// Juvenile Law Reader

Youth, Rights & Justice
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Volume 11, Issue 4 • Winter 2014

"Unequivocally, we find that Oregon's registration of young sex offenders adjudicated in juvenile court is deeply flawed."

— Portland City Club

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Portland City Club Finds Oregon's Juvenile Registry Laws "Deeply Flawed"

By Mark McKechnie, MSW, YRJ Executive Director

A study committee of the Portland City Club spent much of 2014 examining the issue of juvenile sex offender registration in Oregon. The committee was asked to examine this question: "Should the Oregon Legislature modify the process or requirements for including in the state's sex offender registry people who committed sex offenses while juveniles?"

The report describes the conclusions that the study committee made after an extensive review of available studies and other literature, as well as interviews with 17 witnesses from Oregon, including representatives of various interested groups, including state legislators, current and retired prosecutors, victims' advocates, law enforcement officers, judges, criminal defense attorneys, juvenile treatment, probation and corrections representatives and youth advocates. The committee concluded:

> "Unequivocally, we find that Oregon's registration of young sex offenders adjudicated in juvenile court is deeply flawed. Perhaps the greatest flaws are that (1) the law

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currently subjects juvenile offenders to lifetime registration and (2) does so before offenders receive, and hopefully respond to treatment. As we discuss in the Report, these flaws harm juvenile offenders and the public."

The report notes that the committee chose to focus only on youth who were adjudicated in juvenile court of a sex offense. They noted that it is also important to consider youth who are charged as adults for these offenses, but they thought that a re-examination of Measure 11 was a substantial and important topic deserving of a separate City Club study.

An executive summary and the full report can be found at: http://www.pdxcityclub.org/jsor. The final report provided important background about the history of registry laws in Oregon and elsewhere in the country:

"As a society, we have chosen to treat sex offenders differently from other types of offenders in an effort to protect vulnerable populations from sex abuse. No other crimes carry the possibility of lifetime registration with law enforcement. As the names of sex offender laws attest – Adam Walsh, Jacob Wetterling, Megan Kanka – many of them were passed in response to attacks on children.

Twenty years ago when Congress passed the first national legislation, our country was still just beginning to talk about sexual assault and abuse, a difficult conversation that continues today. Policymakers did not have the benefit of the extensive research that has since been done on sex crimes and offenders, especially those who offend as juveniles. With few facts available, policymakers legislated out of fear and made assumptions that time now allows us to test."

The report is clear, well-written and interesting to read, providing background on the origin and expansion of sex offender registry laws generally and the addition of juveniles to these requirements. The committee report focuses on Oregon's law and a history of changes it has made to adult and juvenile registry requirements. The committee noted that:

"Oregon is one of 38 states that include juvenile offenders in their sex offender registries, and one of only six that include juvenile offenders in the registry potentially for life. Approximately 3,000 people appear in the Oregon registry for offenses committed while they were juveniles and youth as young as eight have been included. Juvenile offenders have been included in the predatory designation since 1995, although witness testimony suggests that less than five juvenile offenders carried that designation as of 2013."

The committee also looked at the laws around consent, elements of sex crimes that are dependent upon the age of an identified victim and the fact that voluntary and consensual behaviors between minor children are often considered criminal because they are legally unable to consent to the behavior. The committee report stated:

"In Oregon, any time a person under the age of 12 engages in sexual conduct (other than alone), someone has committed a crime. If both individuals are under 12, both have. Voluntary (or consensual) sexual contact between minors who are over 12 is **not** criminal unless one minor is more than three years older than the other. If so, the older child

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Youth, Rights & Justice

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The Juvenile Law Reader is published six times a year by:

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Youth, Rights & Justice is dedicated to improving the lives of vulnerable children and families through legal representation and advocacy in the courts, legislature, schools and community. Initially a 1975 program of Multnomah County Legal Aid, YRJ became an independent 501 (c) (3) nonprofit children's law firm in 1985. YRJ was formerly known as the Juvenile Rights Project.

The Juvenile Law Reader is distributed electronically free of charge. It is partially funded by the Office of Public Defense Services.

Tax deductible donations are welcome and can be sent to the YRJ offices.

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has committed a sex crime. This means that if a 17-year-old girl has sex with her 14-year-old boyfriend and she is *one day* more than three years older than he is, then, even if the sex is completely voluntary on his part, she has committed the Class C Felony of Rape in the Third Degree and, if the case were pursued and adjudicated, must register as a sex offender, potentially for the rest of her life.

Some sex crimes can be committed by minors even if they are of the same age and acting voluntarily. For example, if two 17-year-olds voluntarily made a videotape of the two of them engaging in sexually explicit contact and then allowed anyone else to see the videotape, both would be guilty of Using a Child in a Display of Sexually Explicit Conduct, a felony sex crime. If the case were pursued and adjudicated in juvenile court [sic], both of them would have to register as sex offenders. The Oregon Criminal Code involving sex offenses is sufficiently complex that lawyers who practice criminal law have to refer to their statutes when reviewing age-based sex offenses. It is probably true to say that *no child* in Oregon understands them." [emphases in original]

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The report also recognized the seriousness of violent, forcible and unwanted sexual contact and the fact that children are disproportionately victims of these offenses. The report highlights its conclusion that "Sexual abuse and assault are serious crimes that can have a lifetime impact on the victim. Sex offenders should be held accountable for their actions. And, if possible, steps should be taken to reduce the risk of re-offense."

The committee was clear that juveniles adjudicated of these offenses should be held accountable and some should face serious consequences. The committee considered access to treatment and rehabilitation to be of paramount importance, as well, and they ultimately concluded that current registry requirements for juveniles in Oregon interfere with the process of rehabilitation and reintegration into the community for juvenile offenders.

The report discusses the latest research on adolescent brain development and the fact that young people are naturally impulsive and often fail to understand or appreciate the con

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sequences of their actions. Amidst extensive discussions of these and other issues, the report committee highlighted several conclusions, including the following:

- "Offenses committed as a juvenile do not necessarily indicate a lifetime propensity for victimizing others. Brain development research demonstrates that impulse control, reasoning and the ability to exercise judgment are developing during adolescence. Treatment during that time can effectively change behavior."
- "Recidivism rates for juvenile sex offenders as a group, are incredibly low. While some offenders pose a high risk for re-offense, the vast majority of juvenile offenders do not. Risk assessment tools for juveniles are imperfect, but evolving, and can offer sufficient guidance for a court to determine the risk a particular youth poses to the community"
- "Sex offender registration often results in juvenile offenders facing barriers to education, housing and employment, as well as community institutions that help them reintegrate into the community. The purpose of registration is to protect public safety, and not to punish offenders. And yet, your committee believes the current policy of registering all juveniles adjudicated of felony sex crimes may actually work against the public safety by alienating rather than rehabilitating youth fully capable of rehabilitation."
- "The complexity of the legal system and financial costs pose significant barriers to juvenile sex offenders receiving relief from registration despite their eligibility."
- "The inflexible nature of the current registration system sometimes leads to underreporting, and sometimes discourages prosecutors from bringing charges they otherwise would bring."
- "Regulations governing release of information are confusing and rely on the discretion and judgment of the person responding to the request, thus creating opportunities for inconsistent application of the rules."

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As a result of their findings, the majority of the committee made the following recommendations:

"Recommendation #1: The Oregon Legislature should amend state law to require that a court's decision to subject a juvenile sex offender to registration occurs when the offender's supervision and treatment ends.

Recommendation #2: The Oregon Legislature should amend state law to require that (a) the court that subjects a juvenile sex offender to registration also determine when the offender may seek relief, which must be no more than five years after registration is imposed, and (b) if the offender is denied relief, the offender has the right to periodically request relief.

Recommendation #3: The Oregon Legislature should amend state law to make the process for obtaining relief from registration more accessible to juvenile sex offenders.

Recommendation #4: The Oregon State Police should establish clear guidelines for the release of information about juvenile sex offenders to the public and should keep records of these requests to better evaluate the effectiveness of the registry."

It was noteworthy, as well, that the minority report of the committee did not argue for the status quo. Rather, the minority report recommended, "The Oregon Legislature should abolish juvenile sex offender registration." The minority report cited much of the same research as the majority did and noted that the low rate of re-offense by juveniles and the lack of evidence of any public safety benefit provided by the registration of juveniles argued for the elimination of the registry. In a meeting of Club Members who heard the reports from both the majority and the minority members of the committee, the assembled membership ultimately decided to advance the majority report and recommendations to the full City Club membership for approval.

The City Club announced the results of the vote on November 18, 2014. Among current City Club members who voted, 96% voted to adopt the findings and recommendations of the majority report. The full report, executive summary and videos of the City Club debate and deliberations can be found online at: http://www.pdxcityclub.org/jsor. ●

Achieving Synergy: How Multidisciplinary Representation Helps Parents Succeed

By Amy Miller, Deputy General Counsel, Office of Public Defense Services

Synergy: the increased effectiveness that results when two or more people or businesses work together

Parents in the child welfare system need to be heard. In a recent New York Times Article[1], Nicole Goodwin shares her story. A young Iraq war veteran, Ms. Goodwin, battles and eventually succumbs to deep depression upon her return home. Her worsening condition leads to charges of child neglect and eventually removal of her daughter. Ultimately, Ms. Goodwin was able to overcome her difficulties and successfully reunite with her daughter. She credits the court and her legal representation team for listening, giving her a voice, and empowering her to succeed.

Meaningful participation by parents and their attorneys is essential to a well-functioning juvenile dependency court system. High quality legal representation for parents, where attorneys have adequate time to devote to their client's case, and parents have access to independent social workers as part of their legal team, has been shown to reduce the time children spend in foster care.[2] Across the country, legal advocates for parents are designing and implementing data-driven programs which consistently prove that high-quality legal representation for parents is also what's best for children.[3] In New York City, the Center for Family Representation's team model for parent representation has been credited with reducing the length of stay for children in foster care and increasing the number of safe family reunifications.[4] Washington State's Parent Representation Program, which includes caseload limits for attorneys and social workers for parents, has been shown to increase reunifications by 36%.[5] Multidisciplinary parent representation programs underway in Michigan, Colorado and Vermont have similar results.[6]

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Parents in the child welfare system need a strong voice and a connection to the court process because early involvement of a parent in their child welfare case is critical to reunification. Indeed, the direction a case takes early on often predicts whether the child will return home.[7] Effective attorneys can ensure parental rights are protected and that a parent's voice is heard in court. Parents need advocacy outside of court as well. They benefit greatly from a knowledgeable, trusted, and experienced social worker who will help them find and engage in the right services—those that comply with the court's order and that will allow them to develop the skills needed to remediate the bases for child welfare involvement.[8] However, parents face the enormous, and in some cases insurmountable, challenge of developing a working and trusting relationship with the same agency that removed their children in the first place.

Unfortunately, without a strong

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connection to a capable and sympathetic social worker, parents often struggle to navigate a complicated system in order to obtain, complete, and learn from the services ordered by the court.[9] Child-welfare-involved-parents are under substantial stress, may face mental health and addiction challenges, and can be overwhelmed by the requirements imposed on them by the court. It's not a surprise that these parents become fatigued, disenchanted and wonder if their hard work will ever pay off. According to Michael Heard, Social Services Manager for the Washington State Parent Representation Program, "This is where parent social workers come in. They are most effective in cases where parents need extra support and encouragement to stay engaged. Social workers for parents help the parents buy into and develop trust in the court process. Parents who believe in the system stay engaged in the system." Too often, agency referrals are provided to parents as a standard menu of services. Additional advocacy is needed to find flexible and creative services to engage parents to move more rapidly towards reunification.[10]

One question policy makers ask is whether parent social workers are duplicating the efforts of the child welfare agency. The answer to this question is no. Social workers for parents have a unique role as part of the parent's advocacy team. Because they work with the parent's attorney, their primary responsibility is to the parent client.[11] Parent clients know that their conversations are confidential, won't be revealed to anyone else besides the attorney, and that the social worker is on their side.[12] As a result, parents can share information with their social worker without fear of the agency bringing the parent back to court or changing the safety plan. For example, if a parent misses a service appointment, the parent and social worker can work together to develop a plan to get back on track and then present the plan to the court.[13]

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Through the Office of Public Defense Services Parent Child Representation Program (PCRP), Oregon joined the national movement to promote high quality legal representation in juvenile dependency cases. Oregon's new pilot program, which started in Linn and Yamhill Counties in August 2014, includes caseload limits, additional training and oversight requirements, and a multi-disciplinary approach to representation. Case managers, who fulfill a function similar to a social worker, are working closely with attorneys to assess and address client needs, motivate parents, develop alternative safety and visitation plans, and identify solutions to expedite permanency for children.

Although the PCRP is in its infancy, significant improvement is underway. Parents and children are now consistently represented at initial shelter hearings by attorneys who have access to discovery and, in many cases, meet with their clients before the hearings. Case managers are available to work with clients from the moment the attorney is appointed. This is crucial because even a moderate increase in parental engagement with the child welfare system is associated with a 47% increase in the rate of reunification.[14] The findings of a National Council of Juvenile and Family Court Judges research project further emphasizes the importance of early involvement in the child welfare system. Families are more likely to be reunified when parents, mothers in particular, and

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attorneys are present and involved in early stage hearings.[15]

When lawyers and social workers collaborate to help parents succeed in reunifying with their children, the entire child welfare system benefits. A number of team representation programs substantiate what has been shown through research and study: that social workers for child-welfare-involved-parents, working as part of a team approach to legal representation, help parents succeed.

[1] Goodwin, Why is this happening in your life? Parents in the Child Welfare System Need to be Heard, The New York Times, http://parenting.blogs.nytimes.com/2014/11/20/why-is-this-happening-in-your-life-parents-in-the-child-welfare-system-need-to-be-heard/?_r=0 (November 20, 2014).

[2] Courtney, Hook & Orme, Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes, Partners for Our Children (Discussion Paper Vol. 1(1)) (2011).

[3] The ABA Center on Children and the Law identifies fourteen different states which have implemented programs aimed at improving parent representation in juvenile court cases. Summary of Parent Representation Models, ABA Center on Children and the Law, http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/summary_parentrep_model.authcheckdam.pdf (2009).

[4] The Center for Family Representation, 2013 Report to the Community (2013).

[5] American Bar Association, ABA National Project to Improve Representation for Parents Fact Sheet, http://schubert.case.edu/files/2014/02/ABAFactsheet.pdf.

[6] Id. Buckholz, When an Attorney's Best Efforts are Not Enough: The Multidisciplinary Approach to Parent Representation, http://vtprc.org/files/buckholz_article2.pdf, Vermont Parent Representation Center (2012).

[7] Cohen and Cortese, Cornerstone Adovacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families, ABA Child Law Practice (May 2009).

[8] Buckholz, When an Attorney's Best Efforts are Not Enough: The Multidisciplinary Approach to Parent Representation, http://vtprc.org/files/buckholz_article2.pdf, Vermont Parent Representation Center (2012).

[9] Id.

[10] See FN 7.

[11] Pilnik, Parents' Social Workers Help Parents Succeed, ABA Child Law Practice 27(9) (November 2008).

[12] Regulated social workers, like attorneys, are mandatory reporters of child abuse under ORS 419B.010.

[13] See FN 11.

[14] Marcenko, Newby, Mienko, and Courtney, Family Reunification in Washington State: Which children go home and how long does it take? Partners for our children (August 2011).

[15] National Council of Juvenile and Family Court Judges, Effects of Parental and Attorney Involvement on Reunification in Juvenile Dependency Cases, PPCD Research Snapshot, http://www.ncjfcj.org/sites/default/files/Parental%20Involvement%20One%20Pager_Final_0.pdf (August 2011).

Clackamas District Attorney Launches Broad Attack On Oregon Juvenile System

By Mark McKechnie, MSW, YRJ Executive Director

Clackamas District Attorney John Foote and retired Deputy District Attorney Charles French issued "Juvenile Justice in Oregon: An Analysis of the Performance of Oregon's Juvenile Justice System and Specific Recommendations for Improvements" on September 29, 2014. The document asserts that Oregon's juvenile justice system is failing relative to other states in the U.S., particularly in the areas of juvenile property crime and drug use. The authors credit a 68% drop in violent juvenile crime to policy changes that waive some juveniles 15 and older into the adult system. The report fails to note that 95% of juvenile violent offenses are still addressed in the juvenile, rather than in the adult, court system. The French-Foote document can be found on the Clackamas District Attorney's web site: http://www.clackamas.us/da/documents/JuvenileJusticeinOregon20140929.pdf

The document was quickly criticized by local juvenile justice professionals and national experts, citing misrepresentation or misinterpretation of juvenile justice data. One critique was published in an Op-Ed by Dick Mendel, entitled: Glaring Flaws and Brazen Biases Riddle Oregon JJ Study." Mendel faults French and Foote for their omission of juvenile data from 1995-2001, a period during which arrest rates of juveniles in Oregon and Multnomah County decreased at much greater rates compared to national trends in terms of violent index crimes, property index crimes and total juvenile arrest rates. Mendel's Op-Ed can be found on the Juvenile Justice Information Exchange web site: http://jjie.org/glaring-flaws-and-brazen-biases-riddle-oregon-jj-study/107662/

Multnomah County and the Annie E. Casey Foundations Juvenile Detention Alternatives Initiative (JDAI) were targeted for particular criticism

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by Foote and French. According to the Annie E. Casey Foundation, JDAI is present in 300 jurisdictions nationally and will be active in 41 states and the District of Columbia by the end of 2015. The JDAI promotes alternatives to the use of county and state detention centers for juveniles whenever possible, citing research that youth placed in juvenile facilities were 38 times more likely to be arrested as adults.

Officials in Multnomah County contacted Melissa Sickmund, Ph.D., the Director of the National Center for Juvenile Justice, the research division of the National Council of Juvenile and Family Court Judges to review the Foote/French document. Her analysis, "Review and Critique of Juvenile Justice in Oregon," found data errors and misrepresentations, as well as faulty logic in the French-Foote report. She also highlighted differences between the prosecutors' arguments and prevailing national goals and beliefs regarding effective juvenile justice practices. Her analysis can be found here: http://www.youthrightsjustice.org/media/3444/ncjj-analysis-of-or-juv-system.pdf

In response to the document and its criticisms of Multnomah County, Presiding Judge Nan Waller has convened a work group to examine the local juvenile justice system as a whole and identify areas of strength and areas needing improvement. The group includes leaders from across the county and across multiple

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systems. The announcement of the work group said:

> "Announcement of Formation of Juvenile Justice Task Force
>
> Multnomah County has a long tradition of collaborating on public safety issues, including our juvenile justice system. We are and have been unwavering in our commitment to positive outcomes for our children and young people involved in the juvenile justice system and to assuring the safety of our community. We are committed to system improvement through the use of best practices and looking to reliable data to inform our decision making. A recent report commissioned by John Foote, District Attorney in Clackamas County, raises questions about how well the juvenile justice system in Multnomah County is currently functioning. We welcome the opportunity to consider these issues in an inclusive, multi-disciplinary, and rigorous assessment of our current practices. We will be convening a task force to begin this assessment. In keeping with the Multnomah County tradition, this group will be a collaboration that includes all key juvenile justice system partners and stakeholders."

The signers of the statement were:

- Nan Waller, Presiding Judge Multnomah County Circuit Court
- Deborah Kafoury, Chair Multnomah County Board of Commissioners
- Maureen McKnight, Chief Family Judge Multnomah County Circuit Court
- Rod Underhill, Multnomah County District Attorney
- Mike Reese, Chief, Portland Police Bureau
- Scott Taylor, Director, Multnomah County Department of Community Justice
- Christina McMahan, Multnomah County Juvenile Services Division Director
- Abbey Stamp, Executive Director, Multnomah County Local Public Safety Coordinating Council
- Suzanne Hayden, Executive Director, Citizen's Crime Commission
- Lane Borg, Executive Director, Metropolitan Public Defender's Office
- Mark McKechnie, Executive Director, Youth, Rights & Justice
- Meg Garvin, Executive Director, National Crime Victim Law Institute

The work group began meeting on October 13, 2014. In addition to

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those listed above, representatives from a number of governmental and non-governmental offices and organizations are participating in the work group, including: Local Public Safety Coordinating Council; Multnomah Family and Juvenile Court; Rosemary Anderson High School/POIC; City of Portland; Portland Public Schools; Multnomah County Department of Community Justice and its Juvenile Services Division; Latino Network; Multnomah County Chair's and Commissioners' Offices; District Attorney's Office; Portland Police Bureau; Gresham Police Department; Troutdale Police Department; Fairview Police Department; Multnomah Sherriff's Office; Metropolitan Public Defender; Volunteers of America; Multnomah County Mental Health Division; Oregon Youth Authority; Citizen's Crime Commission; Oregon DHS; National Crime Victim Law Institute; East County School Districts; and Youth Villages.

District Attorney Foote and Mr. French presented their report to the work group. Mr. French has also indicated that he will seek legislative changes in 2015, based upon his report's findings and recommendations. One recommendation is a redefinition of recidivism that includes arrests, in addition to convictions or adjudications. Another recommendation is to require judges to include a minimum period of confinement during disposition when the judges commit youth to Oregon Youth Authority correctional facilities. During this minimum period, OYA would not be permitted to parole or otherwise release youth back into the community. ●

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ICE Parental Interests Directive

By Christa Obold Eshelman, YRJ Attorney

In 2013, U.S. Immigration and Customs Enforcement (ICE) issued a Parental Interests Directive.[1] It delineates several ways that ICE should consider and facilitate the parenting interests of people who are involved in immigration enforcement proceedings.

1. First, each ICE field office is to designate a Point of Contact for Parental Rights who is responsible to address inquiries regarding parental issues for detainees.[2] The field office handling Oregon and Washington detainees is the Seattle office: Seattle.Outreach@ice.dhs.gov. Locate a detained parent online at https://locator.ice.gov/odls/homePage.do . More information on how to initiate a parental rights request can be found on the ICE website at the following link: http://www.ice.gov/parental-interest-faq.

2. As one factor in its prosecutorial discretion in any stage of an immigration proceeding, ICE is to consider whether the person is a parent or guardian of a U.S. citizen or lawful permanent resident child, or is the primary caretaker of any minor. Prosecutorial discretion includes whether to detain a parent, and whether to prosecute a parent for immigration violations at all.[3]

3. ICE is mandated to try to place a detained parent as close as possible to their children or location of custody or child welfare proceedings.[4] For people from Oregon who are not released during the pendency

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of their removal proceedings, the Tacoma Northwest Detention Center is the default location. However, women are sometimes placed at NORCOR[5] in The Dalles; and at times, Columbia County jail beds have been used by ICE[6], so some advocacy to keep detained parents in Oregon may be possible.

4. Subject to distance, staffing, and security constraints, ICE should transport detained parents to required child welfare or custody proceedings. If impracticable, ICE should work with parties to arrange an alternative mode of participation, such as video- or tele-conferencing.[7]

5. Visitation with children, if mandated by a court or child welfare agency, should be facilitated by ICE at the detention center. In-person visitation is the preferred mode, but video or telephone visits are alternatives.[8]

6. ICE is to accommodate parents' efforts to make arrangements for their minor children, if the parent is to be deported. This includes giving the parents access to necessary persons, including counsel, family may provide a parent's itinerary ahead of time so that the parent can coordinate travel plans for his or her children.[9]

7. Finally, a parent who has already been deported may be given permission by ICE to return to the United States solely for the purpose of participating in "a hearing or hearings related to his or her termination of parental or legal guardianship rights," if a court has determined that the parent must be physically present for the hearings.[10]

An attorney, caseworker, judge, or other person can contact ICE to advocate for family interests.[11] Key to many of the requests is providing a relevant order from the juvenile or family court; for example, as proof of the existence of child custody/welfare proceedings, and the necessity of visitation or participation in hearings. Because juvenile court and Oregon Department of Human Services records are confidential, advocates should make sure they are complying with the restrictions of ORS 409.225 and ORS 419A.255 prior to releasing any information from the case to ICE.

Even when disclosure is permissible, care should be taken regarding what information is provided to ICE. Any information ICE receives about the parent could be used against the parent in his or her deportation proceedings. Very limited court findings and orders likely should be drafted for the explicit purpose of disclosure to ICE for facilitation of family rights.

[1]The full text of the Parental Interests Directive can be found at the following ICE website: http://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf.

[2]U.S. Immigration & Customs Enforcement, 11064.1: Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities, 5.1 (2013) [hereinafter Parental Interests Directive].

[3]*Id.* at 5.2; *Applying the ICE Parental Interests Directive to Child Welfare Cases*, ABA Child Welfare and Immigration Project, Immigrant Legal Resource Center, Vol. 33, No. 10 (Oct. 2014).

[4]Parental Interests Directive at 5.3.

[5]Northern Oregon Regional Correctional Facilities

[6]Interview with Anna Ciesielski, Oregon Immigration Group, Nov. 17, 2014.

[7]*Id.* at 5.4.

[8]*Id.* at 5.5.

[9]*Id* at 5.6.

[10]*Id.* at 5.7.

[11]*Id* at 5.1. ●

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Juvenile Law Resource Center

Conditions for Return: DHS Policy, the Juvenile Code and Case Law

By Julie H. McFarlane, YRJ Supervising Attorney and Jason Pierson, YRJ Law Clerk

Background

The Oregon Safety Model (OSM) was first rolled out in 2007 to provide a practice model for caseworkers that requires child safety assessment and management at all stages of Oregon child welfare cases. The Department of Human Services (DHS) is presently updating the OSM and is educating staff and community partners about these updates in the "OSM Refresh". The OSM and the changes that have come with the "Refresh" are largely found in *Child Welfare Policies, Oregon Administrative Rules and Protocols*[i], the *DHS Staff Tools for Child Welfare – Safety Model Training*[ii], and the *DHS Child Welfare , Procedure Manual*[iii]. More recently, DHS is rolling out Differential Response (DR) is some Oregon Counties. DR focuses on pre-removal intervention with families and is designed to reduce removals.

Overall, the OSM, when correctly applied provides, in these authors' opinions, a significant improvement in the guiding principles of Oregon child welfare practice by requiring improvements in information gathering about child welfare involved families and the application of a more rigorous, logical, sequential and systematic approach to the decisions that must be made in these cases. These rules and policies, while governing DHS casework practice, are also highly relevant to the decisions made by judges in juvenile dependency cases and the work of attorneys in advocating for specific outcomes for their clients.[iv] Gaining a working knowledge of the entire OSM and the interplay between the OSM and the statutes and case law to which the juvenile court must adhere is critical to zealous advocacy in these cases. This memorandum addresses the interplay of the OSM and the Oregon dependency statutes in the context of "conditions for return".[v]

I.Conditions for Return – Rule and Policy Overview

OAR 413-040-0005 (6) defines "Conditions for return" as a: "written statement of the specific behaviors, conditions, or circumstances that must exist within a child's home before a child can safely return and remain in the home with an in-home ongoing safety plan." DHS develops the conditions for return during the creation of the ongoing safety plan for the child and documents the conditions for return in the case plan.[vi] Conditions for return should not be confused with expected outcomes, "Expected Outcomes" are the goals for change that demonstrate that the child will remain safe in the care of the parent and lead to termination of wardship and temporary commitment to DHS.[vii]

The groundwork for the conditions for return is done prior to the completion of the case plan which is due 30 days after removal. The OSM not only details specific activities of the caseworker in determining the conditions for return, but also shifts the case planning focus from the incident(s) that brought the child into care to the individual characteristics of the child (child vulnerability) and the parents (protective capacities) in the context of the threats of danger in the family.

Once the conditions for return have been crafted, DHS must make reasonable efforts to reduce the stay of the child in substitute care, and reunify the child with the parents

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whenever possible.[viii] DHS is also responsible for contacting and communicating with each parent through monthly face-to-face meetings regarding the progress made toward reuniting them with their child through the least intrusive intervention possible.[ix]

The OAR requires the following conditions to be met before DHS will recommend return of the child to her parents with a safety plan:

- The conditions for return in the case plan have been met;
- The identified safety threats can be managed with an ongoing safety plan;
- The parents or guardians are willing and able to accept responsibility for the care of the child or young adult with an ongoing safety plan;
- The parents or guardians are willing and able to continue participating in case plan services;
- Service providers who are currently working with the child, young adult, parents or guardians, and other involved persons including the child or young adult's CASA and attorneys have been informed, in writing, of the plan to return the child or young adult with an in-home ongoing safety plan; and
- No safety concerns for the child or young adult are raised in the caseworker's review of criminal history records and child welfare protective services records of all persons currently residing in a parent or guardian's home.[x]

The OSM further explains that DHS must determine the conditions that must exist prior to the return of the child to the parents by taking the following steps:

1. Thinking about the identified safety threats to consider options;
2. Developing a detailed understanding as to why an in-home plan will not work at this time;
3. Determining what would manage child safety with an in-home safety plan;
4. Clearly communicating the conditions for return to everyone involved, most notably the child's parents;
5. Communicating Conditions for Return to the court, attorneys, CASA, Tribe(s), etc. through regular court reports, case plan reviews, discussions, and other forms of communication; and
6. Documenting information about the conditions for return in the Child Welfare Case Plan and describe the following:
    a. The specific behaviors, conditions or circumstances that must exist before a child can return to parents' home with an in-home ongoing safety plan; and
    b. The actions and time requirements of all participants in the in-home on-going safety plan.[xi]

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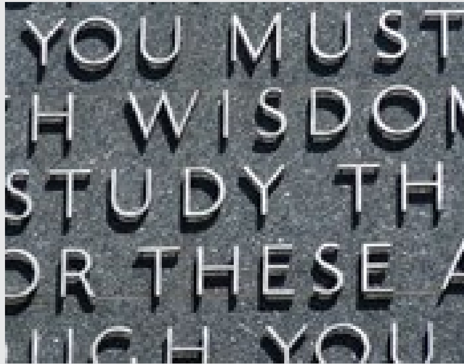

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The case plan and the conditions for return are not static and inflexible, as the on-going case plan must always ensure the safety of the child by implementing the least intrusive means necessary.[xii] When reviewing the case plan, DHS must document the elimination or management of identified safety threats, and an assessment of parents' progress toward the conditions for return.[xiii] The OSM states that "safety threats do not have to be totally eradicated to manage the child's safety," and "parents do not necessarily have to demonstrate sustained change for children to return to the parents' home."[xiv]

These conditions for return can be overridden by a court as discussed in more detail below.[xv] If the court orders the return of the child to the parents' home, DHS must develop an in-home safety plan as soon as practicable, but no later than seven days following the court order.[xvi]

II. Return of Child – Statutory Provisions

Through-out the stages of the court process, the court must determine whether to return the child to her home. The juvenile court has exclusive original jurisdiction over children who come to the attention of the State and who meet jurisdictional criteria, including those whose "condition or circumstances are such as to endanger their welfare or the welfare of others."[xvii] However, "[i]t is the policy of the State of Oregon…to offer appropriate reunification services to parents and guardians to allow them the opportunity to adjust their circumstances, conduct or condition to make it possible for the child to safely return home... [and] there is a strong preference that children live in their own homes with their families."[xviii]

A. The Pre-Jurisdictional Stage

Although conditions for return have not been required to be developed by DHS at the time of the initial removal and shelter hearing, they may well be available for subsequent shelter hearings or settlement hearings. The safety analysis that Child Protective Services (CPS) caseworkers perform in determining whether to remove a child forms the basis for the later development of the conditions for return. While the safety analysis vocabulary differs from the vocabulary of the statutory provisions, the safety analysis can help provide information and analysis that the juvenile court needs to reach the decisions and findings it must make.

1. Statutory Provisions Pre-Jurisdiction

ORS 419B.150 (1) allows DHS to take a child into protective custody when the child's condition or surroundings reasonably appear to be such as to jeopardize the child's welfare, when the juvenile court has ordered that the child be taken into protective custody or when it reasonably appears that the child has run away from home. If an order is sought to take the child into custody, it must be based on an affidavit that describes the facts and circumstances, why protective custody is in the best interests of the child and the reasonable or active efforts made to eliminate the need for protective custody.[xix]

A shelter hearing must be held within 24 hours.[xx] At the initial shelter hearing and any subsequent review, the child and parents are entitled to an evidentiary hearing to determine whether the child "can be returned home without further danger of suffering physical injury or emotional

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harm, endangering or harming others or not remaining within the reach of the court process prior to adjudication."[xxi] At this shelter hearing or subsequent review, the juvenile court must make written findings as to whether DHS has made reasonable or active efforts to prevent or eliminate the need for removal.[xxii] In determining whether to remove the child, or continue the child out of home, the court, considering the child's health and safety as paramount, must determine whether removal is in the best interests of the child and whether provision of reasonable services can prevent or eliminate the need to separate the family.[xxiii]

In *State ex rel. SOSCF v. Frazier*[xxiv], the Oregon Court of Appeals held that the type and sufficiency of efforts that DHS is required to make depends on the particular circumstances of the family and that the trial court must consider services provided before the state took custody of the child and services provided immediately after the removal of the child.[xxv] Further, the juvenile court must assess for each parent, individually, the reasonableness of the efforts by DHS to prevent or eliminate the need for removal of the child from each parent's home.[xxvi]

2. The OSM Interplay Pre-Jurisdiction

Thus, in the pre-jurisdiction stage, the juvenile court is making decisions concerning return, best interests and reasonable efforts – all of which interplay with relevant OSM requirements.

a. The Return Decision – OSM Safety Analysis

Pursuant to the OSM, DHS must be able to articulate either a present danger safety threat, or an impending danger safety threat for a child to be removed from her family.[xxvii] To determine that there is a present danger safety threat to the child, DHS must be able to conclude that the danger is immediate, significant, and clearly observable.[xxviii] The OSM provides further guidance in defining the terms "immediate", "significant", and "clearly observable." In short, these terms mean that the caseworker can see what is happening right before her eyes; that the behavior, condition or circumstance is onerous, vivid, impressive and notable; and that the behavior, conditions or circumstances are totally transparent; requiring no interpretation by the caseworker.[xxix] The OSM provides a non-exclusive list of present danger safety threats.[xxx]

The OAR also requires the caseworker to apply the "safety threshold" criteria to determine whether an impending danger safety threat exists.[xxxi] Safety threshold is defined in OAR 413-015-0115(40) as "the point at which family behaviors, conditions, or circumstances are manifested in such a way that they are beyond being risk influences and have become an impending danger safety threat." It further provides the following five criteria that the behaviors, conditions, or circumstances must meet: imminent, out of control, affect a vulnerable child, specific and observable, and have potential to cause severe harm to a child.

The OSM articulates 16 inclusive impending safety threats, one of which must be identified if a referral to the department is identified as founded.[xxxii] If an impending danger safety threat is identified, DHS must analyze the information by describing the following:

- The length of time the family behaviors, conditions, or circumstances have posed a threat to child safety;
- The frequency with which the family behaviors, conditions, or circumstances pose a threat to child safety;

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- The predictability of the family behaviors, conditions, or circumstances that pose a threat to child safety;
- Specific times (during the day or week), if any, that require special attention due to the way the family behaviors, conditions, or circumstances are occurring
- Identified individual or family behaviors, conditions, or circumstances that prevent a parent or caregiver from adequately functioning in their primary parenting role; and
- Anything else that is associated with, occurs at the same time as, or influences the family[xxxiii].

If it is determined that a safety threat exists, DHS must next analyze whether the child is vulnerable,[xxxiv] and whether the parents have sufficient protective capacities to allow the child to safely remain in the home.[xxxv] Then DHS develops a safety plan for the child.[xxxvi] An in-home safety plan can allow a child to remain in or be returned safely to the home.

b.Reasonable Efforts – Services

All of the activities and requirements of the OSM also interplay with the juvenile court's reasonable efforts determination at the pre-jurisdiction stage. The OSM states that a "rigorous" application of the standards in the OSM is sufficient to comply with the reasonable efforts standard imposed by the ORS and the courts.[xxxvii] The juvenile court may question whether reasonable or active efforts have been made if the caseworker has failed to follow the policies and procedures of the OSM that apply to a particular family given who its members are and the condition and situation in which they find themselves. Thus, it is important for practitioners to examine the work done by the caseworker, applying the OSM, to determine whether reasonable or active efforts have been made.

(The full article and all endnotes can be viewed here.) ●

Juvenile Dependency Issues Pending in the Appellate Courts

By Angela Sherbo, Supervising Attorney, Youth Rights & Justice and Inge Wells, Assistant Attorney-in-Charge, Appellate Division, Oregon Department of Justice

The following article is the first in what the editors hope will be a regular column authored by various appellate attorneys to help trial lawyers keep informed about cases that *haven't* been decided yet. We hope this will be a useful adjunct to the summary of recently decided cases.

Several cases presently under advisement in the Oregon Court of Appeals raise claims of inadequate assistance of counsel. Those cases raise two issues: (1) whether inadequate-assistance claims may be raised on direct appeal; and (2) what actions (or inactions) of trial counsel in dependency and termination of parental rights cases amount to inadequate assistance of counsel.

In *State ex rel Juv. Dept. v. Geist*, 310 Or 176, 796 P2d 1193 (1990), the Supreme Court held that parents could raise claims of inadequate assistance of counsel on direct appeal, in part because of the absence of "statutes providing otherwise[.]" *Id.* at 187. In the cases pending before the court, the state questions whether that holding in *Geist* continues to apply in light of the enactment of ORS 419B.923. That statute, which was enacted in 2001, allows a parent to move to set aside "any order or judgment" made by the juvenile court for reasons including but not limited to excusable neglect or newly discovered evidence. ORS 419B.923(1). *See Dept. of Human Services v. A.D.G.,* 260 Or App 525, 539, 317 P3d 950 (2014) ("the legislature intended to provide a juvenile court with broad authority under ORS 419B.923(1) to modify or set aside a judgment or order").

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In *Dept. of Human Services. v. H.H.,* 266 Or App 196, 206, 337 P3d 925 (2014) the Court of Appeals assumed "without deciding" that the opportunity for a party to seek to set aside a judgment based on a claim of inadequate assistance of counsel under ORS 419B.923 does not foreclose the appellate court from considering such a claim in the first instance or remanding for evidentiary development of the claim. But, citing the Geist caution that a court should authorize an evidentiary hearing only where a parent raises a substantial question about the witness the parent alleges should have been called, the court declined to do so in this case. The court explained

> "Before authorizing an evidentiary hearing, a court doubtless would require a threshold showing of specific allegations, including the names of witnesses to be called, the expected substance of their testimony, and an explanation of how that testimony would show that trial counsel was inadequate."

H.H., 266 Or App at 206.

Questions that continue to arise include whether, as the state argues, a parent should be required to raise claims of inadequate assistance of trial counsel in an ORS 419B.923 motion, so that an evidentiary record may be developed. And if so, whether a parent, as a practical matter, will be entitled to obtain substitute trial counsel for that purpose. Another question is whether the opportunity to file a motion under ORS 419B.923 is sufficient to protect a parent's due process right to a fundamentally fair proceeding.

On the merits of what constitutes inadequate assistance, one issue for trial counsel involves the relatively common situation where a client fails to appear. What is the attorney's responsibility to move for a continuance and, if that motion is denied, participate in the hearing? How should ORS 419B.819(8), which says that if a parent has been summoned, "the parent may not appear through the parent's attorney" be reconciled with ORS 419B.875(2), which establishes the rights of parties, including the right to appear with counsel? Is the attorney inadequate if he or she asks to be excused from the proceeding or asks for leave to withdraw as counsel? And if an attorney does not participate in a *prima facie* hearing, by, for example, objecting to inadmissible testimony and exhibits, how should the court evaluate whether a parent was prejudiced?

Another issue arises where a parent appears, as a result of a mental or physical disability or impairment, to "lack substantial capacity either to understand the nature and consequences of the proceeding or to give the direction and assistance to the parent's attorney on decisions the parent must make in the proceeding." ORS 419B.231. In that instance, the court, "on its own motion, or on the written or oral motion of a party in the proceeding, may appoint a guardian ad litem for a parent." May an attorney for that parent initiate the process of having a guardian ad litem (GAL) appointed for her own client?[1] Or, has the attorney provided inadequate assistance if she does so? Finally, in cases where a GAL has been appointed, can the attorney's actions thereafter, including not asking to have the GAL removed if a parent's circumstances have arguably changed, constitute inadequate assistance of counsel?

Trial counsel for all parties should be alert to these issues, contact their appellate experts if necessary and watch the Court of Appeals website for the latest juvenile decisions.

1For further guidance on this issue, lawyers with a client who may lack full capacity should consult ORPC 1.14 and OSB Formal Ethics Op No 2005-159. ●

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CASE SUMMARIES

By Caitlin Mitchell, YRJ Attorney and Jason Pierson, YRJ Law Clerk

RE: In the Matter of S.F. – H; Dept. of Human Services v. H.H, 266 Or App ___, ___ P.3d ___ (October 8, 2014)
Opinion written by Lagesen; Out of Multnomah Co.

Mother and Father appealed from a juvenile court judgment taking jurisdiction over their two sons, S and H. The grounds for jurisdiction were that (1) father caused a nonaccidental injury to H that amounted to child abuse; and (2) mother refused to acknowledge father's role in the injury to H, and was therefore unable to protect her children. The parents argued that the court erred in determining that H's injury was nonaccidental and that the children's circumstances endangered them. The parents also argued that trial counsel was inadequate and requested an evidentiary hearing on that issue.

The Court of Appeals declined parents' request for a de novo review, reviewing the juvenile court's findings to determine whether they were supported by any evidence in the record. On parents' first claim, the court found that the nature of H's injuries and the facts surrounding them—in particular, that H broke his femur while in father's care, that H did not sustain injuries while father was away for three months, and that H was again injured shortly after father returned home—were sufficient to support the juvenile court's finding that the injury was nonaccidental.

The Court of Appeals also rejected mother's claim that the juvenile court erred in finding that the children's circumstances endangered them. The court held that even though mother is an engaged

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and caring parent, the fact that she continued to reside with father, was adamant that father did not injure H, and testified that the family would likely function in the same way as it had prior to the accident if DHS was no longer involved, was sufficient to support the court's determination that the children's circumstances endangered them so as to warrant jurisdiction.

Finally, the court declined to exercise its discretion to remand the case for an evidentiary hearing on the adequacy of the parents' attorneys. That was because, although the parents argued that they had asked their attorneys to call an additional expert witness and the attorneys had failed to do so, the parents did not explain how that witness' testimony would have contributed to the trial. Quoting Geist, the court explained that, "[b]efore authorizing an evidentiary hearing, a court doubtless would require a threshold showing of allegations, including the names of witnesses to be called, the substance of their testimony, and an explanation of how that testimony would show that trial counsel was inadequate." Absent that showing, the parents' claim did not raise a substantial question concerning the adequacy of counsel. The Court of Appeals assumed without deciding that statutory amendments had not foreclosed the court's discretion to remand a case for

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evidentiary development of a claim of inadequate assistance of counsel pursuant to Geist. The court also assumed without deciding that the right to adequate assistance of counsel applies even where a parent's lawyer is retained and not appointed, and at all stages of a juvenile case, including the jurisdictional stage.

RE: In the Matter of A.H.; Dept. of Human Services v. M.H., 266 Or App ___, ___ P.3d ___ (October 15, 2014) – Opinion written by Egan; Out of Josephine Co.

DHS and the child appealed the juvenile court's judgment setting aside earlier judgments that terminated mother's and father's paternal rights. The Court of Appeals determined that the juvenile court had not abused its discretion in setting aside the judgments and therefore affirmed.

The juvenile court took custody of the child in September 2010. In July 2011, the court entered a judgment changing the permanency plan for A from reunification to adoption. Both parents appealed, and the Court of Appeals affirmed without opinion. DHS filed petitions to terminate the parents' rights in August 2011. In August 2012, the juvenile court held a second permanency hearing and entered a judgment continuing the plan of adoption. Both parents appealed from that second permanency judgment. In March 2013, while the appeal was pending, the juvenile court terminated the rights of both parents. Approximately five months following the termination of the parents' rights, the Court of Appeals issued Department of Human Services v. M. H., 258 Or App 83, 308 P3d 311 (2013), in which it reversed the juvenile court's August 2012 permanency judgment. The court held that the juvenile court had erred by failing to make certain statutorily required factual findings pursuant to ORS 419B.476 and ORS 419B.498, and that the error was not harmless, because adoption and termination proceedings cannot occur until there is a predicate permanency judgment. Based on the decision of the Court of Appeals, the juvenile court granted the parents' motion to set aside the termination judgments.

The state and the child appealed, arguing that (1) a termination of parental rights proceeding is separate from the underlying dependency case, and that a "valid" permanency judgment thus is not required before parental rights can be terminated; (2) the text of ORS 419B.498(3) demonstrates that the legislature intended only to ensure that the juvenile court approves a case plan of adoption before a termination petition is filed; and (3) the permanency judgment that had been reversed on appeal merely continued a plan of adoption that previously had been approved.

The Court of Appeals disagreed. ORS 419B.476(2)(b) requires the juvenile court to consider the circumstances at the time of the permanency hearing to determine whether the appropriate plan is in place. Specifically, the juvenile court is required to make findings as to "whether, considering the circumstances at the time of the hearing, DHS has made reasonable efforts to find the child an adoptive placement"; whether "the permanency plan should change to or remain adoption"; and "whether and when the child will be placed for adoption and the petition for termination of parental rights filed." Those requirements evince legislative intent that the trial court carefully evaluate DHS's decision to change or maintain a particular permanency plan—at each permanency hearing—to ensure that the plan is the one most likely to lead to a positive outcome for the child. To further ensure that the juvenile court carefully evaluates a child's permanency plan at each permanency hearing, ORS 419B.498(3) makes the juvenile court's approval

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of a permanency plan of adoption a precondition to the filing of a termination petition. Whether a juvenile court maintains or continues a permanency plan, the consequences of those decisions implicate the same calculation and careful evaluation. Based on the foregoing analysis, the Court of Appeals affirmed the juvenile court's judgment setting aside the judgments that terminated the parents' rights.

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RE: In the Matter of L.M.; Dept. of Human Services v. J.M., 266 Or App ___, ___ P.3d ___ (October 22, 2014) – Opinion written by Ortega; Out of Douglas Co.

The parents appealed from a permanency judgment changing the plan for their child, L, from reunification to adoption. The Court of Appeals affirmed.

DHS filed a dependency petition two days after L's birth, in August 2012. Jurisdiction was established based on the parents' admissions that they lacked the parenting knowledge to ensure L's safety; that both had mental health problems that interfered with their ability to parent; that mother failed to recognize how father's mental health problems presented a safety risk; and that father's inability to control his anger presented a safety threat. In January 2014, the juvenile court changed the plan from reunification to adoption. The parents appealed, claiming (1) that the juvenile court violated their due process rights by admitting out-of-court statements contained within three reports without providing the parents the opportunity to cross-examine the authors of the reports; (2) that the juvenile court erred in determining that DHS made active efforts to reunify the family and that the parents had not made sufficient progress to allow L to be safely returned home; and (3) that, pursuant to ICWA, the juvenile court had erred in continuing the placement of L in relative foster care without hearing expert testimony that continued custody by the mother was likely to result in "serious emotional or physical damage" to L.

The Court of Appeals rejected the parents' claims. It first held that, pursuant to *Mathews v. Eldridge*, the parents' due process rights were not violated. Dependency proceedings interfere with a parent's liberty interest in the care and custody of his or her child, while simultaneously implicating the state's interest in the welfare of the child, the child's best interests, and, in an ICWA case, the state's interest in preventing the unwarranted break up of Indian families. Those interests must be examined in consideration of the time, place, and circumstances within which the due process claim arises. Here, the court found that a permanency hearing is not a "key juncture" in which due process would prohibit the juvenile court from admitting exhibits without regard to competency,[1] because (1) the state has already taken physical and legal custody of the child; (2) the purpose of the permanency is to achieve permanency for the child while providing court oversight of DHS' efforts and the parents' progress; (3) other procedures—in particular, the power to subpoena witnesses—are available to parents; and (4) a permanency hearing does not determine whether a parent's legal ties to their child

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should be severed, and termination of parental rights proceedings, in which that determination is made, include significant additional procedural protections. In light of those considerations, the court concluded that, given the low risk of erroneous deprivation of the parents' liberty interest, and factoring in the interests of the child and the state, the admission of the exhibits did not violate due process.

Next, the Court of Appeals held that DHS had made active efforts to reunite the parents with L, including visitation, counseling, and weekly one-on-one parent training. The court accepted the opinion of the parents' psychologist, that all of the services provided were appropriate and that it was unlikely that any further progress would be made with additional services. The court additionally determined that the trial court did not err in finding that the parents had not made sufficient progress, due to father's explosive anger episodes and mother's failure to show she could safely care for L.

Finally, the Court of Appeals held that the change of plan from reunification to adoption did not constitute a "foster care placement" that would, pursuant to ICWA, require the court to hear expert testimony at the permanency hearing. That was because L had already been removed from his parents at an earlier proceeding, and because the permanency hearing at issue on appeal had caused no significant shift in legal rights.

[1] ORS 419B.325(2) states that, "For the purpose of determining proper disposition of the ward, testimony, reports or other material relating to the ward's mental, physical and social history and prognosis may be received by the court without regard to their competency or relevancy under the rules of evidence."

***RE: In the Matter of A.W.; Dept. of Human Services v. S.W., 267 Or App ___, ___ P.3d ___ (November 26, 2014)* – Opinion written by Garrett; Out of Wasco Co.**

Father appealed from a permanency judgment that changed the plan for his daughter from reunification to adoption, arguing, among other things, that DHS had failed to make the required reasonable efforts to reunify him with his child. Father focused on a period of approximately 33 months during which he was incarcerated in Washington, arguing that DHS' failure to contact father's prison counselor to discuss services, and DHS' failure to explore the possibility of visitation with A, rendered the department's efforts unreasonable.

The Court of Appeals rejected father's argument. As in the companion case of Dept. of Human Services v. T.S., the court reiterated that the reasonableness of the department's efforts is dependent on the particular circumstances of the case, and that a court must consider not only the burdens that the state would shoulder in providing particular services, but also what benefit might reasonably be expected to flow from them. The court noted that, in assessing reasonable efforts, it may consider whether a parent has attempted to make the necessary changes in his or her life, or whether the parent instead has ignored or refused to participate in DHS' plan.

The court began by noting that this was a "difficult case," in part because DHS' level of effort during the 33-month-period that father had identified was "hardly vigorous." The court found, however, that DHS' somewhat minimal efforts were reasonable, when viewed with in the context of the life of the case and the "particular circumstances of father and A," and keeping in mind the "paramount concern" of A's welfare. The court focused on DHS' significant efforts early in the case to engage father in treatment and to arrange visitation. Father's engagement in both treatment and visitation had been inconsistent, and father ultimately committed new crimes, resulting in a lengthy period of incarceration that rendered him

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unavailable to parent. While in prison, father knew what DHS expected, but chose not to participate in key services, despite their availability. In addition, while in prison, father "evidenced little interest in A," making only a single request for telephone visits and failing to initiate contact until the department encouraged him to write letters.

The court observed that, even during the 33-month-period, DHS' efforts were more than "virtually nonexistent," the phrase used to describe the department's efforts in Williams: DHS had sent letters of expectation to father, had two telephone calls and one meeting with him, encouraged him to write to A, and arranged for a psychological evaluation. Although DHS did not provide visitation, that was because the department had made a "considered decision" that visits would not be appropriate, due in part to the long drive, A's particular physical, behavioral, and emotional problems, A's lack of a relationship

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with father, and recommendations made in father's psychological evaluation. Finally, the court noted, father had failed to explain how any further efforts by DHS would have furthered the statutory objective of allowing A to safely return home, particularly because, at the time of the permanency hearing, father's remaining three months of incarceration would be followed by 19 months of supervised post-prison substance abuse treatment. In response to the dissent, the majority clarified that it was not proposing a per se rule that DHS need not invest in services for parents facing lengthy incarceration, but instead was taking the circumstances of the incarceration, juxtaposed against the child's stage of development and particular needs, into consideration when assessing the department's efforts.

Judge Ortega dissented, arguing that the majority had focused impermissibly on father's behavior in assessing DHS' efforts, thus allowing DHS "to gamble against making such efforts if it appears that a parent is unlikely to be worthy of its investment of time." ORS 419B.476(2)(a) requires that a parent's progress be evaluated only where DHS has made reasonable efforts, and not as a prerequisite to making such efforts: "A parent does not earn the right to reasonable efforts, and a parent's failure to engage consistently early in a case cannot excuse the cessation of efforts by DHS as the case proceeds." The dissent also challenged the majority's manner of considering the length of father's incarceration, arguing that reasonable efforts are required even for parents with lengthy sentences because termination of parental rights is not inevitable in cases involving incarcerated parents, even those in prison for long periods of time. "It is not possible," the dissent writes, "to predict the outcome for an incarcerated parent any more than for any parent—and even if it were, allowing DHS to gauge what efforts are reasonable by such predictions would be inconsistent with the statute's requirement of reasonable efforts and our recognition that such efforts must be made in every case." In sum, the dissent argued, DHS' effort as to father was minimal and not reasonable (the dissent also took issue with the majority's recitation of the facts concerning DHS' efforts), and neither father's incarceration nor his early inconsistencies justified that lack of effort: "The majority's conclusion otherwise relieves DHS of the burden of making reasonable efforts * * * and instead imposes on parents the

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burden of showing that such efforts would have been efficacious in their particular circumstances, as evaluated on a record where such efforts were not made."

***RE: In the Matter of T.S.; Dept. of Human Services v. T.S., 267 Or App ___, ___ P.3d ___ (November 26, 2014) –* Opinion written by Garrett; Out of Multnomah Co.**

Father appealed from a permanency judgment that changed the plan for his daughter, T, from reunification to adoption, arguing that DHS had failed to make the required reasonable efforts to reunify him with T. Specifically, father, who was incarcerated at the time of the permanency hearing, argued that DHS' efforts were unreasonable because the department had failed to contact father for approximately one year; did not look into arranging visitation or telephone calls with T until 7 or 8 months into father's incarceration; and made no efforts to develop father's relationship with T, other than forwarding letters that father had written in the months prior to the hearing.

The Oregon Court of Appeals agreed with father and reversed the trial court's decision. The court began by reiterating that, although a parent's incarceration may not serve as a basis for excusing DHS from making reasonable efforts, the nature of the efforts required is dependent on the particular circumstances of the case, and that a parent's refusal to participate in services may factor into the court's analysis. Here, the court observed that father's participation was erratic at the beginning of his case, but that father became more active after his incarceration. Without assistance or encouragement from DHS, father sought out parenting classes, attended alcohol and drug rehabilitation classes, was employed, attended church services, met regularly with his counselor, and worked toward achieving his GED. Also during his incarceration, father "persistently" sought opportunities for contact with his daughter. The court observed that, notwithstanding father's progress and his repeated requests for assistance from DHS in developing his relationship with his daughter, the department had not contacted father for an extended period of time, choosing instead to focus on the mother because she was regarded as being a more viable candidate for reunification. That choice, the court determined, as "impermissible," because DHS is required to make reasonable efforts as to both parents. Viewing the circumstances in their totality, the court held that DHS had failed to make reasonable efforts to reunify father with T.

Judge Ortega concurred, stating that she disagreed with the majority's analysis because of the majority's "emphasis on the parent's behavior"—that is, the majority's focus on the fact that father had taken initiative to seek services in prison and to write to his child. That focus, Ortega argued, is "misplaced and, taken to its logical conclusion, would allow DHS to hedge its bets on providing reasonable efforts to many parents who lack the coping skills to advocate for themselves and to devise an appropriate reunification strategy" on their own. The statute does not condition DHS' obligation on parental compliancy or initiative. To do so, Ortega argued, would be "contrary to the statutory scheme, which calls for the state to do what it reasonably can to ensure that parental rights are preserved where a parent can be brought up to the standard of minimal adequacy." A parent's ability to make efforts or progress independently should not factor into the analysis of whether the department's efforts were reasonable. •

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Achieving Justice Against the Odds
July 21-23, 2015 Washington, D.C.

Join the movement to reform the child welfare system. The National Project to Improve Representation of Parents Involved in the Child Welfare System will host the 4th National Parent Attorney Conference in Washington, D.C.

The audience will include attorneys who represent parents in the child welfare system, managers of parent attorney offices, parents, social workers, parent partners, judges, court administrators, law professors, and policy makers.

The call for workshop or discussion group proposals is now out. You can find more information here.

Case Summary

State of Oregon v. K.L.F., 265 Or App ___, ___ P3d ___ (September 4, 2014) – Per Curiam Opinion)

summarized by Jason Pierson, YRJ Law Clerk

Youth appealed a supplemental judgment from an underlying judgment finding him within the jurisdiction of the juvenile court. The supplemental judgment ordered him to pay $1,054.22 in restitution to the Oregon Department of Justice, and $292.00 in restitution to the victim's parents. The youth argued that the juvenile court erred in ordering him to pay $152.00 of restitution costs incurred by the victim's parents to restore cellular phone service and obtain phone records. The State conceded that the contested charges were not a result of the youth's conduct toward the victim. The Court of Appeals accepted the concession and noted that the three prerequisites for an award of restitution are (1) criminal activity, (2) pecuniary damages, and (3) a causal relationship between the two. Accordingly, the Court of Appeals held that the youth's restitution should be reduced by the $152.00. ●

Resources

JDAI Helpdesk Updates Conditions For Confinement Page

The JDAI Helpdesk has updated the Conditions for Confinement Page to reflect the recent changes to the conditions for confinement standards. Resources on the facility assessment process, room confinement, PREA, youth with limited English proficiency, and statewide detention facility standards are now easily accessible. You can find them here.

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OYA Releases 10-Year Plan For Close Custody Facilities

By Jason Pierson, YRJ Law Clerk

On August 26, 2014, the Oregon Youth Authority ("OYA") released a 10-year strategic plan for close custody facilities in Oregon. The plan was developed in response to HB5050, a budget note in 2013 that directed the OYA to develop a facilities plan that (1) evaluated the facilities in terms of capacity, operating and maintenance costs, and deferred maintenance need; (2) developed a ten year plan for the facilities; (3) included recommendations and rationale for facilities disposition; and (4) recommended future use of the buildings that OYA no longer needed.

The evaluation revealed that all of the close custody facilities have significant deferred maintenance needs, requiring approximately $21 million in work to bring them up to date. Further, the intake facility for male youth at Hillcrest was found to be small, and correctional in feel, which does not provide a reassuring first experience for youth. Many of the facilities were found to be "very correctional" in design, being inappropriate for providing school, vocational treatment, recreation and visiting. The best example of appropriate housing in the system is the unoccupied Young Women's Transitional Facility at Oak Creek.

As part of the strategic plan, OYA created a forecast for the future of OYA populations. According to the report, recent trends suggest declining youth population levels across the country. However, the report suggests that the Oregon youth correctional population will actually increase from 645 in 2015 to 659 in 2024. The strategic plan requires OYA to complete the deferred maintenance at all of the facilities, except the Hillcrest campus, which it suggests closing. The Hillcrest campus closing is recommended mostly because the Hillcrest campus has two story buildings and retrofitting those buildings for seismic upgrades would be more costly than upgrading the other campuses. The total cost of the 10-year strategic plan for close custody facilities is $97.38 million.

The complete report can be found at: http://www.oregon.gov/oya/reports/OYA%2010%20_Yr%20Strategic%20Plan.pdf

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Save The Date

12th Annual Women in Prison Conference

February 7, 2015

Lewis & Clark Law School, Portland, Oregon

Presented by the Oregon Justice Resource Center

The keynote speaker is Emily Salisbury, Ph.D. Register here.

http://ojrc.info/wipconference/

38th National Child Welfare, Juvenile & Family Law Conference

August 25-27, 2015

Hyatt Regency, Monterey, California

Presented by the National Association of Counsel for Children

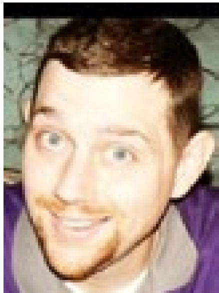
Abstracts due by February 1, 2015. Conference brochure available May 2015.

www.NACCchildlaw.org

In Loving Memory

Nicholas Ryan Demagalski

1979-2014



Nick Demagalski had a true passion for helping Oregon's most vulnerable children. He served as a paralegal for Youth, Rights & Justice for 15 years. Kind, friendly and outgoing, Nick loved the people he worked with, and he was loved in return. Nick was born in Portland and attended David Douglas and Franklin high schools. He met his wife, Nichole, while working at Boston Market. Together, they had three beautiful children: Isabelle, Emma, and Sophia. Nick lost his battle with cancer in September 2014, and he is greatly missed by all of us at Youth, Rights & Justice. Donations for the young family can be made at any Chase Bank under the name Nick Demagalski.

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

Youth, Rights & Justice

ATTORNEYS AT LAW

YRJ is a nonprofit organization that provides legal experts and advocates for children in foster care and youth in the justice system. Our services are provided at no cost to our clients. We have made a positive difference for more than 50,000 children and their families since 1975.

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JUSTICE IS SERVED

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Standing Up For Oregon's Most Vulnerable Children

As 2014 comes to a close, we want to thank all of you who support the work of Youth, Rights & Justice.

In 2015, we will continue to fight for individual children and youth so that each one has a chance to finish school, go to college and become successful adults. We will continue to advocate for policy solutions that promote these goals, as well. You can play a part. We urge you to invest in our efforts and the success of Oregon's next generation.

Make a gift in any amount by visiting us online at youthrightsjustice.org or by contacting Janeen Olsen, Director of Development and Communications at (503) 232-2540 or by email at janeen.o@youthrightsjustice.org.

<< Photos of the 2014 Wine & Chocolate Extravaganza by Win Goodbody.