JRP JUVENILE RIGHTS PROJECT

JUVENILE LAW READER

March 2009

Volume 6, Issue 1

2009 LEGISLATURE UNDERTAKES BALANCING BUDGETS AND SOME JUVENILE BILLS

The 75th Oregon Legislative Session began January 12, 2009 and has focused largely on the economy and the shrinking state budget. Juvenile practitioners can expect to see the biggest changes of the session come as a result of budget cuts enacted to rebalance the 2007-2009 budget and fit state services into a shrinking budget for the coming biennium. The impact of cuts are already being felt in the court system, which initially implemented a plan closing courts on Fridays. Although that plan has been revoked, court staff are experiencing furlough days and many counties are implementing cuts to juvenile departments. Both the Oregon Youth Authority and the Department of Human Services are taking steps to reduce budget expenditures and planning for their respectively smaller pieces of the state budget.

There are also a number of substantive bills related to juvenile law being considered by the legislature, including:

SB 512. This bill, which addresses changes made during the 2008 Special Legislative Session in SB 1092 (requiring pre-adjudication notice to schools of juvenile delinquency petitions) was submitted by the Oregon Law Commission (OLC) after extensive interim work by a sub-workgroup of the Juvenile Code Revision Workgroup. In the final days of the February session, a provision was added to SB 1092 directing the OLC to study the policies in the bill.

SB 512 proposes to modify SB 1092 by requiring notice of an admission or finding of being within the court's jurisdiction. The proposal also contains additional provisions protecting the individual rights of students and narrows the list of alleged acts that trigger an automatic notice to schools. The new bill would continue to require notice to schools upon the filing of certain juvenile delinquency petitions or dismissal of petitions where notice was previously filed.

The policy issues in the bill continue to be controversial and a number of amendments are being considered by the Senate Committee on Education and General Government. Find the bill at: http://www.leg.state.or.us/09reg/measpdf/sb0500.dir/sb0512.intro.pdf

HB 3220. This bill, which is substantively the same as SB 320 which did not pass in the 2007 session, also comes from the Oregon Law Commission by way of the Juvenile Code Revision Workgroup, and would provide procedure and law for juvenile delinquency cases in which a youth is not competent to proceed—commonly referred to as "unable to aid and assist". The Workgroup, which included judges, district attorneys, defense attorneys and other juvenile system stakeholders, recognized the need for legislation to guide courts in cases where youth charged with delinquent acts are unfit to proceed to trial. Because of the projected costs of implementing the legislation, there is concern it will not pass, despite its broad conceptual support. Find the bill at: http://www.leg.state.or.us/09reg/measpdf/hb3200.dir/hb3220.intro.pdf

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Juvenile Law Reader
is published by Juvenile Rights Project, Inc.

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NEWS BRIEFS

Judges Jail Kids for $$

The national news reported a shocking story of two Philadelphia judges accused of taking kickbacks for sending youth to juvenile detention for minor infractions. The judges are charged with taking 2.6 million dollars in kickbacks between 2003 and 2006, to send kids to private detention centers. The judges have been removed from the bench and the detention centers are being investigated.

Many of the youth were unrepresented and were accused of such crimes as taking loose change from cars, writing a prank note, and having drug paraphernalia. The court is determining whether hundreds, or thousands, of sentences should be overturned and the youth's records expunged.
http://www.comcast.net/articles/news-national/20090211/Courthouse.Kickbacks/

Arizona 9-year-old Pleads Guilty in Shooting Death

On November 5, 2008, an 8-year old boy fatally shot his father and his father's roommate in the small eastern-Arizona community of St. Johns. Having no disciplinary record at school, nor history indicating problems at home, the boy shocked authorities and community members.

A judge determined on November 7, 2008 that there was probable cause to charge the boy with two counts of premeditated murder, a charge which can be filed against anyone 8 years or older under Arizona law.

According to St. Johns Police Chief Roy Melnick, officers arrived at the scene within minutes of the shooting. [Associated Press, *Arizona boy, 8, accused of killing two, including dad* (Nov. 8, 2008)]. Police later obtained a confession from the boy, but there were allegations that the police violated the boys rights by questioning him without representation from a parent or attorney. There were also allegations that the police did not advise the boy of his rights before questioning him.

In its coverage of the case, the Associated Press reported that FBI statistics show instances of children younger than 11 committing homicides to be very rare. [Associated Press (Nov. 8, 2008).] The AP also reported that according to FBI statistics, no homicides were committed by a child 8 years old or younger between 2005 and 2007. [Associated Press (Nov. 8, 2008).]

The rarity of such an offense had experts postulating as to the facilitating factors behind the 8-year-old's actions. Some suggested mental health issues within the family, or physical, emotional, or sexual abuse in the home could have contributed to the incident. [Associated Press, *Was 8-year old charged in murders of dad and friend abused?* (Nov. 12, 2008).] Others suggested that children who commit homicides suffer from traumatic stress disorder from living in a dysfunctional and/or violent environment. [Associated Press (Nov. 12, 2008)]. James Alan Fox, a criminologist at Northeastern University, stated that "in very rare cases, children kill because they don't have a conscience . . . [t]hey are 'the so-called bad seeds ... who are capable of committing murder without feeling an emotional response.'" [Associated Press (Nov. 12, 2008)].

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RECENT CASE LAW

Summaries Prepared by Kevin Ellis, Attorney and Rochelle Martinsson, Law Clerk

State ex rel Juvenile Dept. of Clackamas County v. M.A.D., _____Or App ____ (February 18, 2009)

http://www.publications.ojd.state.or.us/A132290.htm

The Court of Appeals (COA) reversed the trial court's denial of the youth's motion to suppress. The COA held that Oregon Constitution, Article I, section 9's guarantee against unreasonable searches and seizures, applies to students on school grounds. The court held that youth did not voluntarily consent to the search, the search occurred without probable cause, and probable cause and an exigent circumstance must have existed, lacking a warrant, before the disputed evidence in this case would be admissible in a juvenile delinquency proceeding.

The youth was brought to the assistant principal's office and accused of possessing and attempting to sell marijuana. The assistant principal, accompanied by the school counselor and a learning specialist, confronted the youth after being told by a student informant that the youth possessed and was trying to sell marijuana near the school.

The assistant principal received this information from the student informant (SI), who was being disciplined at the time. The SI was on a behavioral contract, with the assistant principal, which if violated could result in detention, notice to parents or suspension. The assistant principal knew the SI had lied in the past and tended to deflect scrutiny from himself to others. The assistant principal took the allegations seriously because of the SI's past, the SI's associates and the location where the SI had claimed to have seen the youth's possession and attempts to sell the marijuana.

The assistant principal knew of the youth's attendance issues, despite no direct prior contact with the youth, from meetings regarding the youth's individualized education plan. The assistant principal thought alcohol or drugs might be causing the attendance issue.

The youth, when confronted, denied any wrong doing. The assistant principal told the youth that he had reasonable cause to search him. The assistant principal called the youth's mother and told her that he was going to search the youth. The youth's mother replied that the youth probably had something. The youth spoke to his mother, on the phone, with the three school staff members in the room. Following the phone call the assistant principal asked the youth to turn out his pockets. The youth did so revealing a bulge in an inner pocket of his zipped up jacket.

The youth refused to reveal what caused the bulge, when asked by the assistant principal, explaining that he did not trust the assistant principal. At this point the learning specialist asked if he had the youth's trust. The youth said that he trusted the learning specialist and unzipped his jacket. The learning specialist reached into the inner pocket and removed a bag containing marijuana, plastic bags and a marijuana pipe. The youth then confessed it was his marijuana and he was trying to sell it.

The three staff members did not raise their voices, coerce, threaten or physically restrain the youth during the encounter. The youth was not told that he could not leave the room, but though he would have had to go past at least one adult to leave. During the encounter the youth didn't act agitated or belligerent, nor did the youth make any furtive movements.

The COA found that the student did not consent to the search. Mere acquiescence to governmental authority without a reasonable opportunity to make a choice to consent does not constitute consent to search. The youth, after being told that he would be searched, didn't have the opportunity to consent, but only to cooperate or not. Cooperation is not consent to search.

The COA found that the school officials were government actors and did not have probable cause. The COA clarified that it did not question school staff authority to confront youth, search youth and seize contraband, but for that evidence to then be used in a delinquency proceeding both probable cause and an exigent circumstance must exist. The COA did not examine whether an exigent circumstance existed after deciding that probable cause did not exist in this case, where the suspicion seemed entirely dependent on the credibility of the untrustworthy SI.

The COA rejected the state's argument that the Court should apply the standard applicable to searches under the 4th Amendment developed in *New Jersey v. T. L.O.*, 469 US 325 (1985). The *T.L.O.* Court, applying a balancing of interests approach, held that due to the special nature of schools, probable cause is not required and there need only be reasonable grounds for a reasonable scope of search.

The COA held that under the Oregon Constitution, a search occurs when a privacy interest is invaded and the privacy interest is not the privacy one expects, but the privacy one has a right to expect. Thus, a balancing test such as the Court used in *T. L.O.* is inapplicable, because the privacy interest guaranteed by the Oregon Constitution is "one of right, not of expectation."

Patterson v. Foote, _____Or App ____ (February 25, 2009)

http://www.publications.ojd.state.or.us/A133423.htm

The Court of Appeals (COA)

Continued on page 9.

Juvenile Law Resource Center Pages

The Juvenile Law Resource Center: Now Up and Running

Mission and Overview of Services

As promised in the January *Reader*, the Juvenile Law Resource Center (JLRC) has opened its doors for business. The mission of the JLRC is to support improved representation of parents in dependency cases. Three types of support are available to attorneys representing parents at trial and on appeal. First, several pages of each Juvenile Law Reader will be devoted to the JLRC for coverage of a range of topics pertinent to parent representation. Second, the JLRC will facilitate trainings and forums around the state. Third, the JLRC will provide individual advice and assistance to lawyers representing parents with a particular focus on those who are court appointed. Coming this summer, the JLRC will unveil a designated JLRC page on the JRP website. We encourage you to send specific suggestions about how we can support your parent representation. Please direct suggestions and assistance requests to the following e-mail address: jlrc@jrplaw.org.

Who We Are

The JLRC will be staffed by JRP's two most experienced attorneys and will draw upon the time, talents and expertise of all of the JRP staff. This should be particularly helpful when we focus on an area of the law in which one of our staff attorneys has a particular expertise, such as parents' due process rights in the special education context, immigration law, appeals etc. In addition to JRP staff, the JLRC is pleased to have three *pro bono* attorney volunteers and a summer law clerk.

Angela Sherbo began representing parents in dependency and termination cases in Hazard, Kentucky in 1977. She represented the foster parents in *Timmy S. v Stumbo*, 537 F. Supp. 39 (E.D. Ky. 1981) (due process requires notice and an opportunity to be heard before the state can terminate a foster care certification); the parents in *Ernie S. et al.. v Billy Wilson et al.*,No. 81-121 (E.D.Ky. 1981) (defendant class action against all Kentucky juvenile judges holding that the United States Constitution requires that parents be given a hearing before, or shortly after, the state seizes their child); and the mother in *N.S. v C and M.S.*, 642 S.W.2d 589 (Ky 1982) (termination of parental rights cases must be proved by clear and convincing evidence). In Oregon, she was the appellate lawyer in *State ex rel. Juv. Dept. v Grannis*, 67 Or App 565 (1984) (parents have due process right to counsel in dependency cases on a "case by case basis") and in *State ex rel. Juv. Dept. v Geist*, 310 Or 176 (1990) (parents in a termination cases have the right to adequate assistance of counsel). In addition to her work at JRP, Ms. Sherbo is assisting OPDS to establish a juvenile appellate unit focusing on representing parents.

Julie H. McFarlane is one of the JRP founders and now shares with Ms. Sherbo the job of supervising its attorneys. Ms. McFarlane has represented thousands of children in delinquency cases, and children and parents in abuse and neglect, termination of parental rights and miscellaneous juvenile cases for the past 30 years. She has been a leader in juvenile law reform through numerous pieces of legislation, class action litigation, public advocacy and training. She has been one of the editors of the OSB's Juvenile Law CLE for the 1995 and 2007 editions. She helped develop and later revise the Oregon State Bar Attorney Performance Standards for representation in juvenile court. Her efforts led to child welfare reform, improved legislative and educational advocacy programs, and a legal Helpline at JRP. Julie is a member of the Oregon Law Commission.

Dover Norris-York is a JRP *pro bono* attorney. She has a Master's degree in Counseling and Social Psychology in addition to her law degree. Most recently, she worked as a paralegal at the Federal Public Defender office. She has also clerked for the Oregon Court of Appeals and was an associate of the Lindsay Hart law firm. She is committed to helping parents navigate the juvenile court system, having become passionate about the issue after adopting twice from DHS and forming relationships with the birth families.

Jennifer Pike is a JRP *pro bono* attorney. She obtained her law degree from University of Washington School of Law. Before law school, she volunteered as a Court Appointed Special Advocate and, during law school, she was a member of the school's child advocacy clinic. She also worked at the King County Bar Association, focusing on third party custody issues, and she externed at JRP. Ms. Pike is an associate at Ball Janik LLP, focusing her practice in the firm's land use and employment departments.

Kristina Reynolds is a JRP *pro bono* attorney. She obtained her law degree from Gonzaga University School of Law. She worked for three years for the Oregon Law Center, in Coos Bay, Oregon, advocating

Continued on next page

for low income Oregonians in the areas of housing, landlord/tenant, family, employment and administrative law. Many of her clients were victims of domestic violence. Currently, Ms. Reynolds works for the Multnomah County Circuit Court as a family law facilitator, helping *pro se* individuals complete forms for a variety of domestic relations issues.

Noah Barish, a second year student at the University of Washington, will be the JLRC's first law clerk. Noah graduated from Stanford University in 2004. He has worked as a: health advocacy fellow at the Medicare Rights Center in New York City; paralegal at the Office of the Public Defender in San Francisco; intake counselor at the Bay Area PoliceWatch in Oakland; law student advocate at the Immigrant Families Advocacy Project in Seattle; and legal extern for a U.S. magistrate in Portland.

Input Sought for JLRC Local Training and Forums

The JLRC is planning a series of trainings in partnership with the Office of Public Defense Services (OPDS) and the Juvenile Court Improvement Project (JCIP.) We hope also to partner with the Parent Mentor program at the Morrison Center in Portland. Our idea is to bring information to a number of sites around the state and involve the local bench and bar in the planning and presentations. We envision a half-day or a long-lunch format, so the court docket and the workday are not totally disrupted. We welcome input on the following draft:

Improving Representation of Parents in Juvenile Court: What the Bar, Bench and Clients Expect of Attorneys

Part 1: Attorneys from the JLRC and one or more local volunteer attorneys discuss the PDSC site visit findings, the Oregon State Bar performance standards, and best practices. Time permitting, we could address in depth one or more specific issues identified by the local bench, bar or PDSC. Examples could include: the role of a guardian-ad-litem for a parent, representing incarcerated parents, teen parents, parents with developmental disabilities, use of investigation and experts and preservation of the record.

Part 2: JCIP staff counsel, members of the bench and possibly an appellate judge would speak about their expectations of trial and appellate counsel and current trends in the case law.

Part 3: A panel of parents who have "been there" will discuss what they found helpful from their lawyers, what really did not work, and their observations of good and bad practice among attorneys. The Parent Mentor program is committed to providing some of these parents but having local success stories and input would be invaluable.

If you would like such a training/forum in your community, please e-mail jlrc@jrplaw.org and we will work with you on scheduling, logistics etc.

Ideas for Future *Reader* Articles

Several pages of each *Reader* will feature articles, advice and FAQs about specific topics relating to parent representation. Ideas for future pieces include: the ethics of representing parent interests in a collaborative world, review of Oregon's appellate mediation program, pros and cons of mediation in dependency cases at the trial level, effective assistance of counsel standards and when they apply, clearly defining the court record, expert testimony on novel assessment techniques, attacking expert testimony, describing the record in appellate briefs, handling children's in-court testimony, and other topics you suggest. We also envision using this space to provide updates about national laws and cases impacting parent representation around the country. Past *Reader* pieces will be posted as issue papers on the JLRC website, along with a list of sample memorandum of law and brief sections available on request.

Ist Nat'l Parent Attorney Conference

A wonderful program of workshops and national community building opportunities is provided by the first national parent attorney conference titled "Improving Representation for Parents in the Child Welfare System." This program is produced by the ABA Center on Children and the Law and takes place May 13-14 in Washington D.C., directly preceding the national conference on children and the law. More information at www.abanet.org/child. The ABA Center on Children and the Law also has specific projects providing resources on Parent Representation and Fathers in the Welfare System.

TERMINATION OF PARENTAL RIGHTS IN EXTREME CONDUCT CASES

Part III—Continued from Volume 5, Issue 6

The Oregon Child Advocacy Project
Professor Leslie J. Harris and Child Advocacy Fellows Farron Lennon and David Sherbo-Huggins

C. Decisions from other states

Courts in Florida and Illinois have held unconstitutional state statutes that allow termination of parental rights upon proof of a prior event without requiring proof of the parent's present unfitness. In *Florida Department of Children and Families v. F.L*, 880 So.2d 602, 611 (Fla. 2004), the court struck down a statute that allowed termination of a parent's rights upon proof of the involuntary termination of the parent's rights as to another child.[1] The court said, "[t]he circumstances surrounding a prior involuntary termination are highly relevant to a court's determination of whether a current child is at risk and whether termination is the least restrictive way to protect the child. However [prior decisions] require that a termination decision be based not on any single act or omission with respect to a previous child, but rather on the totality of the circumstances surrounding the current petition." *Id.*

The court said that prior cases established that the state must show by clear and convincing evidence that reunification will pose a substantial risk of significant harm to the child. While this can be demonstrated by previous abuse of another child, the state must establish that termination is the least restrictive means of protecting the child from serious harm. *Id.* at 608 (citing *Padgett v. Dep't of Health & Rehab. Servs.,* 577 So.2d 565 (Fla. 1991)). "In some cases, *but not all cases*, a parent's conduct toward another child may demonstrate a substantial risk of significant harm to the current child." *F.L.*, 808 So.2d at 608. A statute "may not constitutionally permit a termination of parental rights without proof of substantial harm to the child . . . the statute allows DCF to file a petition for termination of parental rights without the prerequisite case plan, based on a prior involuntary termination. But to be constitutional under *Padgett*, the statute must be interpreted as requiring DCF to also prove that reunification would be a substantial risk to the child and that termination is the least restrictive way to protect the child. *Id.*

Similarly, the Illinois Court of Appeals held that a statute which permits termination upon proof of conviction of aggravated battery to a child was unconstitutional. The court said that proof of the crime is "not an adequate proxy for unfitness" because it "fails to take into account several things relevant to the ultimate fitness determination." *In re Amanda D*, 811 N.E.2d 1237, 1242 (Ill. App. 2004). The court observed that "it makes no room for consideration of things such as the passage of time without similar incident, the circumstances of the crime, or the parent's rehabilitative efforts. Such factors are of obvious relevance." *Id.*

In *In re D.W.,* 827 N.E.2d 466 (Ill. 2005), the Illinois Supreme Court also found subsection 1(D)(q) of the Adoption Act unconstitutional because it violated equal protection. The court consolidated two cases in which the circuit court had found a parent unfit based solely upon her conviction of an offense listed in that provision, and subsequently terminated her parental rights after a "best-interests" hearing. Under the Illinois extreme conduct statute, a parent is irrefutably presumed unfit if the parent "has been criminally convicted of aggravated battery, heinous battery, or attempted murder of any child" whether or not the parent is capable of adequately caring for his or her child. *Id.* at 470 (quoting 750 ILCS 50/1(D)(q) (West 2000)). Under another subsection of the same statute, a parent is presumed to be unfit upon proof of some of the same offenses as (D)(q), but under that subsection is allowed to rebut the presumption. *Id.* (quoting 750 ILCS 50/1(D)(i) (West 2000)). Basically, [a] parent "who is the subject of a petition alleging unfitness under section 1(D)(q) is denied the procedural right of rebuttal that is afforded to a person convicted of the same offense, but alleged to be unfit under section 1(D)(i)." *Id.* at 483.

The court held that there was no rational basis for treating parents subject to fitness proceedings under the two subsections differently, "much less a justification that would survive strict scrutiny." *Id.* at 485. As a result, the court held 1(D)(q) unconstitutional for violating equal protection. *Id.* In reaching its decision, the court reasoned:

> As the Supreme Court stated in *Stanley*, addressing another mandatory conclusive (irrebuttable) presumption that also

Continued on next page

> impacted the fundamental family relationship between parent and child: 'Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care . . . it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.'

Id. at 316-17 (quoting *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972)).

In *In re S.F.,* 834 NE2d 453, 457 (Ill. App. 2005), an Illinois appellate court held a similar provision of the Illinois Adoption Act unconstitutional. That subsection provided for termination upon proof that the parent had previously been convicted of a crime because of the death of any child by physical abuse. The statute defined an "unfit person" as "any person whom the court shall find to be unfit to have a child," on grounds including "a criminal conviction resulting from the death of any child by physical child abuse. *Id.* at 456 (quoting the applicable sections of the Adoption Act). The *SF* Court applied the reasoning from *In re D.W.* and held the statute unconstitutional because it effectively created an irrebuttable presumption of unfitness, which a parent was required to overcome to avoid termination. Such a presumption violates due process. *Id.* at 457.

V. Conclusion

The wording of ORS 419B.502 will support arguments for and against the proposition that proof of one of the listed acts, regardless of when it occurred, is sufficient evidence to prove that the parent is "unfit," and the legislative history of the statute does not clarify the issue. However, given the important constitutional interests of the parents at stake, the statute would likely be held unconstitutional as applied if it were interpreted to allow the termination of a parent's rights in the face of other evidence that the parent was able to care for the child safely. To avoid this result, courts should resolve the ambiguity in the meaning of the statute in such a way that renders it constitutional. A possible interpretation that preserves the requirement that the state prove the parent's unfitness but that does not overlap with provisions of ORS 419B.504 is that proof of one of the listed acts would be sufficient to satisfy the state's burden of production on the issue of unfitness, but the factfinder would consider other evidence on this issue as well, and the state would have the burden to persuade the judge by clear and convincing evidence of the ultimate issue, that the parent was unfit.

Endnote

1. The Florida statute, unlike ORS 419B.502(6), did not require proof that "the conditions giving rise to the previous action have not been ameliorated."

For the complete article and other research projects of the Oregon Child Advocacy Project go to:

Http://familylaw.uoregon.edu/docs/extremeconduct.pdf

Juvenile Law Resource Center Pages

CONFERENCES, CLEs AND TRAININGS

NATIONAL JUVENILE AND FAMILY LAW CONFERENCE—Aug. 19-22

The National Association of Counsel for Children's 32 Annual conference will be held at the New York Marriott at the Brooklyn Bridge, August 19-22, 2009. NACC is calling for abstracts from potential presenters. For information go to:

www.NACCchildlaw.org

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Child Abuse & Family Violence Summit

The 10th Annual Summit, hosted by the Clackamas County Sheriff's Office, the Child Abuse Team, and the Domestic Violence Enhanced Response Team, Oregon City, will be held May 5—8, 2009 in Portland, OR at the Red Lion Hotel on the River. Registration deadline is April 10, 2009. For additional information go to:

www.childabusesummit.com

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2009 CENTER ON CHILDREN AND THE LAW BIANNUAL NATIONAL CONFERENCE

The ABA's Biannual Children's Law Conference is scheduled for May 14-16, 2009 in Washington, DC. Plan to start this Conference on May 13th to attend a special program on representing parents in child welfare cases. Send an e-mail to: childlaw2009@abanet.org if you would like to receive a program brochure. Advance registration is open at:

www.abanet.org/child

OCDLA Juvenile Law Seminar

The OCDLA annual spring juvenile law seminar will be held April 17—18, 2009 at the Agate Beach Inn in Newport. The seminar, entitled **A Focus on Younger Children in Dependency and Delinquency Cases**, will feature child and adolescent psychiatrist, David Fassler speaking on "Emerging Issues in Adolescent Brain Development: Implications for Juvenile Justice. The seminar will also provide a Juvenile Competency Hearing Demonstration featuring Dr. Orin Bolstad, Dr. Daniel Reisberg of Reed College speaking on Interviewing Young Children: The View from the Laboratory. Angela Sherbo will give an Appellate Update and Angela Rodgers from Portland State University will talk about recent research into what defense attorneys can do to reduce the trauma of removal for children entering foster care. To register go to: www.ocdla.org

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Building on Family Strengths Conference

This national conference will be held in Portland, June 23rd—25th, 2009, and will provide the latest research and best practice information on inclusion of youth voice and philosophies of wraparound in mental health care and social services. The keynote speakers will present a Call to Action to address gaps in and propose improvements to youth-focused services and research.

For more information and to register online go to: www.rtc.pdx.edu/conference/pgRegistration.php

Please Join Us

For an Evening at the

Portland Classical Chinese Garden

A fundraising event for JRP featuring

Special Guest,

Michael Allen Harrison

Saturday

September 19, 2009

6:30 p.m.

239 NW Everett St.

Portland

For tickets and info

Call Janeen Olsen

503-232-2540 x 231

janeeno@jrplaw.org

Sponsorship Opportunities Available

Recent Case Law—Continued from page 3

reversed and remanded with instructions to grant relief from sex offender registration after finding that the petitioner had meet the burden that he was rehabilitated and did not pose a threat to public safety. The COA noted that both "rehabilitated" and "does not pose a threat to public safety" doesn't mean an absolute guarantee of future perfection. The COA rejected the state's argument, that the COA should only review the trial court's decision for an abuse of discretion, instead reviewing as a matter of law whether the evidence met the clear and convincing standard.

Patterson applied for relief from sex offender reporting requirements. ORS 181.820 provides that the court shall grant relief if the petitioner provides clear and convincing evidence that the petitioner is rehabilitated and does not pose a threat to public safety. Also the petitioner cannot have more than one class C felony or misdemeanor sex offense conviction or adjudication for which supervision must have terminated at least ten years prior to application for relief.

The trial court denied the request for relief after reviewing the following evidence; more than ten years had passed since successful completion of probation for a single misdemeanor, successful completion of three years of sex offender treatment, paid all fines and fees, paid for counseling for the victim and victim's family members, compliance with applicable registration requirements and the expert who had provided the treatment testifying that Patterson did not present a danger to public safety and the risk for recidivism risk is virtually nil. The trial court also received a letter from the victim detailing the trauma that the crime had caused her, the mishandling of the case by the state, and the effect of offenses on victims generally. The COA found that Patterson had met the burden noting that the only evidence presented to oppose the relief, the victim's letter, did not offer information pertinent to the ultimate criteria for relief; is the petitioner rehabilitated and does the petitioner present a threat to public safety.

State ex rel DHS v. M. B., ____ Or App ____ (February 25, 2009), http://www.publications.ojd.state.or.us/A139288.htm

In this case, the Court of Appeals affirmed the juvenile court's establishment of a guardianship under ORS 419B.366, finding that unresolved problems with domestic violence prevented the safe return of the children to their mother within a reasonable time, and that guardianship was in the children's best interests.

The children whose guardianship was at issue included an eight-year old, a four-year-old, and a three-year-old. At the time of the hearing, the Department of Human Services (DHS) had been involved with the mother off and on for 10 years. During this time, the mother was periodically referred to domestic violence programs and medication treatment; the father was referred to anger management, stress management, and domestic violence programs. Both mother and father were also referred to couples and individual counseling, parenting classes, and psychological evaluations.

Although the mother and father successfully completed such services on more than one occasion, DHS continued to receive referrals regarding the family and more than once took the three children into protective custody. Eventually all three children were placed with the mother's cousin and wife. After finding a pattern of domestic violence between the mother and father, DHS moved for guardianship for the children in July of 2007.

In August of 2007, the juvenile court approved implementation of the guardianship plan. The mother and father then moved to Arizona, where the mother failed to engage in couples counseling and individual counseling, as required by DHS.

At the May, 2008 hearing on DHS's motion for guardianship, the three children had been in foster care with the proposed guardians for a little over a year. The juvenile court concluded that the children could not safely return to the mother and father within a reasonable time, and that guardianship was in the children's best interests.

On appeal, the mother argued that the juvenile court erred in its conclusions and requested the immediate return of her children to her. The Court found that the mother was still in a relationship with the father, despite his history of assaultive behavior, and despite receiving domestic violence prevention services. Further, the Court found that despite participating in these services and parenting classes more than once over the DHS's 10-year involvement with the family, the mother and father continued to engage in a pattern of domestic violence. Finally, the Court found that the mother's lack of engagement in services for most of the year that her children were living with the proposed guardians was further evidence of a threat of domestic violence. The Court held that under ORS 419B.366(2) and ORS 419B.366(5), the facts of the case supported guardianship by a preponderance of evidence.

State v. Martin, _____Or App ____ (February 25, 2009)

http://www.publications.ojd.state.or.us/A131522.htm

The Court of Appeals (COA) reversed and remanded after determining that the trial court had erred in

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News Briefs—Continued from page 2

Arizona 9-year-old—cont.

Police investigated the possibility of abuse, but later stated that there had been no evidence of that, reporting to the media and the public that the boy had confessed to the shootings but would not discuss specifics. The motives behind the fatal shootings is still relatively unclear.

On November 18, 2008, police released a video of the boy's interview with Apache County sheriff's Commander Matrese Avila and St. Johns police Detective Debbie Neckel. Toward the beginning of the interview, the boy states that he found the bodies of his father and the other victim when he returned home from school. The boy's statements then proceed through a variety of accounts with regard to his previous contact with guns, as well as his knowledge and involvement of what happened on November 5, 2008. He eventually admits to having been mad at his father, and to shooting the men at least twice each, reloading the gun at times. At the conclusion of the interview, the boy states that he is "going to go to juvie" before putting his head down. [Associated Press, *Arizona boy, 8, accused of murdering father, admits to shooting in chilling video* (Nov. 19, 2008)].

An AP report following the shooting incident sited the boy's statement to a state Child Protective Services worker that "his 1,000th spanking would be his last." [Associated Press, *Arizona 9-year-old pleads guilty in shooting death* (Feb. 19, 2009)].

On February 19, 2009, the now 9-year-old boy pled guilty to one count of negligent homicide, for the death of his father's roommate. Under the plea agreement reached between Apache County prosecutor Michael Whiting and the boy's defense attorney, Benjamin Brewer, charges of premeditated murder for both deaths were dropped. According to the plea agreement, Apache County Superior Court Judge Michael Roca will decide at a later time whether the boy will be institutionalized or live with relatives. The boy will receive diagnostic evaluations and mental health examinations at the ages of 12, 15, and 17, the reviews of which are expected to indicate whether the boy will pose any danger to himself or others in the future.

According to an AP report, Whiting stated that prosecutors had two options in the case: either proceed to trial and risk the boy being found incompetent, and thus receive no treatment, or have the boy enter a plea agreement. [Associated Press, *Arizona 9-year old pleads guilty in shooting death of his father Vincent Romero, roommate* (Feb. 20, 2009).] After discussing both options, attorneys in the case chose the course of action in which the boy would receive treatment. The attorneys have said they are hopeful the boy will receive the treatment he needs to move past the incident and have a chance at a normal life. [Associated Press (Feb. 20, 2009).]

-Summary by Rochelle Martinsson, *pro bono* Law Clerk.

Children of the System

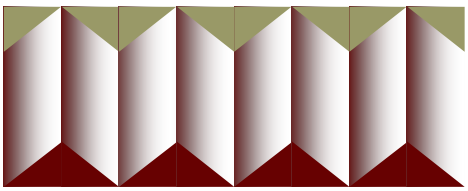
Newsweek reported in a Newsweek Web Exclusive on March 11, 2009 on recently released research from the University of Washington School of Social Work, which finds that caring for foster youth until age 21 will represent a return of $2.40 on every dollar spent. The research supports spending on the Fostering Connections to Success and Increasing Adoptions Act of 2008 (FCSIAA) for youth aging out of foster care. The FCSIAA will, among other things offer states matching federal funds to extend foster care to age 21 for all foster youth who choose to stay in the system after their 18th birthday. The federal matching funds will include extending Medicaid coverage to age 21, providing housing, vocational training, educational funding and psychological counseling services. Read the article at: http://www.newsweek.com/id/188493/

Court of Appeals Rules Juvenile Records on Appeal Not Confidential

In *State ex rel Juvenile Dept. of Clackamas Co. V. C.H. and R.H.* (Court of Appeals No. A140834), the Court of Appeals granted a motion filed by *The Oregonian* Publishing Company for disclosure of documents filed and orders issued in the appeal. The Court of Appeals ruled that the confidentiality provisions of ORS 419A.255 do not apply to the appellate courts to bar disclosure of the Court's own orders and the filings of parties on appeal in juvenile court cases.

The appeal arose in a Clackamas County juvenile case, which had garnered much local publicity and even some national publicity, due to the judge's order to child welfare officials to pay bail for a father, who was in custody pending trial. None of the parties to the appeal responded to *The Oregonian's* motion.

Citing Oregon Constitution Article I, section 10, and *State ex rel Oregonian Pub. Co. v. Deiz,* 289 Or 277 (1980) for the rule that the general public may not be excluded from juvenile court hearings, the Court went on to analyze ORS 419A.255 to determine whether records on appeal from a juvenile court case might bar disclosure on appeal in juvenile cases. The Court found that the legislature intended the confidentiality provisions of ORS 419A.255 to apply to trial-level proceedings in juvenile cases and not appeals, and provided *The Oregonian* the documents and orders they had requested.



RESOURCES

States' Kinship Care Policies: Room for Improvement

Child Trends recently released findings from its *2007 Casey Kinship Foster Care Policy Survey*. The study focused on states' kinship care policies and found that while both federal and state policies give preference to relatives as foster parents, there is a lack of consensus among states about how and when to rely on relatives to care for abused and neglected children. Further, results from the study indicate that there is uncertainty about the appropriate level of financial assistance, support services, and supervision that should be given to children in kinship care and the relatives providing that care.

One key finding of the study is that there has been a significant increase in the number of states encouraging or requiring abused and/or neglected children to be diverted from state custody, in favor of placement with kin. However, another key finding is that children diverted from the system and their kinship care providers are often eligible for much less support than foster children in non-relative care.

Results from the study suggest that ongoing financial assistance for relatives is less, and at times nonexistent, when children are diverted from foster care. The study does note that although Oregon previously denied foster care payments to kin caring for children not eligible for Title IV-E welfare assistance, as of January 2008 the state allows kin to receive foster care payments, whether they are caring for a Title IV-E eligible child or not. Still, in Oregon kin cannot receive personal care reimbursement-Medicaid services.

In addition to receiving less financial support, relatives in some states appear to receive less ongoing supervision, and are at times not required to meet the same licensing standards as non-kin foster parents.

http://www.childtrends.org/Files//Child_Trends-

2009 Legislature—Continued from page 1

SB 313. This bill has already passed the Senate. It creates a privilege for communication by a child to his or her parents. The privilege would also apply if the communication occurred in front of other minor children residing in the home. The privilege does not apply in dependency proceedings, civil cases, or in a criminal action in which the child is charged with a crime against the parent or another child of the parent. Find the bill at:
http://www.leg.state.or.us/09reg/measpdf/sb0300.dir/sb0313.a.pdf

SB 682. This bill would allow a "Second Look" for 15, 16 or 17 year-olds on Measure 11 sentences of at least 24 months of imprisonment to allow conditional release after serving half of the sentence imposed. Find the bill at:
http://www.leg.state.or.us/09reg/measpdf/sb0600.dir/sb0682.intro.pdf

SB 683. This bill deletes from the list of Measure 11 offenses, for which 15, 16 or 17 year-olds must be tried and sentenced in criminal court, assault in the second degree and robbery in the second degree. If passed, SB 683 would return original jurisdiction for these offenses, when allegedly committed by 15, 16 or 17 year-olds to the juvenile court. The state could still seek waiver in individual cases. Find the bill at:
http://www.leg.state.or.us/09reg/measpdf/sb0600.dir/sb0683.intro.pdf

HB 2728. This bill, sponsored by Representative Tina Kotek, creates a new category of health care entitlement for former foster children under the age of 21, who were in foster care at age 18. Find the bill at:
http://www.leg.state.or.us/09reg/measpdf/hb2700.dir/hb2728.intro.pdf

HB 2897. This bill, sponsored by a number of Representatives and Senators, amends ORS 419B.185, which governs reasonable efforts findings. If passed, the bill will require additional findings when the juvenile court determines that a child must be removed from their home or continued in care, as to: whether the child had relatives or persons with a caregiver relationship available for placement; and the reasons the child was not placed with relatives or persons with a caregiver relationship if they were available. Find the bill at:
http://www.leg.state.or.us/09reg/measpdf/hb2800.dir/hb2897.intro.pdf

HB 2760. This bill would expand the access by Court Appointed Special Advocates to records of individuals or institutions that seek to become caregivers, custodians, guardians or adoptive parents of a child or ward. Records CASAs would have access to would include health records, financial records and criminal history. Find the bill at:
http://www.leg.state.or.us/09reg/measpdf/hb2700.dir/hb2760.intro.pdf

HB 2394. This bill would allow for service of a subpoena in a civil or criminal case for a witness under age 14 by service on the witness or on the witness's parent, guardian or guardian ad litem. Find the bill at:
http://www.leg.state.or.us/09reg/measpdf/hb2300.dir/hb2394.intro.pdf

Recent Case Law — Continued from page 9.

not allowing the defendant to present evidence, pursuant to OEC 412, of prior allegations of sex abuse by others made by the victim. The COA found that this was not harmless error.

In May 2005 the victim told her mother that she had been sexually abused by the defendant in the summer of 2004. The victim was taken to CARES Northwest (CARES) where she was examined by Reilly, a pediatric nurse practitioner. Reilly also observed an interview of the victim. Reilly diagnosed the victim as having been sexually abused. Defendant moved, pursuant to OEC 412, to admit three prior allegations of sexual abuse by the victim; a 1997 allegation, a 2001 evaluation based on a different allegation, and a 2003 evaluation based on another allegation. During the OEC 412 hearing Reilly testified that patient history is very important for an accurate diagnosis, she testified that the diagnosis was based on the victim's interview and history, lacking physical evidence. Reilly acknowledged having only seen the 2001 evaluation. The trial court denied the defendant's OEC 412 motion, which would have allowed the defense to rebut or explain Reilly's diagnosis of sexual abuse by casting doubt on Reilly's methodology, thoroughness, and competence.

OEC 412 mandates that the trial court do a three step inquiry requiring the evidence not be opinion or reputation evidence, qualify for admission under one of the exceptions in OEC 412(2)(b) and, be more probative than prejudicial. The COA found that the trial court had erred and that it was not harmless error because it could not conclude that Reilly's diagnosis of sexual abuse had "little likelihood" of affecting the jury's verdict.

State ex rel Juv. Dept. v. T. N., ____ Or App ____ (February 25, 2009), http://www.publications.ojd.state.or.us/A139023.htm

In this case, the Court of Appeals (COA) affirmed the trial court's judgment terminating the mother's parental rights to her two children. The facts revealed that the mother had a long history of untreated mental illness, including psychosis and paranoia, as well as a history of residential instability or homelessness.

On appeal, the mother did not challenge the determination that she had engaged in conduct seriously detrimental to her children. She did contend that (1) the trial court erred in terminating her parental rights on the ground of neglect; (2) the state made inadequate efforts to provide services to her, including DHS's failure to make active efforts to return the children to her home after removal; (3) termination was not in the best interests of the children; and (4) she received inadequate assistance of counsel.

The COA conceded the trial court erred in terminating the mother's parental rights on the ground of neglect, but affirmed the judgment because there was no challenge to the alternative ground of unfitness under ORS 419B.504. In response to the mother's second contention, the Court found that for a period of at least two years, the Department of Human Services (DHS) engaged in reasonable and active efforts to provide services to the mother.

The Court found the mother's third and fourth contentions without merit and rejected those arguments without further discussion.

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