



Oregonian Editorial: Runaways on the Rise

By Rochelle Martinsson, Law Clerk

In a poignant October 31, 2009 editorial, *The Oregonian* addressed ongoing difficulties that runaway youth face in Oregon and elsewhere across the nation.

The editorial focused on an FBI sting operation and two FBI Innocence Lost project sweeps in recent years that rescued Portland-area children from prostitution. The editorial also cited an October, 2009 *New York Times* article about elevated rates of runaway youth, which included a profile of a 14-year-old girl from Medford, Oregon. (See news brief on page 3.)

One reason offered by *The Oregonian* for the "upsurge" in the numbers of runaway and homeless youth in America is the troubled economy. A Portland organization, New Avenues for Youth (NAFY), provides transitional

housing for runaway youth.¹ Eighty-five percent of youth from the program do not return to the streets. Still, resources for programs like New Avenues for Youth are scarce, and the need continues to be great.

Citing drug addiction, mental illness, physical and sexual abuse, job losses, foreclosures, and the unraveling of families as issues which have propelled youth into homelessness and other problems, *The Oregonian* provides a reminder of the significant demand for widespread services and support for youth today.

To view the October 31 editorial, go to:

http://www.oregonlive.com/opinion/index.ssf/2009/10/oregons_lost_and_found_runaway.html

1. NAFY does not accept runaway DHS youth, who may be encouraged to give up DHS benefits to get in. Youth may also be committed to OYA to get in. OYA contracts for beds with NAFT.

DHS Issues 2008 Status of Children Report

By Rochelle Martinsson, Law Clerk

The Children, Adults and Families Division of the Oregon Department of Human Services has released its 11th annual report on the *Status of Children in Oregon's Child Protection System*, for the year 2008. The annual report is "designed to give the public information about the experiences of the children who come into Oregon's child protection system each year due to abuse or neglect."

The report begins by providing detailed information on issues and incidents of child abuse and neglect. The report then discusses:

- family issues that impact the need for child protective services
- programs available to assist families in keeping children safe and protected
- information on children served in the Oregon foster care system
- contributing factors to the need for foster care
- disproportionate representation of minorities in foster care
- family connections, and
- the services children receive while in foster care.

Finally, the report discusses adoption programs and services, including an overview of the population of Oregon children adopted or placed in guardianships.

The full *2008 Status of Children* report can be accessed by going to <http://www.oregon.gov/DHS/abuse/publications/children/index.shtml> and clicking on the link for 2008 under the heading, "Child abuse and neglect annual reports."

HIGHLIGHTS OF 2008 DATA

- **65, 000 reports of abuse & neglect**
- **27,486 referred for investigation**
- **6943 (25.3%) were founded¹**
- **Mandatory Reporters accounted for 75.7% of investigated cases**
- **Of those, 39% came from schools and LEA**

1. OAR 413-015-1000(2)(a) - "Founded" = an administrative determination that there is "reasonable cause to believe child abuse or neglect occurred".

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News Briefs

By Whitney Hill, Attorney,
and Noah Barish and Rochelle Martinsson,
Law Clerks

The Economist Finds America's Sex Offender Laws "Unjust and Ineffective"

In a characteristically pragmatic analysis, *The Economist* reported that increasingly strict American sex offender laws waste scarce resources, marginalize offenders, and do little to increase public safety. The magazine also endorsed a series of reforms suggested by Human Rights Watch, a public advocacy group, but observed that lawmakers are unlikely to roll back harsh sex offender laws that are popular with constituents.

The article traced a history of sex offender laws in America shaped by decades of tough-on-crime campaign promises. Although California adopted the nation's first sex offender registry in 1947, now every state keeps one. Yet despite common perceptions, registries do not target only child molesters and rapists. Many states require registration for less severe offenses, including visiting prostitutes (5 states), urinating in public (13 states), consensual sex between teenagers (29 states), and flashing and streaking (32). Consequently, the number of registered offenders in America has exploded to 674,000. As a percentage of population, this level of registration is four times higher than in Britain, the country with the next-most restrictive sex offender statutes. Registries will continue to grow rapidly because 17 states, including Oregon, require registration for life.

The Economist characterized current American sex offender policy as "a self-defeating pillory." The registries drain public resources by tasking law enforcement with tracking many minor offenders alongside more dangerous ones. This leaves little money for treatment, which one Canadian government study shows is effective in reducing recidivism by 43%. Further, publishing offender's information invites harassment and prevents registrants from finding jobs and housing. Studies indicate that these conditions, in turn, tend to make offenders more likely to re-offend. Thus, a strategy designed to protect the public may actually endanger it by driving recidivism.

Sadly, other countries seem to be following America's lead in imposing more strict sex offender policies. Britain's registry includes children as young as 11, France and Austria have closed national registries, and some politicians have called for a pan-European registry. Now, America has even bested itself with the looming deadline to implement the 2006 Adam Walsh Act, which broadens the class of offenses requiring registration and mandates all states to participate in national registry.

Nevertheless, the magazine suggested that a simple set of reforms could slow the growth of America's registries, protect individual privacy, and focus resources on the most dangerous offenders. A Human Rights Watch report urged that minor, non-violent offenders and juveniles should be excluded from registration, and that registration decisions should be made on a case-by-case basis by judges and reviewed regularly to remove those who are rehabilitated. The advocacy group also said that registration information should not be published and that housing and employment bans should be abolished. The full article in *The Economist* is at http://www.economist.com/displaystory.cfm?story_id=14164614

Justice Department Lauds First Jurisdictions to Implement SORNA

On September 23, 2009, the U.S. Department of Justice announced that Ohio and the Confederated Tribes of the Umatilla Indian Reservation (located in Oregon) were the first two jurisdictions to substantially implement the controversial Sex Offender Registration and Notification Act (SORNA), Title I of the Adam Walsh Child Protection and Safety Act of 2006. "We understand the importance of working together to protect our communities by creating a national system of sexual offender registries," said Antone Minthorn, Chairman of the Board of Trustees for the Confederated Tribes. U.S. Attorney General Eric Holder also noted that the Department of Justice is "committed to working with the remaining states, tribes, and territories with their implementation efforts."

The overwhelming lack of implementation may signal dissatisfaction with substantive SORNA provisions. The legislation mandates a national sex offender registry and establishes universal minimum standards for sex offender registration and notification. SORNA also requires registration for youth who are prosecuted and convicted as adults; youth 14 or older who are adjudicated on offenses comparable to, or more serious than, aggravated sexual abuse;¹ and youth adjudicated for a sex act with a victim under the age of 12 years old. In addition, SORNA requires more extensive registration information (including a photo), broader public disclosure of sex offender information, retroactive registration of individuals convicted prior to the law's passage, and criminal penalties for failure to register.

In May 2009, A.G. Holder granted a blanket one-year extension for SORNA implementation after advocates testified before the U.S. House Judiciary Committee, citing concerns with the burdens of implementation and harsh consequences for juvenile offenders. Jurisdictions must now comply with SORNA by July 26, 2010 or risk losing 10% of their federal Byrne Justice Assistance Grant funding, which supports a variety of law enforcement activities.

For more details about SORNA requirements, see http://www.ojp.usdoj.gov/smart/pdfs/sorna_faqs.pdf

For criticism of SORNA and its effects on youth and communities, see http://www.justicepolicy.org/images/upload/08-11_RPT_WalshActRegisteringHarm_JJ-PS.pdf

For testimony before the Judiciary Committee, see http://judiciary.house.gov/hearings/hear_090310_1.html

1. Sexual abuse by force or threat of serious violence, by rendering unconscious or involuntarily drugging the victim, or with a child under the age of 12.

New York Times article: Runaway Youth

An October 26, 2009 *New York Times* article entitled, "Running in the Shadows: Recession Drives Surge in Youth Runaways," begins with a profile of Betty Snyder, a 14-year-old girl from Medford, Oregon. Author Ian Urbina discusses the events that triggered Betty's run away from home, as well as the harrowing conditions experienced by other homeless youth in the Medford area and nationwide.

Urbina reports that over the past two years, there has been an increasing number of runaway youth, at least in part due to foreclosures, layoffs, rising food and fuel prices, and deficiencies in low-cost housing. Urbina cites estimations from federal studies and experts that "at least 1.6 million juveniles run away or are thrown out of their homes annually."

Urbina's discussion of Betty and her homeless peers in Medford is evidence of the appalling circumstances in which homeless youth try to survive. Noting that while these youth carry switchblades and sleep in back alleys, shallow trenches, and lean-tos made of tarps and sticks, Urbina observes that some still suck their thumbs or do not know how to boil water.

Perhaps most disturbing is the fact that in more than three-quarters of runaway cases, no one is looking for — or helping — these lost and vulnerable children.

To view the *New York Times* article, go to: <http://www.nytimes.com/2009/10/26/us/26runaway.html>

Homeless Students in Oregon Schools

A news release from the Oregon Department of Education, dated September 18, 2009, reports that Oregon's homeless student population rose 14% from 2007-2008 counts. Almost half of the children were elementary school students. Portland Public Schools had the highest count of homeless students in Oregon.

School districts keep track of these numbers due to the McKinney-Vento Act Program for Education of Homeless Students and the funding the Act provides. One purpose of the federal law is to allow homeless students to attend their regular schools, despite disruptions in housing that may lead to residence within a different school's boundary. A homeless student is defined in the law as one who lacks a fixed, regular and adequate nighttime residence, as well as children who are awaiting foster placement. Homeless can mean, for example, staying in a motel, a car, a tent or a friend's home. Each school district is required to have a Homeless Liaison to help the students and their families engage in school and other services.

For more information, please see: <http://www.ode.state.or.us/news/releases/?yr=0000&kw=&rid=710>

Cornerstone Advocacy Focuses on Visiting, Placement, Services, and Conferences Within the First 60 Days

By Noah Barish, Law Clerk

In the May 2009 issue of Child Law Practice, the Center for Family Representation introduced a dynamic new strategy for attorneys in child dependency cases. *Cornerstone Advocacy* emphasizes efforts on the four cornerstones of visiting, placement, services, and conferences in the short period after a child is first placed in foster care. By devoting equal intensity to advocacy in the first 60 days as for later trial preparation, *Cornerstone Advocacy* confers certain advantages, such as maintaining a child's attachments to parents and family, hastening reunification, tailoring services to the problem necessitating placement, and providing accurate information about the ultimate permanency decision. Using this approach over the past five years, the Center for Family Representation has achieved higher reunification rates and shorter lengths of foster care stays than city and state averages. The entire article is available at http://www.abanet.org/child/parentrepresentation/cornerstone_advocacy.pdf, and a summary of tips for implementing *Cornerstone Advocacy* follows.

Visiting

Research shows that meaningful and frequent visitation is the single best predictor of safe and lasting reunification.

First Court Appearance

- Request visits at least once a week, for two hours or more
- If supervised, ask agency to state reasons for supervision on the record
- Explore candidates for visit host (pastor, neighbor, family, foster parent, counselor, etc.)
- Explore activities or events that could be a focus of visiting
- Ask to calendar a status report on visiting

Later

- Assess how visits are going with client, case-worker, or foster parent
- If representing a child, ask that the child be produced at status report to discuss visit
- Ask whether foster parent is willing to host some/more visits
- Ask whether supervision is still necessary
- Ask whether visits can be held outside the agency

Generally

- Have a staff person observe a visit if you learn of problems
- Don't assume a child's "negative" reaction to a

visit means visits should be restricted - it may mean that either parent or child needs more support before, during, or after a visit

- Emotional endings to visits may signal a "good" visit
- Explore resources in the community for visits to take place, like libraries, parks, community centers, etc.

Placement

Finding a placement that supports the child's connection to family promotes reunification.

First Court Appearance

- Ask that the child remain in the same daycare, school, or after-school program
- Inquire about relatives and others with significant connections to the child to provide temporary care
- Ask for a status report in court within two weeks.

Later

- Reach out to placement resources
- Ask foster parents for ideas on how to support the parent-child relationship

Generally

- Explore state regulations on placement decisions, especially concerning non-kin resources and educational continuity

Services

Seek stable, flexible, and creative services to facilitate reunification.

First Court Appearance

- Ask about parents' strengths and encourage services that build on them
- Ask about client's prior experiences with service providers and determine whether they should remain involved
- Get releases of information signed to facilitate speaking with providers throughout the case
- Get referrals immediately for lengthy service goals (e.g., housing, psychotherapy, etc.)

Later

- Investigate why certain services are necessary
- Consolidate services if possible
- Pursue additional court orders related to funding, transportation, etc.

Generally

- Obtain and review documents relating to services

Continued on next page

- Ask court to permit parent to participate in child's services
- Continue to assess appropriateness of services
- Ask for status reports from agency
- Research regulations and rules regarding who can attend conferences and send client a letter with this information

Conferences

Involve families directly in case planning through family team decision-making conferences or safety conferences.

First Court Appearance

- Ask about protocols for out-of-court conferences
- Ask to be notified before any routine conferences in order to arrange for attorney or client to attend
- Ensure that prior service providers and advocates are notified and invited to meetings

Later

- Prepare client for conferences by advising him/her of who can attend, what documents to bring, etc.
- Use checklists to help client remember what issues to raise at the conference
- Be available by phone or in person during the meeting
- Find out about client's experience at any agency conference
- Follow up with the agency or service providers if client feels that inappropriate services have been required

Generally

- Give client copies of court orders to prepare him/her to advocate at agency conferences

Legal Authority

Nearly all of these *Cornerstone Advocacy* techniques can be supported by some combination of the following legal arguments:

- Visiting, placement, services, and conferences can be deemed a "reasonable effort" in support of reunification. See ORS § 419B.340.
- State dependency statutes include requirements of agency services and assistance. See ORS § 419B.343.
- State regulations detail agency obligations to parents and children. See Child welfare policies and Oregon Administrative Rules and protocols at:
http://www.dhs.state.or.us/policy/childwelfare/cross_index.htm; and Oregon Administrative Rules for Child Welfare Programs at:
http://arcweb.sos.state.or.us/rules/OARS_400/OAR_413/413_tofc.html
- Administrative directives, memos, and guidelines address visiting, placement, services and conferences. See DHS Child Welfare Procedure Manual at:
http://www.dhs.state.or.us/caf/safety_model/procedure_manual/index.html

JLRC Website a Must-See for Oregon Parents' Attorneys!

Visit www.jrplaw.org/juvresocent.aspx for a growing collection of issue briefs, practice guides, and other resources designed specifically for parents' attorneys.

Juvenile Law Resource Center (JLRC) attorneys are available to answer general questions and offer case-specific advice to legal professionals representing parents.

Feel free to e-mail us at jlrc@jrplaw.org if you have a legal question, and be sure to include your name, phone number, and the county in which you practice.



Child Safety: A Guide for Judges and Attorneys

Child Safety: A Guide for Judges and Attorneys, by the National Resource Center for Child Protective Services, the National Child Welfare Resource Center on Legal and Judicial Issues, and the American Bar Association, is now available in print and online.

This publication provides a framework for child safety decision-making that "centers on the logical steps of decision making, emphasizing the need for a sequential process that is grounded in principles of critical thinking and rigorous and precise analysis."

Although the *Guide* is written primarily for judges and attorneys, its content may be useful for anyone who participates in the child safety decision-making process.

To access the *Guide* online, go to:
www.nrc cps.org/resources/guide_judges_attorneys.php.

Engaging Fathers in Dependency Cases

By Dover Norris-York, Volunteer Attorney

Fathers need to be engaged in the lives of their children both because fathers have constitutional rights to the relationships they have with their children and because children have better outcomes when their fathers are involved in their upbringing.¹ Attorneys for fathers in dependency cases need to encourage their client's engagement at all stages of the case.² This article draws from a series of articles published in the ABA's *Child Law Practice*, November 2008 through April 2009,³ and identifies some ways in which fathers can and should participate, as well as strategies for attorneys for fathers to facilitate their clients' engagement in the case.

Helping the Client Determine His Goals

Attorneys for fathers should communicate regularly with their clients, including a detailed initial intake appointment, in which the attorney explains the dependency process and provides information to assist the client in setting goals relating to custody of the child, visitation, whether to fight or cooperate with DHS, and options in the resolution of the legal case.⁴ After this initial intake, the attorney should assist the father in making an informed preliminary decision on the father's desired goals for the case. The attorney should inform the father what he can do to promote his objectives, both on his own and through services. Finally, the proposed or likely case plan, and possible modifications should be discussed with the client. In many if not most cases, the attorney for the father will want to encourage the father to begin services he agrees to participate in as soon as possible.

Team Building

After engaging the client in setting goals for his case, the attorney should consider forming a team to support the father in reaching those goals, and encourage and assist the father to recruit team members, e.g., relatives, friends, supportive landlords or employers, etc. The attorney should become familiar with team members, encourage them to participate in meetings and court hearings, and inform them how they can provide assistance to forward the father's case.

Be Proactive with DHS

The attorney should inform DHS of the father's desired outcome, his rationale, and the steps he will take to improve his situation, engage in services, and participate in the court process. DHS should be

advised of all involved team members and their relation to the father, as well as which team members will regularly attend meetings with DHS and court hearings. DHS should be encouraged to begin services for the father when the father is willing to participate pre-trial or after they have been ordered by the court.

Visitation

Contact between the father and child should begin immediately in some form. The attorney should consider all possible methods for whatever contact best facilitates the relationship the father seeks with his child. The attorney should obtain information from the client about the details of contacts between the father and child during this phase and consider observing or having an assistant observe visits. This may become powerful evidence at hearings, so it is important to keep a record.

Services

Services for the father outlined in the case plan need to be both manageable and helpful so that the father can commit to following through with his tasks. In addition to standard parent services like parent training, anger management, drug treatment, etc., services such as job skills training, job placement services, English classes, and help with enrolling children in appropriate programs may be added to the plan. The attorney may want to reassure the father that getting help is not a sign of weakness, but rather represents his commitment to be a good parent for his child.

Getting the Most from the Court

The more the father demonstrates to the court that he is a vested and active participant in the case, the more the court will be motivated to reduce barriers to services, visitation and custody. At each hearing, the attorney should present documentation of the frequency of the father's contact with his child, caseworkers, and service providers. The father's presence at hearings provides an opportunity for the court to assess his demeanor and will help the court imagine the father and child together as an intact family. It may be wise to encourage the father to prepare an update of his progress in the case in his own words to present to the court. At each hearing, supporters should be introduced and those wanting to be considered as visitation or placement resources should be identified.

The attorney's job is to convince the court to order

Engaging Fathers in Dependency Cases

Continued from previous page

the outcome the father wants for his child. Different desired outcomes necessarily require different strategies. If the father wants custody, the attorney must establish fitness by providing evidence of father's capacity to handle the logistics of raising a child. Statements from professionals the father has been in contact with may be useful. It is important to explain the father's plan for housing, transportation, work, schooling, childcare and meeting any special needs. The father's budget and statements from any friends or relatives who are part of the plan should be provided to the court. The attorney should also be prepared to identify a back-up plan and resources that will come into play if the father's primary plan is frustrated.

When the father's goal is not custody, the attorney's efforts should go to convincing the court that the father's desired placement is the most suitable. If both mother and father seek reunification with only the mother, the attorney should join forces with the mother's attorney to assist in making that case. If the father wants his child placed with his relatives, the attorney should try to persuade the court that the relatives are appropriate, and detail the ongoing relationship the father will have with the child and relatives during placement. The court will more readily agree to such a placement when the plan for ongoing contact between father and child is both appropriate for the child and realistically likely to happen.

When non-relative adoption becomes the plan of

the court and the father wants ongoing contact with his child, the attorney should ask the court to facilitate the contact by making sure a recommendation for open adoption is made in the case plan. The attorney should ask the court to order caseworker reports of efforts taken to recruit an adoptive family that is interested in open adoption.

Endnotes:

1. Edwards, Judge Leonard (ret), "Engaging Fathers in the Child Protection Process: The Judicial Role (Part I)", 28 ABA CHILD LAW PRACTICE 1 (March 2009).
2. See, Norris-York, Dover, "Engaging Fathers in Juvenile Cases", JUVENILE LAW READER, Vol. 6, Iss. 2 at p6.
3. A useful tool in giving parent clients information about the Child Welfare and Juvenile Court systems is "A Family's Guide to the Child Welfare System", available online at www.air.org/taparternship
4. The Child Law Practice series includes: "Nonresident Fathers' Constitutional Rights" (Nov. 08); "Representing Nonresident Fathers" (Dec. 08); "Understanding Male Help-Seeking Behavior" (Jan 09); "Involving Nonresident Fathers: Tips for Judges" (Mar. 09); "Engaging Incarcerated Fathers"; "Child Support Issues", and "Ethical Considerations".

Advocating for Noncustodial Fathers in Child Welfare Cases

The American Bar Association and the American Humane Association have collaborated to publish *Advocating for Nonresident Fathers in Child Welfare Cases*.

Content includes guidance on: advocating for the constitutional rights of nonresident fathers; understanding male help-seeking behavior; ensuring quality out-of-court advocacy; representing nonresident fathers in dependency cases; engaging fathers in the child protection process; addressing special advocacy issues; legal strategies to address child support obligations; representing incarcerated nonresident fathers in child welfare cases; and addressing relevant ethical issues.

For more information about this publication or to inquire about ordering, contact the American Bar Association at: (800) 285-2221.

Healthy Beginnings, Healthy Futures: A Judge's Guide

The American Bar Association and the National Council of Juvenile and Family Court Judges have collaborated to publish *Healthy Beginnings, Healthy Futures: A Judge's Guide*.

The guide provides tools and strategies to help judges promote better outcomes for babies, toddlers, and preschoolers who enter their courtrooms by discussing: meeting the needs of very young children in dependency court; promoting physical health; early mental health and developmental needs; achieving permanency; and improving courts' handling of cases involving very young children.

To download a full Judge's Guide, go to: http://www.aba.net.org/child/healthy_beginnings.pdf

Report Highlights Common Shortcomings in Parent Representation

By Noah Barish, Law Clerk

The ABA Center on Children and the Law, in conjunction with the Michigan State Court Administrative Office, recently released an analysis of legal representation for parents in Michigan child welfare proceedings. To view the full report, go to: (http://www.abanet.org/child/parentrepresentation/michigan_parent_representation_report.pdf).

The report drew from a detailed review of local court rules and policy; surveys of parents, attorneys and judges; in-court observations and multiple focus group meetings; and one-on-one interviews with stakeholders. Overall, the report found that improving parent representation could yield significant advances in child safety, permanency, and well-being. In particular, the report called for creation of a state-wide office of parent representation, regular surveys of local attorney practices, increased training for parents' attorneys, updated rules of court, and other structural changes.

Although the report provided many suggestions for improvement, much of the analysis concerned inconsistent or problematic parent representation practices in Michigan. Parents' attorneys in Oregon should take care to avoid these practices.

Although parents' attorneys had the basic knowledge and skills necessary for in-court advocacy, they lacked consistent attitudes about the ethical and practical requirements of representing parents. Specifically,

many attorneys failed to initiate communications with parent clients and substituted brief hallway exchanges for private office interviews.

Also, many attorneys jeopardized the fragile parent-attorney relationship by routine use of substituted counsel. Parents reported coming to court only to find that they were being represented by substitute counsel who had little knowledge of their case and no prior relationship with them. Judges noted that use of substitute attorneys was disruptive and resulted in less zealous representation of clients.

Most attorneys did not advocate for parents during the weeks or months between court appearances. The report recognized that out-of-court advocacy is critical in the child protection context. Parents' attorneys should advocate for clients during meetings with DHS and service providers, assessments, visitation, and case planning. Because expert witnesses, community providers, and services figure prominently in the case against the parent client, attorneys should be familiar with these individuals and the services they provide.

Some parents' attorneys treated parents disrespectfully and failed to communicate with parents. Attorneys should respond to client telephone calls, take time to explain court processes, deliver strong courtroom advocacy, and provide information and support to assist client stability (in terms of housing, Social Security benefits, employment, etc.).

"many attorneys failed to initiate communications with parent clients and substituted brief hallway exchanges for private office interviews"

Recent Case Law

By Angela Sherbo, Attorney and Noah Barish and Rochelle Martinsson, Law Clerks

ICWA Standards

State ex rel Juv. Dept. of Multnomah County v. T.N., 226 Or App 121, 203 P3d 262, rev den 346 Or 257, 210 P3d 905 (September 2, 2009).

<http://www.publications.ojd.state.or.us/A141384.htm>

A mother appealed from a judgment terminating her parental rights to two children on the bases of unfitness and neglect. DHS conceded that the evidence of neglect was insufficient to support termination. Mother conceded that her long history of untreated mental illness was a condition seriously detrimental to her children, but she argued that DHS had

made inadequate efforts to provide her with services.

ICWA applied to one of mother's children. With regard to that child, the court held that ICWA required, in addition to proving the elements of ORS 419B.504, that the state demonstrate that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

However, with regard to the non-ICWA case, the court observed that "ORS 419B.504(5) applies, and merely states as one factor to be considered whether a

Recent Case Law—Continued from previous page

parent has failed to make a lasting adjustment after available social agencies have made reasonable efforts." Because mother conceded that she was unfit based on other provisions of ORS 419B.504, her "complaint about the need for additional efforts" was "academic."

Juvenile Jurisdiction

State ex rel Juv. Dept. v. S.A., 230 Or App 346, 214 P3d 851 (August 12, 2009).

<http://www.publications.ojd.state.or.us/A141669.htm>

Father appealed a judgment making his child a ward. At trial, father had made admissions to two allegations, but challenged the third as insufficient to establish jurisdiction. The third allegation read: "Father has a history of substance abuse, which, if active, would endanger the welfare of the child."

On appeal, Father argued that the allegation was insufficient to support juvenile court jurisdiction because it does not allege *current* endangerment. The state conceded error and the Court of Appeals agreed, reversing and remanding with instructions to establish dependency jurisdiction based on only the allegations admitted by father.

State v. S.M.P., 230 Or App 750; 217 P3d 260 (Sept. 16, 2009).

<http://www.publications.ojd.state.or.us/A141483.htm>

DHS appealed the juvenile court's dismissal of a dependency petition alleging the child "suffered unexplained, non-accidental trauma" while in the care of the parents, who were separated. After trial on the mother's case, the juvenile court dismissed because the state failed to establish its allegations against mother, who was the custodial parent.

On appeal, the Court of Appeals held that there was sufficient evidence for juvenile court jurisdiction where the state proved that child had been physically abused. The Court noted that "[i]t is 'axiomatic that the physical abuse of a child endangers the child's welfare, and, thus, furnishes a basis for the exercise of dependency jurisdiction.'" *G. A. C. v. State ex rel Juv. Dept.*, 219 Or App 1, 11, 182 P3d 223 (2008) (citations omitted). Although we defer to the juvenile court's finding that mother's testimony was 'credible in every way' and accept the court's conclusion that mother did not inflict child's injuries, the evidence indicates that child suffered physical injuries most likely caused by physical abuse and that therefore child needs the court's

protection." Consequently, the Court reversed the dismissal of the dependency petition.

State ex rel Juv. Dept. v. D.T.C., 321 Or App 544, ___ P3d ___ (October 28, 2009).

<http://www.publications.ojd.state.or.us/A140588.htm>

Father appealed a judgment establishing juvenile court jurisdiction over three of his four children with mother. DHS became involved with the children in 2005, took jurisdiction in 2007, and ordered father to participate in substance abuse treatment. Father did not participate in treatment, but did participate in parenting classes and received very favorable reviews. His relationship with DHS remained antagonistic, however, and his drinking at the time made him "meaner" and "edgier" towards his children.

In August of 2008, DHS filed a petition alleging that father's "substance abuse interferes with his ability to safely parent" and that "despite services offered," father had been "unable and/or unwilling to overcome the impediments to his ability to provide safe, adequate care" for the children. By the time of the hearing in October of 2008 however, father had not drunk alcohol for at least ten months.

Testimony at the hearing related in large part to father's past alcohol abuse and involvement with DHS. The trial court found that father was making a good faith effort on his own and that mother's testimony was "reassuring." Nevertheless, the judge found both allegations had been proven, explaining that father's decision to skip court-ordered treatment and recover on his own was not "fair."

The Court of Appeals reversed, holding that the state failed to prove that under the totality of the circumstances there was a reasonable likelihood of harm to the welfare of the children. The court's discussion of the effect of the father's drinking on the children is instructive:

"Here, we perceive little if any evidence that father's condition was harmful to the children in the past. From the record, we learn that he "act[ed] out" when he drank, that his conduct when drinking frightened the children, and that drinking made him mean and "controlling." Obviously, that is not ideal parenting. However, without more, it is not inherently or necessarily more harmful or dangerous than other varieties of parenting that would, by no stretch of the imagination, justify state intervention into the parent-child relationship. Passing

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out is a different matter; had father been the only caregiver in the home when that occurred, we would readily conclude that doing so endangered the welfare of the children. However, at all relevant times, father was living with Tabitha, a non-drinker, and there is no evidence that she was not in the home when father drank himself unconscious." *Id* at 554.

The Court also noted that its focus is on the child, not "on how 'fair' the court's decision is to 'other people' or on father's obstinacy and failure to comply with specific DHS directives." *Id.* at 555. The Court concluded that "because the state has not shown that father was using alcohol at the time of the dependency hearing, nor that he was then at risk of relapsing, nor that a relapse was likely to endanger the children's welfare, it has failed to meet its burden." *Id.*

State ex rel Juvenile Department v N.W., ___ Or App ___ (November 18, 2009).
<http://www.publications.ojd.state.or.us/A141262.htm>

Mother appealed jurisdictional order on petition alleging the children's conditions and circumstances endangered their welfare because mother: (1) "has a history of substance abuse"; (2) "has repeatedly allowed convicted and untreated sex offender(s) [to] have contact with her children, despite being advised of the concerns repeatedly by DHS"; and (3) "has refused to submit to a [UA] and has refused to engage in services with DHS to ameliorate the concerns."

On appeal, mother argued that the allegations were insufficient to establish jurisdiction, relying on two earlier cases, *Randall* and *N.S.* The Court of Appeals found *Randall* unpersuasive. In *Randall*, the single allegation (that mother used controlled substances) was insufficient to establish jurisdiction. In contrast, mother in this case had both substance abuse allegations and allegations regarding allowing untreated sex offenders to have contact with the child. The Court found that the two allegations together "present a more compelling case than either one alone; the danger that is inherent in contact with untreated sex offenders is heightened by the use of controlled substances." Thus, the Court held that the controlled substance allegations were "a proper consideration."

Mother also attacked the judgment on the grounds that proof was insufficient, but the Court disagreed. The Court found that: (1) mother's re-

peated inability to keep a sex offender away from her children showed that she did not acknowledge the danger of such contact and that the offender would likely have continued contact with the children; (2) the presence of untreated sex offenders and the use of controlled substances "synergistically creates a whole that is more dangerous than the sum of its parts;" and (3) the children were at risk because of the offender's violation of a no-contact order. Thus, the Court of Appeals affirmed the trial court's finding of jurisdiction.

State v. A.L.M. ___ Or App ___ (November 18, 2009).
<http://www.publications.ojd.state.or.us/A141708.htm>

Mother appealed a judgment vacating the temporary commitment of her son to DHS but continuing wardship over him and awarding physical custody of the child to father who was given the authority to determine any visitation by mother. Mother argued that the juvenile court could only retain wardship if the conditions originally giving rise to it continued to be in effect. The Court of Appeals held that "it is axiomatic that a juvenile court may not continue a wardship 'if the jurisdictional facts on which it is based have ceased to exist'," citing *State ex rel Juv Dept. v Gates*, 96 Or App 365, 372, 774 P2d 484 rev den, 308 Or 315 (1989). After reviewing the allegations and the evidence of the current circumstances, the Court held that:

"[j]urisdiction over N was originally assumed by the court because mother left the child with inappropriate caregivers and because of father's alcoholism and lack of a custody order. Father's alcohol issues have been rectified so that they no longer endanger N's welfare. Father now has physical custody of N, and mother's act of leaving the child with inappropriate caregivers in the past was not a circumstance that authorized continuing jurisdiction over N in the absence of a continued reasonable likelihood of harm to the child. The juvenile court heard no additional evidence that mother continued to represent a threat to N's welfare in light of father's changed circumstances. The facts that mother is involved in other termination proceedings, that she has no case plan for reunification with N, and that she has had little contact with N do not ipso facto demonstrate that she represented a threat to N's welfare at the time

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of the review hearing. Accordingly, in the absence of any evidence in this case that conditions and circumstances existed at the time of the review that presented a reasonable likelihood of harm to the child, the juvenile court erred in continuing the wardship over N.” (Footnotes omitted).

Judge Sercombe filed a lengthy dissent in which he agreed with the majority that in this case the juvenile court was obligated to evaluate whether jurisdiction should continue, but distinguished *Gates* and disagreed with the majority’s analysis of the evidence in the record supporting the allegations.

Termination of Parental Rights

State ex rel DHS v L.S., ___ Or App ___ (November 18, 2009).

<http://www.publications.ojd.state.or.us/A141440.htm>

Mother appealed termination of her parental rights on grounds of unfitness as to her 8 year old son, R., the youngest of nine children. Mother’s history with DHS stretched back to 1995, including multiple “founded” referrals. In 2003, mother suffered from a cardiac event which caused her to lose oxygen to the brain and resulted in physical and mental impairments. She lost custody of her children to the state in 2003, regained it in 2005 and lost custody of R. again in 2006. At trial, there was conflicting evidence about the degree of mother’s improvement since 2006, as well as the adequacy of her plan to parent. The court ruled that mother was unfit to parent without assistance and the “real issue was whether mother was able to provide a plan that would make up for her deficiencies.”

The Court of Appeals focused on the most recent psychological evaluation and made its own factual findings on some issues. Accepting the proposition found in *Rardin* and *Stillman* that the legislature assumes that conditions can change and that termination can only occur where there is present unfitness at the time of trial, the Court held that “if mother is not unfit, then her parental rights may not be terminated without regard to the viability of the plan that she presented.” However, the Court did not decide the case on that issue because of the underlying inadequacy of evidence. The Court held that mother would be able to arrange for her son’s needs to be met when she is personally unable to provide for them. Even when weighed with conflicting evidence, the Court did not find that it is “highly probable that mother’s mental condition at the time of trial rendered her unfit to be R’s parent.” Termination of mother’s parental rights reversed.

Dept. of Human Services v. B.A.S. ___ Or App ___ (November 25, 2009).

<http://www.publications.ojd.state.or.us/A141515.htm>

Parents appealed the denial of their two motions to set aside the judgment terminating their parental rights. Parents’ first motion to the trial court was filed while the case was still pending in the Court of Appeals, and before the judgment was ultimately affirmed. Their second motion was filed after the Supreme Court denied review but before an appellate judgment issued. Parents’ motions were based on transcript problems that the Court of Appeals had previously addressed by ordering a corrected transcript and allowing the parties supplemental briefing. On appeal, the state urged that the case was moot as the children had already been adopted and the Court of Appeals agreed.

The Court of Appeals began its analysis with the text of ORS 419B.923, the statute under which the parents proceeded in the trial court. Subsection (3) of that statute, by its terms, does not permit an order or judgment to be set aside or modified after a petition for adoption has been granted. This, according to the court operated as an unequivocal bar to setting aside the judgment under this portion of the statute. The court next conducted a lengthy analysis of subsection (8) of the statute including, text, context, legislative history and case law under the analogous civil rule. The court concluded that subsection (8), which states “[t]his section does not limit the inherent power of a court to modify an order or judgment within a reasonable time or the power of a court to set aside an order or judgment for fraud upon the court” could not be read “to ‘override’ the provision of ORS 419B. 923 (3) and defeat the state’s mootness argument.” Lastly, the court dispensed with parents’ due process argument, using the *Matthews v Eldridge* three part test. While the parents’ interest in the care and custody of their children was a commanding one, the risk of erroneous deprivation of those interests, in light of the procedures already available (direct appeal, the appellate court’s remedy for the faulty transcript, appellate remedies the parents did not use) was slight and the state’s interest in finality was strong. “Here, the disruption and uncertainty that would be created by allowing the trial court to set aside the termination judgment—after the judgment had been

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affirmed on appeal and after the children have been adopted – is manifest.” The court held that due process was not violated and affirmed the trial court.

State ex rel Juv. Dept. of Multnomah County v. S.W., 231 Or App 311, 218 P.3d 558 (October 7, 2009).

<http://www.publications.ojd.state.or.us/A141009.htm>

Mother appealed termination of her parental rights as to one child. DHS became involved with the mother and child following allegations of substance abuse and domestic violence in the home. The child was eventually removed from the home; mother participated in services, but derived limited benefit and demonstrated no change or improved understanding.

Mother was evaluated by a psychologist and diagnosed with a personality disorder. Despite subsequent services and treatment, mother continued to behave erratically during home visits and parenting classes, and she was discharged by a parent trainer after having made no progress. The parent trainer identified a risk of child abuse, due to mother’s ongoing misperception of her child’s behavior as acting with malice. Mother later was involved in a domestic violence incident with her then-boyfriend, whom she had met in a parenting class. Later, mother’s progress in a court-ordered hands-on parenting class and in other services was inconsistent and minimal.

At the time of the termination hearing, mother had begun Dialectical Behavioral Therapy (DBT) on the advice of her attorney. Mother’s DBT therapist testified that mother had made progress, that her prognosis was good, and that she would likely complete the program within a year. However, another mental health expert who had evaluated mother in the past testified that DBT was not particularly effective at treating the personality disorder traits experienced by mother. The juvenile court found that mother had failed to effect lasting adjustment and had not benefited from services or counseling, and thus terminated her parental rights.

On appeal, mother conceded that she was not a fit parent at the time of the termination hearing, but argued that the juvenile court erred in terminating her parental rights because: DHS failed to provide appropriate individual mental health therapy and make reasonable efforts to enable the child’s return to mother’s care; mother could complete appropriate mental health treatment within a year; the child could be returned within a reasonable time; and termination was not in the child’s best interests.

On the reasonable efforts issue, the Court of Appeals

held that the state had made reasonable efforts to enable the child to return to mother’s care by “providing services that appeared well-suited to mother’s difficult-to-identify needs.” The Court commented that although the services offered were not entirely successful, “[i]n light of the information that DHS had at each stage of the case, its efforts were reasonably calculated to address mother’s issues and to enable the safe return of [child] to mother.”

On the issue of whether the child’s reintegration into mother’s home was improbable within a reasonable time, the Court found that the record indicated DBT was not likely to effectively resolve some of the obstacles to mother’s caring for the child. The Court noted that even if mother were able to successfully complete DBT within a year, she still would not be prepared to safely care for the child, and there was no indication of when that goal might be reached. Thus, return within a reasonable time was improbable.

On the issue of whether termination was in the child’s best interests, the Court found that the child did not appear to have a strong bond with mother, and the child was doing well in his alternative placement with grandparents, which was likely to result in adoption. The Court concluded that terminating mother’s parental rights and freeing the child for adoption was in the child’s best interests. Affirmed.

Criminal Mistreatment

State v. Dowty, 230 Or App 604, 16 P3d 911 (September 9, 2009),

<http://www.publications.ojd.state.or.us/A135936.htm>

Mother and father appealed their convictions under ORS 163.205 of two counts (one for each of their two young daughters, ages five and two) of first-degree criminal mistreatment, due to the condition of their home.

When officers responded to a 9-1-1 call from the home regarding a separate issue, they found the house to be so cluttered that there was only a narrow path leading from room to room. The officers found large kitchen knives and a hammer lying loose on the kitchen counter, dirty dishes in the sink, and the kitchen floor to be sticky. One officer noted that the house was so pungent, humid and dank that he was forced to breathe through his mouth, which made his throat hurt. In the bedroom that mother and father shared with their two young daughters, officers found a space heater raised off the floor on a heat resistant cutting board, with plastic bags and clothing nearby.

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The officers also noted that the children were sleeping near an unlocked case full of prescription pill bottles. In one bathroom, the garbage can was overflowing with diapers.

At trial, both mother and father moved for a judgment of acquittal, arguing the state had failed to prove that the condition of the home constituted withholding necessary and adequate physical care. The court denied the motions and subsequently found both parents guilty.

On appeal, mother and father argued that the trial court erred in denying their motions for a judgment of acquittal because there was no “significant likelihood of serious harm” to the children, as required by ORS 163.205. In considering whether the evidence was sufficient to support the convictions under this standard, the Court of Appeals discussed the state’s reliance on evidence of fire hazards, clutter, the presence of prescription pill bottles within reach of the children, and kitchen knives and a hammer lying loose on the kitchen counter. The Court found that the evidence did not establish a *present* risk of fire, that the clutter on its own did not constitute “withholding necessary and adequate physical care,” and that the evidence did not establish that the children had access to the pills themselves, which were secured with childproof caps. The Court acknowledged that the kitchen hazards posed the potential for serious bodily harm to a young child, but no more so than a number of items that exist in every home. The Court suggested that the legislature likely did not intend to “criminalize physical care . . . simply because it does not safeguard against every possible danger.”

The COA found that the trial court erred in denying the mother and father’s motions for a judgment of acquittal, and reversed the convictions.

Section 1983 Action—Custodial Right of Family Association

Burke v. County of Alameda, No. 08-15658 (9th Cir.) (November 10, 2009).

<http://www.ca9.uscourts.gov/datastore/opinions/2009/11/10/08-15658.pdf>

B.F., a 14-year old girl, ran away from home. A week after she returned, she reported to an Alameda County police officer that her stepfather had physically and sexually abused her. Without contacting the girl’s biological father or obtaining a warrant, the officer took the girl into protective custody because he believed she was in imminent danger. Biological

mother and father brought a section 1983 suit against the officer and the County of Alameda alleging that the officer interfered with their constitutional right of familial association by removing B.F. without a protective custody warrant and that the county caused their injury by failing to train officers on the need for such warrants. The district court granted summary judgment for the officer and the county and the parents appealed.

On appeal, the family argued that the officer did not have sufficient cause to believe that B.F. was in imminent danger when she was removed. The Ninth Circuit disagreed, holding that (1) the officer’s reliance on the girl’s reports of abuse was reasonable and that (2) the frequency of sexual abuse and the additional risk of physical beatings provided reasonable cause to believe that the girl was in imminent danger. The Ninth Circuit also held that removal of the girl from mother’s custody was reasonably necessary because the mother dismissed her daughter’s abuse allegations and showed hostility towards the investigation. In contrast, the Court vacated the summary judgment as to the non-custodial father, holding that the reasonableness of removal was a jury issue; the father was not accused of abuse and was never contacted about assuming care of B.F. Nevertheless, because the police officer’s failure to contact the father was not clearly unlawful, the officer was entitled to qualified immunity. By contrast, the Court held that the county was not entitled to the same qualified-immunity defense and vacated the summary judgment on the county’s liability to the father.



Jackson County Consortium Prevails on Juvenile Shackling

By Rochelle Martinsson, Law Clerk

Reader, the Jackson County Juvenile Justice Consortium (JJC) had filed a motion on behalf of its juvenile clients to dispense with the blanket use of shackles in Jackson County Juvenile Court. As the news brief noted "shackling [had been] particularly egregious in Jackson County because the facility houses both the juvenile court and the juvenile department detention facilities, making shackling unnecessary for security reasons."

Following the filing of JJC's motion, a hearing was set for October 23, 2009, and the County agreed to change its policy. As a result, there will no longer be a blanket shackling policy in Jackson County. Instead, the Juvenile Department will assess each youth individually and if, after an assessment, it is determined that a youth should be shackled, the youth's attorney will have a brief opportunity to inquire as to the reasons. If the attorney disagrees with the Juvenile Department's decision, there will be opportunity for a hearing on the matter. Kudos to JJC!

Christine Herbert of JJC is willing to consult with attorneys in other



OYA News Release

The Oregon Youth Authority (OYA), and the Oregon Juvenile Department Director's Association have received a grant from the Office of Juvenile Justice and Delinquency Prevention, in the amount of \$750,000, to work with counties to reduce recidivism rates among youth offenders with alcohol and drug problems. The grant will be used to establish a Statewide Reentry Advisory council and five local councils to guide development of reentry planning. For more information, contact Ann Snyder, Interim Communications Manager of the Oregon Youth Authority, at: (503) 378-6023.

MULTNOMAH COUNTY MODEL COURT CONFERENCE

The 2010 Model Court Conference, *Implicit Bias and Family Engagement* will be held on Friday, April 2, 2010 at the Jantzen Beach Red Lion in Portland, Oregon. Speakers will include Judge William Thorne and Dr. Shawn Marsh. For more information contact: Abbey Stamp, LCSW, Juvenile Court Improvement Coordinator, Multnomah County Family Court, 503-988-3383.

Focal Point Discussion: Stigmatization of Youth with Mental Health Conditions

By Kim Meyers, Social Work Intern

The Winter 2009 issue of *Focal Point*, published by the Portland, Oregon Research and Training Center (RTC) on Family Support and Children's Mental Health, includes several articles focusing on the causes and consequences of stigmatization of people with mental health conditions, and on strategies and programs for alleviating such stigmatization.

Subjects discussed in the issue include: what stigmatization is and negative consequences of stigmatization, including prejudice, negative judgment, and discrimination; specific struggles that youth coping with mental health issues experience as a result of stigmatization by peers; the chief effects of stigmatization according to research; common stereotypes regarding those with mental health issues; research on adults' knowledge and attitudes about children experiencing mental health problems; strategies specifically designed to reduce stigmatization of youth suffering from depression and ADHD and common approaches to combating issues of stigma; illness behavior (a common response by people experiencing mental health distress to never act or to delay acting on their symptoms); and how mental health professionals can support young people in managing the psychological and social consequences of seeking mental health treatment and in dismantling beliefs that result in the stigma.

To access the complete Winter 2009 Focal Point issue, go to: www.rtc.pdx.edu

As reported in Volume 6, Issue 3-4 of the Juvenile

CONFERENCES

SAVE THE DATE: NACC Law Conference

The National Association of Counsel for Children (NACC) 33rd annual National Juvenile and Family Law Conference will be held October 20-23, 2010 in Austin, Texas. For more information, call (888) 828-NACC, or see: www.NACCchildlaw.org

SAVE THE DATE: OCDLA Spring Juvenile Seminar

The Oregon Criminal Defense Lawyer's Association will hold its annual Spring Juvenile Law Seminar April 16th—17th, 2010 in Newport, Oregon.

SAVE THE DATE: OCAP Conference

The Fifth Oregon Child Advocacy Project Conference: *Ethical and Practical Dilemmas of Representing Children* will be held Friday, April 2, 2010, in room 175 at the University of Oregon Law School in Eugene, Oregon. For information contact Jill Forcier at 541-346-3845.

“Bridging the Gap” Between Birth and Foster Parents

The U.S. Department of Health & Human Services, Administration for Children & Families, Children’s Bureau, has taken notice of Bridging the Gap’s Northern Virginia Initiative. Northern Virginia’s Bridging the Gap practice connects birth parents with foster parents when children enter foster care.

Promoting relationships between birth and foster parents had been practiced informally in Fairfax County by some caseworkers and parents for years, but the county eventually decided to move toward formalizing the practice in 2005. “This decision led to a unique collaboration among 10 private and 4 public agencies in Northern Virginia working together on Bridging the Gap. A steering committee of representatives from these agencies oversaw the implementation, [and the] group received special consultation and training from Denise Goodman at the National Resource Center (NRC) for Family-Centered Practice and Permanency Planning*.” Ms. Goodman “helped the group define timelines and develop training materials and protocols for caseworkers and foster parents.” According to the Children’s Bureau, Bridging the Gap had its formal kickoff in 2008 and is currently in an evaluation phase.

Bridging the Gap begins with an icebreaker meeting between the birth and foster parents within the first few days of a child’s placement. Following the icebreaker, a

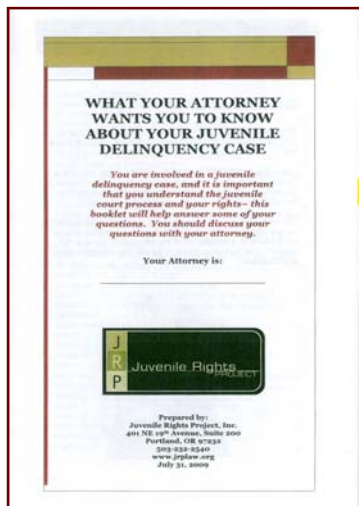
caseworker arranges and facilitates the meeting and continues to remain involved. Subsequent communication depends on each family and set of circumstances, but birth and foster parents may continue to communicate in a variety of ways. “The relationship that develops is unique to each family but can provide benefits to both the children and the two sets of parents. Children are generally more comfortable and secure when they know their foster and birth parents are sharing information, birth parents know more about the family taking care of their children, and foster parents learn about the children’s family and background.”



For more information, go to <http://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=112&articleid=2757>, consult the National Resource Center for Permanency and Family Connections, or contact Claudia McDowell, LCSW, Program Manager, Foster Care & Adoption, Fairfax County, VA, at Claudia.McDowell@fairfaxcounty.gov.

New Resources Available on the JRP Website!

WHAT YOUR ATTORNEY WANTS YOU TO KNOW ABOUT YOUR JUVENILE DELINQUENCY CASE is an informational booklet now available under the “Teens” tab on the JRP Website. This booklet is intended to provide general information to JRP clients with regard to pending juvenile delinquency cases. Please note, that the booklet is not intended to be a source of legal advice, and clients should always discuss their questions and obtain legal advice from their attorney. Also, the booklet reflects JRP practice and may not be useful in other contexts without appropriate adaptation.



The **Juvenile Sentencing Grid** is a color-coded, concise guide to the consequences of juvenile adjudications that may be useful as a quick reference for juvenile counsel. It is now available under the “Delinquency Resources” tab on the JRP Website. It is similar in form and function to the adult sentencing guide published by OCDLA and includes information about: the duration of disposition and other consequences for all classes of offenses for juvenile offenders; commitment and placement parameters for OYA, DHS and PSRB; and specific guidelines with regard to driving privileges, sex offender registration, expunction, and imposition of unitary

Other Recent Case Law

By Rochelle Martinsson, Law Clerk

Diagnosis of Child Sexual Abuse as Scientific Evidence

State v. Southard, ___ Or ___ (October 1, 2009).

<http://www.publications.oid.state.or.us/S055463.htm>

Kermit Eugene Southard was convicted of three counts of sodomy for the abuse of his girlfriend's two children (two counts as to a six-year-old boy, and one count as to a three-year-old girl).

The State originally brought charges based on evidence gathered at the KIDS Center, a nationally accredited medical facility in Deschutes County that examines children to determine whether they have been sexually or physically abused. Troubling behavior of a sexual nature by the boy was observed by family members. Those observations, as well as disclosures made by the boy to family members about being sexually abused by Southard, led to the evaluation of both children at the KIDS Center.

KIDS Center evaluations include a review of history with a child's parent or caregiver, a videotaped interview with the child by a social worker, and a physician conducted medical examination. The doctor who examined the boy in this case diagnosed him as having been sexually abused. The doctor who examined the girl was unable to diagnose whether she had also been sexually abused, but the state charged Southard with one count of sodomy with regard to the girl based on the boy's disclosures at the KIDS Center. Although there was no physical evidence of sexual abuse in either medical examination, Dr. Largent, director of the KIDS Center, testified at trial that the type of sexual abuse reported by the boy usually does not result in physical marks that can be seen during a sexual abuse evaluation.

Before trial, Southard filed a motion *in limine* to preclude the state from introducing "any diagnosis of 'sex abuse' on the ground that such evidence is 'scientific evidence' under OEC 702 and must be subject to the foundational requirements for such evidence." Following a pre-trial hearing on Southard's motion, the trial court ruled that the diagnosis of sexual abuse was admissible. The Court of Appeals affirmed without issuing an opinion. The issue on appeal to the Oregon Supreme Court was whether, under the circumstances of the case, a medical diagnosis of child sexual abuse was admissible scientific evidence. Finding that, under the circumstances, the trial court erred in admitting the diagnosis of sexual abuse, the Supreme Court reversed the Court of Appeals decision and the trial court's judgment.

While both parties agreed that a doctor's diagnosis of child sexual abuse is scientific evidence because it possesses the increased potential to influence the trier of fact as a scientific assertion, they disagreed about whether the diagnosis in this particular case met the minimum level of

scientific validity for the diagnosis to be admissible. Southard argued that without any physical evidence of abuse, "diagnosis of child sexual abuse is too unreliable and not sufficiently verifiable to be considered scientifically valid." The state argued that diagnoses based solely on the history a patient provides are routinely made by doctors, and that the scientific principles supporting the diagnosis in this case are well established.

The Court has held that to be admissible, scientific evidence must meet the following criteria: (1) it must be relevant; (2) it must possess sufficient indicia of scientific validity and be helpful to the jury; and (3) its prejudicial effect must not outweigh its probative value, OEC 403. (See, e.g., *Marcum v. Adventist Health System/West*, 345 Or 237, 193 P3d 1 (2008); *Jennings v. Baxter Healthcare Corp.*, 331 Or 285, 14 P3d 596 (2000). The Court found the evidence of child sexual abuse from the KIDS Center possessed sufficient scientific validity to be admissible against Southard.

However, in examining the question of whether the prejudicial effect of the evidence outweighed its probative value, the Court concluded that the reasons for excluding that evidence far outweighed its probative value. Comparing this case to the analysis of the use of polygraph evidence in *State v. Brown*, 297 Or404 (1984), where the polygraph was found to have some probative value, but that value was outweighed by the prejudice stemming from the trier of fact being overly impressed by a perhaps misplaced aura of reliability or validity of the evidence, leading to abdication of the role of critical assessment of evidence.

The *Southard* Court noted that the diagnosis of the KIDS Center physician did not tell the jury anything that it was not equally capable of determining on its own and thus, the value of the diagnosis was marginal. The Court found that the risk of prejudice, however, was great, because, as in *Brown*, the diagnosis is particularly problematic because it was based primarily on an assessment of the boy's credibility, posing the risk that the jury would not make its own credibility determination and defer to the expert's implicit conclusion that the victim's reports of abuse are credible.

The trial court erred in admitting the diagnosis of sexual abuse and the decision of the Court of Appeals and the trial court judgment were reversed.

Proportional Sentencing

State v. Rodriguez, 347 Or 46, 217 P3d 659 (September 24, 2009). <http://www.publications.oid.or.us/S055720>

Two criminal cases were consolidated for disposition by the Oregon Supreme Court, to address the Court's interpretation and application of the requirement in **Article I, section 16, of the Oregon Constitution** that "all penalties be proportioned to the offense."

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In the first case, Veronica Rodriguez was convicted of first-degree sexual abuse for touching a 13-year-old boy. Evidence showed she stood behind him in a room with 30 to 50 other people, and brought the back of his head into contact with her clothed breasts for about one minute. In the second case, Darryl Buck was convicted of first-degree sexual abuse for touching a 13-year-old girl. Evidence showed he touched and failed to remove his hand from the girl's buttocks more than once, while fishing with her, and that when the girl stood up, he brushed dirt off the back of the girl's shorts with two swipes of his hand. In each case, the touching was deemed unlawful under ORS 163.427(1)(a)(A), due to the fact it was done for a sexual purpose.

Although first-degree sexual abuse carries a mandatory sentence of 75 months in prison under Ballot Measure 11, the judge in each case determined that such a sentence was not proportional to the offense committed, and was therefore unconstitutional. Ultimately, Rodriguez was sentenced to 16 months and Buck was sentenced to 17 months. The state appealed and both defendants cross-appealed their convictions.

The Court of Appeals affirmed the convictions, but held that the trial courts should have imposed mandatory 75-month sentences. (See *State v. Rodriguez*, 217 Or App 351, 174 P3d 1100 (2007) and *State v. Buck*, 217 Or App 363, 174 P3d 1106 (2007). The Oregon Supreme Court affirmed the defendants' convictions, but reversed the decisions of the Court of Appeals as to sentencing, and affirmed the sentences imposed by the trial courts.

The Supreme Court specifically considered whether there was any constitutional limit on the term of imprisonment that could be imposed for the touchings that occurred in each of the cases. In other words, the Court examined whether the mandatory 75-month sentences were unconstitutionally disproportionate penalties for the conduct in those cases. The Court concluded that *Article I, section 16* does impose a limit. The Court relied on the "shock the moral sense" standard articulated in *Sustar v. County Court for Marion Co.* (1921) and discussed, with regard to proportionality challenges in *State v. Wheeler*, 343 Or 652 (2007).

In analyzing the legal standard, the Court identified three factors as bearing on the ultimate conclusion that a punishment is so disproportionate to an offense as to "shock the moral sense" of reasonable people: (1) a comparison of the severity of the penalty and the gravity of the crime; (2) a comparison of the penalties imposed for other, related crimes; and (3) the criminal history of the defendant.

With regard to the first factor, the Court found that a defendant's "offense," for purposes of Article I, section 16, is "the specific defendant's particular conduct toward the

victim that constituted the crime, as well as the general definition of the crime in the statute," rather than the description of the prohibited conduct in the statute, as the state argued. In determining that the penalties imposed were disproportionate to the offenses at issue, the Court emphasized the limited extent of those offenses, noting that: the touchings were brief, if not momentary; there was no evidence of force or threats of any kind; the "sexual" or "intimate" body parts that were touched were clothed; and there was no skin-to-skin contact, no genital contact, no penetration, and no bodily injury or physical harm. While noting that a 75-month sentence is not disproportionate for most of the conduct that constitutes first-degree sexual abuse, the Court held that the 75-month sentences were disproportionate for the conduct at issue in the two cases on appeal.

With regard to the second factor, the Court found that "If the penalties for more 'serious' crimes than the crime at issue result in less severe sentences, that is an indication that the challenged penalty may be disproportionate. The Court commented that the conduct of both Rodriguez and Buck was "at the outer edge of 'sexual conduct' as . . . defined in ORS 163.305(6) . . . [y]et conviction for the sexual contact in [those] cases resulted in the *same* sentence as would be imposed on a defendant who anally sodomized the[children]." The Court held that while a reasonable person would consider a mandatory 75-month sentence for, e.g., anal sodomy, to be proportioned to the offense, a reasonable person could not conclude that a mandatory 75-month sentence is proportioned to the offenses of Rodriguez and Buck.

With regard to the third factor, the Court reiterating *Wheeler* found that the proportionality analysis must focus not only on the latest crime and its penalty, but on the defendant's criminal history, or lack thereof. In finding the 75-month sentences imposed on Rodriguez and Buck to be unconstitutionally disproportionate to the offenses committed, the Court emphasized that neither Rodriguez nor Buck had any prior convictions or charges of any kind, and that in each case there had been only a single occurrence of wrongful conduct.

Ninth Circuit on the Constitutionality of SORNA

U.S. v. George, 79 F3d 962 (9th Cir., August 25, 2009).
<http://caselaw.lp.findlaw.com/data2/circs/9th/0830339p.pdf>

Phillip William George was convicted in 2008 after a conditional guilty plea, of the federal crime of sexual abuse of a minor on an Indian reservation. George served

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his sentence for that offense, but then failed to register as a sex offender in violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250. The case came before the United States Court of Appeals for the Ninth Circuit as an as-applied challenge when George appealed his failure to register conviction as invalid, arguing that: (1) the state where George was required to register (Washington) had not implemented SORNA; and (2) SORNA's registration requirement was an invalid exercise of congressional power and violated the *Ex Post Facto Clause* of the United States Constitution. The Court of Appeals affirmed George's conviction, holding: (1) that the registration requirement under SORNA required George to register as a sex offender in the State of Washington, even though Washington had not implemented the statute; and (2) SORNA's registration requirements are a valid exercise of congressional commerce power, and do not violate the *ex post facto* clause of the Constitution.

On the issue of Washington's failure to implement SORNA, the Court agreed with George that SORNA includes a provision requiring implementation by each state. However, the Court found that the statute itself became effective upon its enactment, absent any clear direction by Congress to the contrary, and that SORNA's direct federal law registration requirements for sex offenders are not subject to any deferral of effectiveness. The Court said, "While states have until July 2009 to implement administrative components of the statute, the statute became effective July 27, 2006, and registration under it became a requirement of federal law at that time. Without regard to whether SORNA is implemented by Washington or any other state, registration under it is required." The Court held that George violated SORNA by failing to register as a sex offender after traveling in interstate commerce.

The Court also rejected George's argument that he may not be indicted for a violation of SORNA, due to the fact that the registration requirement of SORNA as applied to him violates the *Ex Post Facto Clause*. George argued that failure to register is a one-time offense, rather than a continuing offense, and that because he had moved to Washington before SORNA was enacted, any offense that occurred took place when he moved there. The Court held that George was under a continuing obligation to register following the enactment of SORNA, and that the date of his indictment for failure to register occurred after such enactment.

U.S. v. Juvenile Male, 581 F3d 977 (9th Cir., September 10, 2009).

<http://caselaw.lp.findlaw.com/data2/circs/9th/0730290.pdf>

At the age of thirteen, S.E. engaged in non-consensual sexual acts with a ten-year-old child of the same sex. Following a plea of "true" to subsequent charges, the youth

was adjudicated delinquent for the commission of acts that, had they been committed by an adult, would constitute aggravated sexual abuse under 18 U.S.C. § 1153 and § 2241(c).

S.E. was sentenced in district court in 2005, a year before SORNA was adopted. S.E.'s sentence was for two years of detention at a juvenile facility, followed by supervised release until his twenty-first birthday, to include six months at a pre-release center. S.E. was not, at the time of his sentencing, ordered to register as a sex offender. S.E. completed his two-year confinement and moved to the pre-release center, but center officials later requested S.E.'s removal following his failure to engage in a required job search. The district court then revoked S.E.'s supervised release for failure to fulfill the conditions of his probation, and the judge imposed a "special condition" of probation mandating that S.E. register as a sex offender, as required by the Sex Offender Registration and Notification Act (SORNA). Enacted by Congress in 2006, SORNA applies registration and reporting requirements to adults and juveniles who commit certain serious sex offenses at the age of fourteen years or older. Under authority delegated by Congress, the U.S. Attorney General made SORNA retroactively applicable to all sex offenders convicted of qualifying offenses before its enactment, including juvenile delinquents.

On appeal, S.E. challenged the imposition of the registration requirement, arguing that the *Ex Post Facto Clause* bars the retroactive application of the registration provision of SORNA to persons who, prior to its passage, were designated as juvenile offenders. The Court held that "SORNA's juvenile registration provision may not be applied retroactively to individuals adjudicated delinquent under the Federal Juvenile Delinquency Act," and reversed the directive that S.E. register as a sex offender.

The Court's opinion, authored by Judge Reinhardt, includes lengthy discussion of why juvenile offenders have historically been treated different from adult offenders in the U.S. The opinion also includes discussion of the differences between the juvenile justice system and the adult criminal justice system, including emphasis on the purpose of the Federal Juvenile Delinquency Act (FJDA) that "[juveniles be removed] from the ordinary criminal process in order to avoid the stigma of a prior conviction and to encourage treatment and rehabilitation."

Additionally, Reinhardt discusses the effects of retroactive application of SORNA's juvenile registration provision upon many who "were adjudicated delinquent years or even decades before SORNA's enactment" and for whom "sex offender registration and reporting threatens to

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disrupt the stability of their lives and to ostracize them from their communities by drawing attention to decades-old sex offenses committed as juveniles that have, until now, remained sealed.”

Article I, § 9, cl. 3 of the United States Constitution bars a statute or regulation that imposes retroactive punishment. (Emphasis added.) The Court, finding application of SORNA, enacted in 2006, to S.E., who was found delinquent in 2005, to have been clearly retroactive, proceeded to state, “The question we must answer then is whether the application of SORNA’s juvenile registration provision is punitive.” (Emphasis added.) The Court framed its analysis as inquiring “whether SORNA’s juvenile registration provision is . . . punitive because (1) its purpose is to punish or (b) its effect is clearly shown to be punitive.” Because S.E. had conceded the answer to the first part of the inquiry was in the negative, the Court focused its attention on the second part of the inquiry. In considering whether a statute has punitive effect, the Court, quoting *Smith v. Doe* (2003), found to be most relevant to its analysis whether, in its necessary operation, the regulatory scheme: has been regarded in history and tradition as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non-punitive purpose; or is excessive with respect to its purpose.

With regard to whether requiring former juvenile sex offenders to register and report to law enforcement is a historical means of punishment, the Court found that “public disclosure mandated by SORNA’s juvenile registration provision is historically a central feature of a punitive rather than a rehabilitative system of justice.”

With regard to whether SORNA imposes an affirmative disability or restraint, the Court considered the particular and negative effects on former juvenile offenders of retroactive application of SORNA’s juvenile registration provision. Citing “two different systems of justice – one public and punitive [for adult criminal offenders], the other largely confidential and rehabilitative [for juvenile delinquents],” the Court stated that “[t]he burden of sex offender registration upon a former juvenile offender is substantially, and decisively, different.” The Court found that retroactive application of SORNA’s juvenile registration provision imposes an affirmative disability or restraint neither “minor” nor “indirect,” “but rather severely damaging to former juvenile offenders’ economic, social, psychological, and physical well-being,” a finding which “strongly supports determination that [SORNA’s] effect is punitive.”

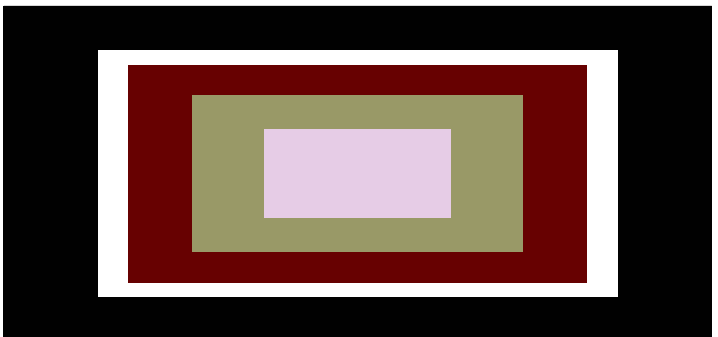
With regard to whether retroactive application of SORNA’s juvenile registration provision promotes the traditional aims of punishment, the Court considered

“whether SORNA’s test and history suggest that the disadvantages imposed are purely regulatory, or were designed, at least in part, in order to promote the traditional aims of punishment, and thus whether SORNA serves that purpose.” The Court found that while SORNA’s aim is principally regulatory, it is also to some extent punitive.

Finally, the Court considered “whether SORNA’s juvenile registration provision has a non-punitive purpose, [and if so], whether the requirement is excessive in relation to that goal.” The Court noted, “Given the low risk that former juvenile sex offenders pose to public safety and the lifetime confidentiality that most former juveniles would otherwise enjoy, retroactively applying SORNA’s juvenile registration provision is an exceptionally severe means of achieving the statute’s non-punitive goal.” The Court also noted that those primarily affected by SORNA’s retroactive application to former juvenile offenders (adults who must register solely because they committed an offense as a juvenile, but who have not since reoffended) are not likely to recidivate, and are likely to experience great personal toll as a result of public stigmatization. The Court even suggested that “the severity of [SORNA’s retroactive juvenile registration provision] may increase the risk of recidivism within a population that otherwise has the greatest potential for rehabilitation.”

A summary of the reasons underlying the Court’s general holding is articulated by the following statement of the Court:

“In light of the pervasive and severe new and additional advantages that result from the mandatory registration of former juvenile offenders and from the requirement that such former offenders report in person to law enforcement authorities every 90 days for 25 years, and in light of the confidentiality that has historically attached to juvenile proceedings, we conclude that the retroactive application of SORNA’s provisions to former juvenile offenders is punitive and, therefore, unconstitutional.”



Resources

Summaries by Whitney Hill (Attorney), Rochelle Martinsson and Noah Barish (Law Clerks), and Kim Meyers (Social Work Intern)

The Urban League's *State of Black in Oregon*

On July 27, 2009, The Urban League of Portland published *State of Black in Oregon*, a statewide report on the condition of African Americans in Oregon, including statistics on the gap in living standards between African American and Caucasian residents.

An article in the report titled, "When Child Welfare is the Issue, One Size Does Not Fit All," addresses "a growing concern about African American and Native American children being disproportionately represented in the state's foster care system." Another article, titled "State of the Village: Children Youth and Families," is a call by Dr. Samuel D. Henry of Portland State University to policy makers and to African American communities and leaders to help improve the disproportionate rates of African American youth who end up in the care of social services. Toward the goal of enhancing African American families in Oregon, Dr. Henry offers various recommendations. The *State of Black in Oregon* report also profiles Phillip Johnson and Cynthia Thomas-Johnson, founders of New Decision Treatment Foster Care, Inc. Finally, The Urban League of Portland outlines specific policy recommendations for addressing disproportional rates of African American children in foster care.

For more information or to see the full *State of Black in Oregon* report, go to:

<http://ulpdx.org/documents/UrbanLeague-StateofBlackOregon.pdf>

Guide to School Searches

A collaboration between the National Juvenile Defender Center, Barton Juvenile Defender Clinic at Emory University School of Law, and the Youth Advocacy Project of the Committee for Public Counsel Services in Massachusetts culminated in the publication of *Defending Clients Who Have Been Searched and Interrogated at School: A Guide for Juvenile Defenders*. The guide is available at:

http://www.njdc.info/pdf/defending_clients_who_have_been_searched_and_interrogated_at_school.pdf or, to request a hard copy contact inquiries@njdc.info or (202) 452-0010.

Dependency Court Improvements Recommended for AI/AN Children

The National Indian Child Welfare Association (NICWA) and the National Council of Juvenile and Family Court Judges (NCJFCJ) have been working together with support from additional agencies to improve service delivery for American Indian/Alaska Native (AI/AN) children and families specifically in dependency cases. Through this work they have outlined several areas in which service within the court system needs to improve in order improve outcomes for AI/AN children including the following: data Collection; training and collaboration; improving legal representation; improving court operation; emphasizing that AI/AN children have unique political status as citizens of sovereign nations and that these nations are best equipped to respond to dependency issues; focusing on processes that support improved outcomes for AI/NA children in foster care; making additional federal funding available to tribes in order for them to better serve their own children; and collaboratively developing culturally tailored training and technical assistance, and making this assistance available to State courts, child welfare agencies, and tribes.

NICWA and NCJFCJ believe improvements in these areas are vital to giving the best services and increasing positive outcomes for AI/AN children.

For more information, see:

http://www.ncjrs.gov/html/ojdp/news_at_glance/227625/topstory.html

Role of Juvenile Defense Counsel in Delinquency Court

This document is a policy paper describing the critical and unique role of the juvenile defender. It reflects best practices as defined by the field and endeavors to "educate judges, prosecutors, probation officers, and other juvenile justice professionals about the importance of the juvenile defender's responsibility to advocate for the client's express interests." To view the document in full, go to: <http://www.njdc.info/publications.php>



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