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"*Camreta* has the potential to significantly impact children's and parents' rights to privacy and family integrity."

Juvenile Cases in the U.S. Supreme Court

By Julie H. McFarlane, Supervising Attorney

In an unusual turn of events, three high profile cases of interest to juvenile practitioners are currently pending before the United States Supreme Court. An additional case of interest to juvenile practitioners was decided by the Court on November 30, 2010.

- Certiorari was granted in the case of **Camreta and Alford v. Greene** (09-1454/1478 decision below 588 F. 3d 1011(9th Cir 2010)) on October 12, 2010. This is an Oregon Petition for Certiorari from the 9th Circuit's decision extending

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Fourth Amendment rights of children to prohibit direct involvement by law enforcement in at-school interviews of suspected child abuse victims absent parental consent, exigent circumstances or a warrant and probable cause. See, *The 9th Circuit Weighs in on the Rights of Parents*, Juvenile Law Reader Vol. 7 Iss. 4 (August/September 2010) http://www.jrp.org/Documents/jrpreader-v7i4.pdf.

Camreta has the potential to significantly impact children's and parents' rights to privacy and family integrity. The case is brought to the Supreme Court by a Bend, Oregon CPS worker (Camreta) and an armed deputy sheriff (Alford), who interviewed a 9-year-old girl (S.G.) for two hours in a school office after they pulled her out of her public school classroom without parental consent. The reason for the questioning was that S.G.'s father had been arrested for sexual molestation of a family acquaintance's son, and the boy's parents made some comments that suggested possibly inappropriate conduct between S.G. and her father, but not enough reliable information to establish "probable cause." In an effort to get evidence for court action against S.G.'s father, Camreta and Alford went to S.G.'s school and pulled her out of class for questioning about intimate details of her home life, giving her new information about sex that she had not known before that day. S.G. repeatedly denied any sexual abuse, but was told "that's not it", and by the end of the two-hour interview, finally told her questioners the answers she thought would satisfy them, indicating that her father had touched her private parts. After release by Camreta and Alford, S.G. went home, threw up five times that evening and later retracted all allegations in a dependency case, which was dismissed.

This case is due for argument in March, the Court will be addressing the question of whether police and child protective services investigators, consistent with the Fourth Amendment may conduct a custodial interrogation of a child in a public school as to the details of her home life, without: 1) a warrant support by probable cause; 2) consent of parent; 3) a court order, or 4) exigent circumstances.

➙ *Certiorari* has also been granted in **In the Matter of J.D.B.** 674 SE 2d 795, aff'd 686 SE 2d 135 (2009), a case involving a student being interrogated by a law enforcement officer (not school police) regarding an off-campus incident. The appeal arises out of a motion to suppress statements made by the youth used in a felonious breaking and entering and larceny adjudication. J.D.B. argued that his statements to officers at school occurred during a custodial interrogation, that officers failed to provide warnings under Miranda, and that a reasonable 13-year old student in special education classes would not have felt he could leave the room. Upholding the state Court of Appeals decision, the North Carolina Supreme Court held that under the objective reasonable person test, i.e., whether a reasonable person in the juvenile's position would have believed himself to be in custody and deprived of freedom, the juvenile was not in custody when he incriminated himself, and not entitled to the protections of Miranda. The North Carolina Count found that "[f]or a student to be in the school setting to be deemed in custody, law enforcement must subject the student 'restraint on freedom of movement' that goes well beyond the limitations that are characteristic of the school environment in general." The Court declined to extend the objective test to include factors such as age and academic standing, which it viewed to be "creating a subjective inquiry".

➙ The Supreme Court heard oral argument in **Schwareznegger v. Entertainment** Merchants Association (08-1448, 556 F 3rd 950 (9th Cir 2009) on November 2, 2010. In this case, the Supreme Court will decide whether states may ban the sale of violent video games to minors, and if so, whether states must prove that the video games cause physical or psychological harm to minors for the sales ban to be constitutional. At issue is California Assembly Bill 1179, which restricts the sale or rental of "violent video games" to minors and imposes a labeling requirement for such games. An organization representing video game sellers challenged the law, claiming it violated the First Amendment rights of minors. The 9th Circuit agreed and ruled the Act was subject to strict scrutiny, finding the Act unconstitutional on its face because there are less restrictive means of furthering the State's interest. The Court also ruled that the social science evidence that the State relied on could not support a reasonable

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inference that the games were harmful to minors. For a complete analysis and more information, see the Oregon Advocacy Project website at: http://familylaw.uoregon.edu/child/events/videogames.php

The Supreme Court decided the case of **Los Angeles County v. Humphries.** http://www.supremecourt.gov/opinions/10pdf/09-350.pdf. The Humphries were charged with child abuse, but later exonerated. Under California law however, their names were placed on the child abuse registry. This appeal from the Humphries' section 1983 civil rights suit for damages, injunction and declaratory relief addressed the county's liability under the case of *Monell v. New York City Dept. of Social Servs.*, 436 US 658 (1978). The 9th Circuit had found that the Humprhries did prevail against the county on their claim for declaratory relief because *Monell* did not apply to prospective relief claims. The Supreme Court reversed and remanded, holding that *Monell's* "policy or custom" requirement applies in section 1983 cases irrespective of whether the relief sought is monetary or prospective. The Supreme Court ruling only addresses the narrow issue of the applicability of *Monell* to non-monetary prospective relief – and does not affect the 9th Circuit ruling that the Humphries' constitutional rights were violated by the state's action. ●

View From the Bench

Reasonable Efforts in Tough Budget Times

By Hon. Patricia Sullivan, Malheur County Circuit Court Judge

All of us are aware that Oregon is experiencing a budget crisis that is serious and ongoing. All of us who work in the field of child protection dread the news of the next cuts to programs and services. At every stage of the dependency process, the Court is required to inquire as to whether DHS has made reasonable efforts to prevent foster care placement and achieve permanency for children in care. Increasingly, the response to this questioning is that budget constraints are interfering with, or actually eliminating, the provision of services. Judges are faced with a tacit or outright request by the agency to adjust the standard downward, based on budget limitations.

Not only is there no such exception under federal or state law, creating such an exception would fly in the face of what all of us know to be what children and their families need. It is not acceptable to simply give up and lower the bar for these most needy and vulnerable children. Especially in times of diminished resources, we all have to work together to ensure that reasonable efforts are made to prevent children from entering foster care and to achieve permanency.

"Wait a minute," you may say. "Isn't this DHS's responsibility? How do we 'all work together' in an adversarial system?"

Yes, making reasonable efforts is ultimately the responsibility of DHS. However, the days when an advocate can stand back and wait for DHS to either do it or not are long past. To be an effective advocate for either a parent or a child involved in the dependency system, as well as an attorney for the state, means working to achieve this goal: prevent removal and achieve permanency. We can't simply take the children into care and sort it all out later (which means over the period until the admit/deny hearing), and sit back and do nothing, then attack DHS for lack of reasonable efforts at the next hearing, whether it be the admit/deny, adjudication, permanency or termination trial.

Neither of these approaches avoids removal, nor gets children to permanency in a timely way. And, they waste precious resources, especially time, time that children don't have to burn.

Assuming that scarcity is going to be a fact of life for the foreseeable future, here are my suggestions for how all of us can better use scarce resources:

1. Front Load: offer services prior to removal. I am seeing this more and more, and it is keeping children out of foster care. By offering pre-removal services, foster care can often be totally avoided, services can often be provided at less expense or in the home with the parent and children together, and parents are more cooperative.

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2. Mediated Shelter Care conferences: We are going to try this in Malheur County after hearing a presentation at the Through the Eyes of A Child conference in August 2010. We have located trained mediators who are willing to meet with the parties prior to the shelter care hearing to try and develop a plan to either avoid removal altogether, or at least place the child in the least restrictive placement through voluntary cooperation of family and other persons involved with the family. We are hoping to reduce the number and length of shelter care hearings, reduce the number of removals or non-relative placements, and develop plans with more parental and family buy-in. Stay tuned. We hope to start after the first of the year with our first cases.
3. Use the National Council of Juvenile and Family Court Judges (NCJFCJ) bench card. Judges were trained on use of the bench card at the August conference. We began using it here in September and it has already made a difference. Use of the card will result in the focus of the hearing changing, fewer removals and better placements.
4. Use the option of legal custody without physical removal. This can be effective in situations where the family is cooperative, but is not progressing at a good pace, or legal authority has needs for various reasons, such as removing dangerous people from the home or accessing treatment options.
5. Know what services are available in your community. Don't assume that the DHS plan is the best plan or the only plan. No plan should be fixed in stone. Counsel need to actively seek and review the services the client is receiving or DHS is providing, and identify and eliminate barriers to getting your clients the services they need. Look for free, low-cost and non-governmental services. Don't beat a dead horse. If it doesn't work, change it up, try something else. The biggest waste of scarce resources is to keep paying for something that isn't working. Right now, the best referrals may be to employment services, vocational training programs, community colleges and GED programs. If housing is the problem, learn about what is available in the community, and what isn't. Get involved in local programs to develop the resources your clients need.
6. Meet or at least talk frequently with your client, the CASA, case worker and foster family. It's the only way you'll know what's going on. Attend all the Citizen Review Board, Family Decision and any other meetings that involve your client. It's the easiest way to talk to everyone.
7. Get a good thorough history. It is impossible to know what services are really needed without knowing the history of the child, the parents and the family. The client or family members are often not reliable reporters, and evaluations based on their oral recollections are often fatally flawed from the start. Many, if not most, of the people who appear in dependency court have documented histories in DHS and court files. Always check there.
8. Partner up with local service providers. Nobody is the enemy here. These cases are like a huge puzzle, and solving it is timed. A group of people working together have a much better chance of solving the puzzle than a group fighting with each other or only working on one little part.
9. Be wary of formulaic plans. One size does not fit all. The tendency is to move toward standard-type plans when resources are tight because they are easier to write and follow, but they actually waste resources by having people do programs they don't really need. Any plan must be individual and fluid, specific, easy to understand and realistic. Read the conditions for return. Does the plan match the conditions for return? Will the goals be achieved if the person follows the plan? If the average fifth grader couldn't read it and be able to tell what the person has to do, it probably isn't being understood by the parents.
10. Think outside the box. Tough times are opportunities for innovation. People are more open to making changes when those changes have budget or time advantages. For example, we are experimenting with pre-trial settlement conferences in termination cases, to see if we can either settle the cases or narrow the issues, to cut the number of trials or the length of trials. We are also working on a parenting time project to take the visits out of the DHS office and into the community in more family-friendly places and involving more activities for parents and children. Perhaps the biggest area where lack of resources is being cited now as a reason for service cutbacks is parenting time. Unfortunately, we know that increasing the quantity and quality of parenting time is often the most important factor in whether reunification is possible. No one can argue that an hour a week in the DHS office is enough to help parents and children stay or become bonded. This is one area where we need to fight back with a new model for parenting time. This is our local Juvenile Court Improvement Project for this year in Malheur County, and we are looking to partner with local churches, the Boys and Girls Club, and other community resources to increase parenting time opportunities.

Tough times force change. While change can be scary, there are good aspects to constantly looking for ways to improve the process to reduce trauma and help families.

11. Be involved in searching for relatives, especially if you represent the child or parents who are struggling. Advocate for continued relative search, throughout the entire life of the case, not just at the beginning.
12. Get real with people. Being a good advocate means knowing when to pick

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your battles. Attorney time is a precious resource, too. If the plan is return to parent, it really needs to be a return to parent case. If this is a sham, and everyone knows it, the waste is enormous. And remember, sometimes the best advocacy involves getting real with a client. An attorney may do the best for a client by helping a parent, maybe for the first and only time, make a decision that is truly in the best interests of a child.

13. Do your homework. Know the Oregon Safety model and the applicable law. Learn something about childhood trauma, neuroscience, child development and substance abuse. Get training any time you can. Then, as an advocate, you can knowledgeably evaluate whether the services offered are appropriate and if more or less is needed.

Tough times force change. While change can be scary, there are good aspects to constantly looking for ways to improve the process to reduce trauma and help families. It isn't a solution to give up and end up with either lack of reasonable efforts findings, or lower the bar for what are reasonable efforts. Rather, now is when we need to try harder to come up with new and innovative plans to get the services we know our families need, and be smarter about using the resources we have. ●

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Questioning Competency of Clients in Delinquency Cases

Challenges and Dilemmas for Counsel

By Julie H. McFarlane, Supervising Attorney, Juvenile Rights Project, Inc. and Paul Levy, General Counsel, Office of Public Defense Services

It is well known that representing juveniles raises a host of unique ethical concerns. But attorneys in delinquency cases are spared at least one quandary that regularly arises in dependency work. Whereas the dependency attorney must frequently grapple with whether to represent the best interests or the expressed wishes of child clients, in delinquency cases an attorney must always follow the expressed wishes of the client on those matters that concern the objectives of the representation[i]. This is not only the expected practice in Oregon, but also the accepted norm nationally.[ii] But what are the ethical obligations in delinquency cases when a youth is so impaired or immature that the client "cannot adequately act in the client's own interest"[iii]? An approach might be found in the applying the principles from adult criminal proceedings to the special circumstances of youth in delinquency cases.

Attorneys in criminal cases, as in most other areas of practice, are accustomed to the twin dictates to abide by a client's decisions concerning the objectives of representation, ORPC 1.2(a), and to preserve the confidentiality of information learned from the client and others about the case. ORPC 1.6. But when a client appears incapable of making decisions concerning the objectives of the representation as a result of some mental disability, attorneys may decide to seek the intervention of the court, through the mechanisms established by ORS 161.365, et. seq., to determine whether the client is "fit to proceed" with the case. In seeking a judicial determination of fitness to proceed, an attorney may be taking action that appears contrary to either the expressed or implied wishes of the client. In this circumstance, though, most criminal defense attorneys understand that determining the competency of the client may be a prerequisite for establishing a viable attorney-client relationship.

The efforts of an attorney in criminal cases to resolve the competency question, even when contrary to a client's expressed directions, would appear to be authorized by ORPC 1.14, which directs lawyers to maintain, as far as reasonably possible, a normal attorney-client relationship with disabled clients but permits lawyers, when necessary, to take protective action on behalf of clients who appear incapable of acting in their owninterests, and specifically permits revealing certain confidential matters to the extent necessary to protect the client's interests.

In attempting to apply the framework for addressing competency issues in criminal cases to delinquency cases the attorney must be aware of at least two major differences between these two types of cases: the lack of a statutory framework for juvenile competency determinations and the inherent immaturity of youth.

The statutory "aid and assist" procedures applicable to adult criminal prosecutions are not among those criminal procedure provisions expressly made applicable to juvenile cases. ORS 419C.270.[iv] In a number of recent legislative sessions the Oregon Law Commission has proposed creation of a statutory fitness to proceed standard for juvenile cases. Oregon Senate Bill 320 A-engrossed (2007) was passed by the Senate Judiciary Committee, but died in the Ways and Means Committee due to the projected fiscal impact of providing "restoration" services to youth found unable to aid and assist. There was, however, agreement on the need for a statutory procedure permitting youth to assert incapacity in a delinquency proceeding, the need to provide restorative services in appropriate cases and the need to require dismissal or conversion to a dependency petition in cases in which restorative services were unlikely to render the youth able to aid and assist.[v] There is also general agreement that the due process clause concerns that give rise to competency standards in criminal cases under the federal constitution also apply in delinquency cases.[vi]

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The lack of a statutory procedure has made representation of youth with competency issues more difficult and has meant that youth, their attorneys and the court lack clearly predictable outcomes that might result from a determination of incompetence. The juvenile court, however, has broad authority to develop appropriate procedures and dispositions in such cases.[vii] While the greater flexibility of the juvenile court creates the potential for less negative outcomes for the youth asserting incompetency than the similarly situated adult client who could face extended mental hospitalization, the unpredictability of the juvenile system presents its own dilemmas for the youth's zealous attorney. A criminal practitioner knows what process and consequences to expect if he or she questions the competency of a client and, accordingly, might apply his or her own "sliding scale" of competency before raising the issue if the likely consequence were to be a greater restriction on the client's liberty than proceeding with a marginally competent client.[viii] With no uniform approach for handling competency questions in Oregon's delinquency courts and no designated facilities or resources for the youth found to be incompetent, attorneys representing youth must proceed cautiously and armed with knowledge about how competency matters are likely to be resolved in their own jurisdiction.[ix]

The inherent immaturity of youth gives rise to a further challenge to attorneys who may question the competency of delinquency clients. While a youth's immaturity may manifest itself in foolish or impetuous decisions, that would not ordinarily constitute grounds for finding a client suffers from diminished capacity sufficient to question his or her competency to make decisions on the objectives of the representation. Indeed, ORPC 1.14 specifically directs lawyers to account for a client's youth in maintaining, to the extent possible, a normal attorney-client relationship. As the National Juvenile Defender Center observes in its invaluable Role of Defense Counsel in Delinquency Court, the recent research on youth brain development "does not provide an argument for counsel to disregard a child's expressed interests merely because of the child's minority. To the contrary, the unique vulnerabilities of youth, make it all the more important for the child's lawyers to help the child identify and articulate his or her views to key players in the juvenile justice system."

On the other hand, it is not uncommon for attorneys handling delinquency cases to encounter clients with significant mental health conditions and developmental delays, including mental retardation.[x] In fact, studies show that mental disorders are significantly more common in delinquency cases than in criminal cases.[xi]

Because a youth exhibits significant immaturity or mental impairment, however, does not necessarily mean the youth is incompetent to stand trial or incompetent to provide direction to her attorney.[xii] As a matter of both due process concern and the ethical obligations of counsel, many impaired and immature youth will be legally competent to stand trial. An attorney must consider the extent to which the youth's mental condition actually interferes with her ability to understand the proceedings, affects the capacity to assist counsel, or too greatly limits the youth's ability to appreciate her legal predicament and to grasp the basic workings of the adversary system. The attorney must also consider the youth's ability to interact with counsel, process information, participate appropriately in court and make informed decisions. If the juvenile attorney reasonably believes that a youth's immaturity or mental impairment so severely diminishes the client's capacity to make adequately considered decisions in connection with the representation that a normal attorney-client relationship cannot be maintained, and the attorney reasonably believes the client is at risk of substantial harm as a result, then the attorney may take protective action either without direction from the client or even contrary to the client's direction. ORPC 1.14

A well-prepared attorney, trained in child development and mental health issues affecting children, through patient and thorough discussion most often can establish trust with the client and get the client to have at least some understanding and agreement with the decision to raise competency.

An aid and assist evaluation performed by a competent juvenile psychologist utilizing approved methods for assessing competency in youth can aid the attorney greatly in making these assessments.[xiii] Before seeking an evaluation, however, the delinquency attorney must thoroughly interview the youth, review records, including school and mental health records, and seek to establish and maintain a normal attorney-client relationship with the youth. ORPC 1.14. These clients will require more of the attorney's time. Many mentally ill, developmentally delayed and immature youth are able to adequately discuss their cases, understand legal advice rendered in age appropriate language and make at least some reasonably informed decisions about their cases.

It is particularly important that the attorney take the time to discuss the competency issue as thoroughly as possible with the youth, including discussing the merits of raising competency and the consequences of not doing so. A well-prepared attorney, trained in child development and mental health issues affecting children, through patient and thorough discussion most often can establish trust with the client and get the client to have at least some understanding and agreement with the decision to raise competency. A youth, who may end up in a facility or foster care for years as a result of the decision to proceed with an aid and assist motion, should feel, if at all possible, assured that her attorney acted zealously on her behalf, considered her wishes and did not usurp her decision-making autonomy solely in the interests of complying with the attorney's ethical requirements and duties to

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the court.

Nonetheless, there will be instances where the youth is so impaired that she cannot make a decision about raising the issue of competency, or there will be instances where the youth disagrees with the attorney about broaching the issue. Then the attorney must determine whether her ethical obligations require that she usurp the client's decision-making autonomy and move the court for a determination of the client's competency. In weighing whether to usurp the client's decision-making authority and risk damaging the attorney-client relationship, the attorney must consider the likely consequences of a determination that the client is not competent. "[I]n taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goal of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections." ABA Model Rules of Professional Conduct, Comment to Rule 1.14.[xiv] An attorney who makes the decision of whether to raise the issue of the client's competency without direction from the client or against the express direction of the client based on a reasoned analysis of the benefits and detriments of how the decision will affect the client, acts not only as a zealous advocate for the client but also in an ethical manner.[xv] ●

[i] Oregon Rule of Professional Conduct (ORPC) 1.2 and 1.4; Oregon State Bar General Standards for Representation in all Criminal, Delinquency, Dependency and Civil Commitment Cases (The Standards) – Standard 1.3

[ii] , Vance L. Cowden & Geoffrey R. McKee, Competency to Stand Trial in Juvenile Delinquency Proceedings-Cognitive Maturity and the Attorney-Client Relationship, 33 ULVLJFL 629 (1995).

[iii] ORPC 1.14(b)

[iv] But see the recent decision of a Linn County trial court which applied ORS 161.365 et seq to motions for competency determination filed by several juveniles. The Linn County court reasoned that the provisions of ORS 161.360-161.370 are applicable to juvenile proceedings, discussing how in the analogous case of State v. L.J., 26 Or App 461 (1976), where the appellate court found that the defense of mental disease or defect, as found in ORS 161.795, could be raised in a juvenile delinquency proceeding, although a strict reading of the juvenile code did not allow for the defense. The Linn County trial judge found L.J. to be rooted in the principal of fundamental fairness central to the due process clause, and interpreted L.J. to also apply to application of ORS 161.360-161.370 to a juvenile delinquency case. Thus, the trial court reasoned, "[c]ase law, as well as ORS 161.360 and 161,.365(1), make it a responsibility of the court to ascertain the capacity of the defendant (or youth, if in juvenile court) to aid and assist once that capacity is placed in doubt and to schedule a hearing to allow parties to present evidence on that issue." The trial court also concludes that the state may have the benefit of the procedure set out in the statute, if it determines to do so. See the full summary and letter opinion at: http://www.jrp.org/Documents/SummaryLinnAidAssist.pdf

[vi] A virtually identical bill submitted by the Oregon Law Commission in the 2009 legislative session HB 3220, suffered the same fate.

[vi] See In re Gault, 387 U.S. 1 (1967) holding that "[n]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."; State ex rel Juvenile Dept. of Malheur County v. Garcia 180 Or App 279 (2002). In Garcia the Court of Appeals stated that the Due Process Clause of the Fourteenth Amendment applies to juvenile delinquency proceedings and requires those proceedings to be fundamentally fair. The Court of Appeals held that the trial court abused its discretion by denying the Youth's motion for continuance. Garcia at 286-287. "One of the boundaries established by law is that counsel must be given a reasonable amount of time to prepare for a hearing that could result in the deprivation of a liberty interest." Garcia at 286-287. The Court of Appeals stated that the trial court denied the Youth, through his attorney, the opportunity to explore the Youth's ability to aid and assist (among other alternatives), which was implicated by the Youth's mental status. Garcia at 287-288.

[vii] In the analogous case of a juvenile asserting the insanity defense prior to the adoption of the statutory process for juvenile cases, the Oregon Court of Appeals recognized the procedural differences between the criminal and juvenile cases in State ex rel. Juvenile Dept. of Multnomah County v. L.J. 26 Or App 461 (1976). Similar procedural differences exist with respect to a competency determination. In L.J. the Court of Appeals held that a youth could raise the affirmative defense of not guilty because of mental disease or defect. L.J. at 464. The Court found that while the Criminal Code provides possible outcomes including "outright discharge, ORS 161.329, release on supervision, ORS 161.335 and commitment to a mental hospital, ORS 161.340[,]" the Juvenile Code permits other possible outcomes including conversion of the delinquency petition to a dependency petition. L.J. at 465. The Juvenile Code permits the court to "order a disposition that is suited to the individual case." State ex rel. Juvenile Dept. v. Alec Bishop 110 Or App 503, 506 (1992). (See also, State ex rel. Juvenile Dept. v. Dreyer, 328 Or 332 (1992) (reiterating the Bishop holding that the Juvenile Code allows the court to dismiss a delinquency petition at any stage of the proceedings.) "In juvenile proceedings, the court has 'greater flexibility' to dispose of cases in a manner that gives primary consideration to the welfare of the child." State ex rel. Juvenile Dept. of Multnomah County v. Alec Bishop 110 Or App 503, 505 (1992) (citing State v. McMaster, 259 Or. 291,297; 486 P.2d 567 (1971)).

[viii] See, e.g.,, Rodney J. Uphoff, The Decision to Challenge the Competency of a Marginally Competent Client: Defense Counsel's Unavoidably Difficult Position, in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER (1995 ABA) at p. 33-35.

[ix] Role of Juvenile Defense Counsel in Delinquency Court, National Juvenile Defender Center (Spring 2009), p.11, available at: http://www.njdc.info/publications.php.

[x] See, Kathleen A. Murphy, Lost in Translation: The Right to Competency and the Right to Counsel for Mentally Retarded Children in the Juvenile Justice System, 51 How. L.J. 367 (Winter 2008)

[xi] The prevalence of mental disorders among youth in pretrial detention or juvenile corrections programs has been estimated to be between 60% and 70%. David R. Katner, The Ethical Struggle of Usurping Juvenile Client Autonomy by Raising Competency in Delinquency and Criminal Cases, 16 SCAIDLJ 293 (2007). See also, Thomas Grisso et al., Competency to Stand Trial in Juvenile Court, 10 Int'l J. L. & Psychiatry 1 (1987).

[xii] A helpful discussion of competence in adolescents can found in: Kimberly M. Mutcherson, Minor Discrepancies: Forging a Common Understanding of Adolescent Competence in Healthcare Decision-Making and Criminal Responsibility, in 6 Nevada L. J. at 927 (2006).

[xiii] See. Antoinette Kavanaugh, Jennifer clark, Tiffany Masson & Barbara Kahn, Obtaining and Utilizing Comprehensive Forensic Evaluations: The Applicability of one Clinic's Model, in 6 Nevada L. J. at 890 (2006).

[xiv] See Also, Kristin Henning, Loyalty, Paternalism and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases, 81 Notre Dame L. Rev. 245, 255-57, 270-80 (2005)

[xv] John D. King, Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant, 58 Am. U. L. Rev. 207, 239 (2008).

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"No one is born a good citizen; no nation is born a democracy. Rather, both are processes that continue to evolve over a lifetime. Young people must be included from birth. A society that cuts off from its youth severs its lifeline."

– *Kofi Annan*

Oregon DHS Seeks Legislative Approval of New ICPC Opposed by Parent Advocates

By Rochelle Martinsson, Law Clerk

Introduction

In response to problems with and controversy over the existing Interstate Compact on the Placement of Children (ICPC), efforts are under way to reform the compact, and a proposed reform to the ICPC is being introduced in state legislatures nationwide.[1] The American Public Human Services Association (APHSA) has been seeking to have states adopt the new ICPC since 2004.[2] After adopting a policy resolution directing a rewrite of the ICPC, the APSHA conferred with states and other stakeholders regarding what direction the new ICPC should take. To date, ten states have passed the revised ICPC, leaving 25 states to do so before the new compact would take effect nationally.[3]

The Oregon Department of Human Services has proposed adoption of the new ICPC in the 2011 state legislative session.[4] While some states, organizations, and stakeholders support nationwide application of the new ICPC[5], others have reservations about whether it will appropriately address deficiencies of the old ICPC, whether it will serve the bests interests of affected children, and whether it adequately protects the rights of parents.[6] This article will review criticisms of the current ICPC, summarize the changes that would result from enactment of the new ICPC, and articulate some criticisms of the new proposal.

Criticisms of the Current ICPC

The importance of an effective and workable ICPC cannot be overstated. It has been reported that interstate placements constitute approximately 5.5% (43,000) of children served in foster care each year.[7] It has also been found that children placed across state lines are twice as likely as those placed in-state to reach a pre-adoptive home, and that two-thirds of interstate placements result in permanent families.[8] In fact, a focal point of child welfare policy has historically been the importance of expediting the placement of foster children into permanent homes.[9] However, "the permanency needs of children remain subordinate to bureaucratic impediments… in the interstate placement of foster children."[10]

A consensus regarding flaws of the current ICPC is reflected in various criticisms by policymakers, academics, advocates, and judges, many of whom argue that the existing statutory scheme is "unworkable and unnecessarily imped[es] children's permanent placement with their parents or relatives."[11] Specific problems cited by those calling for a new approach include the untimely nature of home studies, poor agency decision-making, and inadequate mechanisms to review procedure.[12] A recent law review article, presented at the Winter 2009 Wells Conference on Adoption Law, provides a good illustration of some of the challenges posed by the ICPC, as it is currently implemented:

> A child in Michigan is removed from his mother's care and placed in a temporary foster home. The child's grandmother, who lives in Tennessee, requests immediate custody of the child. All parties to the case agree that the placement is in the child's best interest, but under the Compact, the juvenile court judge cannot make the placement until the Tennessee child welfare agency makes a determination that the placement is not contrary to the child's interest, a process that may take months if not years. If the Tennessee agency refuses to grant approval, the denial acts as an absolute veto of the placement, even if that agency's decision is arbitrary, subjective, or capricious. The ICPC explicitly bars any judicial review of the decision. Despite the well-documented problems in the interstate placement process – lengthy delays in the completion of home studies, subjective decision-making, and inadequate due process protections – this system has persisted for over 40 years.[13]

Another difficulty posed by the current ICPC is disagreement between jurisdictions about whether it applies to the placement of a child with a natural parent. In In re Dependency of D.F.-M., 157 Wash. App. 179, 236 P.3d 961 (2010), the court held that the ICPC does not apply to parent placements, and affirmed the trial court's decision to place a child with his father in another state, after that state had twice declined to accept supervision. While admitting that courts across the country are divided on whether the ICPC applies when an out-of-state placement is to a natural parent, the court found that it governs only placement of children in substitute arrangements for parental care. The court stated, "The ICPC does not require sister state approval of parental placements."[14]

Other jurisdictions holding that the ICPC

Continued on next page »

« *New ICPC continued from previous page*

does not apply to out-of-state placements with a parent include Arkansas[15], New Hampshire[16], New Jersey[17], and the Third Circuit[18]. However, Alabama[19], Arizona[20], Delaware[21], Massachusetts[22], Mississippi[23], New York[24], Oregon[25], and California[26] all hold that the ICPC does apply to out-of-state placements with a natural parent. In In re C.B., 188 Cal. App. 4th 1024, 116 Cal. Rptr. 3d. 294 (2010), the court pointed out that the lack of uniformity with regard to this issue is "dysfunctional," and that "courts and rule makers have not been able to fix it," warranting a multistate legislative response.[27]

The New ICPC

The existing ICPC has been described by one state court as well-intentioned, but ultimately harmful to children.[28] Dissatisfaction with the current system has provided the impetus for the statutory reform movement now advocating for enactment of the new ICPC.

The new ICPC attempts to address many of the concerns discussed above. For example, several provisions in the proposed ICPC emphasize the importance of timely placement decisions.[29] Also, the proposal "attempts to clarify the legal standard governing the receiving state's decision to approve or deny a proposed placement,"[30] and "offers increased protection for familial relationships, primarily between biological parents and their children."[31] Under the proposal, enforcement of these mechanisms would be facilitated by the Interstate Commission. Finally, the proposed ICPC provides for administrative review by the receiving state child welfare agency of decisions made pursuant to the ICPC.[32]

Criticisms of the New ICPC

While the proposed ICPC may represent an improvement over the current system, some claim that current reform efforts are missing the mark.[33] One criticism in particular is that the proposal lacks specific timelines and sufficiently precise definitions for states to approve or deny child placement requests.[34] Another criticism is that the terms regarding "provisional placement" do not afford children or relatives an enforceable right to expedited consideration when the receiving state determines that the home is "safe and suitable."[35] Yet another criticism is that the proposed ICPC does not improve enough upon the older version with regard to the "high level of subjectivity pervasive in current ICPC decision-making."[36] Also, the proposed ICPC would make it clear that the requirements of the ICPC apply to the placement of children with their parents, the legality of which (as discussed above), is very controversial. An additional criticism addresses the insufficiency of enforcement mechanisms included in the proposed ICPC.[37] Finally, the lack of provisions for judicial oversight of agency decision-making has been met with disappointment.[38]

Conclusion

As nationwide adoption of the new ICPC has yet to be accomplished, many of the issues discussed above, as well as a lack of uniformity in the governing of interstate placements, continue. It seems that in order for the new ICPC to significantly improve upon the older version of the compact, several issues must be resolved, and consistency in interpretation must be a primary goal of those advocating for a new approach. ●

1. To view the full text version of the proposal, go to http://www.aphsa.org/Policy/icpc2006rewrite.htm.
2. American Public Human Services Association, History of the ICPC, available at http://www.aphsa.org/Policy/ICPC-REWRITE/Resource%20Materials/HISTORY%20OF%20THE%20ICPC.pdf.
3. The states that have passed the new ICPC include Ohio, Alaska, Delaware, Florida, Indiana, Maine, Minnesota, Missouri, Nebraska, and Oklahoma. To view progress on the enactment of the new ICPC, go to http://www.aphsa.org/Policy/icpc2006rewrite.htm.
4. LC 794 Interstate Compact for the Placement of Children (ICPC)
5. Several national organizations have endorsed the new ICPC, including the National Council of Juvenile and Family Court Judges, the American Bar Association, the American Academy of Adoption Attorneys, the National Conference of the National Council of State Human Services, the National Association of Public Child Welfare Administrators, and the Association of Administrators of the Interstate Compact on the Placement of Children.
6. See, e.g., Vivek Sankaran, Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children, 40 Fam. L. Quarterly, 435 (2006).
7. Penelope Maza, The Role of Interstate Placements in States' Meeting the CFSR Standards, Presented at the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) Annual Conference (May 2003).
8. Penelope Maza, Does Being Placed Out of State Make a Difference for Children in Foster Care?, Presented at the AAICPC Annual Meeting (May 1, 2001).
9. Vivek Sankaran, supra at 436.
10. Id.
11. Vivek Sankaran, Judicial Oversight over the Interstate Placement of Foster Children: The Missing Element in Current Efforts to Reform the Interstate Compact on the Placement of Children, 38 Cap. U. L. Rev. 385 (2009).
12. See, e.g., Vivek Sankaran, supra, 40 Fam. L. Quarterly at 444.
13. Vivek Sankaran, supra, 38 Cap. U. L. Rev. at 387.
14. 157 Wash. App. at 193-4.
15. Ark. Dept. of Human Servs. v. Huff, 347 Ark. 553, 65 S.W.3d 880 (2002).
16. In re Alexis O., 157 N.H. 781, 959 A.2d 176 (2008).
17. State, DYFS v. K.F., 353 N.J.Super. 623, 803 A.2d 721 (2002).
18. McComb v. Wambaugh, 934 F.2d 474 (1991).
19. D.S.S. v. Clay Co. Dept. of Human Res., 755 So.2d 584 (1999).
20. Arizona Dept. of Economic Sec. v. Leonardo, 200 Ariz. 74, 22 P.3d 513 (2001).

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21. Green v. Div. of Family Servs., 864 A.2d 921 (2004).
22. Adoption of Warren, 44 Mass.App.Ct. 620, 693 N.E.2d 1021 (1998).
23. K.D.G.L.B.P. v. Hinds County DHS, 771 So.2d 907 (2000).

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24. Faison v. Capozello, 50 A.D.3d 797, 856 N.Y.S.2d 179 (2008).
25. State ex rel. Juvenile Dept. of Clackamas County v. Smith, 107 Or.App. 129, 811 P.2d 145 (1991).
26. In re C.B., 188 Cal.App.4th 1024, 116 Cal.Reptr.3d 294 (2010).
27. 188 Cal.App.4th at 1027.
28. See In re Crystal A., 13 Misc.3d 235, 237, 818 N.Y.S.2d 443 (N.Y. Sup. Ct. 2006).
29. Vivek Sankaran, supra, 40 Fam. L. Quarterly at 450-1. See also Proposed Compact, Articles I(A), V(F), VII(D), and II(L).
30. Vivek Sankaran, supra, 40 Fam. L. Quarterly at 451. See also Proposed Compact, Articles II(A) and (B), and V(G).
31. Vivek Sankaran, supra, 40 Fam. L. Quarterly at 451-2. See also Proposed Compact, Articles III(B)(1), (4) and (7)
32. See Article VI of the proposed ICPC.
33. See, e.g., Vivek Sankaran, supra, 40 Fam. L. Quarterly at 453.
34. Id.
35. Id. at 454.
36. Id.
37. Id at 456.
38. See, e.g., Vivek Sankaran, supra, 40 Fam. L. Quarterly at 457.

JLRC Case Summaries

DHS v. D.D., 238 Or App 134, ___P3d ___ (2010) (Ortega, J.) (Lane Co.)

Juvenile court jurisdiction affirmed.

http://www.publications.ojd.state.or.us/A144641.htm

In this appeal from a judgment of jurisdiction and disposition, the court addressed the sufficiency of pleadings in a juvenile dependency case. Mother had made the following admission on a pre-printed form: "The child has special medical needs. The mother would benefit from assistance from the Department of Human Services Child Welfare Program." The form had language waiving the right to trial and acknowledging that signing might result in the court "taking control" over the child. Both mother and her attorney signed the form.

On appeal, the court held that while a parent can stipulate to the facts supporting jurisdiction, the parties cannot stipulate to jurisdiction. The court also held that because the mother admitted to "facts," there was no question of the sufficiency of the evidence on appeal. The only question before the court was whether the allegation, as admitted, was sufficient to establish juvenile court jurisdiction. The test is one of the totality of the circumstances - whether there is a reasonable likelihood of harm to the child's welfare. State ex rel Juv. Dept. v. Vanbuskirk, 202 Or App 401, 405, 122 P3d 116 (2005). To be sufficient, the allegations must permit proof that the child's welfare is in danger. Here, while the allegation "would benefit from" was ambiguous, liberally construed, it could permit evidence that mother could not meet the child's needs without assistance, and therefore was sufficient.

DHS v. A.E., WL 4629621, ___P3d ___ (2010), (per curiam) (Lane Co.)

Permanency judgment reversed and remanded.

http://www.publications.ojd.state.or.us/A145662.htm

This case, relying on State ex rel Juv. Dept. v J.F.B. 230 Or App 106 (2009), is one in a line of cases in which the state conceded error where a permanency judgment did not contain the statutorily required findings.

DHS v. D.M.T., WL 4746209, ___P3d___ (2010) (Ortega, J.) (Linn Co.)

Termination of parental rights affirmed.

http://www.publications.ojd.state.or.usA142473.htm

In this termination of parental rights case, the court of appeals, sitting en banc, addressed the relationship between the requirement of "reasonable efforts" (a term appearing in only one of the subsections of ORS 419B.504, which addresses the parent's "conduct or conditions"), and the "improbability of reintegration" element, which must be proved in every unfitness case. Here, father was subject to post prison supervision conditions that prevented him from having contact with his son. Writing for the court, Judge Ortega found father's PPS to be a condition that was seriously detrimental to his child, and that integration of the child into his home was improbable within a reasonable time because of that condition. Judge Ortega rejected the dissent's view that the state can only meet

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Juvenile Law Resource Center

« *Case Summaries continued from previous page*

its burden of proof on the element of improbability of reintegration where it shows that services have failed or will fail. Judge Brewer's concurrence dealt specifically with the issue:

> It remains the state's obligation to plead and prove that integration is improbable in the terms of the statute… The parent may raise the issue of a lack of reasonable efforts in contesting the state's assertion of the improbability of integration into the parent's home within a reasonable time.

DHS v. J.G., WL 4867592, ___P3d___ (2010) (Ortega, J.) (Multnomah Co.)

Appeal from review hearing dismissed as moot in light of subsequent permanency judgment.

http://www.publications.ojd.state.or.us/A145348.htm

This case is an appeal from a review hearing judgment. Appellant, one of five siblings, appealed from the juvenile court's order continuing his siblings in foster care. He had been returned home at an earlier hearing. After the review hearing, and before the appellate court could act, a permanency hearing was held. The trial court again made the requisite findings to continue the four siblings in foster care. Thus, according to the Court of Appeals, the case was moot. The court distinguished the case from one in which the review hearing came after permanency hearing. State ex rel Juv. Dept. v. L. V., 219 Or App 207, 215, 182 P3d 866 (2008). In that case, the court rejected a mootness argument, holding that the permanency judgment and the choice of permanent plan continued to have a practical effect on the parties, and that the subsequent review order simply continued the status quo.

"It is idle to talk of civil liberties to adults who were systematically taught in adolescence that they had none."

– *Edgar Friedenberg*

JLRC Resources

Domestic Violence Reasonable Efforts Checklist

The **National Council of Juvenile and Family Court Judges (NCJFCJ)** has developed the Reasonable Efforts Checklist for Dependency Cases Involving Domestic Violence. This valuable handbook sets out the position of the NCJFCJ on the appropriate response in child protection cases involving domestic violence. Checklists for the removal hearing focus on objective criteria for assessing the risk of harm to the child(ren) in the family affected by domestic violence and encourage support of the primary caretaker, avoiding removal, and urging the community, not the victim to address the batterer. Copies are available from NCJFCJ at a small cost or can be downloaded for free at: http://www.ncjfcj.org/images/stories/dept/fvd/pdf/reasonable%20efforts%20checklist_web2010.pdf

Child Welfare Law and Practice – 2nd Edition Now Available

The National Association of Counsel for Children has released a completely revised edition of Child Welfare Law and Practice – Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Cases (2nd Ed.). Often referred to as "The Red Book", this book defines the national model for representation of children in the dependency legal system and provides in depth analysis and instruction on the multitude of issues facing dependency attorneys. Edited by Donald N. Duquette and Ann M. Haralambie, the chapters in the book are authored by top specialists in the field. This second edition adds 10 new chapters and makes extensive updates and revisions to the first edition. Available only from Bradford Publishing: 1-800-446-2831 or info@bradfordpublishing.com.

Benchcard to Reduce Minority Over-Representation

Courts Catalyzing Change, a project of the **NCJFCJ**, has issued a benchcard for use by judges and attorneys in decreasing minority over-representation in the child welfare system. The benchcard is being used by Judges in Multnomah County to address minority over-representation and to support making more objective and informed decisions at the shelter hearing. Advocates for children and parents in such hearing should familiarize themselves with the benchcard to support their advocacy. Right from the Start: The CCC Preliminary Protective Hearing Benchcard – a Tool for Judicial Decision-Making is available at: http://www.ncjfcj.org/content/blogcategory/280/535/

2011 Legislative Session Preview

By Maura C. Roche, StrategyWorks NW LLC, and Mark McKechnie, Executive Director, Youth, Rights & Justice

The 2011 Session will soon be underway, and there are some significant changes coming to Oregon in the timing and procedures for how the legislature will operate, as well as big changes in the make-up of the chambers.

The General Election of 2010 brought Oregon voters the opportunity via Measure 71 to change the frequency of our legislative sessions from every other year to annually. By a vote of 68% to 32%, voters approved this idea. The details of implementation are not fully known, but the measure requires the legislative session not to exceed a set number of days. There will probably be about three days in early mid-January when the legislature will meet to organize, and then they will stand down until the first week of February for the 2011 Legislative Session. There will be a shorter session in even numbered years of roughly a month in duration. The total number of session days will be about the same as it is currently, just divided between two years instead of one.

Oregon faces a budget shortfall of approximately $3 billion dollars for the 2011-13 biennium. A budget reduction of this magnitude (especially coming on the heels of the 2009-11 budget reductions of a similar size) will require serious re-thinking of what constitutes "vital state services." The size of this budget shortfall is beyond conventional methods of cutting or taxing our way out of this problem. With the House divided 30-30, it is hard to imagine any sort of revenue discussion this session. While many had been hopeful that "the kicker" would be restructured, it now seems unlikely.

Fortunately, one of Oregon's most seasoned budget writers in the Senate, Senator Richard Devlin, will be Co-Chairing the critical Joint Committee on Ways & Means. Although no decisions have been announced from the House, we anticipate Rep. Peter Buckley will continue to play a leadership role as well.

We should anticipate a starting place of across-the-board budget reductions by departments. While the Oregon Public Defense Services budget was spared during recent reductions, it will be more likely to face cuts in 2011. OPDS funds legal representation for criminal defense, dependency proceedings and juvenile delinquency cases. Legislators in both parties have discussed the inadequate funding for juvenile dependency representation, in particular, in past sessions. In most parts of the state, caseloads far exceed any reasonable standard, which endangers both the quality of representation that parents and children receive, as well as the chances that the best outcomes in these cases can be achieved.

Given the size of the budget shortfall, more serious conversations about generally restructuring the criminal justice system may get some traction this session. Advocates for reform have supported more effective and less costly approaches to incarceration—including more access to drug and alcohol treatment services and maintaining services for youth.

There are reports that over 3,000 bills have already been drafted for the 2011 session. One of the hottest topics is human trafficking—specifically, the commercial sexual exploitation of children. There are at least three bills in the works related to the Psychiatric Security Review Board, including one advanced by the PSRB and the Department of Human Services. Work groups have met pre-session to discuss bills in both of these areas.

Youth, Rights & Justice (formerly the Juvenile Rights Project) is part of The Coalition to Promote Safe and Successful Youth, which is advancing legislation to modify sex offender registration requirements for youth adjudicated delinquent of sexual offenses. Research consistently shows that recidivism rates for this population are less than 10%, which is much lower than the recidivism rates for adult offenders or for youth offenders generally.

There are currently more than 2,200 individuals in Oregon who were required to register as sex offenders based upon a juvenile adjudication.

While the benefits to public safety of juvenile registration are questionable, it is clear that registration imposes a range of serious consequences upon registrants. They are ineligible for federal public housing assistance and may find landlords unwilling to rent to them as well. They are officially or unofficially barred from many employment opportunities, and many have reported harassment in the community and other adverse consequences.

There are reports that over 3,000 bills have already been drafted for the 2011 session.

Persons adjudicated of sex offenses as juveniles currently have a three-year window to apply for relief. If they miss the window, they are required to register for the remainder of their lives. In 2009, only 72 former juvenile offenders successfully obtained relief, and only 50 obtained relief in 2008. The proposed legislation would limit registration for juveniles to more serious offenses, provide the court more discretion for imposing registration, and would allow more time for individuals to obtain relief from registration. ●

Youth, Rights & Justice
ATTORNEYS AT LAW

"We have a powerful potential in our youth, and we must have the courage to change old ideas and practices so that we may direct their power toward good ends."

– *Mary McLeod Bethune*

The Sex Trafficking Victim on Your Case Load

By Michelle Dellatorre, Law Clerk and Lynn Haxton, Attorney

If you represent children or youth in the delinquency or dependency systems, chances are you have a victim of human trafficking on your case load. Statistically speaking, children who have been sexually abused[1], are involved in the child welfare system[2], or have run away from home[3] are at higher risk to become victims of sex trafficking than those who have not.

Children and youth are typically recruited into the sex industry by a "boyfriend" who turns out to be a pimp. They may meet this "boyfriend" online, on the bus, or at the mall. Children are also recruited by other prostituted youth, whom they meet in foster care, group homes, or in juvenile detention. Still others are sold by family members, often for drugs. Prostituted children are subject to extreme psychological manipulation, as well as sexual and physical violence by traffickers and "johns."

Proper identification is a major barrier to appropriate intervention and services for these highly traumatized children. Groomed to lie to law enforcement and service providers, and taught to distrust people outside of "the life" of prostitution, sexually exploited children rarely self-identify as victims, and often present as "bad kids" or "chronic runners" to well-intentioned service providers. The contradictory legal system, which simultaneously views them both as criminals and victims, adds to the challenge of identifying these youth.

Though federal[4], international[5], and some Oregon law[6] view them as victims, commercially sexually exploited youth often enter the system as offenders. Recently, Illinois became the first and only state to decriminalize all youth who are commercially sexually exploited. Oregon law currently considers children capable of committing the crime of prostitution, even though they are legally incapable of consenting to sexual activity.[7]

The victim of human trafficking on your case load may be a delinquency or dependency client; male, female or transgender; an American citizen or a foreign national. They may enter your case load for reasons related or completely unrelated to prostitution. Regardless of how they come to you, prostituted children are victims, and need to be identified and given proper, targeted services if they are to succeed. The following is a non-inclusive list of red flags to assist in identification and tips for working with identified youth.

Red Flags: prostitution charge; repeatedly missing or runaway; history of sexual abuse; older boyfriend; expensive clothes/hair style/cell phone but no money; constantly being called on cell phone; driven by older non-relative male; unexplained physical injuries; repeat sexually transmitted infections; multiple pregnancies/children/abortions; tattoos (of pimp's name or child's "street" name).

Tips for Working with Exploited Youth: use non-judgmental language and attitude; find specialized services and service providers who understand child sex trafficking; expect the child to be bonded with their abuser, much like in a domestic violence situations, accept "relapse" as a part of "recovery;" recognize how children's needs are being met in "the life" and strive to meet those needs in a healthy and safe manner; educate yourself and those working with your client about human trafficking.

Legal considerations: Oregon still considers minors as capable of the crime of prostitution and law enforcement will take children into custody for this crime. Whether a child is charged with prostitution is at the district attorney's discretion. However, law enforcement will use the threat of prosecution in an attempt to gain cooperation from the child in an investigation and prosecution of a trafficker. The misdemeanor charge of prostitution is often ineffective against the manipulation and threats of a pimp. Additionally, there are no options for protecting these children from the pimps. Currently, law enforcement's primary safety plan is giving the child a 911 cell phone but there are no safe houses or personal protection by law enforcement. Pimps will often assure the child that even if they are in custody, they have connections with outside people who are willing to carry out their threats.

If law enforcement is attempting to interview your client, be sure to advise your client about the risks involved (which may include attempts to have a material witness hold placed on the client, or some other form of restrictive custody) and notify law enforcement that you want to be present for any interviews. ●

Learn More

Human Trafficking in Oregon: Willamette University College of Law's International Human Rights Clinic has prepared a comprehensive report on human trafficking in Oregon that includes interviews with key players in the Oregon human trafficking field. Modern Slavery in Our Midst: A Human Rights Report on Ending Human Trafficking in Oregon. Summary available at: http://www.willamette.edu/wucl/pdf/clp/redacted.pdf

Request a complete electronic copy from Gwynne Skinner: gskinner@willamette.edu.

Oregon Human Trafficking Task Force: Oregonians Against Human Trafficking (OATH); Local Oregon Hotline: 503-251-2479 http://www.oregonoath.org/

National Human Trafficking Resource Center: 24hr National Hotline 1-888-3737-888 Operated by Polaris Project http://www.polarisproject.org/

Department of Community Justice Multnomah County: Organizing a county wide coordinated response to Commercial Sexual Exploitation of Children. Contact

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Joslyn for more information and to get involved.
Joslyn.r.baker@co.multnomah.or.us

Shared Hope International: Vancouver, WA-based advocacy group offering Training on Identifying and Intervening with Victims of Commercial Sexual Exploitation http://www.sharedhope.org/what/intervene.asp

U.S. Department of Health and Human Services Review of Literature: Human Trafficking Into and Within the United States http://aspe.hhs.gov/hsp/07/HumanTrafficking/LitRev/

Report on Trafficking of Native Women and Girls: http://www.miwrc.org/shattered_hearts_full_report-web_version.pdf

Report on Demand: UK Paper on Men Who Buy Sex http://www.eaves4women.co.uk/Documents/Recent_Reports/Men%20Who%20Buy%20Sex.pdf

U.S. State Department Trafficking In Persons 2009 Report on Human Trafficking Worldwide http://www.state.gov/g/tip/rls/tiprpt/2009/

US DOJ Resources on Human Trafficking http://www.justice.gov/olp/human_trafficking.htm

1. In 20 recent studies of adult women who were sexually exploited through prostitution, the percentage of those who had been abused as children ranged from 33 to 84 percent (Raphael, J. (2004). Listening to Olivia: Violence, poverty, and prostitution. Boston, MA; Northeastern University Press).
2. One study in Canada of 47 women in prostitution found that 64 percent had been involved in the child welfare system, and of these, 78 percent had entered foster care or group homes (Nixon, K., Tutty, L., Downe, P., Gorkoff, K., & Ursel, J. (2002). The everyday occurrence: Violence in the lives of girls exploited through prostitution. Violence Against Women [Special Edition on Prostitution], 8(9), 1016-1043.).
3. Researchers have found that the majority of prostituted women had been runaways; for example, 96 percent in San Francisco (Silbert, M., & Pines, A.. Entrance into prostitution. Youth & Society, 13(4), 471-500 (1982)), 72 percent in Boston (Norton-Hawk, M.,The lifecourse of prostitution. Women, Girls & Criminal Justice, 3(1), 7-9 (2002).) and 56 percent in Chicago (Raphael, J. & Shapiro, D., Sisters speak out: The lives and needs of prostituted women in Chicago, a research study. Chicago: Center for Impact Research (2002).).
4. Trafficking Victims Protection Act (2000), 22 USC 7102 § 103(8).
5. United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 5 Jul. 2000, 54 U.N.T.S. 263.
6. The prostituted person is the victim of Compelling Prostitution (ORS 167.017): State v. Pervish, 123 P.3d 285 (Or. Ct. App 2005). ORS 419B.005 Definitions of Child Abuse includes "allowing, permitting, encouraging or hiring a child to engage in prostitution."
7. Compare ORS 167.007 "Prostitution" with ORS 163.315 "Incapacity to Consent."

Learn more about who we are and what we do at:
www.youthrightsjustice.org

Objections to Novel Conditions of Probation

By Christa Obold-Eshleman

Whenever a juvenile court considers imposing a novel condition of probation or release, including ones that limit a youth's rights to freedom of speech, defense counsel should be alert to possible statutory and constitutional arguments against it. An example that is the subject of current litigation is a ban on a youth's use of violent video games. Several discrete arguments can be made against such a condition.

The first argument is that a condition of probation of "no violent video games" is not within the juvenile court's discretion, because it is outside of the statutorily permissible options. ORS 419C.446(2) provides that the juvenile court may enact "restrictions on the youth's… activities" in its conditions of probation, "consistent with recognized juvenile court practice." In State ex rel Juvenile Department of Multnomah County v. Rial, 181 Or App 249, 261–62, 46 P3d 217 (2002), this court linked the meaning of "recognized juvenile court practice" to the Juvenile Code's mandate "to provide a continuum of services that emphasize prevention of further criminal activity by the use of early and certain sanctions, reformation and rehabilitation programs." ORS 419C.001(1).

Many times, nothing in the record at a dispositional hearing will provide a link between the youth playing violent video games, and the juvenile justice system's purpose of "prevention of further criminal activity." ORS 419C.001(1). Other courts, in fact, have found a lack of proof that violent video games cause violent acts or other harmful effects.[1] This issue is likely to be further addressed by the U.S. Supreme Court in their upcoming decision in Schwarzenegger v. Entertainment Merchants Ass'n, 130 S.Ct. 2398, 176 L.Ed.2d 784, 77 (Apr 26, 2010) (NO. 08-1448), a case which involves a state's ability to restrict sales of violent video games to minors.

This same case will be relevant to a second argument against a probation condition that restricts the youth's use of violent video games. Namely, the juvenile court is further restricted in its authority to prohibit violent video games because such video games fall under the free speech protections of Article I, Section 8 of the Oregon Constitution, and the First Amendment to the U.S. Constitution. "[A]lthough a trial court may impose conditions designed to restrict activities that interfere with reformation, 'where fundamental rights are involved[,] the sentencing court has less discretion to impose conditions in conflict therewith.'" State v. Jackson, 141 Or App 123, 126, 917 P2d 34, 35 (1996) (quoting State v. Martin, 282 Or

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583, 589, 580 P2d 536 (1978)); One can argue that a specific probation condition that involves a restriction on a form of speech is not narrowly tailored to serve a non-speech related statutory purpose, and thus, an order that applied ORS 419C.446(2) in such a way would be overbroad, running afoul of the First Amendment and Article I, Section 8 of the Oregon Constitution.[2]

A final argument for many conditions of probation may be that they are too vague, for failure to communicate the scope of the prohibition. See United States v. Hugs, 384 F3d 762, 768 (9th Cir 2004). It may be unclear, for example, in a restriction of "no violent video games," what would be considered "violent," or whether the youth may possess or watch such games, if he is not actively playing them.

It is important for counsel to adequately spell out the grounds for an objection to any given term of probation, not only to have the best chance of prevailing at the hearing, but also to preserve the issue for appeal. Conditions of probation that limit a youth's freedom of speech can and should be challenged if they are not narrowly tailored to meet the purposes of the juvenile code. ●

1. In American Amusement Machine Association v. Kendrick, 244 F 3d 572, 578 (7th Cir 2001), the Seventh Circuit Court of Appeals found that "[t]he studies do not find that video games have ever caused anyone to commit a violent act." The court went on to state that studies did not show "that violent video games are any more harmful to the consumer or to the public safely than violent movies or other violent, but passive, entertainments." Id. at 579. The Ninth Circuit and Eighth Circuit courts of appeals have also found insufficient evidence of any psychological harm to children caused by playing violent video games. Video Software Dealers Assoc. v. Schwarzenegger, 556 F3d 950, 961 n. 15, 964 (9th Cir 2009), cert. granted by Schwarzenegger v. Entertainment Merchants Ass'n, 130 S.Ct. 2398, 176 L.Ed.2d 784, 77 (Apr 26, 2010) (NO. 08-1448) (noting also that other federal courts have rejected the "violence prevention" rationale for restrictions on violent video games); Interactive Digital Software Assoc. v. St. Louis County, Missouri, 329 F3d 954, 958 (8th Cir 2003) ("The County may not simply surmise that it is serving a compelling state interest because '[s]ociety in general believes that continued exposure to violence can be harmful to children'" [citations omitted]. Where first amendment rights are at stake, 'the Government must present more than anecdote and supposition.'" Id. at 959.

2. Regarding Oregon law, see State v. Robertson, 293 Or 402, 416-17, 649 P2d 569 (1982). For federal law, see United States v. Consuelo-Gonzalez, 521 F2d 259, 265 (9th Cir 1975); United States v. Loy, 237 F3d 251, 266 (3rd Cir 2001); United States v. Terrigno, 838 F2d 371, 374 (9th Cir 1988).

Youth, Rights & Justice
ATTORNEYS AT LAW

"We live in a country that is addicted to incarceration as a tool for social control. As it stands now justice systems are extremely expensive, do not rehabilitate but in fact make the people that experience them worse and have no evidence based correlatives to reducing crime. Yet with that track record they continue to thrive, prosper and are seen as an appropriate response to children in trouble with the law. Only an addict would see that as an okay result."

– *James Bell*

Case Summaries

By David Susens, Law Clerk

Powell's Books v. Kroger, 622 F.3d 1202 (9th Circuit, September 20, 2010)

www.ca9.uscourts.gov/datastore/opinions/2010/09/20/09-35153.pdf

In this First Amendment case, a broad grouping of bookstores, publishers, non-profit organizations; and a concerned grandmother (Together, "Powell's Books"), challenged the constitutionality of both Oregon Revised Statutes ORS 167.054 and 167.057. The Ninth Circuit Court of Appeals (McKeown, CJ) ruled that the statutes, which took aim at the use of sexually explicit materials to entice minors into engaging in sexual conduct, are facially overbroad and criminalize a substantial amount of constitutionally protected speech in violation of the First Amendment. The decision reversed the ruling of the United States District Court for the District of Oregon (Mosman, DJ).

> Interpreting the statutes under Oregon rules of construction, the Ninth Circuit ruled that:
>
> Contrary to the state's position, the statutes reach the distribution of far more material than hardcore pornography or material that is obscene to minors, and they implicate a substantial amount of constitutionally protected speech. In addition, the statutes are not subject to a limiting construction that would make them constitutional.

The court found that the text of the statutes goes far beyond what might qualify as hardcore pornography, referring only to "sexually explicit material" and a "visual representation of explicit verbal description or narrative account of sexual conduct." To demonstrate the overbreadth, Powell's submitted a wide array of well-known books such as The Joy of Sex, Mommy Laid an Egg and Where do Babies Come From. The court noted that they each contain verbal depictions of "sexual conduct" under ORS 167.057 and "visual depictions of 'sexual intercourse' under ORS 167.054, yet they hardly count as "hardcore pornography."

The statues contain an exemption for material whose "sexually explicit portions… form merely an incidental part of an otherwise non-offending whole and serve some purpose other than titillation," Because the material must satisfy both conditions of the exemption, the court found that it does not "limit their application to materials that fall outside constitutional protection." A work could thus give rise to liability if either the sexually explicit portions solely intend to titillate but are only incidental to the work as a whole or the sexually explicit portions make up more than an incidental part of the work as a whole but do not intend to titillate. Several of the works used as examples

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come under one or both of these classifications yet fall short of the state's definition of "hardcore pornography."

Citing several U.S. Supreme Court decisions and federal appellate cases, the 9th Circuit determined that the appropriate obscenity standard for adults, as well as minors, is that states can criminalize the distribution of materials that "taken as a whole do not have serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973). Applying this standard, the statutes at issue "sweep up material that, when taken as a whole, has serious literary, artistic, political, or scientific value for minors and thus has at least some 'redeeming social value." The court also found that the statutes fail the broader standard set in Ginsberg v. New York, 390 U.S. 629, 641 (1968) (Holding that states may restrict the access of minors to obscene material so long as the legislature has a rational basis "to find that exposure to material condemned by the statue is harmful to minors.").

As a last blow to the statutes, the court ruled that they cannot reasonably limit the construction of the statutes so as to overcome their unconstitutionality. Citing ORS 174.010, the court acknowledged that they are not permitted to insert language that would be necessary to satisfy the Miller/Ginsberg standard. The court rejected the state's argument that it will not bring prosecutions against individuals or businesses like the plaintiffs. The court notes that according to United States v. Stevens, 130 S. Ct. 1577, 1591 (2010), "The First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige." Thus they conclude that the statutes may not be upheld merely because the state promises to treat them as properly limited to "hardcore pornography" or "obscenity."

Smith v. Mitchell, ___ F.3d ___ (9th Circuit, October 29, 2010) (per curiam) opinion and judgment reinstated

www.ca9.uscourts.gov/datastore/opinions/2010/10/29/04-55831.pdf

This case is a habeas corpus appeal from a California conviction of assault of a child resulting in death. On remand from the Supreme Court for the second time, the Ninth Circuit Court of Appeals again reinstated their former decision to overturn the conviction in Smith v. Mitchell, 437 F.3d 884 (9th Circuit, 2006).

Smith was convicted in California state court of having causede her grandson's death. The prosecution successfully argued, based on expert testimony, that Smith shook the child so violently that the child died instantly. The California Court of Appeals affirmed the conviction despite Smith's claim that the evidence upon which she was convicted was constitutionally insufficient. The California Supreme Court subsequently denied review. Smith then filed a habeas petition which was denied by the federal district court. She appealed to the 9th Circuit who reversed and subsequently denied the State's petition for panel and en banc rehearing.

The Supreme Court granted the state's petition for certiorari, vacated the decision and remanded to the 9th Circuit for further consideration based on its intervening decision in Carey v. Musladin, 549 U.S. 70 (2006). In Carey v. Musladin, the Supreme Court had held that the state court's determination that a habeas petitioner was not inherently prejudiced when spectators wore buttons depicting the murder victim was not contrary to or an unreasonable application of clearly established law.

On remand, the 9th Circuit found that Carey v. Musladin did not cast doubt on their prior decision that the state court's denial of Smith's claim of constitutionally insufficient evidence was an unreasonable application of Jackson v. Virginia, 433 U.S. 307 (1979) and reinstated their prior decisionh.

The Supreme Court again granted the states petition for certiorari, vacated the decision and again remanded to the 9th Circuit for further consideration in light of McDaniel v. Brown, 130 S. Ct. 665 (2010). Brown involved another 9th Circuit decision holding that a state conviction failed to meet the constitutional standard set forth in Jackson. According to Jackson, convictions cannot constitutionally stand if no rational juror considering all of the evidence in the light most favorable to the prosecution could find guild beyond a reasonable doubt. 443 U.S. at 319. Brown involved DNA evidence that a rational jury could consider to be "powerful evidence of guilt" despite the prosecution's overstatement of its probative value. 130 S. Ct. at 673. The Supreme Court also determined that the evidence in Brown was not viewed by the 9th Circuit in the light most favorable to the prosecution. Id. at 674.

On remand, the 9th Circuit concluded that the deficiencies in Brown were not present in Smith. Unlike Brown, there was no dispute as to the evidence. Both the prosecution and the defense agreed that Smith had always been a caring grandmother. The fact that no one saw her shake the baby with the violence that would have supported the prosecution's theory was undisputed. Both sides agreed that the emergency responders and physicians considered the death to be an instance of Sudden Infant Death Syndrome. The prosecution conceded that there was no swelling, only a small amount of bleeding in the brain and no fractures or large bruises common in most cases of Shaken Baby Syndrome.

The only factual dispute between the prosecution and the defense was the conclusion by the prosecutor's expert witness that Smith had shaken the baby so violently that the brain stem severed in a way that caused immediate death without the symptoms typical of Shaken Baby Syndrome. This conclusion could not be verified by an examination of the brain and there was no physical evidence to support this conclusion. Despite the lack of evidence, the jury agreed with the prosecution's theory and convicted Smith.

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The 9th Circuit concluded that, viewing only the evidence presented to the jury at trial in the light most favorable to the prosecution, no rational jury could find beyond a reasonable doubt that Smith had violently shaken the baby causing his death. As such, the state court's application of Jackson was unreasonable. Holding that nothing in Brown casts doubt on this conclusion, the 9th Circuit reinstated the opinion overturning the conviction as reported at 437 F.3d 884. ●

Save the Date

Register for Trial Skills College Online

February 4 – 5, 2011,
University of Oregon School of Law, Eugene

Trial Skills College features guest instructors Jeffery Robinson, Seattle, and Cynthia Roseberry, Executive Director, Federal Defenders of the Middle District of Georgia. This intensive two-day training will focus on opening statements, direct examination, cross-examination and closing. The college will significantly advance your skills and confidence as a trial lawyer, no matter your experience level. **Register by January 6, 2011.** Space is limited to 32 participants.

Complete program, details and registration here: https://www.ocdla.org/seminars/shop-seminar-2011-trialskills.shtml

Second National Parent Attorney Conference

July 13 – 14, 2011,
Pentagon City, VA

The National Project to Improve Representation of Parents Involved in the Child Welfare System and the **American Bar Association Center on Children and the Law** will host the second National Parent Attorney Conference in Pentagon City, VA – just outside of Washington D.C. July 13-14, 2011. The conference will focus on building advocacy skills as well as discussing policy and systemic reforms to better address the needs of parents and their children. Workshop proposals are being requested. For more information contact Mimi Laver at the ABA at: laverm@staff.abanet.org. ●

Find us on Facebook:
www.facebook.com/Youth-Rights-Justice-Attorneys-at-Law

General Resources

Advocating for Very Young Children in Foster Care

The **American Bar Association (ABA)** has released a new practice and policy brief: Advocating for Very Young Children in Dependency Proceedings: The Hallmarks of Effective Ethical Representation by Candice L. Maze. This brief, which is directed to attorneys representing children in dependency cases, posits the notion that: "Attorneys representing very young children can profoundly impact and influence the health, development and well-being of their clients during and beyond the court process." The brief provides important information on how very young children experience the Child Welfare System, focusing on entry, exits, length of stay and permanency. Available at: http://new.abanet.org/child/Pages/baby-health.aspx this policy brief is an indispensable tool for attorneys representing young children. The most recent ABA Child Law Practice – Vol. 29 No. 9 – includes an article by the same author focusing on some of the ethical dilemmas facing the attorney representing very young children: Representing Very Young Children – Ethical Consideration: Model Rule 4.2 Communicating with Represented Parties. Child Law Practice is available at: www.childlawpractice.org.

Recent Delinquency Research Supports Less Use of Incarceration

Several recent policy briefs and research reports support a harder look at the use of incarceration and formal delinquency sanctions:

- The Justice Policy Institute has issued a new report – The Costs of Confinement: Why Good Juvenile Policies Make Good Fiscal Sense. The Report finds that states spend approximately $5.7 billion each year incarcerating youth, even though the majority are held for non-violent offenses. The report shows that most youth can be safely supervised in the community through alternatives that cost substantially less than incarceration and could lower recidivism by up to 22%. To access the Report go to: http://www.justicepolicy.org/content-hmID=1811&smID=1581&ssmID=83.htm

  Editor's Note: As Jess Barton pointed out in a recent e-mail, the Oregon adult sentencing guidelines include an analogous "economy principle". (Felony Sentencing in Oregon sec. 1-1.4.1). In Missouri, judges are allowed to consider the costs of incarceration and the costs of alternatives to incarceration when making sentencing decisions. http://www.nytimes.com/2010/09/19/us/19judges.html?pagewanted=1&_r=2&hp

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- The National Juvenile Justice Network (NJJN) has announced findings from a longitudinal study on serious youth offenders which offers guidance for policy makers concerned with over-reliance on expensive youth incarceration. The Pathways to Desistance Study shows that:
  - Community based alternatives are as effective as institutional placements for curbing re-arrest for youth with serious offenses;
  - Most youth who commit serious felony offenses will stop offending, regardless of the intervention;
  - Longer stays in juvenile institutions do not decrease recidivism;
  - Institutional placement can actually raise the level of offending for some youth;
  - Substance abuse treatment can decrease recidivism; and
  - Aftercare services do make a difference.

For more information on the Pathways Study go to http://www.njjn.org/media/resources/public/resource_1575.pdf

- The Campbell Collaboration has performed a meta-analysis of 29 randomized and controlled studies over a 35 year period on the use of formal interventions by the juvenile justice system. The analysis concludes that formal interventions actually increase the likelihood of delinquency across the board and fail to control crime. Information about Formal System Processing of Juveniles: Effects on Delinquency can be accessed at: http://www.campbellcollaboration.org/library.php
- A National Council on Crime and Delinquency report: The Extravagance of Imprisonment Revisited, says that the nation could save $9.7 billion by utilizing alternatives to prisons and jails for low lever offenses. "The extravagance of incarceration that plagues the criminal justice system is also a major issue of juvenile justice" The report can be found at: http://nccd-crc.issuelab.org/research/listing/extravagance_of_imprisonment_revisited

Rules Governing Shackling

For practitioners challenging the unnecessary use of shackles on juveniles in Oregon courts, consideration might be given to negotiating a local court rule to restrict the practice. The Alaska Department of Administration Office of Public Advocacy has proposed a Delinquency Rule regarding the Use of Restraints on the Juvenile, which may be a useful model for a local court rule. The supporting memorandum from the Public Advocate's Office is available at: http://www.jrplaw.org/documents/ShacklingAK.pdf

Learn more about who we are and what we do at:
www.youthrightsjustice.org

DHS Proposes New Rules About Adoption Selection

On October 15, 2010, DHS gave notice of proposed rulemaking on a large number of rules governing the adoption selection and review process. JRP participated in the public hearing and submitted written comments. Of greatest concern were changes to the relative and current caretaker rules which would eliminate the possibility that a current caretaker would be considered as the adoptive home for a child if any relative were being considered. We complained that the rules had no exception or waiver provision and that:

> This prohibition[against considering the current caretaker] exists regardless of the length of the child's placement with the current caretaker, the strength of the child's bond, the degree of risk associated with a move and the degree of relationship between the child and the proposed relative placement. While it is certainly true that many children will benefit from a permanent placement with a person who meets the state's definition of "relative," others will receive a greater benefit remaining permanently with the family they have already come to think of as their own. Rules which prohibit the state from considering the individual needs of each child permanently committed to its care are bad public policy.

To read the full text of the comments go to: http://www.jrplaw.org/documents/adoptionrules.pdf

We Would Love to Hear From You

If you have any questions about who we are and what we do, please email Janeen Olsen at: JaneenO@jrplaw.org.

"The young, free to act on their initiative, can lead their elders in the direction of the unknown… The children, the young, must ask the questions that we would never think to ask, but enough trust must be re-established so that the elders will be permitted to work with them on the answers."

– *Margaret Mead*

Happy Holidays *from*

Youth, Rights & Justice
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Help us help youth.

We would love your financial support.

This year we're honored to be part of Willamette Week's 2010 Give!Guide. They are offering rewards based on the amount of contribution and a special raffle for donors ages 35 and under who contribute at least $10. To learn more, go to http://giveguide.oaktree.com/Welcome.aspx.

Knowledge Universe is also generously matching the first $3,000 in contributions.

To help us, please call (503) 232-2540.

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