Class action litigation Judicial reform of child welfare systems in the United States

Marcia Robinson Lowry, Madelyn Freundlich and Sarah Gerstenzang examine the use of class action litigation as a strategy to reform child welfare systems in the United States. They describe the historical roots of the use of class action litigation to reform service systems and the development of this strategy specifically in relation to child welfare systems. They examine the debate about the value of class action litigation as a mechanism for reforming child welfare systems. Finally, the article discusses the typical phases of class action lawsuits against child welfare systems and looks at some of the outcomes of this type of litigation.

Introduction

Over the past several decades class action litigation has been used in the United States to reform social institutions, including public child welfare systems throughout the country. Class action lawsuits have been brought on behalf of children in foster care to obtain court orders that require public child welfare agencies to make fundamental changes in child protective services, foster care and adoption services. Although sometimes the subject of criticism, class action lawsuits have also been credited with creating increased public accountability regarding the quality of child welfare services and the extent to which child welfare systems achieve positive outcomes for children and families.

Like the child welfare systems of most countries, the child welfare system in the United States is comprised of three major service areas: protective or investigative services that respond to reports of child maltreatment and determine whether a child can safely remain at home or must enter foster care; foster care services which provide temporary care for children who are removed from the custody of their parents or guardians; and adoption planning and services for children in foster care who cannot or will not be safely reunited with their biological families.

Unlike the child welfare systems of many European countries, however, the provision of these services for children in the United States is primarily a responsibility of individual state governments. Although the federal government provides funding to the 50 states for certain aspects of their child welfare services programmes (most notably foster care) and engages in some level of oversight in connection with its role in those service areas, each state has considerable latitude in the way it designs and delivers child welfare services. An overarching framework of federal law sets general requirements and parameters regarding child welfare services (laws that will be discussed in this article), but each state has its own statutes that regulate state intervention in cases of child abuse and neglect. Furthermore, the United States has a judicial system comprised of both federal courts and state courts. State courts have jurisdiction over the cases of children in the child welfare system. Federal courts, however, may become involved in child welfare matters when constitutional violations (as discussed later) are alleged.

Child welfare systems in the United States have come under mounting pressures over the past decade as the number of children served by these systems has grown. Reports of child abuse and neglect have risen dramatically in number, reaching almost three million reports in 1999, 800,000 of which were substantiated for abuse or neglect (US Department of Health and Human Services, 1999). Child protective services have struggled to promptly and appropriately investigate reports of maltreatment and intervene in ways that ensure the safety of children (Thompson and Flood, 2001). Over the past decade, the number of children in foster care has also grown...
substantially, rising from 400,000 children in 1990 to 568,000 in 2000 (US House of Representatives, 2000; US Department of Health and Human Services, 2001). As the number of children in care has grown, concerns have deepened about the quality of foster care services (Borgersen and Shapiro, 1997). Finally, with recent developments in policy and practice, adoption has come to be seen as an optimal outcome for many children in foster care (American Humane Association, 2000; Herring, 2000). As a result, the number of children in foster care waiting to be adopted (134,000 children in 1999) has increased dramatically (US Department of Health and Human Services, 2001). This trend has raised significant concerns about the outcomes for children who will not be returned to their families and who, in growing numbers, are waiting to be placed with adoptive families (Cook, 2000; Walsh, 2000).

One study after another has documented deficiencies in child welfare systems across the United States that compromise the safety, well-being and permanency of children whom these systems are designed to serve (Karson, 2001; Malm et al, 2001; US Department of Health and Human Services, 2002). With regard to child safety, studies show systematic problems in the investigation of reports of child maltreatment within legally mandated timeframes and in the assessments of children’s current safety and the future risk of harm when investigations are conducted (Krugman and Hegar, 2000; Ramsey, 2000). Studies have also documented the poor quality of foster care systems in many states, particularly in terms of multiple placements of children in foster care, prolonged placements of children in shelters and other emergency settings, failures to arrange for services to meet children’s physical and mental health and developmental needs, the over-representation of children of colour in foster care and children’s excessively long stays in foster care (Malm et al, 2001). Finally, studies point to serious problems in adoption planning and services for children in foster care, including prolonged delays in freeing children for adoption, placing them with adoptive families and finalising their adoptions, failures to develop individualised recruitment plans for children who need adoptive families and inadequate training and supports for adoptive families (Roberts, 1999; Families for Kids Partnership, 2001).

In response to these conditions, a possibly unique legal approach has been used in the United States: the class action lawsuit. Unlike a lawsuit brought on behalf of a single individual or plaintiff, a class action lawsuit is a representative action. One or more plaintiffs file suit, but the lawsuit is pursued on behalf of both the individuals named as plaintiffs and a defined class of individuals who have experienced harm similar to that experienced by the named plaintiffs or who are entitled to the same legal protections as the named plaintiffs (Adams, 1993). Unlike litigation that focuses exclusively on the harm experienced by specifically identified children in foster care, class action litigation against child welfare systems addresses harms that are the result of broad systemic problems. Class action lawsuits do not seek money damages on behalf of children in foster care but instead seek court orders that mandate fundamental changes in child welfare systems (Stein, 1987). In most cases, class action lawsuits against child welfare systems are filed in federal courts because of the nature of the legal claims (Lowry, 1999).

This article examines the use of class action litigation as a strategy to reform child welfare systems in the United States. It describes the historical roots of the use of class action litigation to reform service systems and the development of this strategy specifically in relation to child welfare systems. It explores the debate about the value of class action litigation as a mechanism for reforming child welfare systems. Finally, the article discusses the typical phases of class action lawsuits against child welfare systems and examines some of the outcomes of this type of litigation.
Class action litigation and institutional reform in the United States

Class action litigation against public child welfare agencies has two principal legal bases in the United States: federal statutes and the US Constitution. In 1980 the US Congress enacted the Adoption Assistance and Child Welfare Act, which established a number of programmatic requirements for state child welfare programmes, including a mandate to use ‘reasonable efforts’ to avert the need for foster care placements for children and ‘reasonable efforts’ to reunite children in foster care with their birth parents (Fried, 1993). Although courts reached different conclusions over the next decade regarding the enforceability of these provisions and other requirements of the law, the clear trend, beginning in the 1990s, was to narrow the scope of children’s legal protections under the Adoption Assistance and Child Welfare Act (Fried, 1993; Lowry, 1999). In 1997 the US Congress enacted new federal child welfare legislation, the Adoption and Safe Families Act. This law modified some of the mandates of the 1980 law and added other requirements which may create new legal protections for children in foster care. However, the extent to which this federal law provides such protections is yet to be determined.

A stronger, more consistent basis on which legal claims have been and continue to be asserted on behalf of children in foster care is the US Constitution. Beginning in the 1970s, advocates in the United States began to pursue social reform through the courts based on claims of violations of constitutionally protected individual rights (Mushlin, 1988). The earliest cases recognised the constitutional right of prisoners to safety while they were incarcerated (Rudenstine, 1986; Mushlin, 1988). Subsequent cases recognised constitutionally guaranteed rights to protection from harm for individuals in other institutional settings, such as those for the mentally ill, juvenile training schools and detention centres for people awaiting trial (Rudenstine, 1986; Stein, 1987; Mushlin, 1988). In the non-prison cases, the principal constitutional right asserted by advocates was that of due process, a right found in the Fourteenth Amendment to the US Constitution which provides that no ‘state [shall] deprive any person of life, liberty or property, without due process of law’. The constitutional right to due process includes, among other protections, that the conditions of any individual’s confinement must bear some relationship to its purpose (Mushlin, 1988). The US Supreme Court held in this connection that ‘when a person is institutionalised and wholly dependent on the state . . . there is a duty to provide certain services’, particularly services necessary to protect the institutionalised person from harm (Youngberg v Romeo, 1982, p 317).

Class action lawsuits on behalf of entire groups of confined or institutionalised individuals have sought court-ordered changes in the structures and operational processes of various systems. In case after case, courts have ordered specific changes in the operational aspects of the facilities in which individuals were confined (Stein, 1987). In situations involving constitutional violations of the rights of individuals who have learning difficulties, for example, courts have frequently ordered physical improvements in facilities, decreases in the number of individuals confined in a facility, higher ratios of staff to clients, staff training and training of the residents (Mushlin, 1988).

These cases laid the foundation for class action lawsuits seeking systemic reform due to violations of the rights of children in foster care (Stein, 1987; Borgerson and Shapiro, 1997). The concept of ‘the right to freedom from harm’, as developed in the non-prison cases, provided the legal basis for such lawsuits (Mushlin et al, 1984). This concept, initially stated by a court in a New York state case that recognised the rights of children in a facility for those with learning difficulties, provides that for children in state custody, ‘a tolerable living environment is . . . guaranteed by law’ (New York State Association for Retarded Children v Rockefeller, 1973, p 764). At minimum, US courts have recognised that children in foster care are legally entitled to ‘adequate shelter and treatment’ (Fried,
Since the 1970s, more than 20 class action lawsuits have been brought against public child welfare agencies in the United States (Lowry, 1999).

The debate about class action litigation as a strategy for institutional reform

Although class action litigation against child welfare systems has become an accepted reality in the United States (Meltzer, 1995; Pear, 1996), it has not been without controversy (Stein, 1987). In some cases, an aversion to litigation in general has led to criticisms of class action lawsuits as a mechanism for reform (see Stein, 1987). More broadly, however, the debate has centered on questions about the legitimacy of judicial action in directing reform of public institutions and service systems, the ability of courts to detail the contours of institutional reform and the capacity of courts to oversee the implementation of broad systemic changes (Horowitz, 1977; Mnookin, 1985).

The debate concerning the role of courts in directing institutional reform has focused on the division of power among the three branches of government in the United States: legislative, executive and judicial (Stein, 1987). On one side of this debate, it is argued that it is legislatures and not the courts that should determine how public institutions function, and that systematic reform should be undertaken through legislative activity (Stein, 1987). On the other side of the debate, it is contended that legislative bodies, because they are subject to majority rule, cannot be relied upon to protect minority rights, and that courts can more effectively ensure that the rights of these individuals are upheld (Stein, 1987).

The debate regarding the extent to which courts can effectively shape and oversee institutional reform has focused on a number of issues. One challenge that has been identified in relation to the implementation of court-ordered systems reform concerns conceptual complexities. Specifically, lawyers, social workers and administrators use varying constructs in relation to service delivery and the evaluation of systems changes. Conceptual complexity is also introduced in the form of political barriers at both the legislative and executive levels of states. Another challenge arises from the diverse and complex needs of a clientele to whom the direct service delivery system must respond. Finally there are administrative and management issues, particularly given the interplay between public and private child welfare agencies in many states of the US (Johnson and Fried, 1984; Borgersen and Shapiro, 1997). In the arena of child welfare system reform, some commentators have seen the challenges associated with implementation of court-ordered reform as particularly great because of the qualitative nature, if not vagueness, of the goals of child welfare systems (see Stein, 1987).

Nonetheless, institutional reform through class action litigation has been well documented (Stein, 1987). This strategy has been shown to be a means of effectively overcoming the bureaucratic inertia that characterises systems that serve children and their families (Stein, 1987; Borgerson and Shapiro, 1997). It has, in fact, been viewed as affording protections that would not otherwise be in place to relatively disempowered groups like children, the mentally ill and incarcerated individuals (Stein, 1987).

The features of class action litigation

Although each class action lawsuit against a public child welfare agency has unique features, there are certain commonalities. Typically, class action litigation involves a strong collaboration between local child welfare advocates and the attorneys who bring the lawsuit. In most of the cases in which class action lawsuits have been brought against child welfare agencies, local advocates had previously attempted non-litigation approaches to reform child welfare services in their communities, all of which had proven unsuccessful in effecting meaningful reform. Typically, it is local advocates who ask a national legal organisation such as Children’s Rights to assess the viability of a class action lawsuit as the mechanism to reform their community’s child welfare system.

In one class action lawsuit, local
Advocates had utilised multiple approaches in their attempts to improve the quality of foster care services in their state. Repeated meetings with state officials had proven futile, despite the officials’ stated agreement to institute changes. A number of highly credible reports (including reports by the state’s own auditor) had documented that children in foster care were not being protected from harm and appropriate plans were not being made to return children home or place them with other permanent families. These reports, however, had had no effect. Recognising that they had exhausted all other options, advocates invited legal experts to assess the appropriateness of a class action lawsuit to reform their state’s child welfare system.

Prior to the filing of any class action lawsuit, intensive fact-gathering is conducted to assess the strengths and weaknesses of the child welfare system under consideration and whether litigation would be a viable reform strategy. Data are collected from a variety of sources and knowledgeable parties are interviewed. In many jurisdictions this type of analysis is the first of its kind, resulting in information not previously made available to local advocates. Following the intensive fact-gathering process, a decision is made regarding the appropriateness of seeking court involvement in reforming the child welfare system. In cases in which a lawsuit is filed, fact-gathering continues and may lead to a settlement of the lawsuit.

In one state, local advocates and legal experts identified and analysed key data on all aspects of the child welfare system (child protective services, foster care and adoption). The analysis revealed that African-American children were not only significantly over-represented in the state’s foster care system, but that they also received far fewer services than did white children. In another state, the fact-gathering process revealed extremely high rates of repeated maltreatment of children previously reported to the child welfare system for abuse or neglect and for whom no services were provided.

When class action litigation is contemplated, it is common practice to consult with local and national child welfare experts regarding the results of the intensive fact-gathering process and appropriate approaches to resolving identified problems. Prior to, during and following litigation, these experts analyse data and trends, assess various approaches to improving service delivery and service outcomes, and provide guidance on the implementation of selected approaches.

In one case, litigation led to the involvement of staff from a national non-profit policy organisation with expertise in human service management, financing and service delivery. As an entity known to and respected by both the state’s child welfare agency and the attorneys for the class of children in foster care, this organisation was able to assist the parties to find common ground and work cooperatively to improve services for children and families (see Borgersen and Shapiro, 1997).

Finally, at the heart of class action litigation is the lawsuit itself. Class action lawsuits are brought in the names of individual children (using pseudonyms) whose experiences in foster care represent the deficiencies in the child welfare system which has been charged with their care. As with any other litigation, witnesses and other evidence are presented to establish the claims that have been outlined in the petition and other legal documents. Requests for legal relief involve changes in the child welfare system’s programmes, operations and infrastructure. Court orders mandating system reform are sought because, unlike informal agreements, they are judicially enforceable.

In one case, the chief administrator of the state’s child welfare system refused to entertain any discussion of needed changes in foster care services. Given his intransigence, the only solution was to fully litigate the case, obtain orders from the court regarding the needed changes and use the court’s power to enforce compliance with its order. The administrator was not willing to comply with the court’s order until he was held in contempt of court, at which time he began to actively participate in a plan to address and rectify the deficiencies in the state’s foster care system.
Implementation of court-ordered systematic reform

In some child welfare class action lawsuits, the plaintiffs (that is, the class of children) and the defendant agency are able to reach a settlement, and a consent decree (a binding judicial order that results from an agreement negotiated by the parties themselves) is issued. In other cases, as described earlier, the case is fully litigated and the court itself issues remedial orders. As Stein (1987) has noted, a court may select from a number of approaches in fashioning legal relief after it concludes that a public child welfare agency requires systematic restructuring. The court itself may impose a remedy or, alternatively, the court may order litigants to negotiate their own remedy (Stein, 1987). However, judicially imposed remedies have significant drawbacks. Because they do not engage the defendants in a process that promotes their support of the selected remedy, defendants may view such remedies as overly intrusive and resist implementation. A negotiated remedy, on the other hand (whether achieved prior to litigation in the form of a settlement or developed by the parties after litigation upon order of the court), fully involves the defendant agency and provides a process through which negotiation can refine the remedy and ensure its acceptability to the defendant agency (Stein, 1987).

Irrespective of the approach that a court uses (although negotiated remedies clearly seem preferable), the result of the process is an implementation plan that ‘create[s] the conditions necessary to achieve compliance’ with the court’s order (Stein, 1987, p 156). The implementation plan outlines the specific steps and timeframes for achieving the court-ordered reforms (Stein, 1987). Once a court order and an implementation plan are in place, a defendant agency that fails to abide by these mandates may be charged with violations of the court’s order, be held in contempt and/or be subjected to additional orders.

In most cases, the court appoints a third party to supervise the implementation of the court order. Studies have shown that court-ordered institutional reform is far more likely to be successful when a credible, neutral third party oversees the process and ensures that multi-disciplinary expertise and resources are available to implement and sustain reform (Borgersen and Shapiro, 1997). In many cases, a neutral third-party monitor will be appointed to oversee implementation. In other cases, direct oversight with regard to court-ordered systems reform can be provided by a receiver. Like a monitor a receiver is a neutral third party, but a receiver also has the court’s authorisation to operate the child welfare system directly under the sole supervision of the federal court.

Outcomes of class action litigation

In one class action lawsuit, the court relied on agency administrators to implement the mandated reforms. However, a series of administrators demonstrated an inability to make the changes mandated by the court. Ultimately, the court placed control of the child welfare system with a receiver who was authorised to direct the operations of the child welfare agency and report to the court on a regular basis.

In instances, class action lawsuits against child welfare systems in the United States have required many years of litigation and turbulent re-negotiations (Borgersen and Shapiro, 1997), but litigation has prompted many significant changes. Assessments of the impact of this type of litigation against child welfare agencies have shown improved protection of children from abuse and neglect, higher quality foster care services, more timely and effective permanency planning for children in foster care and stronger management of and structural supports for child welfare agencies (Children’s Rights, 2000). In communities throughout the United States, class action litigation has led to improved outcomes for children in terms of safety, well-being and permanency by mandating systems changes and requiring the mobilisation of new resources to strengthen the infrastructures of child welfare agencies (Children’s Rights, 2000).

The extent to which class action litigation results in effective reform of
child welfare systems (or any other social institution) will depend on a number of factors. First, the likelihood of success is heightened when there is a clear, specific implementation plan that establishes goals, timeliness and criteria for monitoring compliance with the plan and the mandates of the court order (Stein, 1987). Second, meaningful reform is related to the extent to which individuals within the system (from frontline caseworkers to administrators) and outside the system (including juvenile courts) are willing to co-operate to achieve common goals of improved services and quality outcomes (Stein 1987; Borgersen and Shapiro, 1997). Third, the success of court-ordered reform depends on the diligence of the attorneys for plaintiffs in monitoring implementation and ensuring the defendant agency’s compliance with the court order (Stein, 1987). Finally, reform is contingent on the court’s willingness to play an active role in monitoring compliance and overseeing implementation, and its willingness to remain involved until full compliance is achieved (Horowitz, 1977; Rothman and Rothman, 1984).

Conclusion

Class action litigation is a unique legal tool that has been developed in the United States to reform public child welfare systems. Drawing on the US Constitution and federal statutory protections for children in foster care, these lawsuits seek broad-based changes in the design, delivery and assessment of child protective services, foster care and adoption planning and services. Class action litigation has not been without criticism in the United States. Because of the complexity of institutional reform, there has been considerable debate about the role of courts in directing systems change. Nonetheless, class action litigation has led to significant improvements in child welfare systems. Although the results ‘may be less than what was envisioned by reform-minded attorneys’, these lawsuits have afforded plaintiffs with protections that are likely to be greater than what would have been the case without litigation (Stein, 1987, p 158). Through a process involving collaboration with local advocates, intensive fact-gathering and the involvement of child welfare experts, class action lawsuits have addressed systemic problems in child welfare systems throughout the United States. They have demonstrated that legally enforceable court orders can provide a foundation for ensuring that pervasive programmatic, operational and infrastructure problems are addressed and that positive outcomes for children and families are achieved.

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