

The Court as the Last Resort: When the Child Welfare System Fails, Litigation Provides a Last Line of Defense for Children in Trouble

An Interview With Marcia Robinson Lowry

By Carolyn Beeler

Marcia Robinson Lowry, JD, is Executive Director of Children's Rights, a national advocacy group based in New York that is working to reform failing child welfare systems on behalf of the abused and neglected children who depend on them for protection and care. Caroline Beeler interviewed Ms. Lowry for the APSAC Advisor in May 2008.

Recent law school graduate Marcia Lowry was working at a legal services office in New York City when the staff instructed the group of new lawyers to pick a legal specialty. Lowry chose children's issues because she thought it seemed the most interesting. Decades later, she has represented hundreds of thousands of children through child welfare litigation.

Lowry is the founder and director of Children's Rights, a nonprofit advocacy group that uses litigation to reform the child welfare system. Since spinning off from the American Civil Liberties Union in 1995, after the project began in 1973 at the New York Civil Liberties Union, Children's Rights has filed 11 class action lawsuits in an effort to assure accountability in a system where, she argues, there is none. Though the organization litigates at the local and state levels, it aims to affect system-wide change.

The Children's Rights Web site (www.childrensrights.org) makes the following pledge: "We won't rest until every state in the U.S. lives up to its constitutional and statutory obligation to provide basic services, care and protection to abused and neglected children." By creating an environment in which good systems are the norm rather than the exception, and by providing a model for change that can be emulated across the country, Children's Rights hopes to use litigation at the state level to improve systems across the nation.

From Tip to Trial

Investigation of a specific state will usually begin with concerned citizens, often a foster parent group, juvenile court judge, or mid-level official in a state agency who contacts Children's Rights when frustrated with the level of care provided to children by an inadequate system. According to Lowry, the problem in the state has typically been documented for a number of years before anyone calls Children's Rights, but the state has failed to take real action. Occasionally, there is a disconnect between the perceptions of upper management and what is actually happening on the ground.

In Michigan, a new child welfare plan was developed and nominally implemented; but in fact, it wasn't being followed. "They may have intended to implement it, but they didn't have the staff, they didn't have the supervision, they didn't have the management to actually do it. So they thought that they were, and I think that the top-level commissioner who wasn't down at the field level may have believed it, but she didn't find out whether it was true," Lowry said.

After initial contact with a source, Children's Rights launches a preliminary investigation to establish whether the system is bad enough to warrant legal action. Due to the monetary and other costs associated with these suits, they are embarked upon as a last resort. "These cases are extremely time consuming, very expensive, and we have such limited resources. There are so many candidates, unfortunately, that we wouldn't go into a state unless we really thought litigation was necessary," Lowry reported. If Children's Rights determines that avenues for improvement haven't been exhausted, the organization remains in contact with the state and continues to monitor the situation in case legal action becomes appropriate.

If, however, the situation is appropriate for litigation, Lowry and her team begin the exhaustive process of developing a case, researching first by using public information and then by conducting interviews with an ever-widening network of sources. The team meticulously documents all findings to be used in settlement proceedings. "By the time we've concluded an investigation, we've talked to literally hundreds of people," she said.

After about a year of fact gathering, Lowry files suit. Early on in the case, she establishes class certification, meaning that the children she represents don't just speak for themselves but for all of the children in the system. After a lengthy discovery process, Children's Rights and the state usually enter settlement proceedings. (Because settlement is mutually beneficial in these cases, only two cases since 1995 have actually gone to trial.) During these talks, Lowry and the state develop a plan, spending months negotiating solutions to the issues that were uncovered during the fact-finding process. When the state and Children's Rights agree on a plan of action, Lowry receives a legally enforceable court order that gives Children's Rights the authority to hold the state accountable to the plan. Once the judge approves the plan, the state remains under court monitoring, and Children's Rights retains contact with the state, checking in periodically to assess progress. If the agreed-upon changes aren't being implemented,



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Children's Rights can file contempt of court charges to try to enforce completion of the plan.

Controversial Success

Children's Rights reports compelling results. According to the organization, reforms resulting from litigation in Washington, DC, more than tripled the annual number of adoptions of children in foster care. In Tennessee, the number of children living in orphanage-style institutions and other nonfamily settings has been cut in half since 2002 (after a suit filed in 2000). In Missouri, Children's Rights helped to overturn a state law that cut aid to parents adopting kids from foster care. In 2007, after a suit filed by Children's Rights, New Jersey broke a state record for the number of children adopted out of foster care.

But the agency is not without its detractors. Critics argue that fighting litigation diverts time, money, and resources from the real work of child welfare systems, burdening already overtaxed agencies. Lowry has no patience for this argument. "If they were improving their systems, they wouldn't have to deal with the litigation. It's a last resort. It should be done, and we don't do it unless there's nothing else," she said. Others criticize the legal fees that Children's Rights collects in successful suits, fees that, as in all vindicating civil rights cases, are paid by the state or city. And with each new case, there are those who criticize the policy changes that result. But though Lowry vehemently believes that what she is doing is right, she is the first to acknowledge that her work isn't perfect. In talking about *Marisol A. v. Giuliani*, the landmark 1996 case against New York City that tore open the city's child welfare bureaucracy, Lowry acknowledges that even after more than a decade has passed since she filed suit, the system is still far from where it should be. "The lawsuit had a big impact on getting better, but it's not good. I haven't achieved what needs to be achieved. But I'm still working on it."

Questions and Answers

Have you always been interested in child welfare issues?

"No, I was always interested in civil rights work. I went to law school to do civil rights work, and when I got to the legal service program [a New York City legal backup services agency where Lowry worked after law school], they told us that we had to specialize in something. . . . Because children's issues are really interesting and can have the biggest effect on people's lives, I decided to specialize in that. But it wasn't really a field or body of law at that point, so I basically made it up as I went along. I liked it very much and continue to like it to this day."

Before that time, had you ever considered doing work in that area?

"Children's issues? No, I was well known for not liking children."

What do you think is wrong with the child welfare system in the U.S.?

"It's unaccountable. There are no consequences for state government for damaging children who are dependent on state government for their care, protection, and for their lives. No consequences. They're difficult systems to run, and if they're run poorly..., children's lives get destroyed."

Do they do anything right?

"Sure they do. Some children have good experiences; there are many wonderful foster parents and many wonderful workers who really care and work very hard, but that's serendipitous. If the kid happens to get a good worker and wind up in a good home, then the kid is lucky. But there's no system designed to require that. If the kid is unlucky and has ten different placements by the time she's [age] 2, then the kid is destroyed."

Do you think it is possible to fix the child welfare system?

"Oh, I do. It's not possible to make it perfect. But I do think it's possible to make child welfare systems far better than they currently are."

What do you see as your role in fixing the system?

"I think our role is twofold—to make state government aware that . . . these systems can be made to work well and . . . these children have rights to have the system work in a way that benefits them. If the state doesn't make sure that's the case, [it] may get sued. It's too bad that lawsuits are necessary. I do think that, but . . . at this time in this country, it is necessary. Ideally, the state does it itself. But when the state doesn't, children have rights that may not get enforced."

Do you think you're being successful in meeting these goals?

"In the systems we're involved in, we've seen a great deal of improvement in what happens to the children, and I think that we've had an impact on other systems by example. I don't think I can rest assured that kids aren't going to get hurt in the future, but we're being relatively successful in raising the level of attention. We're really giving children a voice and some power that they don't otherwise have because they don't vote."

Are you the last resort in child welfare?

"We are definitely a last resort. We think of ourselves that way because we don't think that litigation should be taken lightly.... The states ought to try to fix their own problems, and it's only when the states fail to act that we become involved. We don't like to get into a situation unless other means of resolving the situation have been exhausted."

Do you ever lose?

"Yes, we lost in Nebraska, I think about a year and half ago. But mostly we don't."

Is that your only loss?

[Long pause] "I'm trying to think.... I hope I haven't blocked it out. I certainly haven't lost in a long time.... I don't believe we have. We sometimes lose small pieces, but we don't lose the whole case."

Do you think litigation is the most effective way to change how states function?

"I don't know whether it is in all areas, but it certainly is in child welfare. Because child welfare services are really a stepchild of state government, when a state has to cut funds as so many of them do, it's easy to cut funds from a part of the state system that people aren't going to complain about getting cut. That's why there are

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often huge budget shortfalls and mismanagement in child welfare, and nobody complains about it. It's all due to a lack of accountability, so the only way you can put pressure on these systems is by external intervention, through a court order. I wish it were not so, but it is."

What do you say to people who say that fighting litigation from you draws time and resources away from them improving their systems?

"If they were improving their systems, they wouldn't have to deal with the litigation. It's a last resort. . . ; we don't do it, unless there's nothing else."

In 2000, you added a policy department to your organization, which was charged with studying issues pertinent to child welfare and advocating at the state and federal levels for public policies that improve public child welfare systems. Do you place more importance on litigating or developing policy?

"The primary emphasis is on reforming child welfare systems. We have found that the most effective way to do that is through very carefully structured and supported lawsuits. We use the policy people in the lawsuits to help us understand what is going on, to help us craft better solutions, and to help ensure that that whatever settlement we get is in fact implemented."

What kind of legal responsibility do you have to the children you represent after you receive a court decision or settle out of court?

"We have a great deal of responsibility. When our case goes to resolution, there's a legally enforceable court order, and we're in charge of ensuring that the provisions of the court order are actually enforced. We make sure that the kids who are supposed to benefit from the court order really do. The states are responsible for fulfilling the plan, and then there are usually neutral monitors that collect information about how the state is doing on specific provisions of the settlement and issue reports. We meet with the state about every 2 to 3 months, and if we think the state is not doing well, we negotiate with the state and sometimes take it back to court on contempt proceedings."

Do you think other agencies, agencies that you aren't suing, are noticing what you're doing and improving their operations?

"I don't know that they're improving, but I think they're noticing. We want to document more of what we do so people will see that it is doable. We haven't done enough to get the word out about how a system can deinstitutionalize children, for example, or how we can get permanent homes for kids in much greater numbers and much more quickly. . . . We see these results in our individual cases, but other people don't know that it's doable. I think that's very important for both public perception and for the people who run these systems."

Are you satisfied with what Children's Rights has accomplished to date?

"I'm never satisfied. . . . I'm proud of what we've accomplished, but we have much work to do."

What's in the future for Children's Rights?

"Our plan is to expand and to bring enough lawsuits so that we get enough systems on the path to reform [so] that the perception of

the systems changes. Right now the perception is that they're all lousy and that's the best you can expect. And I think that perception has to be changed. If we can get enough reforms underway and enough systems to actually do it, then the perception will shift. We want to make really bad systems the anomaly rather than really good systems. That's the goal."

And how many trials do you think that's going to take?

"I think there's a critical mass. I don't think it's got to be all 50 states. Once we have enough examples out there of systems that we've fixed, then the ground rules will start to shift."

When do you think you'll reach that critical mass?

"We ought to be able to see some really significant change before 10 years, but how short of 10 years I don't know. We need to gear up, we need to add to our staff and get ourselves in a position to be able to get that significant of a campaign underway. We want to very much increase the amount of work we do."

What's the hardest part of your job?

"The hardest part is being impatient and wanting things to change quickly when they can't. Looking at a dysfunctional system, one that is harming children every day, and knowing there's no way it can be turned around in a short period of time is very hard to accept. You have to sit there for a couple of years and know that kids are going to continue to be abused in care, be moved from place to place, or be denied adoption or whatever it is. It's very frustrating."

So why do you keep doing this work every day? Where does your passion for child welfare law come from?

"It comes from a belief that society has to help its dependent, vulnerable citizens. Children are our most vulnerable citizens—it is the most extreme form of social injustice not to give children the opportunity to grow up to be happy adults. And it also comes from a deep anger that we are spending all of this public money to damage children when we could be giving them an opportunity for a much better life."

You've pioneered an entire body of law and become the authority on child welfare class action lawsuits. You've risen to the very top of your field—why do you work so tirelessly in this area?

"Because this is life and death work. There are many important public interest jobs to do in a whole range of areas—education, prisons, mental health, all of them are important—but this is life or death."

About the Author

Carolyn Beeler is a journalist intern from Northwestern University in Evanston, Illinois. Her journalistic interests include children's issues, international affairs, and social issues.