at county
25 law, it does say that when an attorney is assigned on

1 family court cases, they may bring any action that is
2 consistent with taking the rights of their client. So
3 the statute as it is now contemplates there is to be
4 assignments of sorts before those other things can
5 happen.

6 PRESIDING JUSTICE PETERS: Like a client
7 bringing an attorney asking permission to bring in
8 cases with DSS and --

9 JUDGE KOHOUT: Right or attorneys assigned
10 on custody cases. It happens quite often. And then
11 the neglect case comes in the back door. You know, I
12 think that the attorney can be actively involved
13 during that period of time before the case is filed.

14 But in the case, in the situation
15 where cases haven't been filed yet, when I was in the
16 Public Defender's Office -- and admittedly our
17 caseloads were much less -- we would occasionally, it
18 wasn't quite regularly, get a call, somebody called,
19 comes in the office and says they're taking my child,
20 they're taking my child, we need to do something. And
21 we can file -- help her file a one-page request for a
22 1028 hearing. I would say that's the whole courthouse
23 it's often we did that because nobody asks for a 1028
24 hearing at that time in our courts without a petition
25 being filed. But it demobilized things and as a

1 result some of these cases were not being filed
2 because DSS then got their lawyers involved, looks at
3 the case and said we don't need to do a removal
4 hearing, we can do something different.

5 So, that's where my experience comes
6 from was at the request of the client who contacted
7 the law office. I don't think they're able to do that
8 now because of the caseloads.

9 PRESIDING JUSTICE PETERS: Correct. So I
10 have one more question.

11 And before I ask the last question, I
12 just want to thank you for coming. We go back a very
13 long way. And your brilliance and guidance and
14 experience is really class. We appreciate you today.

15 Do you think there is a role for CASA
16 to fill in some of the gaps that you described?

17 JUDGE KOHOUT: There can be. I'm a great
18 fan of CASA, but I've also seen over the time that
19 I've been a family court judge how CASA has gotten
20 broiled into contested litigation. And I have tried
21 my best to isolate CASA from those occasions by trying
22 to get the parties to agree that they won't call for
23 CASA in the case and putting down some parameters so
24 that they didn't see CASA as for or against one party
25 or the other. And I have not been successful. So,

1 generally I don't use CASA except for where I'm sure
2 that there is no contest, where there's volunteer
3 placements. I use them a lot to free children.

4 PRESIDING JUSTICE PETERS: To what?

5 JUDGE KOHOUT: To free the children, you
6 know, as they get to adolescence and they have no one
7 to talk to about college, about school, about other
8 things and they're wonderful, but I do think that
9 there can be a role. It becomes dicey when you have a
10 truly contested situation and then they become a
11 person who may be called by either side. The
12 caseworker may have said something, a parent may have
13 said something or seen or heard interaction that
14 becomes pertinent in the case.

15 PRESIDING JUSTICE PETERS: Thank you again
16 for coming. Thank you very much.

17 JUDGE KOHOUT: Thank you.

18 PRESIDING JUSTICE PETERS: Mr. Funk, good
19 afternoon.

20 MR. FUNK: Good afternoon, Mark Funk from
21 the Monroe County Conflict Defender's Office. On
22 behalf of the men and women of the Monroe County
23 Conflict Defender's Office and the attorneys of the
24 Assigned Counsel Panel for Monroe County, I would like
25 to thank you for inviting us today and hearing what we

1 have to say. And I apologize for being thorough. I'm
2 probably going to cover a lot of the same ground that
3 the first two speakers already covered.

4 PRESIDING JUSTICE PETERS: We hope some of
5 the issues are raised by every speaker from now until
6 the end of the full hearing.

7 MR. FUNK: Thank you. And I want to take
8 you to what our clients see when Judge Kohout
9 mentioned that knock on the door. You hear the knock
10 on door and there's a CPS worker there and they say
11 I'm here to take your child away from you. Probably
12 the worst moment of the parent's life. And it's no
13 less traumatic if that parent has mental health issues
14 or substance abuse issues or is a victim of domestic
15 violence or is just plain poor. It's traumatic. And
16 they get upset and that's used against them when they
17 get to court. And if they don't cooperate, meaning
18 they don't willingly hand over their child to this
19 complete stranger, that gets used against them in
20 court. And then they're told you have to work with
21 this person that just removed your child or you won't
22 get your child back. And if they are reluctant to do
23 that, then that gets used against them in court. That
24 all winds up in the petition. That's the first words
25 out of the county attorney's mouth. Judge, they

1 weren't cooperative with the caseworker when they
2 showed up to remove the child.

3 And then they're told you have to go
4 to court, usually the next day. And maybe the parent
5 is thinking there is a glimmer of hope here. Maybe
6 I'll get a lawyer when I go to court. There will be
7 someone there to help me, to listen to me.

8 And Ms. Woods talked about earlier
9 that some of the counties don't have removal or
10 attorneys at removal hearings. Well, this is really
11 what happens in Monroe County. The client shows up
12 early in the morning, removal hearing is going to take
13 place and it isn't going to be until the afternoon.
14 So, they sit on the third floor all day long. Nobody
15 talks to them, a lot of them fall asleep, and people
16 are running around, pass them all day long. And then
17 finally someone comes up to them and they say, hey,
18 I'm Mark Funk. I'm your lawyer. Here's a card, just
19 trying to introduce myself. I just received a
20 fifty-page petition that I haven't read. I know
21 nothing about your case. We're going into court in
22 five minutes and the judge is going to take your child
23 away from you. Oh, he can have a hearing if you want.

24 What is that parent thinking? They
25 are thinking I got no chance, this so called attorney

1 isn't helping me, I've lost this case before I even
2 walked in the courtroom, and this can't be fair or
3 right or legal. And it's not fair or right, but
4 currently it's perfectly legal.

5 Now, what happens? We know, the
6 folks in this room know, that when that person knocks
7 on your door and says I want to take your child away
8 from you, that that implicates the parent's legal and
9 constitutional rights. But most, if not all, of our
10 clients don't know that. And they don't know what to
11 do when that knock comes.

12 And prior to that knock on the door,
13 the CPS worker has talked to that parent for days or
14 weeks or even months prior to that knock. And they
15 document in great detail everything that parent said.
16 And they never once said to them, you don't have to
17 answer our questions or, in other words, you have the
18 right to remain silent. They don't tell them anything
19 you say will be used against you if we have to bring
20 your case into court. They don't tell them you have
21 the right to have an attorney and that if you can't
22 afford one, one will be provided to you. In short,
23 our parents are treated worse than criminal suspects.

24 Now, and Judge Doran touched on this
25 earlier, the first two things: The right to remain

1 silent and anything you say can be used against you.
2 Well, CPS doesn't want to tell her that because they
3 think it would make their jobs more difficult. And
4 why would they want to make their jobs more difficult?

5 The next part. You have the right to
6 an attorney and one will be provided to you if you
7 can't afford one. CPS doesn't tell them that for two
8 reasons. One is it will make their job more difficult
9 if there's a lawyer involved, but the second reason is
10 the parents don't have the right to have an attorney.
11 Under the laws of New York, they are not entitled to
12 an attorney until they walk into the courtroom door.

13 Now, I'm modestly suggesting some
14 things. Parents should be entitled to attorneys at
15 the beginning of an investigation. And this question
16 was just mentioned to Judge Kohout. In Monroe County,
17 it's not uncommon for a criminal suspect who gets a
18 card from a Rochester police investigator slipped into
19 their door to call the Public Defender's Office and
20 the Public Defender's Office will represent them in
21 the investigation stage or if they have a conflict of
22 interest, they will call my office to assign an
23 attorney to represent that person in the investigation
24 stage.

25 The same could happen in family

1 court, but the parents don't know enough to make that
2 request and it doesn't happen. And because of our
3 overwhelming caseloads, we are very short-staffed and
4 would be hard-pressed to handle cases like that, but
5 it could happen if we had a caseload cap, if we had
6 more staffing, if we had more assistance in support
7 staff.

8 And I would propose that Child
9 Protective should be required to advise parents that
10 they have these rights at the beginning of an
11 investigation and tell them how they can obtain an
12 attorney.

13 The attorney that practices in family
14 court should have meaningful caseload caps and support
15 staff. This was discussed a little bit. Legal
16 assistance, investigators, social workers, parent
17 advocates can all play a role in representing parents
18 affected with this. A lot of this equates to time for
19 attorneys to represent their clients, to get to know
20 the clients, to get the clients to trust them, to get
21 the clients to a point where they will work with them
22 and know that the attorneys have their best interests
23 at heart. This would allow attorneys in family court
24 to thoroughly investigate the allegations against them
25 to ensure due process. And I would submit that if the

1 parent has that relationship with the attorney, that
2 trusting relationship, knowing that the attorney will
3 be able to work toward their exclusive benefit as we
4 are required to do, that that will make the
5 relationship with Child Protective much more
6 cooperative.

7 The attorney will be able to assist
8 the client in working with CPS, and I would submit
9 that the attorney being involved would make the
10 relationship with CPS less adversarial and more
11 productive.

12 Our clients -- and I'm sure you will
13 be equally shocked to hear this -- our clients don't
14 trust CPS. If they had someone on their side, a
15 parent advocate that worked with their attorney to
16 assist them in engaging in the services that family
17 court might provide, I would submit to you that more
18 parents would successfully complete their proposed
19 plans and the result will be stronger families in New
20 York State.

21 I would submit to you that the entire
22 process, both in and out of the court, should be more
23 cooperative and less adversarial. The focus here
24 should be helping our families. In criminal
25 prosecutions, at least theoretically, a prosecutor's

1 job is to do justice, not to convict that particular
2 defendant that's in front of the Court on this
3 particular day. It's to do justice. I've never heard
4 that once in family court. It's never even paying lip
5 service that family court and the county attorney's
6 job is to do justice for this family.

7 I would submit that there should be
8 less intending to litigate family court, particularly
9 Article 10 cases. At least in Monroe County, if you
10 get an ACD as opposed to a neglect finding, the
11 dispositional order is the exact same. What's the
12 benefit in most cases of saddling a parent with a
13 neglect finding when the outcome is the exact same?

14 I would submit to you that attorneys
15 with adequate caseloads and support staff will result
16 in one, less cases being brought into family court;
17 two, if cases are brought into family court, it will
18 diminish the need for removal of the children; and
19 three, if removal is required, it's going to shorten
20 the time that the kids are placed in foster care.

21 It's mentioned in my written
22 submission that the Center for Family Representation
23 in New York City, and this is 2014 statistics, that
24 their cases average a child being in foster care for
25 five months. The rest of the state, the average is

1 twenty-nine months. And that's because they engage in
2 holistic representation, parent advocates, caseload
3 caps, support staff for attorneys and would submit
4 that's the benefit. They have estimated that based on
5 those numbers of children being in foster care less,
6 they have saved a a 130 million dollars. I think a
7 130 million dollars could go a long way to improve
8 family courts of New York State.

9 One thing I want to mention in terms
10 of it was just touched on with Judge Kohout is the
11 concept of one family, one court. I've been
12 practicing for over twenty years and it seems like we
13 ebb and flow. Yes, we're going to do this, one
14 family, one court. No, we're not going to do that
15 anymore. Okay, yeah, that's a good idea. Let's go
16 back to one family, one courtroom. And frankly, I'm
17 not sure where we all stand on that right now.

18 But just yesterday I was reading a
19 First Department decision that referred to a case that
20 lasted for eight years that had one referee, three
21 support magistrates and four family court judges from
22 two different boroughs in New York City involved.
23 That's not helping that family. And I would submit
24 that we as a state need to decide is it going to be
25 one family, one court or some other mechanism and

1 stick with it to the benefit of our litigants, our
2 attorneys.

3 I would submit that and I would echo
4 the sentiment Judge Kohout said about our attorneys in
5 family court in terms of the Conflict Defender's
6 Office, the Public Defender's Office, the Assigned
7 Counsel Program. They all are in family court because
8 they choose to be. A joke in the Hall of Justice is
9 that when the third floor elevator door opens, people
10 back up and they don't even want to get anywhere near
11 or get off the third floor. So, the people that do
12 that want to be there, they want to help families,
13 they want to help children and we need to give them
14 the tools to do that.

15 What I would submit that means is we
16 need -- a little more staff that I mentioned, we need
17 more training. I would submit that like
18 state-endorsed or created training models for all of
19 the different family court cases, support matters,
20 paternity matters, custody/visitation matters, abuse
21 and neglect, termination matters, that the state have
22 uniform training for attorneys handling those cases.
23 Access to forms, motion forms, other types of forms
24 like that to assist the attorneys would be a great
25 help.

1 My attorneys in the Monroe County
2 Conflict Defender's Office last year averaged two
3 hundred and eighty-six cases each. When that's going
4 on, they don't have time unfortunately to -- once a
5 case is over, as Judge Doran mentioned about the
6 permanency hearing, okay, that's six months down the
7 line. I have a hundred cases to deal with between now
8 and that permanency hearing six months down the line.
9 My attorneys don't have time to call the client and
10 say, hey, did you get to your program yesterday? Hey,
11 don't forget you have an appointment next week with
12 your mental health counselor. If we had support staff
13 to do that, that permanency hearing would go a lot
14 better for that client in that six-month time period.

15 We, in essence, unfortunately -- it's
16 blunt to say this -- the case is over, we cut them
17 loose. You're on your own. And I would submit that
18 CPS -- and they're overworked and understaffed -- they
19 don't hold up their end of the bargain. Yeah, state
20 law says they are required to work toward
21 reunification, but really what do they do. The case
22 is over, they give the client a bus pass and say, you
23 have to sign releases for me. That's what they do.

24 And in some cases I would submit that
25 actually CPS will sabotage a parent's ability to

1 reunite with their child. Anyone that's done an
2 Article 10 case in family court has probably heard
3 something like this. CPS says, oh, the child can't
4 visit with mom on Tuesday because the foster parent
5 signed her up for dance class that day.

6 What's that tell the parent? CPS has
7 chosen the foster parent over you. That parent is
8 thinking I got no chance of getting my child back.
9 They have taken sides against the parent when their
10 mandated responsibility is to work with that parent.
11 And it's all too common that this happens.

12 And that happens all too quickly.
13 You get a first appearance and a parent comes in and
14 says I have three relative resources I want to place
15 my child with. And CPS dismisses them out of hand.
16 No, we're not placing those kids there. We have a
17 pre-adoptive foster home to place the child with.

18 So, when we're talking about that six
19 months between the disposition and the permanency
20 hearing, social workers, parent advocates to remind
21 the parents, you have that appointment next week,
22 don't forget or to maybe drive them there, it gives
23 them the best chance of success to reunite with their
24 child.

25 I would submit that all of these

1 things that were proposed are going to cost money.
2 And I would submit that the State of New York should
3 be required, as the state constitution requires that
4 they are or says that they are, to give adequate
5 representation to our clients.

6 In the criminal context, the state
7 has just agreed to expand the hearing settlements to
8 all of the counties of New York and they are extending
9 two hundred and fifty million dollars over the next
10 five years to do that. Our parents in family court
11 deserve no less. And I would submit to you that
12 reforms such as articulated in the rough hearings and
13 settlement should be extended to family court.

14 Thank you.

15 PRESIDING JUSTICE PETERS: Thank you.

16 Judge Carter.

17 PRESIDING JUSTICE CARTER: I don't have any
18 questions.

19 MS. RUSLANDER: Mr. Funk, you had mentioned
20 about basically what constitutes civil Miranda.

21 Do you think that this Commission
22 should make a recommendation about a legislative
23 proposal that would provide for that?

24 MR. FUNK: Yes, absolutely. Unfortunately
25 -- and it was touched on, Judge Kohout just mentioned

1 it and Ms. Woods mentioned it earlier, there is a
2 disparity in our state between rich and poor and part
3 of that translates into it seems that folks of means
4 know their rights more than folks of lesser means. So
5 -- and prior to being a Conflict Defender I was in
6 private practice. I would occasionally get a call,
7 CPS just came to me, what do I do? I don't get that
8 call from folks of lesser means. And that has
9 devastating outcomes on the remainder of the case.

10 I would, you know -- and things
11 frankly -- I mean, let's start with the very
12 beginning. If a parent doesn't have an attorney, this
13 results in the removal of the child. The outcomes in
14 family court once a child is removed are much worse
15 for the parent than if a child is home during the
16 pendency of the case. So, those initial stages
17 dictate how everything goes. And the litigation may
18 last for years, but what started with I don't have an
19 attorney, I don't know my rights, I made all these
20 statements to the CPS worker three years later results
21 in a termination of parental rights. So, yes, I would
22 submit that parents should be told these are your
23 rights. You have the right to have an attorney. You
24 have the right not to talk to us, though I would
25 encourage you to recommend that.

1 PRESIDING JUSTICE PETERS: Anything else?

2 MS. RUSLANDER: My other question is whether
3 or not your county is -- do you ever receive funds
4 from 722-c of the County Law for assistance in
5 representation?

6 MR. FUNK: I guess I'm not clear on what
7 you're asking.

8 MS. RUSLANDER: Well, you talk about, you
9 know, how perhaps a social worker could help you in
10 going out and doing some of the legwork. And given
11 that 722-c of the County Law provides for expenses of
12 representation in the same way, you know, that, for
13 example, attorneys for the children could use state
14 funds for that, there was some brief testimony from
15 somebody else about how the county declined that, and
16 I'm just wondering if you ever sought an application
17 to get funding from the county for -- under that
18 section for expenses and representation that might
19 assist you in your case?

20 MR. FUNK: Well, as a county agency we do
21 have a budget for some things like that. My office,
22 we do not have investigators on staff. The
23 investigators we do use are generally for service of
24 process and not for actually investigating the
25 allegations against our clients, particularly in the

1 family court context. We do not have social workers
2 on staff or parent advocates on staff. I think that
3 it's something that our staff has talked about in the
4 appropriate cases to make applications like that, but
5 the practical reality is it doesn't happen often.

6 MR. RUSLANDER: Thank you.

7 PRESIDING JUSTICE PETERS: Judge Doran?

8 PRESIDING JUSTICE DORAN: If I could just
9 follow up on a couple of things.

10 First of all, thank you for your
11 work. It's a pleasure to work with you on a regular
12 basis in your capacity. You're a good guy and a good
13 guy to deal with. So, props.

14 MR. FUNK: I appreciate that very much.
15 Thank you.

16 PRESIDING JUSTICE DORAN: The way I try to
17 view issues or problems is trying to find common
18 ground first before we fight about something. And I'm
19 listening to the conversation about Child Protective
20 proceedings and how they turn into contentious
21 proceedings too soon. I'm sort of moving in the
22 direction now of thinking that there is probably a way
23 that we could find common ground because what -- I'll
24 ask a rhetorical question:

25 What is the major difference between

1 that or understands that or cares about that. That's
2 my problem.

3 PRESIDING JUSTICE DORAN: That's a pretty
4 big generalization.

5 MR. FUNK: Yes.

6 PRESIDING JUSTICE DORAN: And I would have
7 to say, since this is going to be recorded, that I
8 don't necessarily agree, there are CPS caseworkers
9 that I know don't fit into that category.

10 MR. FUNK: There are. And there are a lot
11 that I would submit don't. Again, when you have a CPS
12 caseworker that says mom can't visit because the kid
13 is going to dance class, on behalf of our clients, we
14 have a problem with that. And I think that's
15 indicative of those CPS workers that are not trying to
16 work together.

17 PRESIDING JUSTICE PETERS: Thank you.

18 Do you agree that to a great extent
19 the CPS workers are overworked just as much as you're
20 overworked?

21 MR. FUNK: Yes, I do.

22 PRESIDING JUSTICE PETERS: So, sometimes I
23 think the problem has to do -- because they're
24 suffering similar to the type of caseloads you're
25 suffering which creates a real problem.

1 MR. FUNK: Right. I would agree with that.
2 And I think that's why, as I mentioned, that I think
3 CPS workers do little more than here's a bus pass and,
4 you know, sign a release for me.

5 PRESIDING JUSTICE PETERS: Could you tell me
6 whether you believe the attorney for the child can
7 play a role in ensuring that dispositional orders are
8 geared towards the need of the parent and the child as
9 compared to just per forma requirements?

10 MR. FUNK: I think a lot of the family court
11 judges respect and listen to attorneys for the
12 children more than parents' attorneys or the county
13 attorneys. So, I think that anything that an attorney
14 for the child can do to support the reunification of
15 the children would be looked at by the courts as a
16 step in the right direction.

17 PRESIDING JUSTICE PETERS: And you mentioned
18 in your written testimony that you had serious
19 concerns regarding the translation services in family
20 court. Actually, you said sometimes they were
21 substandard.

22 Do you have any suggestions to
23 improving that process?

24 MR. FUNK: It is a difficult issue. I just
25 came across my desk a case scheduled for trial and the

1 translator that's been working on the case for a
2 couple months is not available on the trial date and
3 the attorneys were trying to scramble to get someone
4 else on board, especially when you have unique
5 languages. And in the Hall of Justice they have
6 Spanish interpreters on staff, but they have to kind
7 of contract basis with other languages and sometimes
8 you don't get even the right fit for the particular
9 dialect --

10 PRESIDING JUSTICE PETERS: The dialect,
11 right.

12 MR. FUNK: -- the litigant is involved. I
13 think a number of things such as a database of
14 approved court translators could be helpful and it may
15 be the courts can access, that attorneys can access,
16 and not only just for interpreters but a number of
17 service providers. Who can we call if this is the
18 issue? Who can we call if this client has a housing
19 issue?

20 PRESIDING JUSTICE PETERS: Is there a
21 website you can go to now for the attorney for a
22 parent to get translators?

23 MR. FUNK: When I started at the Conflict
24 Office, I did some research in this and we have a list
25 of interpreter services that if this issues come up we

1 will refer either the courts or the attorneys to.

2 PRESIDING JUSTICE PETERS: So you think a --
3 do you suggest that there be a more expansive
4 availability? I need to understand exactly what you
5 think is necessary.

6 MR. FUNK: Yes. I think that there needs to
7 be an availability. And, you know, about a year and a
8 half ago I got a call for who is that interpreter? I
9 never even heard of that language before. And we had
10 to scramble to try to find an interpreter. We ended
11 up having an organization out of Florida do
12 translation via telephone into Gates Town Court. And,
13 you know, to have ready, more ready access to who can
14 we call, what services are available would be quite
15 helpful.

16 PRESIDING JUSTICE PETERS: Thank you. I
17 have another question.

18 I mentioned to one of the former
19 witnesses about the challenge of rural transportation.
20 She mentioned it and I suggested that maybe our job
21 was to come up with some suggestions on resolving
22 those problems.

23 Would you be supportive as an
24 attorney representing adults to have adults appear in
25 by video conference from their library or their town

1 court?

2 MR. FUNK: Yes, absolutely.

3 PRESIDING JUSTICE PETERS: That might mean
4 that you're not there, it might mean that you're
5 somewhere else.

6 MR. FUNK: There are drawbacks to that. We
7 represent people in state prison and that could be a
8 possibility of having them appear via phone, video
9 conference, things like that. Clearly when there is
10 an appearance by phone or video conference, prior to
11 that or during that court appearance, you don't have
12 the ability to maybe speak with your clients as you
13 normally would --

14 PRESIDING JUSTICE PETERS: Correct.

15 MR. FUNK: -- or you can't sit out in the
16 hall with your client and get an update on what's
17 going on since the last court date prior to going into
18 court. But the alternative is if the client doesn't
19 just show up to court, then the judge issues a warrant
20 for them or holds it against him in some other way.

21 PRESIDING JUSTICE PETERS: If a client can't
22 get there and calls you and says I can't get there,
23 then you're stuck.

24 MR. FUNK: Right.

25 PRESIDING JUSTICE PETERS: So you support

1 the idea of remote appearances?

2 MR. FUNK: Yes.

3 PRESIDING JUSTICE PETERS: I have one more
4 question.

5 One of the subjects that have been
6 discussed is the one family, one judge concept. And
7 having been a family court judge and the appellate
8 judge, I can tell you that I've seen both sides of
9 that. When I was a family court judge, we had the one
10 judge in family, was an appellate court judge where we
11 had the rule that if a case was decided on appeal and
12 it came back, it got assigned to the judge that had
13 previously decided it on appeal so they wouldn't have
14 to relearn the whole custody record or the whole
15 Article 10 record. And I've now seen it switch so
16 that it goes to a new judge for a, quote, fresh look.
17 That's the problem.

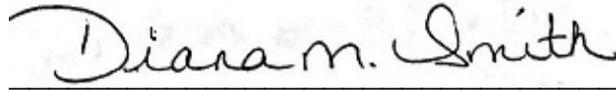
18 The problem is: Does one think that
19 consistency in the judge knowing the family and
20 understanding the problems is best or should one think
21 that a fresh look will be of greater advantage to the
22 child and the parents we have?

23 Do you have an opinion on that?

24 MR. FUNK: I think that generally speaking,
25 a judge who is familiar with the facts and

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(Certified to be a true and accurate transcript.)

A handwritten signature in cursive script that reads "Diana M. Smith". The signature is written in black ink and is positioned above a horizontal line.

Diana M. Smith
Official Court Reporter