Chapter 2
The Court System and Child Protection

State courts, including county and municipal courts, are responsible for resolving a wide variety of issues and do so increasingly in diverse ways. In addition to going to court for child abuse and neglect cases, child protective services (CPS) caseworkers often also must be involved in court proceedings for child support, domestic violence, criminal conduct, juvenile delinquency, child custody, mental health, and directly related proceedings such as termination of parental rights (TPR) and adoption. How courts are organized and how they divide their caseloads vary widely by State and even within a State. Thus, it is important for CPS caseworkers to know which courts hear which kinds of cases in their communities.

This chapter begins with an introduction to the concept of jurisdiction. The chapter continues with an overview of the juvenile court, then provides descriptions of other specialized courts. To set the stage for the later discussion of court processes, the chapter also reviews the general powers of the court, as well as the rights accorded to parents and children in judicial proceedings.

Jurisdiction

To hear and to decide a case, a court must have jurisdiction or “authority” over that type of case, as specified by State law. The allegations of the petition initiating the case must satisfy the statutory criteria for cases of that type. The court must have jurisdiction over the parties against whom the case is brought, such as the parents of a child removed from the home. It is the judge's responsibility to decide at the outset whether the court has jurisdiction over the subject matter of the case and over the parties. Objections to jurisdiction, although infrequent in child abuse and neglect cases, can be complex and require CPS to have legal representation.

Juvenile Court

The juvenile court decides whether children have been victimized by maltreatment, as defined by State law. It then assumes responsibility for ordering services and monitors cases to ensure that its interventions are as beneficial and effective as possible.

The Focus of Juvenile Courts

The juvenile court—the earliest of the specialized courts—originated in Illinois in 1899. Initially, the juvenile court's primary focus was on delinquency (i.e., the commitment by youth of what would be crimes if they were adults) and status offenses (i.e., transgressions of children that would not be crimes if adults committed them). The emphasis was on the rehabilitation and reform of the youth who came before the court. Over time, the juvenile court concept spread rapidly to other States and expanded to include protecting children from child abuse and neglect.

The juvenile court operates according to the legal power of parens patriae. The parens patriae doctrine stipulates that the State has the legal authority to act as the guardian of children whose parents are unable to provide adequate protection or meet their needs sufficiently.

Today, juvenile court judges hear cases alleging child abuse and neglect, delinquency, and status offenses. Most also hear TPR cases and adoption matters. Some juvenile courts have responsibility for mental health commitment and admission hearings, abortion consent waivers for minors, and petitions for emancipation.
The organization and structure of juvenile courts vary widely from State to State and within States, depending on how State legislatures create their court systems and on the volume of cases in each jurisdiction. Some large communities have full-time courts dedicated to hearing just child abuse and neglect or delinquency cases, while others have one or more full-time courts that hear a mix of juvenile cases. Judges in smaller and rural communities regularly hear a variety of case types and commonly hear all the juvenile cases on the same docket with other types of cases.

How Juvenile Courts Are Different From Other Courts

Juvenile courts operate like other courts when deciding whether a child was abused or neglected or committed a delinquent act or a status offense. What is unique about juvenile courts is that they also make extensive use of experts, including CPS caseworkers, juvenile probation officers, psychologists, mental health professionals, physicians, domestic violence specialists, educators, child development specialists, foster parents, relative caretakers, and others. The court utilizes the expertise of these individuals to understand children and their families better, why events occurred that necessitated court intervention, and how to prevent recurrence. Juvenile courts attempt to look beyond individual and family deficits to understand the family and child as a whole. They aim to make well-informed decisions to address needs for housing, childcare, in-home services, domestic violence advocacy, mental health or substance abuse treatment, paternity establishment, child support, educational services, or employment. Also unique to the juvenile court, particularly in CPS cases, are the frequent review of parents and the assessment of agency performance.

Specialized Courts

Many communities are experimenting with “specialized” or “dedicated” courts that focus on particular areas, such as mental health, truancy, domestic violence, substance abuse, child support, and reentry. Specialized courts are designed to require treatment and services for the specific offense in addition to, or instead of, punishment, such as incarceration. These courts are more common in larger communities that have available funding. Three specialized courts that are particularly relevant to CPS cases are highlighted here.

Family Courts

Several States either have or are implementing “unified” or “coordinated” family courts that hear most, if not all, of the different types of cases having to do with children and families. Family courts are characterized by:

- Case management practices that expedite the resolution of cases;
- Specialized services;
- Coordination of all cases involving the same family, often before the same judge;
- Extensive use of alternative dispute resolution methodologies;
- Reduced court appearances;
- Enhanced training for judicial officers;
- A commitment to providing participants with good customer service.

Family court cases are fundamentally different from criminal cases for several reasons. First, they involve intimate, interpersonal relationships and highly charged emotions that profoundly affect how the parties approach the litigation. Commonly, the courtroom battle is an extension of unresolved personal conflicts. The adversarial process only heightens the conflict. Second, they involve multiple claims, each with a unique set of issues and timetables for court action. Third, the litigation is ongoing. Any changes in the circumstances in the lives of the parents or children, changes in the financial circumstances, or noncompliance with support or visitation provisions of an order frequently require renewed litigation.

Where family courts have been established, they typically include the juvenile court and attempt to coordinate cases that arise there with cases on other dockets involving the same family. They also provide access to a variety of services, some of which may be valuable resources in child maltreatment cases (e.g., child waiting rooms with capable caretakers when parents need to be in court).

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**Model Family Courts**

Currently, there are 25 model family courts located throughout all the States and the District of Columbia. The National Council of Juvenile and Family Court Judges (NCJFCJ) has conducted extensive information dissemination, curriculum development, and training and technical assistance in support of the model courts process. Its nationally recognized Child Victims Act Model Courts Initiative works to improve juvenile and family court practices in child abuse and neglect cases nationwide.1

A “model court” is created when a lead judge in a juvenile court jurisdiction seeks to implement the principles of court reform. These were first formulated in the 1995 NCJFCJ publication Resource Guidelines: Improving Court Practices in Child Abuse and Neglect Cases (online at [http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/resguide.pdf](http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/resguide.pdf)). The model court teams identify impediments to the timeliness of court events and to the delivery of services for families with children in care and then design and implement court- and agency-based changes to address these barriers. Model courts receive ongoing technical assistance and training from the Permanency Planning for Children Department of NCJFCJ. For more information on model courts and this initiative, visit the “Frequently Asked Questions” page of the NCJFCJ Web site at **https://www.childwelfare.gov/pubs/usermanuals/courts/chaptertwo.cfm**

[1](http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/resguide.pdf)
Drug Courts

Drug courts, an increasingly common specialized court, emphasize recovery from addiction, provide access to immediate treatment, and conduct frequent reviews to monitor abstinence, participation in treatment, and compliance with court orders. The reviews are a constructive and supportive group process in which each participant’s performance is assessed in the drug court. While drug courts handle mostly criminal cases and require an underlying criminal conviction to mandate participation, the number of dependency, delinquency, and child custody drug courts is rising.

Drug courts, including criminal ones, are resources CPS should utilize whenever possible. Studies suggest that parental substance abuse is a contributing factor for between one-third and two-thirds of children involved with CPS. Drug courts can facilitate access to treatment, which otherwise may not be available. Individuals with substance use disorders who access services through drug courts generally initiate treatment sooner, have lower rates of recidivism, and participate in treatment longer.

Juvenile and Family Drug Courts

Recently, a number of jurisdictions have referred to the experiences of adult drug courts to determine how juvenile courts might adapt to the increasing population of substance abusing juveniles and parents. The result is the emergence of:

- **The juvenile drug court**—a drug court that focuses on juvenile delinquency matters and status offenses that involve juveniles who are substance abusers.
- **The family drug court**—a drug court that deals with cases involving parental rights in which:
  - An adult is the litigant (i.e., any party to a lawsuit, which means plaintiff, defendant, petitioner, respondent, cross-complainant or cross-defendant, but not a witness or attorney);
  - The case comes before the court through either the criminal or civil process;
  - The case arises out of the substance abuse of a parent.

Juvenile and family drug courts provide immediate intervention in the lives of children and parents using drugs or those exposed to substance abuse through family members. They also provide a structure allowing for the ongoing, active participation and oversight of a judge. Common goals of juvenile drug courts include providing children with substance abuse treatment and services, offering constructive support to aid them in resisting further criminal activity, supporting them to perform well in school and to develop positive relationships in the community, and helping them to build skills that will aid in leading productive substance- and crime-free lives. The goals of family drug courts are similar, but also include helping parents become emotionally, financially, and personally self-sufficient and develop effective parenting skills.


### Family Drug Courts

As of December 31, 2004, there were 153 family drug courts in 33 States and the District of Columbia. A family drug court, also known as a family dependency treatment court, is a juvenile or family court docket in which selected abuse, neglect, and dependency cases are identified and treatment providers collaborate to provide safe homes for children while simultaneously providing drug and alcohol treatment and other support services to the parents. Family drug courts typically operate within the general court organization in their respective jurisdiction. In most family drug courts, the judge, after consultation with attorneys, CPS, and treatment providers, will decide which cases to accept into the program. Once in the program, participants are subjected to frequent drug screenings and may appear more frequently before the judge, sometimes as often as once a week, to report on their progress with treatment.

Powers of the Court

Courts and judges often are viewed as possessing enormous power and influence. The power of the courts is ever changing, and the authority of judges varies considerably from State to State. Some courts exercise the authority to dictate to CPS where children should be placed, sometimes including specific foster homes. Other States are more prescriptive in their statutory laws about placement options for children in State custody and give less discretion and authority to the courts. CPS caseworkers who recognize and know how to access the powers of the court will find them advantageous to the resolution of their cases. This section describes seven different powers held by the court:

- Power to subpoena witnesses;
- Power to subpoena documents and records;
- Power to assist CPS investigations;
Chapter 2: The Court System and Child Protection

### Power To Make a Negative “Reasonable Efforts” Determination

A court can find that CPS has failed to make "reasonable efforts" to:

- Avoid a child's removal from the home;
- Reunite a child with the family from which the child was removed;
- Power to make negative “reasonable efforts” determinations;
- Power to hold individuals in contempt;
- Power to order treatment;
- Inherent power of the position.

This section also highlights how these powers can benefit casework practice and court processes.

### Power To Subpoena Witnesses

Courts have the power to subpoena witnesses. A subpoena is a court order that directs a person to appear in court. Anyone who is properly served with a subpoena and who fails to appear as directed is subject to being held in contempt.

Courts also can compel a witness to testify, unless there is a constitutional right or a privilege that protects the witness from having to do so. The U.S. Constitution’s Fifth Amendment privilege against self-incrimination is a protection that applies to criminal proceedings as well as to testimony in any other forum, including child abuse and neglect courts, if the testimony might be used against the witness in a future prosecution.

There are two types of immunity that the prosecuting attorney or, in some States, the judge may grant:

- **Use immunity**—bars the use of a witness’s testimony and statements from being used directly or indirectly against that person in a subsequent trial. Future prosecution must be based on evidence independent of the immunized testimony or statements.
- **Transactional immunity**—bars any subsequent court action against the immunized person, regardless of the source of the evidence against that person.

Use immunity is generally preferred because it does not prevent prosecuting the person based on independently acquired evidence. For example, both parents are allegedly the only people present when their child is killed. The prosecutor may grant use immunity to the parent believed not to have participated in the actual murder to gain that parent's testimony against the other. If subsequent evidence is uncovered from an independent source that implicates the immunized parent (e.g., an eyewitness comes forward or a videotape of the incident is discovered), he can then be prosecuted. If transaction immunity had been granted, however, even with this subsequent evidence, the parent could not be charged. If either type of immunity is granted, the witness can be compelled to testify.

Depending on State law, witnesses who are doctors, clergy, lawyers, and mental health professionals may not be compelled to divulge confidential communications made to them by or about their clients. The content of these communications is privileged and cannot be disclosed without the express, informed consent of the client. These privileges encourage those seeking professional assistance to interact freely and openly with those professionals in order to maximize the benefits of their services and to eliminate fear of repercussions. Such privileges, however, may not apply if the client reveals child maltreatment. Under those circumstances, the professional may be required to make a report to CPS and to testify in court if a court proceeding results from the report. The court ultimately determines whether any claim of privilege applies. Any witness who refuses a court directive to provide testimony can be held in contempt and incarcerated until the testimony is given.

### Power To Subpoena Documents and Records

Courts also have the power to issue a subpoena duces tecum (i.e., a court order requiring the release of specified documents or records). This subpoena commands a person to produce in court certain designated documents or records. For example, a court may require a hospital to provide its records on a child’s care or compel a CPS caseworker to produce a case file or notes of conversations.

### Power To Assist CPS Investigations

CPS caseworkers can face seemingly insurmountable barriers in their investigations of suspected child maltreatment. For example, parents are under no legal obligation to allow CPS to enter their homes to conduct an investigation. The Child Abuse Prevention and Treatment Act (CAPTA), as amended by the Keeping Children and Families Safe Act (P.L. 108-36), requires a CPS worker to advise the individuals being investigated for child abuse or neglect of the complaints and allegations being made against them, but they must still protect the confidentiality rights of the person who reported the suspected abuse. (42 U.S.C. 5106a(b)(2)(A)(xviii)).

Obtaining formal documents and other information related to the alleged maltreatment, such as medical or school records, is also difficult. To assist CPS in obtaining information necessary to investigations, some States have granted courts the authority to order parents to allow CPS to examine and to interview their children and to compel others who have information relevant to a child maltreatment investigation to make that information available for CPS examination.

### Power To Make a Negative "Reasonable Efforts" Determination

A court can find that CPS has failed to make "reasonable efforts" to:

- Avoid a child’s removal from the home;
- Reunite a child with the family from which the child was removed;
A negative reasonable efforts finding can result in a court order preventing CPS from seeking reimbursement for the cost of that child’s care or to report the finding to Federal and State oversight agencies.

"Reasonable" is a familiar term in the law, and determining what is reasonable is a familiar standard for judges. It is applied on a case-by-case basis to the particular needs of that child and family and the services necessary to meet those needs. (For more information on reasonable efforts, refer to the section on the Adoption and Safe Families Act (ASFA) in Chapter 3, The Interplay Between Child Maltreatment Legislation and Caseworker Practice.)

Power To Hold Individuals in Contempt
There are two types of contempt, civil and criminal. Civil contempt is the willful failure to do something that a court has ordered, such as refusing to testify when the court has found that no privilege applies or refusing to pay child support when there are ample funds to do so. Civil contempt is punishable by incarceration, which, in theory, can last until the witness relents and complies. Usually, however, a compromise is negotiated or one side relents before anyone is sent to jail.

Criminal contempt can be indirect or direct. Indirect contempt is a willful violation of a court's order. Examples of indirect contempt include a CPS caseworker's refusal to arrange for a particular evaluation or a parent's refusal to submit to paternity testing. Indirect criminal contempt requires advanced notice of the specific charge and a full hearing. Direct contempt occurs in the presence of the judge and usually involves some disruptive or disrespectful behavior, such as uttering an epithet when the judge announces an unfavorable decision. Direct criminal contempt is punishable immediately. Both direct and indirect criminal contempt can be punished by incarceration for a fixed time determined by statute, a fine, or both.

Power To Order Treatment
Some States specifically authorize courts to order parents to participate in mental health or substance abuse treatment. Whether or not the court has that power by statute, it does have the power to determine if the child should be removed from or returned to a parent, which may be conditioned on the parent's participation in treatment.

Inherent Power of the Position
One of the most significant judicial powers is not found in statutes or in case law; it is the power to gain the attention of others. Most of the professionals involved with child maltreatment respect the position and authority of the court and are responsive to judicial requests or inquiries. When a judge calls a meeting to address a particular issue or invites stakeholders in a child abuse or neglect case to a meeting, they usually attend. This is the power "to get people to the table." Of course, the outcome of such a meeting depends on the judge's leadership skills and the extent to which the attendees are willing and able to communicate effectively and to collaborate in achieving system improvements. (See Chapter 9, Court Improvement and Best Practices for more on judicial leadership.)

For information on any particular State's child abuse and neglect laws, visit http://www.childwelfare.gov/systemwide/laws_policies/state/index.cfm

The Rights of Parents and Children in Child Maltreatment Cases
The court system accords both parents and children certain legal rights and entitlements, depending on the type of proceeding in which they are involved, including:

- The right to family integrity;
- The right to notice of the proceedings;
- The right to a hearing;
- The right to counsel;
- The right to a jury trial;
- The CAPTA requirement of a Guardian ad Litem or court-appointed special advocate;
- The entitlement to reasonable efforts.

Parents and children must not only be informed of their rights, but they also must understand the protections those rights afford them. Court representatives and CPS caseworkers can educate families about their rights and help them feel empowered in an otherwise intimidating process.

The Right to Family Integrity
Public policy has long recognized a right to family integrity, and there has been ample case law defending that right. The legal framework regarding the parent-child relationship balances the rights and responsibilities among parent, child, and State, as guided by Federal statutes. It has long been recognized that parents have a fundamental liberty interest, protected by the Constitution, to raise their children as they choose. This parent-child relationship grants certain rights, duties, and obligations to both parent and child, including the responsibility of the parent to protect the child's safety and well-being. If a parent, however, is unable or unwilling to meet this responsibility, the State has the power and authority to take action to protect a child from
significant harm.  

A series of U.S. Supreme Court cases have defined when it is constitutional for the State to intervene in family life. Although the Court has given parents great latitude in the upbringing and education of their children, it has held that the rights of parenthood and the family have limits and can be regulated in the interest of the public. The Court has further concluded that the State, as parens patriae, may restrict the parent’s control by regulating or prohibiting the child’s labor, by requiring school attendance, and by intervening in other ways to promote the child’s well-being.

In a recent case, the U.S. Supreme Court reaffirmed the right to family integrity in *Troxel v. Granville* when it said that parents’ interest in the “care, custody, and control of their children is perhaps the oldest of fundamental liberty interests.” In *Troxel v. Granville*, the U.S. Supreme Court reviewed a Washington State statute authorizing grandparent visitation. The Court decided that the statute unconstitutionally infringed on Granville’s fundamental liberty interest in raising her children free from State interference. This fundamental interest extends to a family’s right to remain together.

As discussed in the next chapter, CAPTA is one of the primary pieces of Federal legislation guiding casework (See Chapter 3, The Interplay Between Child Maltreatment Legislation and Caseworker Practice), and it supports the right of family integrity through community-based grants that aim to strengthen families. Of course, this right is not absolute. A compelling State interest, such as the need to protect children from significant harm, will justify infringement on the right to family integrity.

### The Right to Notice of the Proceedings

Parents or other custodians of a child have the right to “notice” of any petition filed regarding that child and to be notified of any hearing regarding that petition. The right to notice encompasses the right to be formally given the petition, which also must state what the parent has done or not done that makes court involvement necessary. The right to notice is a fundamental element of the constitutional right to due process. Due process specifies the right to be present in court, representation by an attorney, and procedures that are speedy, fair, and impartial. It applies to both parents, whether or not they are living together. Orders entered without notice are subject to being withdrawn.

Putative fathers (those identified as the biological parent, but whose paternity has not been legally established) also must be identified in the petition and be served. Their relationship to the child needs to be determined as early in the proceeding as possible by formal acknowledgment or by genetic testing. If paternity is established, these fathers or their families may become financial and placement resources for the child.

Petitions may be filed and emergency *ex parte* orders may be entered without advance notice to parents. *Ex parte* is defined as being on behalf of or involving only one party to a legal matter and in the absence of and usually without notice to the other party. For example, an emergency removal of a child from an unsafe home situation may be done through an *ex parte* order. Action must be taken, however, to serve the parents with the petition and order as quickly as possible. Foster parents and kinship care providers also must be notified of pending court hearings and be given an opportunity to be heard during these proceedings. (For more information on *ex parte* communications, see Chapter 7, Going to Court.)

### The Right to a Hearing

Another fundamental element of due process is the right to a hearing on the merits of a petition, including the right to cross-examine or to question any witness called by CPS, by the other parent, or on behalf of the child, as well as the right to present evidence on one’s own behalf.

### The Right to Counsel

Most States provide court-appointed lawyers for indigent parents in child maltreatment cases, but there is no Federal constitutional right to counsel in such cases. A constitutional right to counsel (i.e., every citizen’s right to an attorney) does attach in some TPR cases, but not all.

The quality of this representation varies widely among lawyers and courts. With the goal of improving quality, national, as well as many State and court, standards or guidelines exist for attorneys practicing juvenile and family law. Some jurisdictions also mandate training before appointing attorneys to child abuse and neglect proceedings. In fact, the amended CAPTA requires that attorneys representing children receive training that is “appropriate to [their] role.”

### The Right to a Jury Trial

A few States grant parents the right to a jury trial in child maltreatment cases, but the right is usually “waived” or “voluntarily given up” by the parent. In criminal child maltreatment cases, by contrast, the U.S. Constitution gives adult defendants in every State a right to trial by jury.

### The CAPTA Requirement of a Guardian ad Litem or Court-appointed Special Advocate

Children who allegedly have been maltreated are entitled to a Guardian ad Litem (GAL), who is an independent advocate for the children’s best interest. States must comply with this requirement in order to satisfy CAPTA State Grant funding requirements. The GAL role may be fulfilled by the appointment of an attorney, a volunteer who is not an attorney, or both. Volunteers also may be called court-appointed special advocates (CASA). The volunteers often are professionals trained in other disciplines, such as nursing, psychology, or education. Responsibilities of the GAL or CASA include:
Chapter 2: The Court System and Child Protection

The Entitlement to Reasonable Efforts

Except in certain aggravated circumstances, parents and children are entitled under the Adoption Assistance and Child Welfare Act (P.L. 96-272) and ASFA (P.L. 105-89) to have State agencies make reasonable efforts to keep them together, or if a child has been removed from the family, to make reasonable efforts to reunify the family. ASFA also states that children who are not going to be reunited with their families are entitled to reasonable efforts by State agencies or departments to secure a permanent placement for them.

Federal law further requires that judges decide at each critical stage of an abuse or neglect case whether the agency has complied with the reasonable efforts requirement. The obligation to make reasonable efforts applies to CPS alone, not to the parents, any other individuals, or service providers.

"Reasonable efforts" is not defined in Federal law. Some States, however, have attempted to define it, and caseworkers will need to familiarize themselves with any definition in their State’s statutes. Information about the application of reasonable efforts in a State’s appellate court should be provided by the CPS agency’s attorney to the head of the agency for dissemination to caseworkers and other pertinent staff, along with clarification of the decision’s impact on their responsibilities.

Caseworkers are encouraged to read Making Reasonable Efforts: A Permanent Home for Every Child, developed by the Youth Law Center, for a comprehensive discussion on the reasonable efforts requirement and how it affects their responsibilities and those of their agency, attorneys for all parties, and the judges. It can be obtained online at http://www.emcf.org/pdf/children_makingreason.pdf.

National Court Appointed Special Advocate Association

The National Court Appointed Special Advocate Association (NCASAA) promotes and supports volunteer advocacy in juvenile courts for children alleged to be maltreated. NCASAA provides money and technical assistance to start and expand programs, disseminates performance standards, produces training manuals and other publications, and trains program leaders and volunteers. For more information on NCASAA and GAL, go to http://www.casanet.org.

[Link to National Court Appointed Special Advocate Association]

You are in section: 2 - The Court System And Child Protection

http://www.childwelfare.gov/pubs/usermanuals/courts/chaptertwo.cfm