JUVENILE RIGHTS PROJECT

JUVENILE LAW READER

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Teachers Fear Students, Demand Notice of Juvenile Allegations

By Mark McKechnie

The Oregon Education Association, the state teacher's union, introduced a bill that will require that information about allegations brought against juvenile defendants will be provided to their school districts. The bill, SB 1092, which was passed by the Oregon Legislature during their brief February 2008 session, includes descriptions of the types of offenses that will trigger the notice, including:

- Harm or threatened harm to another person, including criminal homicide, felony assault or any attempt to cause serious physical injury to another person;
- Sexual assault of an animal or animal abuse in any degree;
- A sex offense listed in ORS 181.594 (4), except for rape in the third degree under ORS 163.355;
- A weapon, as defined in ORS 166.360, or the threatened use of a weapon;
- Possession or manufacture of a destructive device, as defined in ORS 166.382, or possession of a hoax destructive device, as defined in ORS 166.385; or
- An offense for which manufacture or delivery of alcohol or a controlled substance is an element of the crime.

The bill requires the district attorney, juvenile department or other party filing a petition under ORS 419C.250 to send a notice by mail within 15 days after the youth's first court appearance. The notice is to be sent to the school district superintendent or superintendent designee.

The notice will include the youth's name and date of birth, the names and addresses of the parents or guardians, "the alleged basis for the juvenile court's jurisdiction over the youth;" and "the act alleged in the petition that, if committed by an adult, would constitute a crime." Schools are to receive a subsequent notice within 15 days if the petition is set aside or dismissed or the youth is not found to be in the jurisdiction of the court. (cont'd, p. 4)

2007 AMENDMENTS IMPACT ON OREGON'S PATERNITY LAW ON DEPENDENCY PROCEEDINGS IN JUVENILE COURT, Part I

By Prof. Leslie J. Harris, University of Oregon School of Law

Best practices in dependency cases require that juvenile courts resolve any disputes about a child's legal paternity as early as possible for several reasons. First, fathers, like mothers, are entitled to the rights of parties in cases, which include procedural due process protections and rights to claim custody and to reasonable efforts to make it possible for them to have custody. See ORS 419B.875, 419B.819. Second, even if a child's legal father is not willing or able to raise his child, identifying him can help implement two practices that promote involvement of the child's extended family, both maternal and paternal, in the case – a preference for kinship foster care and efforts to involve family members in decision-making about the child's placement and treatment plans through family group conferences or family meetings. Finally, if the ultimate permanent plan for a child is adoption, failure to identify the child's father early and to establish the factual basis for termination can delay or even derail this plan. (Continued, p. 5)

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Recent Case Law

Case Summaries by Rakeem Washington and Michael Mangan, Law Clerks

State ex rel Juvenile Dept. of Multnomah Co., v. S.P., --- P.3d--- (February 20, 2008)

Defendant, S.P., a thirteen year old, was found to be within the jurisdiction of the juvenile court on first-degree sexual abuse and first-degree sodomy. On *de novo* review, the Court of Appeals vacated and remanded the sodomy charge after concluding that statements the three year old complainant, N., made during a CARES interview was improperly admitted testimony in violation of the confrontation clause as outlined in *Crawford v. Washington*. The Court of Appeals held that the nature and extent of police and prosecutorial involvement in this case was decisive in determining that N.'s statements were testimonial. The confrontation clause was triggered when both parties stipulated that N. was unavailable as a witness.

In determining substantial police and prosecutorial involvement, the Court of Appeals determined that "CARES also functions as an informational clearinghouse for police and child welfare authorities" to provide law enforcement with the "cleanest, most credible evidence of abuse." The Court of Appeals also concluded that law enforcement involvement with the interview process was pervasive when a police officer observed (through a one-way mirror) the entire interview, observed the evaluation team's consultation, and immediately thereafter met with N.'s mother to discuss the course of the prosecution. Additionally, the Court of Appeals recognized the close connection between CARES and law enforcement by CARES' routine practice of providing complete copies of evaluation reports to police agencies as well as the resulting CARES' treatment recommendation to police urging further investigation by DHS and law enforcement. In rejecting the state's assertion that determining whether N.'s statements were testimonial hinged on N.'s subjective purpose in making the statements as largely immaterial, the Court of Appeals held that the primary purpose of the CARES interview was for the preservation of evidence of future criminal investigation and potential prosecution. While remanding the sodomy charge, the Court of Appeals affirmed the sexual abuse charge based on the properly admitted evidence adduced in the trial court record.

***Smith v. Patrick,* 508 P.3d 1256, (9th Cir. 2007)**

Shirley Ree Smith was convicted in a California state court of assault on a child resulting in death. On a habeas petition, the federal district court denied Smith's argument regarding the insufficiency of evidence under federal due process. The Ninth Circuit reversed, holding that no rational trier of fact could have found beyond a reasonable doubt that Smith caused the death of the child. The United States Supreme Court granted *certiorari* on this case, and vacated and remanded for further consideration in light of (continued, next page)

the Supreme Court's ruling in *Carey v Musladin*.

The Ninth Circuit concluded that its prior decision remained unaffected by *Musladin* and reinstated its judgment and opinion. The court noted that the issue in *Musladin* was whether a state court affirmation "of a conviction resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law." *Musladin* involved a situation that the Supreme Court had never addressed, and therefore the state court decision at issue there had not been contrary to established federal law. In the instant case, however, the issue was merely whether there was sufficient evidence presented by the prosecution to uphold a conviction under the constitutional standard, which the Supreme Court has addressed in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The Ninth Circuit held that the state court decision to uphold the conviction of Smith was contrary to established federal law. The opinion and judgment were reinstated.

In Re Zamer, et al., 153 Cal App. 4th 1253 (2007)

The Children's Law Center (CLC), a publicly funded, nonprofit law office was disqualified from representing four siblings because an "actual conflict" existed under California law. The Center created separate units (referred to as CLC Unit 1, CLC Unit 2 and CLC Unit 3) to provide, in the same proceeding, legal representation to multiple clients who might have conflicts of interest. In this case, four siblings were being represented by CLC Unit 1 and one sibling was represented by CLC Unit 2. One of the four siblings represented by an attorney on CLC-1 reported that his stepfather (biological father of two of the four siblings) had hit him, his brothers and his mother. The court found that this created an "actual conflict" because the attorney could not professionally and independently evaluate each child's best interests when faced with this dilemma. The court upheld the disqualification of CLC-1 from representing the siblings.

In Re J.K., 217 Or App 116 (2007)

This is an appeal from a permanency hearing changing the plan for two children, T.K. and J.K., from reunification with their parents to adoption. DHS filed a dependency petition in 2005 when it discovered that the parents were using drugs and alcohol, including methamphetamine, and that the parents had failed to provide proper care and a suitable home for the children while under the influence of narcotics.

The court ordered the parents to complete drug and alcohol assessments and follow all recommendations including complete a psychological evaluation, submit to random urinalyses, and successfully complete a parenting class. Approximately one year later, the court granted the parents a 90-day continuance to allow them to engage in necessary services, including completion of drug and alcohol treatment.

At the second permanency hearing, nearly 17-months later, the parents had completed their psychological evaluation, but had not fully met other conditions. Although both mother and father were employed, regularly attended Alcoholics and Narcotics Anonymous meetings, maintained a stable living arrangement, had passed all urinalysis tests and had enrolled in drug and alcohol treatment programs, the court found that that by the preponderance of evidence, and giving considerable weight to the trial court's credibility findings, not enough significant progress had been made in the nearly year and a half time frame. The appellate court also agreed with the trial court that if the parents continued to progress and complete all required conditions, the plan could be reevaluated in the future. "We presume that if parents have continued that progress and completed necessary services, they would have the opportunity to present evidence to that effect at a future hearing, and, as the juvenile court pointed out, they "certainly would not be the first . . . in a long list of parents who have continued to work and have changed the direction of the case for their children. . . ." "We also note that, as the state recognized at oral argument, the record at this point would not support termination of parents' parental rights."

Humphrey v. Wilson, 282 Ga. 520 (2007)

Wilson, a 17 year-old at the time of the crime, was convicted of aggravated child molestation. The sexual act involved a 15 year-old victim who willingly performed oral sex on Wilson. The statutory minimum sentence for conviction of aggravated child molestation was ten years in prison with no possibility of parole. As a result, Wilson was sentenced to ten years in prison with no possibility of probation or parole plus one year probation as well as being subject to registration as a sex offender. In a habeas petition, Wilson challenged the statutory minimum sentence contending it constituted cruel and unusual punishment. He pointed to the 2006 amendment to the statute which makes conduct such as his a misdemeanor. (Continued, p. 4)

Case Law, cont'd from p. 3

Since the amendment occurred after the trial and his first appeal, Wilson did not fail to comply with Georgia's procedural rules on appeal in not claiming that his sentence constituted cruel and unusual punishment. Thus, the habeas court was correct in finding that the sentence constituted cruel and unusual punishment and in reducing his sentence to twelve months. The Supreme Court of Georgia held that the sentence was cruel and unusual under both Georgia's and the United States Constitutions.

***Beaty v Schirio,* 509 P.3d 994 (9th Cir. 2007)**

Donald Beaty was convicted of murder and sexual assault in Arizona state court. The Ninth Circuit previously remanded this capital habeas appeal to the district court to conduct an evidentiary hearing on whether Beaty's inculpatory statements to a prison psychologicst during a group therapy session were voluntary within the meaning of the Fifth Amendment. The district court found that these statements, which were used as evidence to convict him, were voluntary despite Beaty signing a contract regarding confidentiality.

The Ninth Circuit concluded that Beaty could not have had a reasonable belief that the sessions would be kept absolutely confidential reasoning that (1) Beaty was not guaranteed the confidentiality of statements made during or after the group session, (2) he was not coerced by other group members, and (3) he was not required to attend the group therapy sessions. The Ninth Circuit then affirmed the earlier conviction.

***In re Marriage of Boldt*, --- P.3d---. 2008**

This case addresses the custodial a parent's ability to choose

(Continued, p. 7)

Teachers Demand Notice, continued from p. 1

Once the notice is received by the district, the superintendents or their designees are permitted by SB 1092 to relay the information to any school district employees or contractors who require the information in order to "safeguard the safety and security of the school, students and staff" or to arrange counseling or other educational services.

The new law stipulates that any information personnel receive about charges filed against a student be kept confidential and may be discussed only with the youth, the youth's parents, the school principal or superintendent, other staff notified under these provisions of ORS chapter 419A, law enforcement or the youth's juvenile counselor.

Limits on Use of Information

Section 3, subsection 6a, of the bill prohibits the use of information the school receives about allegations brought against a student in juvenile court as a basis for discipline or denying enrollment, except for incidents that occurred at school or during school functions. The bill allows the school, however, to consider the information in making decisions about a student's educational placement, educational services or need for counseling.

The extent to which schools can change students' placements based upon behavior that allegedly occurs outside of school remains unclear. Existing federal statutes, such as the Individuals with Disabilities Education Act, require that most placement decisions be made by a team that includes students' parents or educational surrogates. Schools may not typically make unilateral decisions about students' educational placements. There is also a presumption that students will be educated in the "Least Restrictive Environment."

For non-special education students, it also remains unclear how a school can change a students' placement outside of the context of disciplinary action. Schools typically cannot exclude students or unilaterally move them to alternative school settings absent major disciplinary action.

Unfortunately, SB 1092 does not describe any specific recourse or remedy for students or their families if students are unlawfully excluded from school or moved to other educational settings without the parents' consent.

Other Provisions

Section 3(3) of the bill also includes the requirement that: "If a youth transfers to an Oregon school from a school outside the state, the school administrator of the Oregon school shall contact the youth's former school and request any information that the youth's former school may have relating to the youth's history of engaging in activity that is likely to place at risk the safety of school employees, school subcontractors or other students or that requires arrangement of appropriate counseling or education for the youth."

Youth, as used in this section has the meaning defined in ORS 419A.004. It remains unclear how school personnel will be able to determine which incoming students require such an inquiry.

In addition, the bill shortens the timelines from 15 days to five for notice to schools regarding adjudicated youth and for youth charged as adults.

The bill also directs the Oregon Law Commission to review the new law and make recommendations for refinements, including provisions for judicial review. The law goes into effect January 1, 2009.

See, e.g., State ex rel. DHS v. Rardin, 340 Or 436, 444-445, 134 P3d 940 (2006).

For these reasons, the 2005 legislature enacted a statute, now codified at ORS 419B.395, that explicitly authorizes juvenile courts to determine issues of legal paternity that arise in the course of dependency and termination of parental rights proceedings. Before entering a judgment, the juvenile judge must find that adequate notice and an opportunity to be heard were provided to the parties, to any man alleged to be the child's father, and to the Division of Child Support.

As it turns out, some of the most complex fact patterns that raise issues of legal paternity arise reasonably often in dependency cases. For example, a married woman may give birth to child but say that another man is the biological father. She may even sign a voluntary acknowledgment of paternity with that other man. Or the child support enforcement agency may determine that one man is the father of a child born to an unmarried woman, who later signs and files a voluntary acknowledgment with another man. The juvenile code does not contain substantive rules for determining how these complicated cases should be resolved but instead refers the courts to ORS chapter 109 and its generally applicable provisions regarding paternity. During the interim between the 2005 and 2007 legislatures, a group convened by the Oregon Law Commission worked to update the paternity provisions of chapter 109, which had not been reconsidered as a whole for 30 years. The 2007 legislature enacted the group's proposal with some changes. This article explains those changes.

ORS 109.070(1) sets out the bases for a finding of legal paternity. The three most important means are presumptions of paternity based on marriage, judicial or administrative orders, and voluntary acknowledgments of paternity. ORS 109.070(1)(a), (b), (c), (d), (e), (f). The next sections discuss how legal paternity is established on these bases and explains changes made by the 2007 legislation.

Paternity presumptions based on marriage

About two-thirds of all children born in the U.S. today are born to married women, and their husbands are presumed to be the legal fathers. Until 2005, ORS 109.070(1)(a) provided that if a married woman and her husband were cohabiting when a child was conceived and the husband was not infertile, he was conclusively presumed to be the father of children born to her. Oregon was one of only two states with a conclusive presumption, and the only one with a conclusive presumption that applied to the husband and wife in all circumstances. The 2005 legislature temporarily repealed the conclusive presumption. Laws of 2005 c.160 §11. The 2007 legislation repealed the conclusive presumption permanently. A recent Court of Appeals decision addresses which law governs litigation brought in 2007 over the legal paternity of a child born in 2002 -- the law in effect in 2002 or in 2007. In State ex rel. Juvenile Dept. of Lane County v. G.W., --- P.3d --- (Or. App. 2008), the court held that the legislation in effect at the time of the litigation governed, and the court's reasoning supports the conclusion that the same should be true for litigation arising under the 2007 legislation.

The 2007 legislation retained and amended the other presumption based on marriage that has long been part of ORS 109.070(1) – that a married woman's husband is rebuttably presumed to be the father of children born to her during the marriage. ORS 109.070(1)(a). However, the 2007 legislation imposed new limits on standing to rebut the presumption. It provides that either the husband or the wife may challenge the presumption under any circumstances, but third parties, including DHS and the child, may not challenge it if the spouses are living together unless the spouses consent. ORS 109.070(2). The purpose of this limitation, which was borrowed from California law, is to protect the privacy and integrity of the intact family.

The 2007 legislation also enacted a new rebuttable presumption, derived from the 2002 Uniform Parentage Act, that woman's former husband is rebuttably presumed to be the father of any child born within 300 days of the termination of the marriage by any means. ORS 109.070(1)(b). This provision codifies prior practice. It could clash with the rebuttable presumption that a woman's husband is the father, as when a married woman becomes pregnant, divorces, and remarries within 300 days of the divorce. In the rare cases of clashing presumptions, courts generally give effect to the one supported by the more important policy considerations and facts of the particular case.

Finally, the new legislation significantly reduces the effect of a section of ORS 109.070 that previously provided that the biological father of a child born outside marriage became the legal father automatically if he married the mother. As amended, ORS 109.070(1)(c) now requires that the spouses also file a voluntary acknowledgment of paternity form with the state office of vital statistics. As discussed below, filing such a form is in itself sufficient to determine paternity; the man and woman's marriage is, (continued, next page)

therefore, irrelevant to the legal paternity determination. However, this section is still important because the rule permitting only the spouses to challenge paternity while they are cohabiting, discussed above, also applies here.

The 2007 legislation does not impose a statute of limitations on bringing challenges to the marital presumption, but it does give judges discretion about whether to admit evidence to rebut the presumption. ORS 109.070(3) provides that the judge should admit such evidence only upon a finding that it is "just and equitable, giving consideration to the interests of the parties and the child."

In several cases decided before the 2005 and 2007 paternity legislation, the Oregon Court of Appeals held that a trial court may refuse to allow the presumption of paternity to be rebutted because the petitioner is equitably estopped from denying paternity. Marriage of Johns and Johns, 42 Or. App. 39, 601 P.2d 475 (1979); Marriage of Hodge and Hodge, 84 Or. App. 62, 733 P.2d 458, rev. den. 303 Or. 370, 738 P.2d 1999 (1987); Marriage of Sleeper and Sleeper, 145 Or.App. 165, 929 P.2d 1028 (1996), aff'd on other grounds, 328 Or. 504, 982 P.2d 1126 (1999). These cases remain good law, though a judge's authority under the "just and equitable" standard to exclude evidence to rebut a marital presumption is not limited to facts giving rise to estoppel.

Paternity based on an Adjudication

The traditional way of determining the paternity of a child born outside marriage is by litigation – a filiation suit, as the Oregon statutes call it. ORS 109.124 – ORS 109.237. ORS chapter 416 also allows legal paternity to be established by administrative proceedings conducted by the office of child support enforcement. ORS 416.400 to 416.470. The 2007 legislation amended the filiation statutes to prevent courts from entering findings of paternity that are inconsistent with each other, but it did not enact similar provisions for the administrative proceedings under Chapter 416.

The amendments to the filiation statutes complement ORS 109.326, which provides that a court may make a determination that a married woman's husband is not the father of a child born during the marriage only if the husband has been served with a summons and a true copy of a motion and order to show cause, provided that the child has lived with the husband at some point or the husband has repeatedly contributed or tried to contribute to the child's support. As amended, ORS 109.125, which governs filiation proceedings, is even more protective of the rights of other men who have the status of legal father. It requires that a petition to establish paternity identify the mother's husband if she is married and provides that a man who paternity is presumed or has been previously established is a necessary party to the proceedings unless his paternity has been legally disestablished. ORS 109.155(7) precludes a court from entering a judgment of paternity in a filiation suit if another man's paternity is presumed or established under ORS 109.070(1) unless paternity has been disestablished. Chapter 416 does not include parallel provisions, and it is, therefore, still possible for administrative child support proceedings to result in paternity findings that conflict with paternity presumptions or preexisting determinations of paternity.

Setting aside administrative findings of paternity The 2007 legislation also amends existing legislation that governs challenges to administrative determinations of paternity. The amended version of ORS 416.443 allows a party to an administrative proceeding that established paternity to petition to reopen the issue for up to one year after the administrative order was registered with the court, provided that blood tests were not done before the paternity order was issued. In response to such a petition, the agency administrator must order blood tests and, if the blood tests exclude the man as the child's biological father, may file a motion with the court for an order setting aside the order of paternity. If either party refuses to submit to blood tests, the issue of paternity must be resolved against him or her. The child support program must pay for the costs of testing, though it may seek to recover them from the party who requested the tests.

Setting aside judicial findings of paternity Until the 2007 legislation was enacted, the only way to set aside a judicial determination of paternity was to bring an action under ORCP 71. The 2007 law establishes a new method for bringing such an action that is intended to parallel ORCP 71 as much as possible. This method is not exclusive, but was enacted at the urging of the child support enforcement office to help pro se litigants who often do not understand Rule 71 and its application to paternity findings. The new legislation is found in Section 9 of the 2007 legislation, HB 2382. (At the time this is written, the legislation has not yet been codified into the ORS.)

For purposes of Rule 71 and the new legislation, judicial determinations of paternity are not limited to orders entered in filiation suits.
(Continued, p. 11)

Adoption Conference in Portland March 26-29

The American Adoption Congress is highlighting these trends at its 29th annual conference. Set in Portland, Oregon March 26-29, this international gathering features numerous workshops on families created through inter-country, trans-racial, and cross-cultural adoption.

AAC's conferences are intended for everyone touched by their own, or someone else's separation from his or her family of origin. This annual event attracts members of: adoptive, blended, birth, foster, guardianship and step-families; domestic, inter-country, trans-racial and cross-cultural adoptees; and professionals whose work regularly brings them into contact with people affected by the loss of family continuity.

Another featured highlight of this year's conference is Adoptive and Foster Families' Day, on March 27. Teenagers and their adoptive/foster parents may attend at a reduced cost.

Among the topics scheduled for AAC's conference are workshops on: the ethical implications of assisted reproduction; adults who were adopted trans-racially, internationally and cross-culturally will reflect on their experiences; the 84 million children growing up in non-traditional households.

Continuing education units are available for social workers and educators through our conference workshops.

Through education and advocacy, the AAC promotes honesty, openness and respect for family connections in adoption, foster care and assisted reproduction. On-line registration: www.americanadoptioncongress.org.

Case Law, Continued from p. 4

medically necessary or elective surgery for a child. The court found that although circumcision is an invasive medical procedure, the decision is historically made by the custodial parent unfettered by a non-custodial parent's concerns. However, mother had averred in her pleading that child did not wish to consent to the circumcision. Given that the child is now 12 years old, the court found that forcing the child to undergo the surgery could seriously affect the relationship between child and father, and could have a pronounced effect on father's capability to properly care for child. As a result, the case was remanded to trial court to resolve the issue of whether M objects to the circumcision or not.
http://www.publications.ojd.state.or.us/S054714.htm

***State v. G.W.,* 217 Or App 513 (2008)**

In 2007, father, who was no longer living with mother, filed a motion of non-paternity as to the child born in 2002. At the birth of the child, father and mother were living together, although they were unmarried. The trial court found that the law in effect at the time of child's birth was controlling and that it presumed that father was the legal father. As a result, the court did not review the merits of father's claim. In 2005, however, the legislature changed the statute to provide that if no blood tests were used to establish paternity, then legal father may petition court to reopen the issue of paternity. The court also found that the statute permitted father to file the petition at any time. In this case, father had DNA evidence that he was not the child's biological father and he had previously testified that he had no relationship with the child. The case was remanded to consider father's motion on the merits.
http://www.publications.ojd.state.or.us/A135991.htm

***J.B.D. v. Plan Loving Adoptions Now, Inc.*, ---P.3d---, 2008 WL 376137 Or App. 2008**

A birth parent's motion to set aside a judgment of adoption will be set aside if the parent never attempted to revoke consent or intervene in the adoption even if the birth parent makes the motion within one year of the judgment. In this case the biological mother agreed to the adoption with PLAN during the third month of her pregnancy. After the child's birth, the biological mother was visiting with child when the adoptive parents decided to restrict access to the child. At that time, the biological mother stopped visits with child all together and retained an attorney. One month later the adoptive parents obtained a judgment of adoption. Biological mother never notified court, adoptive parents or their attorney that she planned to contest the adoption. An additional two months after the judgment of adoption, the biological mother reportedly sent a letter to the court requesting to re-open the file; however, that letter was apparently never received. Finally, 8 months later (a total of 11 months having passed since the biological mother reportedly obtained an attorney) biological mother motioned the court to set aside the judgment.

The appellate court found that first, the court's power to finalize an adoption is a special statutory power and the statute promotes finality of adoption judgments. The court held that ORS 109.381(3) is a statute of limitations and not an affirmative (Continued, p. 12)

ZEALOUS ADVOCACY: THE SHELTER HEARING

Continued from Volume 4, Issues 5 & 6 – by Julie H. McFarlane

Roles of Attorney

Attorney for the Child

The ORPC and the OSB Standards provide guidance on the role of the attorney for the child, although determining the proper role can be more difficult with a child client. As with parents, ORPC 1.2(a) Scope of Representation and Allocation of Authority Between Client and Lawyer provides that an attorney must abide by a client's decisions concerning the objectives of representation, including consulting with the client as to the means of pursing the client's objectives in the case, and abiding by the client's decision whether to settle the case. ORPC 1.14 Client with Diminished Capacity gives further guidance when a client has diminished capacity, as in the case of minority. ORPC 1.14 (a) provides: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

Standard 3.4 **Role of a Lawyer**, of the OSB Standards provides that lawyers should follow the ORPC in determining the scope of the lawyer's representation and allocation of authority between client and lawyer, when representing children capable of considered judgment. When a child client's capacity to make adequately considered decisions in connection with the representation is diminished due to minority, the lawyer must still, as far as reasonably possible maintain a normal attorney-client relationship with the child.

Considered Judgment

Under Standard 3.4, it is the duty of the lawyer for a child to determine whether the child is capable of considered judgment. If a child client is not capable of considered judgment, counsel should advocate for what is in the client's best interests.

For a child client who is capable of considered judgment, the same ultimate decisions on the case must be made by the child client as by the parent client. See, *Juvenile Law Reader*, Volume 4, Issues 5 & 6, at p. 20. Specifically, in the context of the shelter hearing, counsel for the child client capable of considered judgment should advocate for the placement order and other temporary orders the client desires. Since in many cases the child client will not be present at the shelter hearing, and counsel will be being newly appointed to the case, counsel should ask for the shelter hearing to be continued in order to consult with the client before taking a position on placement.

When a child client is not capable of considered judgment, counsel must determine what would be in the child's best interests concerning the issues in the shelter hearing. Implementation 7 of Standard 3.4 suggests that a lawyer in such a position should inquire thoroughly into all circumstances that a careful and competent person in the child's position should consider in making the best interests determination. Having determined what is in the child client's best interest, counsel should advocate accordingly, taking into consideration and following the suggestions in Standard 3.5 and its Implementations.

It is important for the child's lawyer to be cognizant not only of the risks of allowing the child to remain in the parental home, but also the relative risks and losses suffered by children unnecessarily removed from their families – and all they are familiar with and know. The emotional trauma of such losses can be as severe as the harms caused by parental abuse and neglect. See, THE EVIDENCE IS IN – Foster Care vs. Keeping Families Together: The Definitive Study, http://www.nccpr.org/reports/evidence.doc. Consideration should also be given to whether removal, rather than supportive services and monitoring with the child in the home, is likely to cause further deterioration in the family's situation.

Counsel for the child client not capable of considered judgment should also take care to consider the immediate needs of the child, including: needs for visitation and contact with parents, siblings and other relatives; needs for medical and mental health evaluation and treatment; need for temporary restraining orders, and need for orders related to educational placement and services.

A Shelter Hearing checklist for children's attorneys can be found on pp. 9-10.

Checklist for the Child's Attorney

BEFORE THE SHELTER HEARING:

___ Obtain and review the petition and supporting paperwork for:

___ Jurisdictional sufficiency of the allegations

___ Reasonable Efforts

___ Efforts to place with relatives/siblings

___ Determine whether there is any conflict of interest

___Make contact and gather information from case-worker and opposing counsel

___ Introduce self to client, if present, explain role and what focus of hearing will be

___ Obtain contact information and other basic information

___ Help client formulate position, if present, on return to parent, relative placement, placement with siblings

___ Determine whether to seek continuance/second shelter hearing to obtain client's position, testimony, etc.

___ Formulate positions on issues before the court at the shelter hearing

DURING SHELTER HEARING:

___ Be aware of the law and applicable burdens of proof

___ Present evidence & argument to support client's desired outcome for placement or placement that is in client's best interests

___ Make reasonable efforts arguments, if appropriate

Shelter Hearing Checklist for Children's Attorneys, continued from p. 9

DURING SHELTER HEARING, Continued:

___ Request orders for

___ Placement with relative, siblings or family friends

___ Visitation that is sufficient to meet client's needs for contact with parents, siblings & relatives

___ Maintenance of child in current school & transportation to same

___ Paternity order or testing

___ Services for client and parents – medical, mental health, grief, etc.

___ Assessments – medical, mental health, psychological, educational, etc.

___ Restraining orders

___ Ensure that court addresses:

___ ICWA ___ Parentage ___ Setting next hearing

AFTER SHELTER HEARING:

___ Consider whether to pursue rehearing and file request

___ Consult with child to explain court rulings and answer questions

___ Send letter to caretaker with contact information and summary of court orders

Continued in future issues of the Juvenile Law Reader: **Other Issues at the Shelter Hearing**, including reasonable efforts, venue, the Indian Child Welfare Act, the UCCJEA, the ICPC, consolidation and appointment of a *Guardian ad Litem* for a parent.

Paternity in Juvenile Court, continued from p. 6

Most importantly, a divorce decree identifying children as children of the marriage (or using equivalent language) probably constitutes a judgment of paternity even if the issue of paternity was not actually contested. Before the conclusive presumption that the husband was the father was abolished, family law practitioners may not have considered such a divorce decree as a judicial order establishing paternity because the issue of paternity could not be contested.

Now that the conclusive presumption is abolished, paternity is now contestable in every divorce, and even if it is not contested, res judicata (claim or issue preclusion) may prevent a party from raising a challenge later. The report of the Oregon Law Commission committee that wrote the 2007 legislation observes, "Practitioners need to be made aware of this and to recognize that practice needs to change in response to this change in the law."

A petition under the new legislation may be filed by the parties to the original litigation, DHS if the child is in the custody of DHS as a dependent child under ORS Chapter 419B, or the Division of Child Support if support rights have been assigned to the state. If anyone else has interests that are affected by an order determining paternity, he or she may challenge the order only under ORCP 71. Challenges based on mistake, inadvertence, surprise or excusable neglect must be filed within one year. A challenge based on fraud, misrepresentation or other misconduct must be filed within one year from the date of discovery.

The petition must state "the facts and circumstances that resulted in the entry of the paternity judgment and explain why the issue of paternity was not contested." Necessary parties include everyone who was a party to the original proceeding, the child if he or she is "a child attending school" under Oregon law, DHS if the child is in DHS custody under the dependency provisions of ORS Chapter 419B, and the Division of Child Support if child support rights have been assigned to the state. The court on its own motion or the motion of a party may appoint counsel for the child and must appoint counsel on the child's request. This provision parallels the requirements of ORS 107.425(2).

The court may order the parties and the child to submit to blood tests. In deciding whether to enter such an order, "the court shall consider the interests of the parties and the child and, if it is just and equitable to do so, may deny a request for blood tests." This section, granting the court discretion over whether to order blood testing, recognizes that, as a practical matter, this may be the most important decision, more important than how to determine legal paternity once the biological facts are clear. If blood tests show that the man is not the biological father and the petitioner proves the judgment was obtained by mistake, inadvertence, surprise, excusable neglect, fraud, or other misconduct, the court must set aside the determination of paternity unless it finds "giving consideration to the interests of the parties and the child, that to do so would be substantially inequitable."

A judgment setting aside a paternity finding must terminate future support duties and may vacate or deem satisfied unpaid past due support obligations, but may not order restitution from the state for support paid.

Continued in the next issue:

Paternity based upon voluntary acknowledgements; Unresolved issues.

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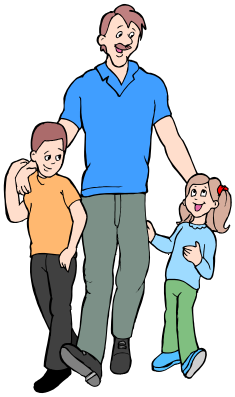

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http://www.law.uoregon.edu/org/child/2008conference.php.

Case Law, continued from p. 7

authority permitting biological mother to bring an action. Any challenges to a judgment of adoption must find authority in another statutory source.

Although biological mother is not a party to this case, the court found that ORCP 71 applies to adoption cases and could have been a source permitting her to challenge the adoption. In this case, however, the court agreed with trial court that the "reasonable time" requirement of ORCP 71 was not satisfied because biological mother waited 11 months after obtaining representation before contesting the adoption. http://www.publications.ojd.state.or.us/A133920.htm

***State v. Bowden*, 217 Or App 133 (2007)**

Defendant Tyrone Bowden was revoked on his probation based on two subsequent juvenile adjudications. Defendant contended that the mandatory revocation applied only to persons who committed new crimes and that juvenile adjudications were not new crimes under the statute. The appellate court affirmed the revocation.

The defendant reasoned that juveniles did not commit crimes because juveniles are not held criminally responsible for their conduct. As a matter of law, juveniles do not commit crimes but, instead, "commit acts which, if done by an adult, would constitute a crime." The appellate court rejected this argument noting that "the criminal code makes few distinctions between adults and juveniles in its applications." For the purpose of probation revocation a juvenile commits a new crime when engaging in conduct that violates the law that would constitute a crime if committed by an adult.

***State v. Sullivan*, 217 Or App 208 (2007)**

Defendant Timothy Sullivan was charged with sexually abusing a minor child and convicted on two counts of first degree sexual abuse. The trial court allowed the admission of the child victim's testimony into evidence, as well as hearsay statements the victim made to others. The defendant appealed the conviction and claimed the trial court should not have admitted the victim's testimony or hearsay statements because the witness was effectively "unavailable" for cross-examination under the *Crawford* test. The court held that victim was competent to testify, even though she did not respond to all questions asked of her on the stand. A child victim's choice to selectively respond to questions under cross-examination does not render her "unavailable" under the state or federal constitution.

***In re A.R.S.*, 216 Or. App. 282, 172 P.3d 286 (2007)**

In A.R.S. a father appealed a judgment terminating his parental rights. The court found that although father completed the required drug and alcohol and domestic violence treatment as well as parenting classes, he had failed to learn the necessary parenting skills and had failed to address his relationship with mother and related domestic violence problems. The court applied the two step analysis from *State v. Smith* which requires the court to look at, first, whether the parent engaged in conduct or is characterized by a condition, and whether the conduct or condition is seriously detrimental to the child and, second, if the parent is unfit, whether it is improbable that the child will, within a reasonable time, be integrated into the parent's home.

There was clear and convincing evidence that father had physically assaulted mother after he attained sobriety and completed a domestic violence prevention program. In addition, his parenting skills remained inadequate to keep the child safe.

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