



WHITTIER LAW SCHOOL

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TO: State of Connecticut Select Committee on Children

FROM: WILLIAM WESELY PATTON, PROFESSOR AND J. ALLAN COOK  
AND MARY SCHALLING COOK CHILDREN'S LAW SCHOLAR

RE: *Raised Bill No. 6419, An Act Concerning Transparency and  
Accountability of the Department of Children and Families, in  
opposition to Section 1(a)(1)(F)*

DATE: FEBRUARY 12, 2009

The proposed open court pilot program in *Bill No. 6419* raises two salient issues regarding the safety of Connecticut's abused children: (1) Are open dependency proceedings harmful to abused children who do not personally appear in court and testify; and, (2) once the proceedings are presumptively open to the press and public, will the court really protect the psychological health of abused children by excluding particular individuals and/or the press and general public?

I. **Empirical Data Demonstrates That Children Who Do Not Testify Suffer Psychological Trauma Both From the Fear of Disclosure of The Child's Intimate Facts Concerning the Abuse and From the Public's Reaction to That Private Information.**

The Canadian government funded a four year longitudinal empirical study of the effects of open court proceedings on children **{both those who testified and those who did not}**. (*A Study of the Social and Psychological Adjustment of Child Witnesses Referred to the Child Witness Project* [hereinafter, "*Study*"]). Although each child faced the prospect of having to testify, approximately 40% of the abused children studied did not testify. (*Study, at 29*) The study interviewed children and their parents and

conducted a series of psychological tests on the children prior to the scheduled trial and at several intervals up to 3 years after the completion of the trial. (*Study, at 5*).

“Ninety-five percent” of the children were “scared at the prospect” of testifying even if eventually they did not testify. (*Study, at 88*). During the pendency of the open court hearing the fear of having the public find out about their abuse resulted in the children “having difficulty concentrating on their school work”, and they had great psychological pressure from fear that “their fellow students not know about the abuse....” (*Study, at 91*). The Study found that during the “pre-trial” phase, the children’s fears of the open court process was an “arduous time” for many children who during that period had “[s]evere acting-out behaviors, depression or suicide attempts....” (*Study, at 96*).

Those children who were forced to testify in open court indicated that much of their difficulty resulted from “having strangers in the courthouse” and the “public nature of the proceedings”, and one of the most frequent responses to the question of how to make the proceedings more child-friendly was “closing the courtroom to the public.” (*Study, at 112, 114, 117*).

When questioned between three and four years after the trial, children indicated that disclosure of their abuse had had a significant impact on their relationships with their peers. “One quarter reported that the disclosure had been followed by a change in the extent to which they interacted with their peers and class mates.” (*Study, at 143*). In addition, “**12 percent had been taunted by fellow students... [and] [t]hese taunts were often homophobic references or hateful and hurtful comments about incest.**” (*Study, at 91*). Even though the courts issued publication bans, in a few cases in which the names and/or addresses of the parties were published or in “high-profile” cases, the children had to suffer the public humiliation. (*Study, at 91-92*).

“Almost half” of those parents interviewed about the effects of open court proceedings on their children “were able to identify a lasting, negative consequence of having the case go to court.” (*Study, at 167*).

The Canadian study clearly demonstrates that even when children do not testify, the fear that the intimate and private facts surrounding their abuse might become public causes abused children a great deal of stress, and the effects of such disclosure often exacerbate their psychopathology when peers taunt them, especially when the sexual attacker was of the same sex as the child.

## **II. Can Judges in Presumptively Open Proceedings Protect Children By Excluding Particular Individuals Or By Closing the Courtroom to All the Public and Press?**

The National Center for State Courts empirical study of the Minnesota Open Court program clearly demonstrated that courts rarely close dependency courts to the press and public, even when children’s attorneys argue that closure is needed in order to protect the mental health of their abused child clients. (Fred L. Chessman, NATIONAL

CENTER FOR STATE COURTS, KEY FINDINGS FROM THE EVALUATION OF OPEN HEARINGS AND COURT RECORDS IN JUVENILE PROTECTION MATTERS, Vol. 1, vii, 6-7 (Aug. 2001). The Study found that “[c]losures of open child protection hearings occurred very infrequently” even though children’s counsel routinely made motions to close the court proceedings. (Id., at vii, 6-7). It should not be surprising that judges are reluctant to close presumptively open court proceedings since judges must not only justify the protective measure, but they must also suffer the political fallout from an angry press which has been denied a statutory right to attend the proceedings.

In a presumptively closed proceeding in which the juvenile court judge has discretion, on a case by case basis, to admit necessary individuals to attend the dependency court hearing, like in California, judges face little political heat from those who seek, but who are denied, court access. In California those seeking access must file a petition with the court demonstrating that they have a “direct and legitimate interest in the particular case or the work of the court.” (CA Welf. & Inst. Code § 346). The court then engages in a balancing of the attendance of non-parties with the best interests of the child. The court can consider all relevant evidence on the issue of who can attend court. For instance, the court could consider evidence of whether a member of the press has ever published confidential data, or whether the person attending will exacerbate the child’s mental state. Since the burden is on the moving party, rarely in California do those denied access seek appellate court review of the denial of court attendance since there is little likelihood of success on appeal regarding an “abuse of discretion” standard.

However, in a presumptively open court system, the burden shifts to the court to prove that an individual or media source should be denied access to the court proceedings. Since the burden shifts to the court to justify the denial of access, if a person or media source is forbidden access, they have a much greater incentive to appeal the decision since their appellate burden is significantly lower than in a presumptively closed system. It is one thing for a juvenile court judge to determine that a person has not sufficiently demonstrated a legitimate interest in attending a hearing, but quite a different process for the court to demonstrate that the evidence of potential harm to the child is sufficiently great to strip the press and/or public from their statutory right to attend a hearing.

Once the press has a statutory right to attend a hearing, what is the likely response once a judge excludes the media? The media is very likely to immediately seek a temporary injunction or writ of prohibition and/or mandate against the juvenile trial court judge. Since it will be relatively simple to obtain a temporary injunction based upon the court’s denial of the statutory right of the media to attend the hearing, the result will be that the dependency court process which is attempting to decide the best interest of the abused child will come to a halt. The central goal of modern child dependency proceedings, **rapid permanency** for abused children, will be frustrated during the weeks that it will take to finalize the media’s appellate procedures. Again, in presumptively closed proceedings, since the media and public lack a right to attend the hearing and because those seeking access have a difficult burden to prove the court erred, appeals are extremely rare.

The Canadian system is very illustrative of the difficulty of closing presumptively open juvenile courtrooms. Canadian juvenile court judges have discretion to close those proceedings if “it would be in the interest of public morals, the maintenance of order or the proper administration of justice to exclude any or all members of the public from the court room....” (R.S.C., C. Y-1, S. 39; S.C. , c. 1, s. 132). However, court closures are rare since the court must justify that drastic remedy. For instance, the court in *R. v. C. (T)* (2006 NSPC 61, 251 N.S.R. (2d) 86, 802 A.P.R. 86 (2006), issued a 15-page written opinion justifying the exclusion of the press and public from a juvenile court proceeding. The court stated that it had statutory discretion to close the hearings “if the court considers that the person’s presence is *unnecessary* to the conduct of the proceedings *and* the court is of the opinion that *either* any evidence or information presented to the court would be *seriously injurious or seriously prejudicial* to the young person *or* it would be *in the interest of the proper administration of justice* to exclude any or all members of the public from the court room.” The court in *R. v. C. (T)* noted that hearings will be closed only in “rare circumstances” where “[t]here are no alternative measures” available to both permit public attendance and prevent “a serious risk to the administration of justice....”<sup>1</sup>

The bottom line is that there is no empirical evidence from any presumptively open juvenile dependency system that demonstrates that judges have, in fact, excluded members of the public and/or press from those hearings in any meaningful way. The evidence from Minnesota and Canada demonstrates that closing the courts in which the press and public have a statutory right to attend is politically difficult for judges, procedurally time-consuming, and almost non-existent.

I appreciate your consideration of my research, and I am here to assist your Legislature in any way that I can during its consideration of *Raised Bill No. 6419*.



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<sup>1</sup> The *R. v. C (T)* court ordered the hearing closed because the proceeding was a voluntary hearing in which witnesses were not required to testify under oath, and therefore, had the public attended the experts would not have participated since public disclosure of confidential information would have violated the experts’ professional ethics.

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