

# Attorneys Help Parents Keep Families Intact Amid Misplaced Child Protection Allegations

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Esther T., a resourceful and articulate mother of two children, was stuck. Her increasingly churlish husband did not appreciate the successful and popular craft classes she was running in the basement of their suburban home. He also did not support her pursuit of becoming a teacher's aide—a goal she was close to realizing since her coursework was completed. Esther's husband demanded that she stop the craft classes, and when she refused, he threw a remote control at her. Even though the incident was quickly over and Esther was not physically hurt, she took precautions and called the police for assistance.

This telephone call led to the Department of Children and Family Services (DCFS), Illinois's child protection agency, being called in to investigate, despite the fact that Esther's children were playing in another room upstairs and were not present during the argument. DCFS accused Esther and her husband—and found them “guilty”—of creating an “environment injurious” to the children. The form of the guilt determination was an “indicated” finding that registered both parents as neglect perpetrators in the State Central Register, the Illinois database that maintains indicated findings of child abuse and neglect. Because Illinois child protection authorities, as well as those in many other states, are authorized to make indicated or substantiated findings before notifying parents of their rights to an administrative appeal, all of this occurred without any

neutral decision maker reviewing the evidence and determining whether the State had met its burden of proving Esther was a child neglecter.

Suddenly, Esther's plans to obtain a teacher's aide job were at grave risk, even though her children were not endangered in any way and she took prompt steps to separate from and then divorce her husband after the incident. This is because the Illinois State Central Register functions as an employment blacklist. All Illinois schools planning to hire new teachers are first required to search the applicants' names against the register. Therefore, the indicated finding for allegedly causing an “environment injurious” to her children was very likely to stop any school from hiring Esther. To make matters worse, Esther lived in constant fear that the state investigators or caseworkers might take her children, just as many other children are separated from their parents under so-called “safety plan” directives or removed into protective custody based on very limited information.

Esther had done everything a conscientious parent would do to protect her children: She had called 911, cooperated with police, taken steps to ensure that her children would stay out of harm's way, and arranged for counseling when necessary. Yet, despite all her best efforts, Esther was treated unfairly and had her livelihood threatened by the erroneous indicated finding.



This, combined with the hurdles she needed to clear to have that finding reversed, left Esther overwhelmed. Esther, who had done nothing wrong, was caught in a legal nightmare.

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## Handling a Legal Nightmare

Unfortunately, few lawyers know much about how to handle a case like Esther's. Many criminal and family lawyers, including those who very skillfully exonerate their clients from criminal charges and from charges related to domestic disputes, find themselves at a loss when it comes to a child protection investigation or administrative hearing to clear a wrongly accused parent who has not been criminally charged or brought before a juvenile court judge. Very few lawyers in the United States work in the field of law in which Esther suddenly found herself entangled. Child protection law combined with civil rights and administrative law is an unusual combination of specialized expertise that is not practiced by more than a handful of lawyers, even in large urban areas.

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But the absence of experienced counsel in this special niche area of law doesn't mean the problem Esther faced was unique. In Illinois alone, more than 100,000 calls are made to the Child Abuse Hotline every year. And 13,000 cases of "environment injurious" allegations are registered in the State Central Register, often for reasons similar to those that brought Esther's family life to the attention of child protection authorities. In the United States, hotline calls are made concerning an estimated 3.2 million children a year (2009 figures). Many states and local child protection authorities are now reporting a surge in hotline calls after the publicity from the recent Penn State scandal, which involved the non-reporting of a serious, witnessed act of child sexual abuse. Although there has been a call for increasing child abuse reporting so that the horror of real child abuse is detected and investigated, more than three-quarters of hotline calls involve claims of neglect, not physical or sexual abuse, and most of these neglect cases are connected to poverty or health-related conditions like mental illness or substance abuse. Allegations of serious physical or sexual abuse make up a very small fraction, estimated to be between 1 percent and 3 percent,

of hotline calls, and the numbers of sexual abuse cases, fortunately, are dropping. Because millions of adults care for those 3.2 million children, and many others are professionally mandated to report suspicion of child abuse, it is fair to conclude that tens of millions of Americans have had some contact with the child protection system.

Of the calls concerning those 3.2 million children, only a quarter of them are considered serious enough to be substantiated by child protection authorities. Even when hotline calls are indicated and registered in a child abuse database, a shockingly high percentage of those findings are erroneous. In Illinois, I challenged the high rates of error in a 13-year-long epic class action suit, *Dupuy v. McDonald*, 141 F. Supp. 2d 1090 (N.D. Ill. 2001), aff'd in part and rev'd in part, 397 F.3d 493 (7th Cir. 2005). In *Dupuy*, an error rate of 74.5 percent, or three out of four cases reviewed in the hearings unit, was demonstrated in a painstaking analysis of all the appeals for a particular year. The district court labeled this rate of error "staggering." 141 F. Supp. 2d at 134. In a significant victory for mothers like Esther, the *Dupuy* court ratified the vastly improved notice and hearing procedures Illinois adopted to provide quick hearings to parents and caregivers subject to child protection investigations. Hearings are now conducted within 35 or 90 days, depending on whether the case is expedited due to the potential career impact of an indicated finding. In addition, the *Dupuy* final ruling requires DCFS to gather and consider all available exculpatory evidence before entering a finding. Despite these system improvements, as Esther's case demonstrates, the DCFS rules aren't always followed.

The *Dupuy* error rate is not an anomaly. In *Valmonte v. Bane*, it was reported that 75 percent of the registered findings in New York were erroneous and an astonishing 2 million individuals were registered as child abuse perpetrators. 18 F.3d 992 (2d Cir. 1994). The Second Circuit Court of Appeals found the number shockingly high and evidence of an unacceptably high risk of error due to a too-low burden of proof under the "some credible evidence" standard that had been used to register findings of child abuse. *Id.* at 1004.

Although the remaining states vary in the adjudication of child abuse and neglect, many of their systems are even more flawed than those of Illinois and New York. For example, until very recently, California had no functioning appeal system for individuals accused of abuse. See Diane L. Redleaf & Steven L. Pick, "Part I: Challenging a Listing in a Child Abuse Registry," *Children's Rights*, Vol. 12, No. 4 (Summer 2010), at 3, available at [apps.americanbar.org/litigation/committees/childrights/content/newsletters/childrens\\_summer2010.pdf](http://apps.americanbar.org/litigation/committees/childrights/content/newsletters/childrens_summer2010.pdf); Redleaf & Pick, "Part II: Challenging a Listing in a Child Abuse Registry," *Children's Rights*, Vol. 13, No. 1 (Fall 2010), at 1, available at [apps.americanbar.org/litigation/committees/childrights/content/newsletters/childrens\\_fall2010.pdf](http://apps.americanbar.org/litigation/committees/childrights/content/newsletters/childrens_fall2010.pdf).

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## Family Defense Center

To address the perplexingly high rates of error, the scant number of attorneys practicing in this area, and defective state systems across the country, I founded the Family Defense Center in 2005. Based in Chicago, the center opened its doors to clients in 2007 to provide assistance to families who find themselves the targets of erroneous hotline calls and misplaced investigations. The center also assists attorneys across the country who are representing clients and attempting to reform state systems for adjudicating child abuse and neglect. In 2008 the center started to build its pro bono program with attorneys from large and small law firms, as well as solo practitioners, volunteering to represent parents and caregivers who are the victims of erroneous indicated reports of abuse or neglect.

Unfortunately, most jurisdictions do not have well-developed pro bono programs for representation of wrongly accused parents of the sort that the center has worked hard to develop in Illinois. Although the center's network of attorneys with experience in this area is small, it is developing into a stronger network of national resources to assist attorneys who might want to take on a case challenging an improper registry. In the meantime, for attorneys who lack experience but who wish to assist clients like Esther, the center has published a prose manual, *Self-Representation in DCFS Administrative Expungement Hearings (Indicated Report Appeals): A Manual for Self-Help* (May 2010), available at [www.familydefensecenter.org/manual-for-self-representation-in-dcfs-expungement-appeals.html](http://www.familydefensecenter.org/manual-for-self-representation-in-dcfs-expungement-appeals.html). It should be borne in mind that procedures for challenging registries vary significantly from state to state. Many parents and employees represent themselves in these cases, and they often prevail by dint of preparing witnesses and exhibits that demonstrate the registry is factually and legally erroneous. It follows then that attorneys with trial and other advocacy skills should be able to handle these cases as long as they first look carefully at the agency procedures and examine the case file supporting the agency's decision to adequately prepare their evidence for the hearing.

In early 2011, Esther contacted the Family Defense Center where she obtained legal services and benefited from the center's knowledge of the precarious position many mothers face in the child protection system. Mothers are particularly vulnerable to child neglect allegations even when the sole basis for the allegation is that the mother is a victim of abuse herself. As a result of its representation of many mothers who came to the attention of the hotline solely because they were in specially vulnerable categories, including being domestic violence victims, in 2009 the center started to identify "gender-plus" discrimination as a root cause of investigations that wrongfully put children at risk of being taken from their families and put their

mothers at risk of false allegations of abuse or neglect. See Diane L. Redleaf, "Protecting Mothers Against Gender-Plus Bias: Part 1," *Children's Rights*, Vol. 14, No. 1 (Fall 2011), at 2 (part one of a three-part series concerning the center's Mother's Defense Project), available at [apps.americanbar.org/litigation/committees/childrights/content/articles/fall2011-protecting-mothers-gender-plus-bias.html](http://apps.americanbar.org/litigation/committees/childrights/content/articles/fall2011-protecting-mothers-gender-plus-bias.html).

Esther's experiences presented a classic mother's-defense case. The Family Defense Center, Sidley Austin partner Erin Kelly, and two associates, Maria Post and Julie Weber, investigated the factual background of the matter, revised the witness list Esther had first prepared, examined the DCFS records available in every administrative hearing, and prepared all witnesses. Because Illinois administrative appeals from indicated reports are subject to speedy hearing requirements, pursuant to *Lyon v. DCFS*, 209 Ill. 2d 264 (2004), extended discovery is not available in these cases. But direct and cross-examination opportunities are available in abundance. The pro bono Sidley Austin team took full advantage of their opportunity to cross-examine the DCFS investigator at the one-day hearing on July 18, 2011. Surprisingly, they learned that the investigator herself had not wanted to indicate Esther but had been directed to do so by her superiors.

On September 1, 2011, the DCFS director affirmed an administrative law judge's decision in Esther's favor, meaning that Esther's entanglement with the Illinois child protection system, and the registry of her name in the list of child neglectors, was over. The administrative law judge found that Esther had provided a "good home" and that Esther and her husband were "concerned parents." Moreover, the judge found that the parents handled their eventual divorce well and that Esther had not exposed her children to risk.

Thanks to the center's expertise and the outstanding legal advocacy of the Sidley Austin team, this Kafkaesque story ended well for Esther and her team of lawyers. The legal team received one of the 2011 Thomas Morsch Awards for Pro Bono Service at Sidley Austin. Esther's story is only one of many. Altogether in 2011, 57 Chicago-area attorneys in major firms and small practices, including 10 Sidley Austin lawyers, worked with the center's staff to help exonerate wrongly accused parents, keep families together, and help them to avoid the career-shattering consequences of erroneous child abuse or neglect determinations. Overall, the center won exoneration for 83 percent of the clients it represented in 2011. ■