This book offers a fascinating insight into the conduct of civil court proceedings relating to children in the USA. The author is a professor of law at Whittier Law School, California, where he is active in a centre that trains advocates to represent children and provides a pro bono resource for families. He has also been employed as a public defender in juvenile courts. Much of the law cited in the book is therefore Californian state legislation, but other US jurisdictions are also covered. It is written for US lawyers, and some of the terminology and concepts would be unfamiliar to UK readers. While 'child custody' is recognisable as equivalent to our residence order, 'dependency' covers proceedings relating to child abuse and neglect. The phrase 'competent and zealous' continually recurs, because the professional framework measures legal representation in these terms. These qualities are discussed in the second chapter, which cites a range of judgments and opinions on the degree of zeal with which it is ethical, and indeed financially viable, to represent indigent parents and children. n1 Despite the structural and cultural differences between jurisdictions, it is possible to draw some useful comparisons in policy and practice from this book, particularly with regard to alternative...
Patton aims to contribute to the improvement of children's representation by setting out the standards that should be practised by legal professionals. From his premise that the entire system is seriously under-funded, he sees strengthening the ethical base as an essential preliminary stage in a campaign to increase resources and provide a decent service. While there is no doubt of his commitment to reform, for the most part he avoids polemic by concentrating on case analysis to review the current law.

The structure of the book is a little unpredictable, plunging straight into a first chapter on conflict of interests, rather than beginning with a gentler introduction to the context. Further on, however, it becomes clear that this is a common problem area for US attorneys, who can find themselves representing more than one party. Separating out the roles of the advocate for child, parent and child protection agency in this early chapter does assist our understanding of their different functions as discussed later in the book.

It is dispiriting to read that lawyers handling cases for parents are usually isolated in sole practice and can be carrying caseloads of several hundred, being paid at a flat rate of US$200 per case. Consequently it is impossible for all parents to be represented 'competently' or even adequately. The lawyer for the child protection department is also over-burdened and faces a number of potential conflicts. He or she may be working toward reunification or concurrent planning, or as a quasi-prosecutor, according to different state policy, with correspondingly varying standards of proof. One disturbing issue is the massive take-up of large federal financial subsidies to encourage states to pursue adoption, with some evidence of relatives being coerced to adopt. This is relevant to widespread concerns in England and Wales about the discrepancies between financial allowances for kinship carers according to the type of order made, and (with far less evidence) claims that adoption targets are being met by young children being inappropriately taken into care.

The section on judges contains some hair-raising examples of over-involvement, which would support arguments against proposals for judges to speak directly to children. In one unforgettable tale, a judge interviewed a four-year old child on successive occasions and at length, accusing him over 200 times of lying and threatening him with handcuffs and divine retribution. Again, Patton attributes (less dramatic) poor practice to extensive caseloads, but calls on judges to educate the public and legislators to redress this.

This theme is followed up in the chapter on confidentiality, which very interestingly discusses an affirmative duty on judges to speak to the public on the law and administration of justice, as well as to comment publicly on law reform, in any available forum. The only restriction is on commenting publicly on an individual case while it is pending. Such practice would appeal to members of the English judiciary who are calling for greater openness in the courts. At this point Patton drops his attempt at a dispassionate tone:

'Juvenile dependency and family court judges have an equal ethical obligation to speak out on legislation inimical to children served by those court systems. However, how many juvenile law judges have you seen on '60 Minutes', '48 Hours', PBS, or anywhere in public correcting outrageous allegations about the juvenile dependency system? These judges have failed our children either through ignorance or fear of electorate backlash against judges soft on crime and sexual abuse.'

Two sets of recommended practice standards, and one case study, are set out in appendices. It would have been helpful had the standards been linked to the main text, especially those that explain important points such as the respective functions of the child's lawyer and guardian ad litem (GAL). The case study is a simulation and analysis exercise, setting out a child protection scenario that raises some fairly obvious points about conflicts between the rights and welfare of six- and 16-year-old siblings. This touches on the legal provision in some US states that enables adolescents to apply for a declaration of emancipation (independent legal status) from their parents. Interestingly, the task presented is to resolve the case without any trial or formal adjudication. This links to the chapter on alternative dispute resolution (ADR), with which Patton begins unequivocally:
'America's child custody and dependency systems would collapse if most cases were not disposed of through some sort of alternative dispute resolution.' n13

He goes on to point out that despite an enormous increase in volume of custody applications in recent years, fewer than 2% ever reach a full trial. Most states mandate or strongly promote mediation or settlement conferences to avoid a trial; these systems have evolved to save costs of those litigants who are paying attorneys and because a large proportion of parents are unrepresented. n14 Patton concludes that most parents therefore benefit from quicker, cheaper and less formal procedures.

ADR is also common in dependency hearings, in an attempt to address the pressures of multiple hearings that extend to an average of 16.5 months. Unlike our system of successive interim care hearings over about a year, the US courts hold initial, review and permanency planning hearings. Over 30 states have introduced ADR in child protection, but Patton queries how voluntary this can be in cases that often involve criminal charges. He is suspicious of an agenda to increase the rate of criminal convictions that will serve either to discourage parents from being open with the child protection authorities, or will mislead them into acquiescing to the removal of their children for fear of being prosecuted. n15

There follows a useful discussion on the possible advantages of ADR, referenced with US research studies that indicate it is cheaper, results in more individualised and resilient settlements, and reduces trauma and delay for children. n16 The dangers are also considered; these are largely connected with the contradictory notion of 'compulsory' mediation. As noted by Joan Hunt and Ceridwen Roberts in their policy briefing on international contact intervention schemes, mandatory mediation is still controversial, even where it has been long-established, as in some US states. n17 This is particularly so where there has been a history of domestic violence. n18 Similarly, Patton points to the disadvantages to the weaker party, unprotected by formal safeguards. The objectives of the mediator to neutralise blame and avoid reflection on past behaviour can particularly undermine women. More widely, there is also evidence that less formal procedures disadvantage individuals from marginalised and minority groups. Pressures on mediators can impact on their neutrality, and they are seen as less accountable than lawyers. n19 One chilling example is given of a study which found that pathological liars could convince mediators they were the reasonable party and the better parent, with the other parent's fears being perceived as overly defensive. n20 It appears that mediators, like the other players in the system, also suffer from case overload and can coerce parties into early settlement, in some courts being expected to make recommendations. Thus the process is becoming less about empowerment and more about imposing 'the norms of the courthouse'. n21

The notion of compulsory mediation has been raised for some years in arguments about the law on contact disputes. n22 We do not use the language of ADR for out-of-court agreements in public law, although of course they have the same objectives of reaching quicker, cheaper, more workable agreements. Once an application has been made to court, however, the patterns in the USA are more structured. In the case study, for example, the lawyers for the child protection department are expected to demand an agreement that the mother attend court-ordered counselling, under threat of having her younger child permanently removed. n23 The negotiations take place between a detention hearing (at which the state establishes its case, in a similar way to the threshold criteria being established in a section 31 application) and the adjudication hearing, at which decisions are made about the future care of the children. In the English jurisdiction, such negotiations might go on between interim care orders, or between two stages of a split hearing. The ethical dilemmas facing the US lawyers are that once the State has established its prima facie case, the court expects an agreement to be reached without further judicial testing of the evidence. Only if the agreement fails will the department return to court with an application for the termination of parental rights. It can be seen therefore, that a heavy burden of responsibility lies on the legal advocates for all the parties.

This is where Patton's guidance on competent and zealous representation is intended to provide some answers for hard-pressed lawyers caught up in these problems. Children may be entitled to either an attorney or to a GAL, or possibly to both. Confusingly, the same person sometimes fills both roles. The 'pure attorney' model zealously argues their clients' case as instructed, making no judgment on their best interests. The GAL is usually a lay person who forms
an objective, independent view of the child's best interests and argues for these, taking the child's views into account but not necessarily agreeing with them. They are fact-finders, who do not have a confidential relationship with the child. There is no independent professional social work 'voice of the child' as provided in England by children's guardians.

n24 The degree to which an attorney should act as a zealous advocate or a GAL depends in principle on the child's capacity to make informed decisions, but is complicated by the different models in state legislation. About 60% of states use a hybrid attorney/GAL model; three states use the lay GAL model; one uses two separate lawyers; and two use a traditional attorney model. There are variations according to type of case, and differing opinions among professional bodies as to whether there is a rebuttable presumption that all children are competent, or whether this depends on a fixed age. There is strong emphasis in the professional codes on enabling young people to attend court, and a much higher level of participation is expected than we allow young people in UK courts.

No statistics on the proportion of dependency cases which avoid a full adjudication are given, and there is considerably less research cited in this context than in relation to custody cases. This is somewhat disappointing to the reader from a socio-legal perspective, as Patton's views on the impact of family reunification programmes and clinical evaluations on eventual outcomes might have been valuable. However, the book does inspire one to follow up several of the themes and references provided. ADR in public law is a timely theme in the context of new policy emphasis on early intervention to reduce the number of children in care in England. n25 It might also be useful to revisit some of the ideas about care proceedings put forward by Joan Hunt and colleagues in the Department of Health studies on the early working of the Children Act 1989. n26

US commentators may regret the increasing legalisation of mediation, but there is also an issue of encroachment on the powers of the courts by legislative imposition of ADR. Patton claims that the equitable principle of parens patriae, under which it is the duty of the court to decide on a child's best interests, is violated by policies of binding arbitration. n27 Accepting that economic imperatives mean that ADR is here to stay, he calls for better education for law graduates in its substantive and procedural aspects in order to improve protection for families.

In his concluding chapter, Patton explains that professional anxiety to retain self-regulation in the face of widespread public distrust of lawyers has emphasised the teaching of ethics in legal education, but this has been supplemented by legislative intervention at both state and federal level. Most states admit and regulate attorneys through their own supreme court but there is a multi-layered framework including Congress; the trial courts in which cases are conducted; administrative agencies; law firms regulating partners and employees; and bar associations. Consequently, there is plenty of scope for discord and controversy. For example, the Californian legislature removed the right of children in dependency proceedings to zealous representation, following a high-profile child abuse case (a similar situation to the Mara Colwell case in England which led to the establishment of children's guardians). Patton claims that this conflicts with the rulings of the Federal Supreme Court and has instituted legal action (unsuccessfully to date) on the basis of a breach of the separation of powers.

The book is intended as an analysis of, and guidance on, ethical issues facing lawyers acting for children, parents or child protection agencies. Almost all the difficulties Patton identifies flow from the under-funding of courts, legal assistance and public child protection agencies, a state of affairs which he passionately believes fails children and families, and ultimately society. The book would therefore be strongly recommended to anyone in the UK or other jurisdictions contemplating the future of their own legal professions, and addressing inequality. For the academic lawyer, there is ample opportunity for comparing principles of legal ethics, access to justice, the interface between civil and criminal law in child protection, children's rights and representation, and dispute mediation.
n1 US legislation uses the term 'indigent defendants' to describe those who cannot afford legal representation; in those states that have determined that all parents have a constitutional right to counsel in cases of termination of parental rights, the court will assign a lawyer for parents too poor to pay for one (at p 61).

n2 Family judges can hear as many as 5-10 new cases and 25 reviews a day, and lawyers may carry caseloads of between 400 and 600 (at p 6).

n3 At p 43.

n4 At p 44.

n5 At p 17.

n6 See Early Day Motion by John Hemming MP no626, 15 January 2007 on local authority adoption targets.

n7 See Separate Representation of Children: Summary of Responses, Ministry of Justice CPR 20/06 (2007) in which only 13% of respondents agreed that judges should routinely speak to children in proceedings.


n9 At p 60.

n10 Select Committee on Constitutional Affairs Family Justice: the operation of the family courts revisited HC 1086 (2006), at pp 6-7.

n11 At p 86.

n12 The Appendices are the National Association for Counsel for Children Standards, and the American Bar Association Standards of Practice. These relate only to dependency proceedings and it is not entirely clear how they relate to each other and to what extent they are mandatory.

n13 At p 88.

n14 These is no constitutional or statutory right to publicly funded legal representation for parents in custody cases.


n16 At p 96.


n18 Some states exclude these cases from mediation, which severely reduces the number where it can be used, but there is wide variation both in policy and in attitudes. Some provide the victim with their own counsellor to accompany them in mediation sessions.

n19 Patton's view is that an affirmative duty on mediators in some courts to protect the best interests of children during negotiations prevents their neutrality in what may be a three-way dispute. This echoes comments made about the impact of child-saving on attempted neutrality in in-court conciliation in England, for example,


n21 At p 98.

n22 For example, by several speakers in the Parliamentary debates on the Children and Adoption Act 2006.

n23 Appendix 3.

n24 Originally known in England as guardians ad litem, the description was changed to children’s guardians by the Criminal Justice and Court Services Act 2000. They must be registered social workers, and are provided by the Children and Family Court Advisory and Support Service. In Scotland, the function is undertaken by curators ad litem.

n25 Care Matters: Time for Change, Cm 7137 (TSO, 2007).


n27 At p 101.

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