

INTERVIEW – PROFESSOR MARTIN GUGGENHEIM

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Note: This interview has been edited and condensed for publication.

AG: Prof. Guggenheim, thank you so much for speaking with us today. The Family Defense Symposium took place in April 2016. It's been twenty-five years since the Family Defense Clinic started at NYU Law. How do you think the symposium went?

MG: I thought it was a great day. It was wonderful to see so many people who had been in the clinic as students and teachers and fellows. It also brought out many of the great lawyers in New York City who care about the field. We had some wonderful nationally recognized scholars to celebrate not just the clinic but, for many, the meaning of the clinic's anniversary—the reality that family defense, as an important field of practice—is a real thing. There were about 170–200 people there.

AG: I can imagine it must have been extraordinary. Can you tell us about how the field of family defense started?

MG: Well, originally child welfare intervention by the government—that led to coercive removal of children—really began in the 1970s. That was the modern version of it. Before that, children entered the state's care, but not through a formal legal proceeding. So there had been, in states like New York, attorneys assigned to represent indigent parents throughout that time since the 1970s.

But what those lawyers usually did was, to borrow from the closest analogy—when the state gives someone accused of doing something the consequence of losing fundamental rights—the criminal defense field. And in criminal defense, for better or worse, indigent defenders really are courthouse lawyers. They make the center of their attention the courthouse. They see the courthouse as the most important place for advancing their clients' interests. So when we started the clinic in 1990, we were trying to figure out what is the right way—a good way—to represent parents.

Through trial, error, and discovery, we learned that the courtroom is *not* the best place for us. We learned that time out of courtroom is exponentially more important. The courtroom can sometimes be critical to success. But we needed to penetrate the agency level of practice. Because in the practice, you have two proceedings happening at the same time. You have the court hearing. But the agency also schedules conferences with parents, at which crucial decisions are made.

We quickly appreciated that we needed to attend those conferences and shape those conversations. In order for parents to get their children back, they must

demonstrate they've made progress in their cases. Very often, parents were characterized as failing to make progress when they didn't finish a program—without regard to whether the program was of any value to them. So we tried to ensure that our parents were not required to do something that wasn't valuable. And we tried to make sure that they were being asked to do things that were beneficial.

So we would find sometimes that the agency could not do something that was *pro forma*—like an anger management class when they didn't have anger, or parenting skills class when the case had nothing to do with parenting skills. The agency could instead ask them do a program that was useful—like a therapy or a visitation. And we'd keep the spirits up of parents, and the court would be ready to return the children.

AG: What are some of the accomplishments you're most proud of?

MG: Well, another useful thing we fought like the dickens for was improved visitation. Visitation, when we started, was one hour every other week in a sterile room at the agency called the "visitation room." Which was a pathetic environment for maintaining and building a parent-child bond. Anyone who knows anything about parent-child development knows that all this meant was 26 hours a year. That's one day a year.

So we insisted on longer, more frequent visits. And in a more friendly setting, when they're supervised. We insisted that the visits be far more meaningful. This led to the city agreeing to a visitation protocol that is now on the other end of the spectrum. Now you have to have visits every week, for several hours, and in the most family-friendly setting possible.

But for services, they were cookie-cutter services in every class. Everyone was going through the same motion. We asked: what are our clients' strengths? Where has our client not done what could be reasonably expected of a good parent? And we fought for targeted interventions. That largely meant drug treatment, therapy, some kind of didactic/intervention therapy, where you might have meaningful contact.

As far as recidivism, we have drastically reduced the number of days children are in foster care, and we have an excellent record for children who do get reunited with families.

AG: What are some of the biggest problems currently facing family defense?

MG: As far as budgetary changes, I've been fortunate to practice in New York City all this time because they have a spectacular record of drastically shrinking the number of children in foster care. And shrinking the length children are in foster care. So, I haven't really seen budget changes matter. What's mattered in the world we inhabit daily—New York City child welfare—is that the head of the agency responsible for the field understands that removing a child from a family is a drastic act that needs to be jealously limited. That it should only be done when

necessary, and that we have a history of doing it very commonly without necessity. It's not a budget issue—it turns out to be a tabloid issue. The greatest challenge has not been dollars, it's been public sentiment and pressure.

There's always two camps in child welfare: (1) the child savior camp, and (2) the family preservationist camp. So, in 1996, for instance, the Commissioner of the Department of Police in New York City publicly said, "The proper thing whenever there is any doubt that a child may suffer harm at home is to pull them out." Which was the dumbest and most improper articulation of a principle in child welfare that has ever been expressed. That has never been said again in New York City; that commissioner's tenure was short-lived. Mayors and commissioners have taken a near-opposite position since then. They say removing a child from a home should only happen when necessary.

When the tabloids want to hit the city for being too reluctant to remove children, they point to a recent child fatality. It is child fatalities more than anything that push the local system to be more aggressive. We're in the midst of an overreaction as we speak. The number of children brought to court has gone up sharply in New York City—mostly because the political climate has shifted a bit, making those working in the field feel they are more vulnerable to criticism for leaving children rather than removing them. For many years, we lived in environment where that wasn't true, and we'll get back to it again.

AG: Where do you think family defense should go in the future?

MG: There are a thousand things happening in child welfare today that do not take into account the wishes of the parents. Our mission over the next decades is to be a far more influential presence at the policy and law-making stages—where *very* important substantive changes still need to be made.

The greatest example would be the 1997 Adoption and Safe Families Act (ASFA). It will be repealed one day as the worst law ever enacted in American history involving children. It calls for the permanent banishment of parents from children's lives whenever the parents are incapable of overcoming the obstacle to a safe return of a child in foster care within one year. Sometimes that means the parents have a physical condition that takes two years to heal—and they can lose their children. Most often it means that parents who are drug users who are still using after a year, or after having completed their program, are removed from children's lives forever. It has led to needless destruction of American families at an unprecedented rate in the country and the world.