

Speech for Advanced Child Protection Law CLE

Dallas, Texas

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I have to tell you—it's more than a little daunting for me to be speaking to a room full of child welfare experts about child welfare. It's like walking into a convention of priests and giving a speech about God.

In some sense, feeling a little like an imposter has been an unavoidable consequence of the decision to sue the State over its operation of the foster care system. Fortunately, we've been supported all along by our co-counsel in NY, Children's Rights, the nonprofit organization we teamed up with in bringing this case. As importantly, we've benefitted beyond measure from the ongoing input we've received from child welfare experts here in Texas, some of whom I know are in this room. That includes folks like Madeline McClure and Dimple Patel from TexProtects; Kate Murphy with Texans Care for Children; Will Francis with the National Association of Social Workers; Mike Foster; Andy Homer (with TexasCASA); Katherine Barillas (now with Texas Network of Youth Services); Tara Garlinghouse (the Foster Care Advocacy Center); and Barbara Elias-Percival (with Texas Lawyers for Children), to name just some of the many people in the child welfare community we've had the great fortune to get to know over these years.

In my remarks today, I've got three goals. First, I want to tell the story of how this lawsuit came about. The course director, Rhonda Hunter, thought that it would be valuable for me to give some sense of how the lawsuit began. It's an important story because it helps show that, as with so many things in life, the impetus for change has to start somewhere—and that it takes individual people who care enough to make change possible. Second, I will give a brief summary of what's happened so far in the case and where things stand today. And, finally and perhaps most importantly, I'll try to address where I think we go from here.

How the Lawsuit Came About

Fifteen years ago, a brand-new associate, Dori Goldman, joined the Yetter Coleman law firm in Houston Texas. When she arrived, she was eager to work on some type of impact litigation—litigation that could make a difference in the lives of people. Paul Yetter, the firm's senior lawyer, encouraged her to find an important cause. As it turns out, just as Dori was beginning to think about what kind of case they might take on, Carole Keeton Strayhorn, who then was the Comptroller of Texas, published a special report on the Texas Foster Care System. Titled, *Forgotten Children*, it was the culmination of her office's year-long investigation into the State's foster care system. The report identified glaring systemic deficiencies: from inadequate numbers of caseworkers, to serious shortcomings in licensing and investigations, the report chronicled stories of abuse and neglect in care that were just shocking. When she read it, Dori Goldman immediately realized that this might be the very cause she was looking for. She met with Jim Harrington and others from the Texas Civil Rights Project. They only handled individual litigation—they had no experience with bringing a collective action to try to remedy system-wide problems—but they told her about a nonprofit group of out of NY that did do this sort of work.

At the time, Marcia Lowry was Executive Director of Children's Rights, a group that she founded decades earlier. Lowry had risen to prominence in the 1970s as a leading crusader for using the legal system to fight for systemic changes to state foster care systems. When Dori approached Children's Rights, they had already had their eyes turned to Texas. The timing was perfect.

Dori's new employer, Paul Yetter and the Yetter Coleman firm, were fully behind the effort from day 1. They also teamed up with Barry McNeil at Haynes and Boone right here in Dallas and together, began to do the necessary investigation and due diligence that they had to do. It turned out to be a much bigger undertaking than anyone initially imagined.

All litigation has its challenges. But to bring a successful class action suit against the State of Texas was particularly daunting. I'll just mention two of the biggest hurdles to bringing this case. The first is a procedural hurdle: whether the lawsuit could be filed as a class action suit.

Most litigation is brought on an individual basis. By that I mean that it's usually just one party suing another. A class action suit, by contrast, is a suit that seeks to represent an entire group of claimants: here, that meant more than 12,000 children in the permanent managing conservatorship of the State of Texas. To be able to maintain a class action, you have to show that everyone's claims are sufficiently similar—that there's some common bond or glue that binds all of the cases together.

The second major hurdle was substantive. In order to show that the State was violating the constitutional rights of the children it had taken into its care, it would be necessary to show that the State acted with deliberate indifference to the rights of these children. That's intentionally a high standard to meet. The courts are not supposed to intervene just because someone says that the State is doing a fair job, but they could be doing a little bit better. The US Constitution is understood to set a floor—an absolute minimum level of care that the State has to show. This ensures that the courts do not find themselves asked to take over state administrative responsibilities except in the most extreme of circumstances.

But that's exactly what the lawyers' investigation revealed. Strayhorn's report was just the tip of the iceberg. Reports of other independent groups, outside of DFPS, confirmed the Comptroller's findings. And these reports were consistent with the longstanding views of child welfare experts in the State who had witnessed firsthand the State's deliberate indifference to foster children. Woefully inadequate resources, terrible policies, and reckless leadership that turned a blind eye to the countless stories of abuse and neglect in the system. Indeed, the lawyers found that DFPS had even conducted its own internal investigations and found the system to be broken and neglected but had done little to remedy these longstanding problems.

Eventually, in 2011, after doing enough initial research and investigation to feel confident that the claims could be amply supported, suit was filed. The case ended up in front of Janice Jack, a federal district judge in Corpus Christi Texas. And that's how it all began.

So What's Happened Since Then?

A lot. It's been an eventful 8 years. I'll focus on some of the highlights.

Initial Certification Decision. Judge Jack initially certified a single class of all foster care children in the permanent managing conservatorship of the State. But as luck would have it, her decision came just before the US Supreme Court issued a landmark class action ruling in a case called *Wal-Mart v. Dukes*—a case that seemed to signal that the Supreme Court wanted lower courts to be tougher before allowing class actions to proceed. So the State appealed Judge Jack’s class action decision—this was the first of what have been, as of today, a total of seven different appeals that the State has taken in this case.

In their first appeal, the State was *partially* successful. They convinced the Fifth Circuit that Judge Jack should not have certified a class under *Wal-Mart*. But, I said that they were only partially successful—because the appellate court didn’t end the case. Far from it; instead, it sent it back to the district court to try again—and, critically, it gave some specific suggestions for how a class action might be properly certified the second time around.

On Remand. And this is where my part in the story begins. At the time, I was—as I still am today—a full-time member of the faculty at the University of Houston Law Center. Knowing that one of my areas of specialty is class action cases, Dori Goldman from the Yetter Coleman firm reached out to me and asked if I wanted to be involved in helping them. I did, and working closely with the firm and Children’s Rights in NY, we did further factual investigation that led us to reframe the case.

Following the roadmap that the Fifth Circuit had laid out for us, we proposed that Judge Jack certify a general class and three subclasses. The general class would be comprised of all PMC children. This was the central claim in the case: but we narrowed our claim to focus on the fact that all of these children are at serious risk of harm because the State does not maintain an adequate number of primary conservatorship workers. We likened caseworkers to human fire alarms: critical for sounding warnings when a child in the system is at risk of abuse or neglect.

Our second claim was on behalf of a subclass of these children: we argued that children who are placed in a licensed foster care placement are at serious risk of harm because of the State’s policies and practices regarding its investigations of licensed placements. We also argued that the state’s policies and practices regarding its placement array were unconstitutional.

Our third and fourth claims were also on behalf of subclasses of children; they concerned the State’s unsafe practices and policies in housing larger groups of children together—back then, these placements were called Foster Group Homes and General Residential Operations.

Trial and 2015 Decision. Judge Jack agreed and certified these new classes. So the State appealed again—this was their second appeal. Only this time, they made a mistake. They missed the deadline for taking an appeal-- by one day and the Fifth Circuit refused to hear it. They could still appeal at the end of the case—but not now.

So the case proceeded and in Dec 2014 went to trial. Over the course of nearly two weeks, the evidence we offered of the State’s deliberate indifference was extensive. It included expert and lay

testimony, including from 14 top DFPS officials. We offered independent outside reviews and studies; internal audits and commissioned reports; and damning admissions from State officials.

A year later, Judge Jack issued her decision. She found for the plaintiff children on nearly every claim we brought. She found that overburdened caseworkers expose all children to a substantial risk of harm. For instance, Judge Jack found that 53% percent of PMC children had primary conservatorship caseworkers whose loads exceed 20 children; 30% had caseworkers with loads of 25 or higher. And the court found that the State has known about excessive caseloads for many years but has been deliberately indifferent to addressing the problem.

The Court similarly found for the plaintiff children as to their claim regarding state investigation policies and practices. Some of the most damning evidence came from the State itself. We found that it had conducted an internal audit of its own abuse investigations back from 2012-2013. It found that 75% of the initial findings of RCCL investigations into physical abuse, sexual abuse, and negligent supervision claims were incorrect. A 75% error rate. But, as bad as this sounds, it gets worse. Even after its internal audit confirmed this staggering error rate, the court found that the state took no corrective actions. No children were moved from the facilities where they had suffered abuse and neglect. None of the agencies involved were penalized in the slightest. And the State made no further effort to reexamine other investigations to see if the problem were even more widespread. In short, the State did nothing.

Finally, Judge Jack found that the State was deliberately indifferent to the rights of children placed into congregate care settings. The core problem was inadequate supervision in placements that house between 7-12 foster children. Back then, these were called Foster Group Homes. Today, the state calls them cottage homes.

In short, Judge Jack's 2015 decision was a scathing indictment of the State's foster care system and that the state was violating these children's constitutional rights; but the court realized that fixing these problems was going to be very difficult and so she said she planned to appoint two expert special masters to help her figure out what relief to order.

State's Next Appeal. Any hope that Judge Jack's decision would catalyze the State to start addressing these problems was soon dashed, however. Within days of her decision, the State appealed again and asked the court to stop the case from moving forward to the remedy stage. If you're keeping track, this is its third appeal in the case so far. But, once again, they lost. The Fifth Circuit refused to stay the case.

Judge Jack then proceeded to name two special masters. One was a long-time expert in child welfare, Kevin Ryan. Recognizing that she also needed the help of an experienced expert with class action reforms, she also appointed Professor Francis McGovern from Duke University, one of the country's leading special masters, with a long history of experience with implementing institutional reform remedies.

State's Fourth Appeal and Special Masters. And so, of course, what did the State do? It tried to appeal again, seeking another emergency form of relief known as a petition for mandamus. But, once again, the Fifth Circuit rejected its appeal.

Over the course of the next year and a half, the special masters dug deeply into the system. They issued recommendations of specific reforms to remedy the constitutional violations. Relying on their recommendations, Judge Jack issued her Final Judgment in January 2018. Those remedies included the imposition of a caseload cap on conservatorship caseloads and on caseloads of RCCL investigators. The court also ordered a number of other reforms to address the serious harms children face, including, for instance, ordering an overhaul of the state's computer databases. Those dysfunctional systems, the court found, make it harder for caseworkers to adequately protect children.

State's Fifth and Sixth Appeals. The State then appealed again. This time, it had some success. The Fifth Circuit agreed that the issues in the case were important enough to warrant putting Judge Jack's ruling on temporary hold. And so the State was not forced to comply with her orders until after the Fifth Circuit had a chance to carefully review her decision. That gave the state time to appeal to the fifth circuit; which it did. The State filed a very long brief detailing all of the supposed problems with her decision. And the appellate court heard oral argument last spring.

Fifth Circuit Affirms Core of Case. About six months later, in October 2018, the appellate court issued decision. And it was a blockbuster. That's the one I included in the course materials for everyone to see. It upheld the core of the plaintiff children's claims. It found that the State has been deliberately indifferent to all PMC children because of its policies and practices as to conservatorship caseworkers, and as to RCCL investigations. The only major difference it had with Judge Jack as to caseloads was that it struck down her order of a caseload cap. But, it upheld the core of what Judge Jack ordered, finding that the State must "determine how many cases, on average, caseworkers are able to safely carry." And based on that determination, it must "establish generally applicable internal caseload standards."

The Court did reject some of the district court's regarding Foster Group Homes, but it upheld the core finding that there must be adequate supervision whenever groups of children more than 6 are housed together. The only ruling that was not upheld was as to the state's inadequate placement array.

So, technically as we lawyers say, the Fifth Circuit partially affirmed and partially reversed Judge Jack's rulings. It ordered a limited remand of a few issues back to the district court to address, which the court promptly did, following the fifth circuit's instructions.

State's Seventh Appeal. So this surely, should be the end of our story, right? The Fifth Circuit affirmed the core harms found and remedies ordered by Judge Jack. The State should now have to comply with those orders, right? Well, I'm sure you can guess by now what happened instead? The State appealed again- its seventh appeal in the case, arguing that even though Judge Jack followed the Fifth Circuit's instructions on remand, she still erred.

Which brings us to the present day. We had oral argument before the Fifth Circuit last week on that 7th appeal and we are waiting on its decision—which we expect will come in the next 3 months or so, perhaps sooner.

Unfortunately, the State has already indicated that it plans to appeal again—to the entire Fifth Circuit and, if need be, to the US Supreme Court. Some of you may have seen that in the Dallas Morning News story about the case that ran just a few days ago. So, it seems that we've still got some legal battles ahead of us.

Looking Forward

Which brings me to the last point I want to briefly make: where do we go from here. While I won't predict how the remaining legal fights will turn out there are some reasons to be optimistic about the future.

What is important and potentially transformative about Judge Jack's orders that the Fifth Circuit has affirmed is that they hold the promise of forcing the State to be accountable, truly accountable, for fixing the grave harms that children face. For decades, there have been calls for reform. Time and again, the legislature and DFPS have promised to make key reforms to the system only to see those promises broken or unfulfilled. By affirming the core of the district court's findings, the Fifth Circuit has ruled that the State must ensure that children do not face unreasonable risks of harm—and if it doesn't, the judge will be there to hold them accountable.

But it can't stop there, of course. That is, no matter what happens in our class action case, to fully protect children and ensure the best possible outcomes for them, it is incumbent on the legislature and DFPS to act responsibly. After all, the lawsuit was never going to force Texas to fix *all* of the problems that plague the system and it was certainly never going to force Texas to adopt *best practices*. It could never have done that. As I said before, by design, the law does not permit a judge to order a State to adopt reforms that will ensure the highest level of care. The constitution sets a floor—an absolute minimum—that the State must meet. But the judge's role has never been to make the system perfect; only to ensure that it is constitutionally satisfactory.

I'll end by quoting Carole Keeton Strayhorn's 2004 report—a report that, as I've said, was pivotal in convincing the lawyers who decided to take on this case, that the system was in desperate need of reform. As she put it:

It has been said that any society can be judged by how it treats its weakest members. My investigation shows that Texas can and must be judged harshly. We are not doing all that is necessary to protect our children. Texas is great, but we can do better. ... Our children are our most precious resource.

Judge Jack's rulings have shed a critical light on how harshly the Texas system still must be judged and her orders, if ultimately upheld, will ensure that the most egregious problems are remedied. But the courts cannot order more than that. It is up to the legislature and DFPS to go beyond just adequate enough to meet the bare minimum that is owed to children. And it is up to child welfare advocates—that is, to all of you here in the room, to lobby and argue and demand that legislators and agency officials act to make the Texas foster care system as good as it can be.