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Open or Closed:

An overview of the current opinions and realities of opening juvenile court deprivation proceedings*

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Introduction

The child welfare systems in all fifty states have failed their Child and Family Services Reviews (CFSR).¹ Across the country courts and child welfare agencies are failing our nation's children due to their inability to keep children safe from harm. Child advocates across the states have proposed several measures to improve and heal the child welfare system and to hold the system accountable. One measure often discussed is to allow juvenile courts to make deprivation proceedings open to the public.² Currently, nearly every call to open juvenile courts is met by a call for the need to keep courts closed. Both sides of the debate claim to focus on the best interests of the child.

The existing laws governing court confidentiality within the child abuse and neglect system are almost exclusively governed by state statutes, which are often promulgated in response to federal funding guidelines, but not mandated by any federal requirement. This implies that while federal policies cannot be wholly disregarded, most efforts toward opening the system would likely be carried out through state governments and not as a national initiative.

The majority of arguments advanced on either side are not legal arguments *per se*; rather they are predominately the opinions of care givers, court personnel and child advocates on how the system works or can be mended. These arguments will be examined along with the current federal position on confidentiality, the practical reality in a sampling of states with open proceedings and Georgia's current position on confidentiality.

Confidentiality – The Federal Position

Historically

The sponsors of the original legislation to establish juvenile courts were concerned with protecting the confidentiality of children and their families.³ To prevent

¹ “The Child and Family Services Reviews (CFSR) are designed to enable the Children's Bureau [a division of the federal Department of Health and Human Services Administration for Children and Families] to ensure that State child welfare agency practice is in conformity with Federal child welfare requirements, to determine what is actually happening to children and families as they are engaged in State child welfare services, and to assist States to enhance their capacity to help children and families achieve positive outcomes.” Administration for Child and Families, Child Welfare Monitoring, *available at* <http://www.acf.hhs.gov/programs/cb/cwmonitoring/index.htm> (last visited March 2, 2006).

² The term “deprivation proceeding” applies to civil child abuse and neglect proceedings in Georgia. Other states generally refer to these same hearings as “dependency proceedings.”

³ National Council of Juvenile and Family Court Judges, *To Open or Not to Open: The Issue of Public Access in Child Protection Hearings*, citing Tanenhaus, D.S. “The evolution of juvenile courts in the early twentieth century: Beyond the myth of immaculate construction.” In M.K. Rosenheim, F.E. Zimring, D.S. Tanenhaus, & B. Dohrn (Eds.), *A Century of Juvenile Justice*. Chicago: University of Chicago Press.

stigmatization and to protect privacy rights, the sponsors directed that the legislation be drafted to prohibit public access to juvenile proceedings.⁴ Many people strongly disagreed with this decision because they feared that closing courts would allow juvenile judges and agencies to have unchecked power to separate children from their families without any public awareness.⁵ Thus, the long term debate about whether to keep juvenile courts open or closed began.

One key piece of federal child welfare legislation is the Child Abuse Prevention and Treatment Act (CAPTA) which was originally passed in 1974.⁶ In fiscal year 2006, all U.S. states plus the District of Columbia and several U.S. territories received federal CAPTA funds and were thus bound by CAPTA's requirements.⁷ Under its initial enactment, CAPTA required states to provide near complete record confidentiality. Records could only be released to serve a legitimate state purpose or to those who needed the information as part of their legal obligation to protect children from abuse and neglect.⁸ Those persons authorized to review the records were subject to the same confidentiality requirements as the releasing agency.⁹

Similarly, under its initial passage, Title IV-E of the Social Security Act, which provides the bulk of federal funding for state foster care programs, restricted the use of information concerning children involved in abuse and neglect cases.¹⁰ Thus, if states wished to keep receiving federal funds, their laws had to protect the confidentiality of child abuse and neglect records with few administrative exceptions.¹¹ The Social Security Act was, however, silent as to if the actual deprivation proceedings may be open or closed to the public. Despite this federal statutory silence on the matter, the Children's Bureau¹² issued a policy statement advising states that they run a risk of losing federal

⁴ *Id.*

⁵ *Id.*

⁶ P.L. No. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. §§ 5101-5107 (2000 & Supp. 2004)).

⁷ See Administration for Children and Families, *Basic State Grants Child Abuse Protection and Treatment Act (CAPTA) States FY 2006 Estimate*, available at: http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/pi0504b1.htm (last visited March 2, 2006).

⁸ 42 U.S.C. § 5106a(b)(2)(A)(viii)(VI) (2000 & Supp. 2004).

⁹ 45 CFR 205.50.

¹⁰ 42 U.S.C. § 671(a)(8) (2000 & Supp. 2004).

¹¹ The most common exception makes records available to the public when a child in care dies or suffers near-death injuries. This is pursuant to 42 U.S.C. § 5106a(b)(2)(A)(x) (2000 & Supp. 2004).

¹² The Children's Bureau (CB) is the oldest federal agency for children and is located within the United States Department of Health and Human Services' Administration for Children and Families, Administration on Children, Youth and Families. It is responsible for assisting States in the delivery of child welfare services - services designed to protect children and strengthen families. The agency provides grants to States, Tribes and communities to operate a range of child welfare services including child

funds if they open dependency proceedings because of the apparent conflict with federal confidentiality requirements.¹³

In response to the Children's Bureau's statement, the Conference of Chief Justices and others petitioned Congress to leave the policy determination of access to juvenile courts in the hands of the states.¹⁴

Recent Federal Changes: The 2003 CAPTA Reauthorization and the 2005 Social Security Act Amendment

Since its initial passage, CAPTA has been reauthorized multiple times, most recently in 2003 as part of the Keeping Children and Families Safe Act.¹⁵ Under this reauthorization, Congress expressly clarified that state grant-related confidentiality requirements *do not* prohibit states from granting public access to court proceedings, so long as such access does not jeopardize the “safety and well-being of the child, parents, and families.”¹⁶

In light of the successful change made to CAPTA, there was a movement to amend provisions governing Title IV-B and Title IV-E assistance.¹⁷ In early February 2006, this movement was successful when President Bush signed the Deficit Reduction Omnibus Reconciliation Act of 2005 (S. 1932). This bill adds a clarification that is consistent with the provisions in the Keeping Children and Families Safe Act of 2003. Specifically, “the budget bill adds a Title IV-E state plan requirement clarifying required confidentiality provisions related to information about children served and does not limit the ability of a state to determine its policies regarding public access to court proceedings on child abuse and neglect or other child welfare related court proceedings. The exception is that the policies must, ‘at a minimum ensure the safety and well being of the children, parents, and family.’”¹⁸

Thus, states can freely explore the issue of opening dependency proceedings and establish their own policies without the fear of losing federal funds.

protective services (child abuse and neglect) family preservation and support, foster care, adoption and independent living. In addition, the agency makes major investments in staff training, technology and innovative programs. See Administration for Child and Families, Children’s Bureau, *available at*). <http://www.acf.dhhs.gov/programs/cb/> (last visited March 2, 2006).

¹³ See Claire Sandt, *Openness in Civil Dependency Proceedings*, Child Law Practice, Vol. 23, No. 6, p. 97.

¹⁴ *Id.*

¹⁵ P.L. No. 108-36, 117 Stat. 800 (2003).

¹⁶ 42 U.S.C. § 5106a (2000 & Supp. 2004).

¹⁷ See Sandt *supra*, note 13, at 97.

¹⁸ Child Welfare League of America, *Summary & Analysis of Final Reconciliation Bill*, *available at* <http://www.cwla.org/advocacy/fostercare060201.htm> (last visited Feb. 14, 2006)

NCJFCJ Resolution in Support of Presumptively Open Courts

The National Council of Juvenile and Family Court Judges (NCJFCJ), a group of more than 1,600 judges, referees, commissioners, masters and other juvenile and family law professionals dedicated to improving the effectiveness of the nation's juvenile courts, recently passed a resolution in support of presumptively open hearings.¹⁹ NCJFCJ's mission is "to improve courts and systems practice and raise awareness of the core issues that touch the lives of many of [this] nation's children and families"²⁰ NCJFCJ released the following resolution concerning its position on open courts:

Resolution No. 9

RESOLUTION IN SUPPORT OF PRESUMPTIVELY OPEN HEARINGS WITH DISCRETION OF COURTS TO CLOSE

WHEREAS, the National Council of Juvenile and Family Court Judges is an organization which identifies problems within our nation's juvenile and family courts and formulates ways of improving practice in order to enhance justice; and

WHEREAS, the National Council seeks a society in which every child and every family in need of judicial oversight has access to fair, effective and timely justice; and

WHEREAS, the nation's juvenile and family courts decide cases involving children and families; and

WHEREAS, these cases focus upon our society's efforts to hold children accountable for their conduct, protect children from abuse and neglect, preserve families, and achieve timely permanency for children; and

WHEREAS, the public has a legitimate and compelling interest in the work of our juvenile and family courts; and

WHEREAS, open court proceedings will increase public awareness of the critical problems faced by juvenile and family courts and by child welfare agencies in matters involving child protection, may enhance accountability in the conduct of these proceedings by lifting the veil of secrecy which surrounds them, and may ultimately increase public confidence in the

¹⁹ NCJFCJ 68th ANNUAL CONFERENCE, JULY 17 - 20, 2005, Pittsburgh, PA, Resolution No. 9.

available at

<http://www.ncjfcj.org/images/stories/dept/resolutions/resolution%20no.%209%20open%20hearings.pdf>

(last visited March 3, 2006).

²⁰ NCJFCJ, *About the National Council of Juvenile and Family Court Judges*, available at

<http://www.ncjfcj.org/content/view/15/75/> (last visited March 3, 2006).

work of the judges of the nation's juvenile and family courts.
NOW, THEREFORE, BE IT RESOLVED, our nation's juvenile and family courts be open to the public except when the juvenile or family court judge determines that the hearing should be closed in order to serve the best interests of the child and/or family members.
Adopted this 20th day of July, 2005
By the Membership Assembled in Conference
In Pittsburgh, Pennsylvania

Thus, judges who preside over juvenile and family courts everyday have come together to take the position that the courts should be presumptively opened with discretion for the judges to close them if that would be in the best interest of the child.

State Positions on Confidentiality in Juvenile Courts

Currently there are seventeen states that have varying degrees of open dependency proceedings. In all but one of these states, there is judicial discretion to close the proceedings.²¹

State positions on confidentiality in dependency proceedings vary widely, so it is important to examine a number of states comparatively. Among those states that have made a move towards open court, the extent to which the system is open has varied as have the methods of achieving the open status. Two states, Oregon and Nebraska, read their state constitutions to require open juvenile proceedings and thus the juvenile courts in these states have been open since the 1800s. All other open court states rely on state statutes, sometimes in combination with court rules or case law, to open their courts. For most of these states open juvenile proceedings are a relatively new phenomenon that started in the late 1970s and early 1980s and really picked-up in the last decade. In 2004 alone, two states adopted legislation that would presumably open dependency proceedings statewide. Similar to most presumably open courts, the enacted legislation grants judicial discretion to close proceedings.²²

The following discussion on the states of Oregon, Florida, North Carolina, Michigan, Minnesota and California will highlight some of the similarities and differences of open court proceedings and proposed legislation among states.

²¹ The states with presumably open and judicial discretion to close are Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, Texas, Utah and Washington. The one state that does not have judicial discretion to close is Oregon because the openness of juvenile court proceedings is a state constitutional right. *See* Or. Const. Art 1, § 10 and *State ex rel. Oregonian Pub. Co. v. Deiz*, 289 Ore. 277 (holding that the order of the judge barring the newspaper publisher and reporter from the hearings was invalid under art. I, § 10. Article I, § 10 stated that no court could be secret, but justice would be administered openly and without delay.).

²² Utah Code Ann. § 78-3a-115.1 (2004) and *See* National Center for State Courts Issue Brief *Public Access to Child Abuse and Neglect Proceedings* (May 2004) available at http://www.ncsconline.org/D_Gov/IssueBriefs/Brf-Opn-Crts-May-04.pdf.)

Oregon maintains the most open system of child abuse and neglect proceedings in the country, allowing public access for all cases. The provision that authorized this broad access is from the state constitution, which declares in Article I, “No court shall be secret, but justice shall be administered, openly and without purchase.”²³ The judge maintains the ability to restrict access to the courtroom if there is overcrowding or if a person is interfering with the proceedings, otherwise the right of access cannot be waived or compromised.²⁴ Court records remain closed except the public may learn the name and date of birth of the child, the basis for the court's jurisdiction over the child, and the date, time and place of any juvenile court proceeding in which the child is involved.²⁵

Florida currently operates open juvenile proceedings under state sunshine statutes. The Florida statutes are fairly non-restrictive in terms of confidentiality, allowing for open proceedings and partially open records. Proceedings are to be open to the public at all times, unless the judge determines that closure is in the public interest or the best interests of the child.²⁶ Only termination of parental rights cases and adoption matters are to be held in private. The open proceedings may be published with limited exceptions.²⁷ All court records are confidential, except that they may be inspected by a range of “interested parties,” excluding the public.²⁸ Furthermore, the records are kept for seven years or until a child is eighteen, whichever comes first, at which point they are destroyed. The only records that are maintained and admissible in later court proceedings are those that indicate a termination of parental rights.²⁹

Although not explicit in statute, juvenile courts in North Carolina have generally allowed parents, relatives, friends and concerned individuals access to abuse, neglect and dependency proceedings held in juvenile court.³⁰ Over the years, the failure to statutorily close juvenile court proceedings has resulted in North Carolina juvenile courts to be viewed as presumptively open with judicial discretion to close. This is further implied in the North Carolina Juvenile Code where judges are granted the power to close any part of the proceedings.³¹ In addition to the specific circumstances of the case, the statute

²³ O.R. CONST. art. I, § 10.

²⁴ State ex rel Oregonian Pub. Co. v. Deiz, 613 P.2d 23 (Or. 1980).

²⁵ OR. REV. STAT. § 419A.255 (5) (2004).

²⁶ FLA. STAT. ANN. § 39.507(2) (2005).

²⁷ FLA. STAT. ANN. § 39.507(3) (2005).

²⁸ FLA. STAT. ANN. § 39.0132(3) (2005).

²⁹ FLA. STAT. ANN. § 39.0132(2); FLA. STAT. ANN. § 39.507 (6) (2005).

³⁰ In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), *aff'd sub nom.* McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971). (The court did not believe it was the practice of the juvenile court to allow access to the general public though.)

³¹ N.C. GEN. STAT. § 7B-801 (2005).

provides five factors for the court to consider before closing a proceeding: (1) the nature of the allegations against the juvenile's parent, guardian, custodian or caretaker; (2) the age and maturity of the juvenile; (3) the benefit to the juvenile of confidentiality; (4) the benefit to the juvenile of an open hearing; and (5) the extent to which the confidentiality afforded the juvenile's record will be compromised by an open hearing.³² Juvenile court records are kept confidential and can only be examined by order of the court.³³ The following persons may examine the juvenile's record without an order of the court: the juvenile; the guardian ad litem; the department of social services; and the juvenile's parent, guardian, or custodian or the attorney for the juvenile or the juvenile's parent, guardian or custodian.³⁴

Michigan's confidentiality practices are generally viewed as lenient, particularly with regards to court records. Michigan court rules provide that all proceedings are open to the public as are court records.³⁵ The press and family members often visit the record room to review case files, but records are only available after confidential portions have been removed.³⁶ The judge may only close the proceedings after considering several issues dictated by statute.³⁷ Court personnel indicate, however, that sometimes the openness of the proceedings is constrained by the size of the courtroom and judges often bar cameras from the courtroom.³⁸ Records in dependency proceedings are expunged twenty-five years after the court's jurisdiction over the last child in the family ends.

³² *Id.*

³³ N.C. GEN. STAT § 7B-2901 (2005)

³⁴ *Id.* at § 7B-2901(a)(1) – (4).

³⁵ MICH. CT. R. 3.925 (2004).

³⁶ MICH. CT. R. 3.925 (D)(1). *See also* MICH. CT. R. 3.903(3) (2004) (providing: "Confidential file" means (a) that part of a file made confidential by statute or court rule, including, but not limited to, (i) the diversion record of a minor pursuant to the Juvenile Diversion Act, [MCL 722.821](#) et seq.; (ii) the separate statement about known victims of juvenile offenses, as required by the Crime Victim's Rights Act, [MCL 780.751](#) et seq.; (iii) the testimony taken during a closed proceeding pursuant to [MCR 3.925\(A\)\(2\)](#) and [MCL 712A.17\(7\)](#); (iv) the dispositional reports pursuant to [MCR 3.943\(C\)\(3\)](#) and [3.973\(E\)\(4\)](#); (v) fingerprinting material required to be maintained pursuant to [MCL 28.243](#); (vi) reports of sexually motivated crimes, [MCL 28.247](#); (vii) test results of those charged with certain sexual offenses or substance abuse offenses, [MCL 333.5129](#); (b) the contents of a social file maintained by the court, including materials such as (i) youth and family record fact sheet; (ii) social study; (iii) reports (such as dispositional, investigative, laboratory, medical, observation, psychological, psychiatric, progress, treatment, school, and police reports); (iv) Family Independence Agency records; (v) correspondence; (vi) victim statements.)

³⁷ MICH. CT. R. 3.925(a)(2) (2006). In making the determination to close the court, the court "shall consider the nature of the proceedings; the age, maturity, and preference of the witness; and, if the witness is a child, the preference of a parent, guardian, or legal custodian that the proceedings be open or closed."

³⁸ Telephone interview with Ron Apol, Michigan Court Administrator (July 13, 2000).

Following a three-year Minnesota Supreme Court pilot project,³⁹ which began in twelve of Minnesota's eighty-seven counties, the Minnesota Rules of Juvenile Protection Procedure has been updated to provide that juvenile protection hearings are presumed open to the public with discretion of the courts to close.⁴⁰ Courts are only allowed to close a hearing, however, in "exceptional circumstances" and must record reasons for the closure of all or part of a protection hearing.⁴¹ In addition, the court can choose to exclude any party or participant, except for the guardian ad litem or attorney for a party or participant, if the court deems exclusion to be in the best interests of the child or the excluded individual has disrupted the proceedings.⁴² Court records are also mainly open to the public with exceptions for documents such as mental health or medical records and records pertaining to sexual assault.⁴³

In 2004, the California Assembly introduced bill AB 2627, which proposed to open dependency proceedings.⁴⁴ AB 2627 proposed to change California law from presumably closed dependency proceedings to presumably open. The bill did not open dependency proceedings wholesale. Instead, if passed the bill would create a three to ten county pilot project to assess the measurable impact of presumptively opening dependency proceedings. In these pilot counties, any proceeding could be closed if opening the court would harm the best interests of the child. For all open proceedings, the public would be admonished against revealing any identifiable personal information about the child, the child's family or any other persons mentioned during the proceedings.

When considering the passage of AB 2627, the Senate rehashed arguments made during the informational hearings concerning SB 1391, which was earlier legislation that sought to open dependency proceedings. Arguments made during these hearings are representative of arguments made across the country concerning open or closed juvenile courts. Specifically, proponents of both bills pointed towards the need for accountability in California's ailing child welfare system. They argued that open proceedings can generate media exposure and public scrutiny, which would promote needed reforms to

³⁹ Minnesota's pilot project was operated under Supreme Court mandate with no involvement from the legislature. It began in January 1998 and had a life-span of three years. During that time an independent audit was conducted to assess the effectiveness of the open court system. Based upon the results of the pilot project, the Minnesota Supreme Court could decide whether to renew, expand or dismantle the project at the end of its term.

⁴⁰ MINN. R. OF JUV. PROT. P. 27.01.

⁴¹ *Id.*

⁴² MINN. R. OF JUV. PROT. P. 27.04.

⁴³ MINN. R. OF JUV. PROT. P. 8.01

⁴⁴ In 1999, California's Senate passed SB1391, which provided for open dependency proceedings. This bill died in the Assembly's Appropriation Committee. In light of CAPTA's reauthorization, the California Assembly introduced AB 2627 to change California's presumption from closed to open dependency proceedings. All information pertaining to AB2627 has been drawn from Bill Analyses, mainly the Senate Judiciary Committee, found on the California Legislature's website <<http://www.senate.ca.gov>>.

the system. Additionally, proponents asserted that public access to dependency proceedings can generate more awareness of adoptable children and promote speedier permanency for such children. Major proponents of the bill included California Newspaper Publishers Association, Children's Advocacy Institute, Juvenile Court Judges of California, and Judicial Council of California.

On the other hand, opponents to the bill claimed that opening dependency proceedings to the public and media would re-victimize the children without measurably increasing the public's understanding of the child welfare system or causing system employees to be more accountable. With presumably open proceedings, the burden shifts to the parties, including the child-victim, to demonstrate why a proceeding should be closed. Further, there was a concern that alleged abusers might be less likely to settle due to public exposure. Finally, the media cannot be guaranteed to provide a full and accurate impression of the child welfare system: only the sensational cases receive attention; therefore, the public will maintain a skewed perception of how dependency courts and the child welfare system operate. Opponents to the bill included County Welfare Directors Association, SEIU, National Association of Social Workers, California Youth Connection, Legal Services for Children, and several experts in child psychology.

The California Senate found that there was inconclusive empirical data to support the "potential benefits" of an open court system. Although the Senate did grant that institutional changes are slow and opening dependency proceedings is fairly new, it concluded that in states with presumably open courts, there had been no "marked improvements in the quality of decisions" or in the effectiveness of moving a child through the court to permanency. Several child psychologists addressed how open proceedings are likely contrary to the best interests of the abused child as they subject the child to psychological trauma and stigmatization. Even though the Senate recognized the gaining momentum of the trend toward opening juvenile courts and the general favorable reception of open proceedings, the Senate Judiciary Committee (except for one) voted against the bill.

Georgia's position

Georgia currently maintains closed dependency proceedings and records. The only exception to this law is for child support cases or legitimation actions.⁴⁵ Records can only be inspected by interested parties as defined by statute.⁴⁶ Records of children in the care of or known to the Department of Family and Children Services at the time they die are not confidential and may be released to the public, as dictated by CAPTA.⁴⁷

⁴⁵ O.C.G.A. § 15-11-78 (2004).

⁴⁶ See O.C.G.A. § 15-11-79 (2004) and O.C.G.A. § 49-5-41 (2004)

⁴⁷ O.C.G.A. § 49-5-41(a)(8) (2004)

Although it is not indicated in the Georgia legislation, all states, including Georgia, receiving CAPTA funding must comply with CAPTA requirements. This includes having a provision that allows for records to be publicly disclosed only when a "case of child abuse or neglect...has resulted in a child fatality or near fatality."⁴⁸ Currently, Georgia law does not have a provision to address the records of children that suffer near-fatal injuries.⁴⁹

Georgia has little case law on confidentiality in juvenile proceedings. The main case addressing the issue is, *Florida Publishing Company v. Morgan*, 253 Ga. 467 (1984), which continues to define Georgia's position on confidential proceedings.⁵⁰ This ruling was cited for support in the landmark *San Bernardino County Dept. of Public Social Services v. Superior Court*⁵¹ case because despite the court's outright rejection of the constitutional right of access, the court holds that absolute closure is also unconstitutional. *Morgan* places the burden of requesting an open proceeding on the public who must present evidence demonstrating that the public's right to attend overrides the juvenile's interest in a closed proceeding. Additionally the court imposes a standard for the review of the request, stating that "the juvenile court's ruling on this question must be composed of findings in writing articulate enough for appellate review."⁵²

The Pros and Cons of Opening Dependency Proceedings

The strictly legal argument against a system of closed courts is the constitutional argument that the First Amendment guarantees the public a right of access to dependency proceedings.⁵³ This argument is based on several Supreme Court rulings that establish a public right of access to criminal trials, preliminary hearings, and jury selection based on

⁴⁸ 42 U.S.C. § 5106a (b)(2)(A)(x) (2000 & Supp. 2004).

⁴⁹ O.C.G.A. § 49-5-41 (6) provides that any adult requesting information regarding investigations by the department or a governmental child protective agency regarding a deceased child when such person specifies the identity of the child, but such access shall be limited to a disclosure regarding whether there is such an ongoing or completed investigation of such death and, if completed, whether child abuse was confirmed or unconfirmed. However this is at the discretion of the court to releases, it is not mandated.

⁵⁰ This case dealt with a delinquency issue, but the opinion addressed the issue of confidentiality in all juvenile proceedings, including dependency matters.

⁵¹ 232 Cal.App.3d 188, 283 Cal.Rptr. 332 (Cal. Ct. App. 1991). In this case, the California Appellate Court held that "the constitutionally protected public right of access to trials and pretrial proceedings in criminal cases does not extend to juvenile dependency proceedings."

⁵² *Morgan*, 253 Ga. at 472.

⁵³ Scholars have argued that the courts have not traditionally been closed, but the majority of writings and court opinions demonstrate that this is not a widely held belief. Compare Samuel Sokol, *Trying Dependency Cases in Public: A First Amendment Inquiry*, 45 UCLA L. Rev. 881 (1998), with *San Bernardino County Department of Pub. Social Services v. Superior Court*, 232 Cal. App. 3d 188 (1991).

the First Amendment speech and press clauses.⁵⁴ Overall, the Court developed a two-part test that evaluated the historical tradition and societal benefits of access in establishing the public's right to view criminal proceedings. Although there has been an attempt to analogize the public's right to view dependency proceedings with the public's right to view criminal proceedings, the Supreme Court has never directly addressed this issue. Several lower courts, however, have addressed the issue and have split on the specifics of the constitutionality of closed juvenile courts.⁵⁵ Ruling against a constitutional requirement to open juvenile courts, the Ohio Supreme Court rejected opening the courts based on both an historical and societal benefits analysis.⁵⁶ Similarly, the California Court of Appeal rejected open courts and the argument that historically proceedings have been open, but acknowledged that open courts would be of substantial societal benefit.⁵⁷ On the opposing side, a recent ruling by the Pennsylvania Superior Court holds that the principle of openness extends to juvenile court proceedings including dependency cases, although the Pennsylvania court found the presumption of openness is rebuttable and it is within the discretion of the trial court to grant or deny access to proceedings based on a balancing of the interests of the parties and the public's right to access.⁵⁸

Although the above arguments are First Amendment based, the major arguments for and against opening dependency proceedings are not legally based. The debate concerning access to dependency proceedings is centered on two competing values: the family and child's right to privacy versus the public's right to know and the supposedly ensuing system accountability.⁵⁹ Proponents of allowing public access to dependency proceedings focus on the need to hold the child welfare system accountable and to improve how courts and agencies make decisions regarding the futures of children in abuse and neglect proceedings. They also tend to embrace the idea of "it takes a village to raise a child" and thus claim court attendance by foster parents, relatives and other caring adults provides a benefit to the child. The open court proponents argue open courts would lead to more accountability and more community involvement, which in turn would lead to better outcomes for children and families caught-up in the child welfare system. Opponents to open courts center their arguments on the negative impact open proceedings have on the child and the court process and the invasion of family privacy encountered in open courts.

⁵⁴ See *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

⁵⁵ *In re T.R.*, 556 N.E. 2d 439 (Ohio 1990); *San Bernadino*, 232 Cal. App. 3d 188.

⁵⁶ See *In re T.R.*, 556 N.E. 2d 439.

⁵⁷ See *San Bernadino*, 232 Cal. App. 3d 188.

⁵⁸ *In re M.B.*, 819 A.2d 59 (Pa. Super. 2003).

⁵⁹ Honorable Leonard P. Edwards, *Confidentiality and the Juvenile Family Courts* (2004).

The most prevalent argument for opening the courts is that public scrutiny would force all parties working on the child's behalf to be more accountable for their actions. This argument is also the most contentious because those opposed to opening the courts maintain that public observation will not actually result in the needed reform. All parties seem to agree that judges and other court personnel need to be held responsible when they abuse their power or a child suffers because of their decisions. Actually determining whether the light of public scrutiny serves any benefit is difficult because few courts have experimented with the open model. Those opposed to open courts point to open jurisdictions, such as Minnesota, where one official noted that the public has not become more interested in dependency hearings since the opening of the court proceedings to the public. Officials in several jurisdictions have noted that the public and the press are only interested in notorious cases, therefore opening proceedings does not increase public scrutiny or accountability. This lack of interest, however, also has a positive angle. One of the main arguments against open courts is that allowing the public access would be too disruptive to the system. Comments from court personnel indicate that the public proceedings are actually not troublesome. Judge Pitt of Michigan admitted that before the juvenile system was opened she thought, "the sky would fall," but once it was opened, "it didn't."⁶⁰ There was a similar belief that the system would be "flooded" in Minnesota, but after some proceedings were opened, the public only seemed interested in high-profile cases.⁶¹

Nonetheless, proponents of the open model say that the public access is necessary to give the public confidence in the court process. Proponents assert that as taxpayers, the public is entitled to see what their money is used for and can act accordingly if they disagree with that usage. With closed courts, the only parties who know enough about the system to promote change are often those with the most to lose when mistakes are revealed. The public, in the role of concerned citizen, could possibly serve as a less partisan critic of flaws in the system. Opponents of the open court system contend that public scrutiny only encourages judges and other personnel to spend more time worrying about how to protect themselves politically than worrying about how to protect children. Furthermore, the public will continue to be confused about the judicial process because the only cases that will receive attention are high-profile cases that may represent the exception rather than the rule.

The most prevalent argument against open courts is that children would be further traumatized by open proceedings. In those cases that gain notoriety, a child's face and personal information could end up on the evening news. While this type of exposure may bring the public's attention to an administrative gaffe, it also can cause further psychological harm to the child. Advocates of open court counter that if public attention will in any way harm a child, closure is still an option. In all proposals for open courts,

⁶⁰ Memorandum from Open Hearings Subcommittee Members: Representative Wes Skoglund, Erin Sullivan Sutton and Heidi S. Schellhas to Minnesota Supreme Court's Foster Care and Adoption Task Force (Sept. 6, 1996) (on file with author) [hereinafter Minnesota memorandum].

⁶¹ Telephone interview with Ron Apol, Michigan Court Administrator (July 13, 2000).

there is a provision that allows the judge discretion to close the proceedings. The language typically used is "in the best interests of the child," which can be interpreted widely. Many states do not define "best interests" either in statute or in case law, however, some states have made it clear how the phrase is to be interpreted. In California, the "best interests" standard was established by the *San Bernardino* case, which directs courts to consider such factors as the child's age, the nature of the allegations, and the effect of publicity, if any, on family reunification when determining if closure is in the child's best interests.⁶² Even in some open proceedings, judges maintain strict rules about the use of a child's picture and name by the news media. In Michigan, the media must obtain permission to use cameras at least 48 hours in advance.⁶³

Opponents of an open system also contend that the final placement of a child will be delayed because of the resulting increase in contested cases. Since the accused parent or guardian will now be subject to public exposure, there is a possibility that more parents will contest the actions alleged against them than if they could admit to the actions in a closed proceeding. As an alternative, parties could file for closure of the proceeding, which would be an additional delay. Proponents of open courts challenge this argument with the assertion that, despite the new public attention, few cases would be contested because a significant number of parents have no substantial interest in the disposition of their child. If the parents do have an interest in the case, their interest can be channeled into participation in a mediation or family conferencing session as an alternative to contesting charges. Furthermore, the delay would not be substantial because a motion for closure can often be considered as soon as it is made and upheld or dismissed based on state statutory procedure.

For additional discussion of the pros and cons of opening dependency proceedings please see the National Council of Juvenile and Family Court Judges brief on open courts.⁶⁴

Conclusion

It is evident that both sides of the open court debate have very legitimate concerns about the role of confidentiality in the dependency process. While everyone agrees that the system needs to be mended, there is not enough data to suggest whether opening the courts is in fact as effective as proponents argue. There is only one thing that both sides can agree on -- the best interests of the child must be considered above all else. To this end, many methods of repairing flaws in the system must be explored. It is essential that open court pilot programs be allowed to operate long enough for both sides to assess the effectiveness of loosened confidentiality on the system and the children.

⁶² *San Bernardino County Department of Pub. Social Services v. Superior Court*, 232 Cal. App. 3d 188 (1991).

⁶³ Minnesota memorandum, *supra* note 60.

⁶⁴ National Council of Juvenile and Family Court Judges, *To Open or Not to Open: The Issue of Public Access in Child Protection Hearings*, Permanency Planning for Children Department, June 2004.