Juvenile Law Reader

Youth, Rights & Justice
ATTORNEYS AT LAW

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"SB 741-A would give foster parents who have cared for a child for one year or longer equal consideration to a child's relatives who are interested in adoption. "

— Mark McKechnie
YRJ Executive Director

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Federal Court Finds "Indian Children, Parents and Tribes Deserve Better"

By Adrian Tobin Smith, JD, MSW, National Indian Child Welfare Association, Government Affairs Associate

On March 30, 2015, in a groundbreaking decision, a South Dakota Federal District court ruled that South Dakota state officials were violating the Indian Child Welfare Act of 1978 ("ICWA") and the due process rights of Indian parents and tribes in emergency custody proceedings, referred to as 48-hour hearings.1 The class action lawsuit was brought by the American Civil Liberties Union (ACLU) on behalf of two tribes in their *parens patriae* capacity as well as two parents representing all parents of Indian children subject to 48-hour hearings in the Seventh Judicial Circuit of the South Dakota Unified Judicial System.[2]

The facts of the case found that the typical 48-hour hearing in the Seventh Judicial Circuit lasted less than five minutes,[3] and that the standardized custody order functioned as a checklist which lead to "the Seventh Circuit judges sign[ing] temporary custody orders detailing findings of fact that had

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never been described on the record or explained to the parents present at the 48-hour hearings."[4]

Further, during these hearings parents and tribes were not provided copies of the ICWA affidavit [5] or petition for temporary custody,[6] were never advised that they had a right to contest the state's petition,[7] were never advised that they had a right to call and cross-examine witnesses (including the ICWA affiant),[8] and were never advised that they could request a brief continuance to retain counsel.[9]

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The Federal District court found that between 2010 and 2014, the Seventh Circuit Presiding Judge--the judge who sets the policies and procedures for all the court rooms in this circuit--granted 100 percent of motions for continued custody at the 48 hour hearing. This resulted in nearly 60 percent of children in these cases spending at least two weeks away from their parents, families, and communities. This often resulted in children being removed from their homes for 60-90 days before the parents were afforded a hearing in which they could challenge the claims against them.[10]

The Defendants argued that the emergency custody provision of ICWA (Section 1922), which creates a high standard that state officials must meet before removing an Indian child from the home, did not apply to their 48-hour hearings.[11] The Federal District court disagreed, finding that ICWA's emergency custody provision "mandates that state officials 'insure that the emergency removal…terminates when such removal… is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.'"[12] The court further found the relevant portions of both the 1979 and 2015 *Department of the Interior Guidelines for State Courts; Indian Child Custody Proceedings (DOI Guidelines)—an* "administrative interpretation of ICWA entitled to great weight"—supported this interpretation.[13] The court then determined that both the ICWA and the corresponding *DOI Guidelines* and *South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases* require not only compliance with ICWA's requirements but also the temporary custody 48-hour hearing be an evidentiary hearing, because "a competently conducted evidentiary hearing held on an expedited basis is fundamental to ICWA's purposes."[14]

Additionally, the Federal District

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court found that these practices also violated the parents' Due Process protections under the Fourteenth Amendment. Specifically, adequate notice was not provided;[15] the right to counsel was not insured;[16] and the defendants failed to protect parents' rights to a fair hearing by "not allowing them to present evidence to contradict the states removal…not allowing the parents to confront and cross-examine witnesses…by using documents as a basis for the courts decisions that were not provided to the parents and which were not received into evidence at the 48-hour hearing."[17] The court concluded that "Indian children, parents and tribes deserve better."[18]

This case reiterates not only the important due process rights of parents at the temporary custody hearing, but also the importance of early identification of an "Indian child," early engagement with a child's tribe, and compliance with ICWA at the earliest stages of a case. The decision can be accessed here, the new *BIA Guidelines* can be accessed here, and information on Oregon laws relevant to ICWA can be found here.

1 *Oglala Sioux Tribe v. Van Hunnik*, Order, No. 13-5020-JLV (March 30, 2015, D.S.D.)

2 *Id.* at 3-4.

3 *Id.* at 2.

4 *Id.* at 19-20.

5 All judges received an ICWA affidavit at each 48-hour hearing from the South Dakota Department of Social Services ("DSS"). These require the DSS worker to certify the Indian status of the child and compliance with ICWA (that notice has been sent to the appropriate tribe(s), the efforts to comply with ICWA's placement preferences, the "active efforts" provided to reunify the family and the reasons that the continued custody of the child would cause serious physical or emotional harm to the child). A sample affidavit can be found attached to the initial complaint as exhibit 3. https://www.aclu.org/sites/default/files/field_document/ost1_complaint_with_exhibits_3_4_6.pdf

6 *Van Hunnik* at 13-14.

7 *Id.* at 18.

8 *Id.*

9 *Id.* at 18-19

10 *Id.*

11 *Id.* at 28.

12 Id. at 28-29 (citing to 25 U.S.C. § 1922).

13 *Id.* at 31.

14 *Id. at. 35.*

15 *Id. at 37-38.*

16 *Id. at 39-40.*

17 *Id. at 42.*

18 *Id. at 34.* ●

Legislation of Interest to Juvenile Practitioners in the 2015 Legislative Session

By Mark McKechnie

June 12, 2015—The Oregon Legislature is likely to complete its 2015 Regular Session within a month or less of this writing. It has been a remarkable session for a number of reasons. Both chambers welcomed a larger than usual number of freshmen members, which also led to many changes in committee memberships and chair positions. In May, the State Economist predicted that state revenues will exceed original projections by a large enough margin to trigger Oregon's unique "Kicker" law.

Most unusual was the resignation

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of Gov. Kitzhaber on February 18, 2015, less than three weeks into the legislative session. As his successor, Gov. Kate Brown was sworn in upon his resignation. Governor Brown has a background as a juvenile and family law attorney, in addition to extensive experience as a legislator and Secretary of State.

Bills of concern or interest to juvenile practitioners are too numerous to list here. Many bills die along the way as the session progresses and they fail to be voted out of committee by the deadlines. The bills listed here have been passed or remain active and have a chance to reach final passage before the Legislature adjourns.

Juvenile Records

Confidentiality: The Oregon Law Commission has worked for the past few years to update the juvenile records statutes to accommodate the use of electronic records and other changes that have occurred since the statutes were last revised. **SB 405** was passed unanimously by the members present during the House and Senate votes. According to the House Judiciary Committee staff summary, SB 405 "Makes minor changes to ORS 419A.255 to correct unintended consequences of recent legislative changes. Authorizes Oregon Youth Authority to disclose same information about youth within their jurisdiction as juvenile courts and county juvenile department can disclose. Clarifies that nothing in current law prohibits juvenile court from providing certain information to appropriate Child Support Program Administrator. Proposes one-year extension to operative date of statutory provisions regarding providing access to juvenile court records to other persons not specifically provided access by statute." The bill also extended the sunset provisions enacted in 2013 and 2014 to allow more time to consider changes that would grant juvenile courts the authority to grant access to the "confidential social file" to "any other person allowed by the court." The original sunset was established by SB 622 in 2013 and it was extended to September 30, 2015 by SB 1536 in 2014. This bill, SB 405 extends the sunset further to September 30, 2016. Status: awaiting the Governor's signature.

Access by the Department of Corrections: The Oregon Department of Corrections (DOC) introduced **HB 2425** to allow juvenile departments and the Oregon Youth Authority to release juvenile records related to persons now in the custody of the DOC. The original bill was opposed by OCDLA, the juvenile directors association and Youth, Rights & Justice. The bill died in committee, but the opponents agreed to work with the DOC to craft language that provided narrower access, limited to persons who transferred directly from the custody of OYA or a juvenile department to the DOC. Most would be youth convicted of Measure 11 sentences who were later transferred from the physical custody of OYA to DOC. On June 3, the Senate Judiciary Committee adopted amendments to **HB 2313**, which removed the contents of the original bill and inserted the language negotiated to provide DOC this limited access to juvenile records. Status: awaiting vote on the Senate floor and, if passed, return to the House for a concurrence vote on the amended bill.

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Collateral Consequences

HB 2367-A was also developed by the Oregon Law Commission. The bill would create a Collateral Consequences Commission tasked with documenting the collateral consequences that attach or may attach in Oregon upon a criminal conviction or juvenile court adjudication. This document would help defense

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attorneys to advise their clients on the collateral consequences of a conviction or adjudication. The bill requires the court to provide to youth issued a summons described in ORS 419C.303 the following notice:

> *NOTICE OF ADDITIONAL LEGAL CONSEQUENCES*
>
> *If you are found to be within the juvenile court's jurisdiction under ORS 419C.005, you may suffer additional legal consequences beyond detention or incarceration, probation, parole and fines. These consequences may include but are not limited to: Being unable to get or keep some licenses, permits, jobs or volunteer positions; Being unable to get or keep benefits such as public housing or financial assistance; Having restricted access to public education and higher education; Receiving a harsher disposition or sentence if you are adjudicated or convicted of an offense in the future; Having the government take your property; and Being unable to possess a firearm. If you are not a United States citizen, a juvenile delinquency proceeding may also result in your deportation, removal or exclusion from admission to the United States or denial of citizenship. The law may provide ways to obtain some relief from these consequences. Further information about the consequences of juvenile adjudication is available on the Internet at [Internet website address of collection as described in section 4 (11) of this 2015 Act] and by consulting your attorney.*

Status: HB 2367-A is currently awaiting action in the Ways and Means Committee.

Permanency Plans for Children in Substitute Care

SB 741-A was introduced at the request of Youth, Rights & Justice and sponsored by Senators Shields, Olsen, Gelser and Monnes Andersen, as well as Representatives Stark and Williamson. The bill would require the Department of Human Services to change its Administrative Rules regarding adoption selection to give foster parents who have cared for a child for one year or longer equal preference to a child's relatives who are interested in adoption. The OARs adopted in 2010 require DHS to consider relatives first and only consider non-relative long-term foster parents if no relatives are interested or suitable. Appeals to grant an exception to this preference must be made by a district program manager to the permanency manager in Salem.

SB 741-A would also add to the court's authority the ability to order placement or restore a placement with a "current caretaker" (foster placement of one year or longer) under some circumstances. The bill would also, with some exceptions, direct DHS to report, and the court to hold a hearing, when DHS moves a child from a current caretaker to another foster care placement. Status: Passed Senate Human Services and Early Childhood Committee; Human Services Subcommittee scheduled a public hearing for June 8, 2015.

HB 2908 is intended to bring Oregon into compliance with the interestingly-named federal legislation, the "Preventing Sex Trafficking and Strengthening Families Act of 2014." The Oregon bill does not relate to the "sex trafficking" provisions of the federal law. HB 2908 modifies the definition of Another Planned Permanent Living Arrangement (APPLA) to state that only a child age 16 or older can have a permanency plan of APPLA. Related to this change, ORS 419B.443 and ORS 419B.476 modify the review requirements for the Citizen's Review Board and the juvenile court, respectively, to consider whether the state agency is making reasonable efforts to comply with the revised permanency standards.

While children under 16 should no longer have APPLA plans, federal law does allow long-term placements with a "fit and willing relative." HB 2908 amends the permanency statute to add this new type of permanency plan. Additional definition of this type of plan will be developed through rule-making by the Department of Human Services.

The bill also adds a definition of a "reasonable and prudent parent standard." This standard is to be applied by foster parents in involving wards in their care in extracurricular, enrichment, cultural and social activities. Courts and the CRB are also expected to review the agency on its compliance with this requirement at review hearings.

More information can be obtained about HB 2908, including a section-by-section summary and statutory references, in the testimony provided to the Senate Judiciary

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Committee by Megan Hassen from the Oregon Judicial Department at: https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/72736

Status: Passed; Governor signed on June 4, 2015.

The Rights of Foster Children

The Oregon Foster Youth Connection developed two bills for the 2015 session. **HB 2889-B** requires that foster youth who are 12 years or older and in care for six months or longer are entitled to open a savings account in their own names, without the consent of a parent, guardian or caregiver. The bill requires DHS to ensure access to these accounts, limits access to the accounts by foster parents, parents or guardians without the child's written consent and limits the liability of financial institutions that establish these accounts. The B-Engrossed version of the bill allows DHS to monitor use of child's money relating to state and federal benefits. It is awaiting a vote by the Oregon Senate as of this writing.

The second bill promoted by OFYC is HB 2890-B which requires the Department of Human Services to provide an opportunity for the child or ward to participate in at least one ongoing extracurricular activity based on availability and the interests of the child or ward. Senate amendments added the "prudent parent standard" language, presumably, to increase conformity with HB 2908, described above.

Status: Both bills were amended in the Senate and passed; will return to House for concurrence votes.

Grandparents Rights

Governor Brown has signed **HB 3014**, which maintains the legal grandparent-grandchild relationship even when the rights of the child's legal parents have been terminated. The definition of grandparent in ORS 419.875 was changed to remove the reference to ORS 109.119 and instead define a grandparent as "the legal parent of the child's or ward's legal parent regardless of whether the parental rights of the child's or ward's legal parent have been terminated under ORS 419B.500 to 419B.524." This change applies to juvenile dependency proceedings pending or commenced on or after the effective date, January 1, 2016. Status: Governor signed on June 2, 2015.

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Legal Representation in Juvenile Dependency Cases

The Department of Human Services introduced **SB 222** to extend the sunset for two years on legislation, passed in 2014, which clarifies that DHS may appear without counsel (an AAG) at some proceedings after jurisdiction is established. The bill was amended to remove the sunset in a staged fashion so that DHS would be required to appear with an AAG at all hearings in specified counties. The requirement would apply to 12 counties during the 2015-17 biennium at an additional cost of $7.3 million. The requirement would apply to 12 additional counties during the 2017-19 biennium at an additional cost of $19 million. And the remaining 12 counties would be phased in starting on July 1, 2019. The additional cost of full implementation would presumably be an additional $21 million to $25 million per biennium from 2019-21 going forward, however, this figure was not provided in the fiscal impact statement.

As of this writing, the Ways and Means Committee chairs have stated that the additional funding required to implement SB 222-A is not available. We expect amendments to be drafted to extend the sunset another two years and to establish an interim commission to look at the needs

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Photo of Governor Kate Brown CC by 2.0

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of the state in providing adequate resources to the juvenile courts and for representation of all parties in child dependency cases. The proposed amendments are not yet available as of this writing. Status: Awaiting action by the Ways and Means Committee.

School Discipline

Youth, Rights & Justice drafted **SB 553** and **SB 554** to address high rates of school suspension and expulsion in Oregon and racial and other disparities in school discipline. The chief sponsor, Sen. Gelser, also introduced **SB 556**, which prohibits school expulsion for truancy.

SB 553 restricts out-of-school suspension in elementary grades, Kindergarten through Grade 5. Students may only be suspended out-of-school or expelled if the student causes serious physical injury to another student or staff member, when the student's behavior poses a direct threat to health or safety or when required by federal law. SB 553 is effective July 1, 2015. SB 554 was referred to the Ways and Means Committee. It would appropriate additional funding for schools to reduce disparities in discipline based upon race, ethnicity, socioeconomic status, disability or other factors. Status: SB 553 and SB 556 were signed into law by the Governor on June 2nd.

Children of Incarcerated Parents and Family Diversion

The termination of the Family Preservation Program (FPP) at the Coffee Creek Correctional Facility by the Department of Corrections early in 2015 has led Legislators to look for options to re-establish a similar program and to also look for alternatives for parents who may be sent to prison. **SB 939** would direct the Department of Corrections to contract with nonprofit entities to assist children of incarcerated parents. Services would focus on maintaining family attachments, reducing the likelihood of justice system involvement by the children served, reduce recidivism by parents served, improve re-entry for parents and reunification of families and improve educational outcomes for children. Program services would include regular therapeutic visitation between children and their incarcerated parents, parent training, communication between parents and children in between visits, and support for including incarcerated parents in parent-teacher conferences by phone. Documentary filmmaker Brian Lindstrom depicts the original FPP program in his film, "Parenting Inside." The proposed program provides similar services to FPP, with additional support for transportation and other services to maintain parent-child contacts.

HB 3503 would create a "Family Sentencing" pilot program based upon a similar program already operating in Washington. The program would provide options to some defendants who face potential prison sentences to instead receive intensive probation and support services. Eligible defendants would include those who had physical custody of one or more children at the time the

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crime occurred and are accused of crimes that exclude sex offenses and person felonies. The bill would provide funds for probation services in counties participating in the pilot project and funds to the Department of Human Services to provide supports to families served by the program.

Status: Both bills are awaiting action by the Ways and Means Committee.

Public Defense Budget

As of this writing, the Public Safety Subcommittee of the Joint Ways and Means Committee has adopted amendments to the public defense budget bill, **SB 5533**, and referred the bill to the full Ways and Means Committee. Following approval, the bill would be sent for votes in the House and Senate. The bill appropriates funds to the Public Defense Services Commission. The amendments adopted increase the Public Defense Account by approximately 7% over the 2013-15 funding level and adds $5.2 million to reduce differences in case rates between public defender offices and private and consortium contractors. An additional $161,700 would be added for mileage reimbursements to contractors in rural areas of the state. The total budget figure represents a 9% increase over 2013-15 levels and also includes the maintenance of the OPDS Deputy General Counsel position to oversee the Parent Representation Pilot Project.

More information on these and other bills, including bill versions, amendments, testimony and measure histories, can be found on the Oregon Legislative Information System (OLIS): https://olis.leg.state.or.us/liz/2015R1 ●

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View from the Bench

By The Honorable Paula J. Kurshner
Multnomah County Circuit Court Judge

1. How long have you been a judge on the juvenile law bench?

20.5 years. Appointed Aug 23, 1994.

2. What has surprised you most since joining the juvenile bench?

Not as much surprised but pleased that so many skilled and caring lawyers choose to do this important work.

3. If you could change one thing, what would it be?

I would increase the number of lawyers so that caseloads were smaller so lawyers could have more time for meaningful contact with clients.

4. What practices do you observe (and encourage others to emulate) from the most effective lawyers?

Active involvement and contact with clients whether parents or children. Concise arguments to the court with suggestion the court should adopt, and I must add - do not be late - if you are elsewhere please let the court know.

CASE SUMMARIES

By Afton Coppedge, Anne Haugaard, Joshua Olmstead, Maggie Poffenbarger and Ricky Tucker, YRJ Law Clerks

Department of Human Services v. T.L., 269 Or App 454 (March 4, 2015), appeal docketed, No. S063204 (Oregon Sup. Ct. Nov. 12, 2015).

Father appealed a permanency judgment after his attorney did not appear at a permanency hearing. Following the hearing, the court changed the permanency plan of the father's eldest child from that of reunification to APPLA and to guardianship for the father's two younger children. Father arrived very late to the hearing and did not say anything about the absence of his attorney. On appeal, father argued that under State ex rel Juv. Dept. v. Geist, 310 Or 176 (1990), his attorney's failure to appear rendered inadequate assistance of counsel, that he was denied a fundamentally fair hearing, and entitled to a reversal of the three permanency judgments.

Although the Geist court specified that it can create an appropriate procedure for ensuring adequate counsel on direct appeal, it held that the ability to do so only exists "absent an express legislative procedure for vindicating the statutory right to adequate counsel." Here, DHS argued that under ORS 419B.923, father had the option to address the inadequacy of his counsel at the time of the hearing and chose not to do so, failing to preserve the issue for appeal. The Court of Appeals agreed, holding that the statute provides the legislative procedure mentioned in Geist. Under ORS 419B.923, parents must first seek to resolve their issues at the trial court level and move for the court to either modify or set aside the judgment or order, regardless of whether or not an appeal is pending. The statute, according to the majority, makes Geist inapplicable, as the "primary rationale for the court's decision in Geist was the absence of a 'legislative procedure.'" The Court of Appeals expressed concern regarding the issue of raising inadequate counsel concerns for the first time on appeal, finding the statute provides a more "expeditious and efficient" path for raising such concerns. Inadequate counsel claims should not be raised for the first time on direct appeal. The trial court is best equipped to gather evidence regarding whether or not counsel was adequate.

Judge Egan's dissent concluded that the court has continuously allowed parents to bring claims of inadequate counsel on direct appeal during the 25 years since Geist, even though there had always been some form of statutory language providing for the set aside of judgments and orders. The dissent would hold that remanding cases to the trial level to establish a clear record erases the "fundamental fairness" standard and need for judicial efficiency by creating an extra step. The original record may already be detailed enough to determine counsel's adequacy and the appellate court should review each case before deciding that remand is necessary. Finally, the dissent raises the ultimate concern that a challenge regarding inadequacy on remand would most likely be brought by the very attorney whose adequacy is in question. Allowing claims of inadequate counsel to be made on direct appeal gives the parent a "meaningful opportunity to assert [them]."

Department of Human Services v. A.B., 271 Or App 354 (May 20, 2015), Multnomah County.

Following a judgment establishing jurisdiction over one-year-old

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daughter N, both mother and father appealed. Eight months after both parents placed N in the physical custody of her grandmother and aunt, the juvenile court took jurisdiction of both N and her older half-sister, K. The dependency petition was filed in response to K being found in the back seat of father's car during a controlled drug buy. Mother then informed DHS that N was living with her grandmother in a nearby town. N was placed into stranger foster care, despite a close attachment between N, her grandmother, and her aunt. Though both mother and father had a history of drug use and criminal activity, neither child was exposed to these activities prior to the drug incident. N was living apart from her parents due to the parents' expressed desire to shield her from their behavior.

Because N was not in the care of her parents or present during the drug buy, the parents argued that jurisdiction over N was not proper and that their conduct did not present a risk to N. Parents argued that DHS failed to demonstrate a nexus between parents' conduct and a risk of harm to N and that the totality of N's circumstances required the court to analyze whether N's grandmother and aunt exposed her to a threat of serious loss or injury. DHS argued that if N had been in parents' care, she could have been exposed to the drug deal. DHS further stated the parents' decision to place N under grandmother's care presented a risk to N, depriving her of critical bonding time with her mother. DHS never argued that N had been exposed to risk of harm while in the care of her grandmother and aunt.

Photo by Kymberly Janisch CC by 2.0

The Court of Appeals held that DHS failed to show a nexus between parents' conduct and a risk of harm to N. The totality of the child's circumstances should be the focus of the juvenile court's inquiry, including situations where someone other than the parent is caring for the child. Although a child under the care of someone else does not prevent the court from taking jurisdiction, the totality of the circumstances must expose the child to serious risk. DHS argued that, under ORS 419B.100(2), jurisdiction was proper despite grandmother's adequate care. The court found this argument incompatible with the language of ORS 419B.100(1), which calls for consideration of all the child's circumstances.

Subsection (2) does not negate the requirements of subsection (1). Rather, subsection (2) adds to the existing inquiry under (1). The fact that N was adequately cared for by her grandmother does not prohibit the court from taking jurisdiction if one of subsection (1)'s requirements is satisfied. The court clarifies that its holding in State ex. Rel Juv. Dept. v. Moyer, 42 Or App 655 (1979), did not conclude that subsection (2)

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eliminates the burden to establish jurisdiction under one of the bases in subsection (1). Subsection (2) is not an independent basis for jurisdiction. If N's circumstances showed that N was still at risk of harm even while in the adequate care of her grandmother, jurisdiction would have likely been proper under subsection (1).

Dept. of Human Services v. A. S.-M., 270 Or App 728 (2015)

In this consolidated appeal; mother and father appeal judgments terminating their parental rights to their six children. Mother appeals on grounds that she was deprived of a fundamentally fair termination proceeding, in violation of her Fourteenth Amendment right, because the juvenile court appointed a guardian ad litem (GAL) for mother without sufficient legal basis. Father also appeals alleging the juvenile court erred in finding he was unfit, that the children could not return within a reasonable time, and that termination was in the children's best interests.

DHS became involved with the family initially in 2006 following an incident of domestic violence which led to father's conviction. The children were removed and returned several times over the next five years. In April 2011, all six children were again placed in DHS foster care and the court entered judgment of jurisdiction over the children. DHS filed petitions in October of 2012 to terminate parents' parental rights to the six children. Mother received a neuropsychological evaluation and was diagnosed with depression and a personality disorder. The report concluded that mother's prognosis for change was "poor." Father's evaluation concluded that he had an antisocial personality disorder.

DHS moved to appoint a GAL for the mother. In March 2013, mother's attorney wrote a letter to the evaluating doctor that requested his opinion as to whether mother should have a GAL appointed. Mother did not testify at the hearing, but her attorney conveyed to the court that mother objected to the appointment. DHS's counsel relied on the evaluating doctor's testimony that mother was "unable to contain her emotions" which made it "extremely difficult for her to remain on point, on track, coherent and focused during conversations." Additionally, the doctor reported that he believed the mother to suffer from "delusional thinking." The juvenile court granted DHS's request and appointed a GAL to protect the mother's rights, finding that "[m]other suffers from a mental disability or impairment…[which] renders her unable to give direction and assistance to her attorney on decisions that mother must make in this proceeding." Following the termination trial, the juvenile court entered a judgment terminating mother's and father's parental rights.

Mother's appeal makes 10 assignments of error. Mother contends that she received inadequate assistance of counsel based on her attorney's role in obtaining the GAL appointment against her wishes. However, the claim was unpreserved and a decision by the court, made after this case was submitted, forecloses further consideration of the inadequate-assistance claim.

The remainder of mother's claims focus on challenging the court's appointment of the GAL. She argues the appointment was erroneous and rendered her termination proceeding fundamentally unfair. The state contends that mother's challenge to the appointment is unreviewable because mother was required to, and did not, seek interlocutory review of the appointment. The Court of Appeals rejected this argument holding that the state's argument overlooks the language in ORS 419A.205 that an appealable judgement includes a "final order adversely affecting the

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rights or duties of a party and made in a proceeding after judgement." (Emphasis in original.) Here, the appointment of the GAL was made in the proceeding, but was not entered after the judgement. Thus, the appointment was not appealable prior to the court's entry of judgment and may be raised in the appeal from the judgement terminating the mother's rights.

A juvenile court may not appoint a GAL for a parent unless the court finds by a preponderance of the evidence presented at that hearing that: "(a) Due to the parent's mental or physical disability or impairment, the parent lacks substantial capacity either to understand the nature of the proceeding or to give direction and assistance to the parent's attorney on decisions the parent must make in the proceeding; and (b) The appointment … is necessary to protect the parents right in the proceeding during the period of the parent's disability or impairment." The juvenile court made no finding that mother was unable to understand the "nature and consequences of the proceeding." Rather, the court's finding appears to be limited to mother's inability to give direction and assistance to her attorney.

The court held that the evidence before the juvenile court was insufficient to support the appointment of the GAL. Mother did not testify at the GAL hearing, so it was not possible to observe her demeanor or interactions with her attorney. Further, because mother requested that her attorney withdraw after she had learned about his interaction with the doctor, and opposed appointment of the GAL, this provides some evidence that mother was able to provide direction in the matter of her legal rights and representation. The doctor's testimony of the mother's mental health fell short of establishing that she lacked "substantial capacity." Accordingly, the appointment of the GAL was erroneous.

Mother urged that the termination of parental rights be reversed

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because the invalid appointment of the GAL rendered her proceeding "fundamentally unfair." The court has previously held that termination of parental rights be achieved consistently with due process. Due process requires procedural safeguards to ensure that termination proceedings be fundamentally fair, which is "the opportunity to be heard at a meaningful time and in a meaningful manner." State v. Geist, 310 Or 176, 189-90, 796 P2d 1193 (1990). The appointment of the GAL impaired mother's ability to meaningfully defend against the termination petition because (1) the appointment adversely affected her rights, and (2) the appointment contributed to the evidence used against her in the proceeding, despite the statutory prohibition against using it that way. When the juvenile court issued its findings of fact supporting the termination, it cited, as evidence the mother's unfitness, the fact that a GAL had been appointed on her behalf.

The court acknowledged that considerable evidence in the record supported the finding that mother was unfit; however, it concludes that the erroneous appointment of the GAL renders the termination proceeding fundamentally unfair. The judgment of termination of mother's parental rights is reversed and remanded.

The court affirmed the juvenile court's judgment terminating father's parental rights, finding that the record overwhelmingly demonstrated he was unfit and that the termination was in the children's best interest. *Continued on next page »*

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Dept. of Human Services v. R. K., 271 Or App 83 (2015)

In this termination of parental rights appeal case involving two children (X and R), mother and the father of each child argues that on de novo review the Court of Appeals should reverse the trial court's judgement that they were unfit by reason of conduct or conditions seriously detrimental to the child.

At trial, mother acknowledged her addiction, mental health issues, and homelessness, but contends that DHS did not provide sufficient assistance, and with assistance, she would be able to care for the children in a reasonable time; she requested six months. However, mother's previous resistance to services offered by DHS and her lack of follow through led the court to be skeptical of mother's prediction that she will be able to care for children in a six-month time period. In light of her history of non-engagement, and mother's drug abuse, domestic violence, and mental health, the court held it was unlikely that her conduct or conditions would change in the foreseeable future. The court affirmed the termination of her parental rights.

Father of child X challenged the court's determination that his incarceration was a condition that is seriously detrimental to X. At trial, father was incarcerated with 36 months remaining on his sentence. The court's findings were based on his criminal conduct and incarceration. Based on his history and an insufficient plan to have X return to his care, the juvenile court determined there was unfitness seriously detrimental to X. Further, integration of X into father's care was improbable within a reasonable time and that adoption was in the best interest of the child. The Court of Appeals recognized the factors set out by the state, but for purposes of termination the inquiry is whether the parents conduct was seriously detrimental to the child at the time of the trial. (Emphasis added.) Although incarceration meant that father was not a current placement resource for X, he had the desire and ability to rebuild the relationship and wanted to be responsible for X upon his release. Additionally, father testified that he had a good relationship with X's foster parent and that they would allow him to have contact with X. The court held that evidence, at the time of trial, was insufficient to show that incarceration was detrimental to child's wellbeing. Judgment terminating parental rights is reversed.

Father of child R contends that the trial court erred in determining that he was unfit and mistakenly placed on him the burden to establish that he would be able to successfully parent. R was removed from the parents' home following a domestic violence incident and child endangerment that led to the father's conviction. He repeatedly violated the conditions of his probation and was later convicted of another crime which led to his incarceration. He was released two days before the termination hearing. Father testified that at the time of trial, he had been enrolled in treatment for three weeks and was living in recovery-based housing. The juvenile court terminated his parental rights because three weeks of treatment was not sufficient to establish that he could successfully parent. Based on past and repeated conduct the court found father of R was unfit by reason of conduct or condition not likely to change within a reasonable time. The father states that evidence shown at trial proves that he is on track and is not engaging in activity detrimental to R. The court holds that brief and recent effort to change does not overcome the evidence of unfitness demonstrated by the state. Moreover, he had not yet begun to address other issues that led to the jurisdictional judgment and it would be improbable that R could be returned to father's care within a reasonable time. The court of appeal affirmed the termination of parental rights.

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Juvenile Law Resource Center

« Case Summaries continued from previous

Dept. of Human Services v. M. U. L., 270 OR App 343 (2015)

Mother appealed a judgment terminating her parental rights. She argued that the juvenile court erred in appointing a guardian ad litem (GAL), that her counsel was inadequate and that she was prejudiced by counsel's failure to object to continued appointment of the GAL, and that the termination proceedings were fundamentally unfair.

Mother has a history of mental illness. Her child was removed from her care following an interaction with the police after pushing the stroller containing her daughter into a fireworks booth in July of 2012. Police observed that the mother "was not making sense" and "talking in circles," and, after a visit to the home, contacted DHS. The juvenile court entered a judgment of jurisdiction over the daughter in October, 2012 and in August 2013, DHS filed a petition to terminate mother's parental rights on the grounds of unfitness.

In October, 2013 mother was found unfit to stand trial in separate criminal matters. Later in that month, DHS requested a GAL be appointed for the mother during the termination proceedings. Over mother's attorney's objection, but the juvenile court appointed a GAL. By December mother had stabilized after receiving psychiatric treatment from Oregon State Hospital and she was considered competent to aid in her own defense in the criminal proceeding. Thereafter, the juvenile court held a hearing on whether to continue the GAL appointment. DHS requested the appointment continue and mother's attorney did not object. The court continued the appointment. Mother's attorney did not raise an objection at trial.

The mother argued that under ORS 419B.237(2) the juvenile court was required to terminate the GAL appointment after the mother was determined competent to aid and assist in her criminal proceedings. The state argued that the court was not required to make a sua sponte determination as to whether a GAL should be removed. Because the error was not preserved, the Court of Appeals reviewed the issue for plain error. The court held that the juvenile court did not commit plain error in continuing the appointment of the GAL, because ORS 419B.237(2) does not support the mother's contention that the court had a sua sponte obligation to terminate a GAL. Furthermore, the court held that the mother's challenge to the adequacy of her counsel was unreviewable in light of Dept. of Human Services v. T.L., 269 Or App 454, 344 p.3d 1123 (2015). In Dept. of Human Services v. T.L., the Court of Appeals rejected unpreserved arguments

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ineffectiveness of counsel, finding that parties must claim ineffective assistance of counsel in the trial court under ORS 419B.923. Finally, the court found that the termination proceedings were not fundamentally unfair because mother's arguments rested wholly on the GAL appointment and the inadequacy of counsel argument. The court affirmed the termination of parental rights judgment.

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***Dept. of Human Services v. E.L.G.*, 270 OR App 308 (2015)**

Father and mother appeal a juvenile court judgment asserting jurisdiction over their two-month old child, arguing that DHS failed to prove that the father and mother's incestuous relationship posed a current risk of serious loss or injury to their child. The mother also argued that the juvenile court erred in ordering no contact between the two parents. The mother is father's biological adult daughter. At some point, they began a sexual relationship, which resulted in two children. The older child, who has some serious medical issues, was already under the jurisdiction of the juvenile court and in foster care at the time of the jurisdictional hearing for the four-month old child. At some point prior to the jurisdictional hearing, the police began a criminal investigation into the father and mother's relationship.

During the jurisdictional hearing, the court noted the mother's admission in agreement for dismissal of several of the allegations against her. DHS also communicated to the court that the agency agreed to amended allegations against the father in exchange for the father's agreement not to contest those allegations. Parents acknowledged that they did not preserve the jurisdictional argument but asked the court to review it as plain error and exercise discretion to correct it. DHS responded by arguing that the assertion of jurisdiction was not erroneous because there was evidence in the record to support the juvenile court's finding that the child's welfare was at risk based on the mother's admissions that her conditions and circumstances prevented her from safely parenting, the parents criminal conduct, as well as unchallenged testimony from the caseworker at the hearing. DHS also argued that even if the juvenile court had erred, the Court of Appeals should not examine the unpreserved challenge because the parents invited the error by not challenging the sufficiency of the evidence, objecting, or cross examining the sole witness.

The court concluded that the failure of the parents to object to the sufficiency of the evidence was a strategic choice which deprived the juvenile court of the opportunity to correct that error. The parents did not object to the testimony of DHS's sole witness or even cross examine the witness. The court did find that the juvenile court was over-broad in ordering no contact between the parents, because the basis for jurisdiction was only the parent's sexual relationship. The court reversed and remanded the no contact order, and otherwise affirmed the judgment of the juvenile court.

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« Case Summaries continued from previous

Dept. of Human Services v. R. S., 270 Or App 522 (2015)

Mother appeals a permanency judgment changing her child, K's, permanency plan from reunification to another planned permanent living arrangement (APPLA). In February 2012, K was removed from mother's care due to her inability to follow a DHS safety plan. Mother was found unable to handle K's substantial mental health concerns, and to have a history of choosing violent or unsafe partners, placing K at a risk of harm. After initial struggles finding suitable foster care, K was eventually placed with a supportive foster family and began making positive progress. Despite regular phone visitation and occasional structured in-person visits with the mother, K expressed a strong desire to remain with the foster family.

At a July 2014 permanency hearing, DHS recommended keeping the permanency plan as reunification based on the mother's participation in family therapy, alcohol treatment and parenting skills classes. However, the family therapist and a CASA volunteer both reported concerns that the mother's interactions with K were slowing K's mental health progress. In the written permanency judgment, the court checked boxes indicating that DHS had made reasonable efforts and that the mother had made sufficient progress toward meeting the expectations in the service agreement, however the court decided that the child could not be safely returned to her home.

The mother first appealed on grounds that the juvenile court's findings were inconsistent with its ruling. The Court of Appeals affirmed the decision, stating that under ORS 419B.476(2)(a), even though the juvenile court found that mother made "sufficient progress" in her service agreement, it is not inherently inconsistent with a determination that the parent has not made sufficient progress to make it possible for the ward to safely return home, given the current state of the child. Second, the mother argued on appeal that the juvenile court applied the incorrect standard under 419B.476(2)(a) when it based its determination on "the best interest of the child" rather than on its "sufficient progress" finding. The Court of Appeals again affirmed the judgment of the juvenile court, stating that: "we do not understand the court's oral findings to indicate that the court neglected the findings required under ORS 419B.476(2)(a) concerning 'reasonable efforts' and 'sufficient progress.' The court explicitly concluded that DHS had made reasonable efforts and that the mother's progress was insufficient for K to safely return home."

Dept. of Human Services v. J. A. M., 270 Or App 464 (2015)

Father appeals a judgment of the juvenile court terminating his parental rights to his daughter, H. DHS removed H from her father's care in October 2012, when H was four years old. At that time, father was using heroin and living in a room with H where she was exposed to dangerous conditions. The court ordered father to undergo drug treatment. Through the first months of treatment, father failed numerous UAs and participated minimally. Despite a recommendation for in-patient treatment, father refused. In September 2013, DHS petitioned to terminate parental rights. While father did not relapse into heroin use, he failed several UA's and obtained numerous prescriptions for opiates.

During the two years from the removal of H from father's care to trial, H formed a strong connection with her aunt and uncle with whom she lived. She expressed a strong desire to remain with her aunt and uncle rather than returning to her father's care; H's anxiety disorder also began to show improvement. The juvenile court determined that because of the father's continuing struggles with drug use, his refusal

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« *Case Summaries continued from previous*

to accept that he had a drug addiction, the fact that he was still living with his own parents without the space and resources to house H, and H's own desire to remain with her aunt and uncle, that termination was appropriate on grounds of unfitness under ORS 419B.504.

On appeal, father argued that he successfully treated his opiate addiction. He asserted that by the time of trial he was not using heroin and that his prescription opiate use was safe. He argued that under Dept. of Human Services v. C.J.T., 258 Or App 57, 308 P3d 307 (2013), and Dept. of Human Services v. C.Z., 236 Or App 436, 236 P3d 791 (2010), his use of prescription medication was insufficient to establish serious detriment to H. After reviewing the facts de novo, the Court of Appeals affirmed the termination. The court distinguished the prior cases on the grounds that father's drug use in this case was directly detrimental to H. Additionally, his continued use of prescription opiates coupled with a refusal to accept that he had a substance abuse problem demonstrated that it was unlikely that his conduct or condition would improve within a time suitable for H, given her particular need for immediate permanency.

***Dept. of Human Services v. C. M. K.*, 270 Or App 1 (2015)**

In a consolidated appeal, parents appealed the juvenile court's judgment terminating parental rights to their children, I and K, both four years old. The court held that the parents were unfit under ORS 419B.504 reasoning that "they were unable to provide minimally adequate parenting . . . and would not be able to do so within a . . . reasonable [time] . . . due to conduct or conditions . . . not likely to change."

Father argued that he is fit because he has been sober and has engaged in services. Mother argued that a mere risk of relapse doesn't necessarily render her unfit. DHS countered that it proved unfitness by evidence of a long history of drug abuse, domestic violence, and neglect. DHS further contended that reintegration of the children within a reasonable time is unlikely because mother and father have not been able to sustain sobriety despite years of engaging in services. On de novo review, the Court of Appeals agreed with DHS.

First, both parents continued to struggle through a "years-long pattern of [cyclic] drug abuse, sobriety, and relapse" despite engaging in and completing services to promote sobriety. In fact, K tested positive for methamphetamine at the time of birth and exhibited withdrawal symptoms a few weeks later. Further, father's participation in services was inconsistent because he did not engage in the programs until a year after being referred and stopped attending altogether after just four months.

Second, the evidence strongly suggested that the parents' behavior was unlikely to change. Both parents were diagnosed with Personality Disorder, characterized by an unrealistic view of one's own ability to overcome problems, which left them more susceptible to relapse. Furthermore, shortly before trial, father was arrested for a fourth-degree assault when he pushed his mother who then hit her head on a piece of furniture. Also, mother used marijuana just four months before the termination trial.

Finally, the children have spent the majority of their lives in foster care. By October 2013, I and K had experienced three moves and two different foster placements, respectively. As a result, they showed signs of developmental delays and attachment issues. Further delays in permanency only would have exacerbated these problems.

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The parents' conduct or condition was seriously detrimental to their children and not likely to change. Consequently, the children could not be expected to return to their parents' care within a reasonable time. Therefore, the Court of Appeals determined that in the best interests of the children, termination of parental rights was appropriate. Accordingly, the court affirmed.

Dept. of Human Services v. D. H., 269 Or App 863 (2015)

Mother appealed a juvenile court judgment taking jurisdiction over her son, J. The grounds for jurisdiction were: (1) mother was aware of her husband's sex offender status yet did not believe he posed a risk to J, thereby placing J under threat of harm; (2) mother was unwilling to protect J from unauthorized contact with her husband, thereby placing J under threat of harm; and (3) mother's mental health issues, which led to a suicide attempt, interfered with her ability to care for J, thereby placing J under threat of harm. Mother argued that DHS failed to establish risk of injury or harm to J sufficient to permit the juvenile court to exercise jurisdiction over J under ORS 419B.100(1)(c). The Court of Appeals agreed with mother.

First, there was no evidence that the husband ever harmed J or any child in any way. The husband's sex offender status, resulting in a condition of no-contact-with-minors, was for the attempted rape of an 18 year-old adult female. Since J was a 5 year-old male child, J was not within the class of the husband's victims. Since the evidence of the husband's attempted rape conviction alone, without a speculative inference, was insufficient to establish a risk to J, the state failed to meet its burden.

Second, the existence of a condition of no-contact-with-minors, alone in itself, is not enough to establish a risk to J. The DHS case worker admitted that they could not make any direct inference of a risk to J stating, "we really don't know what threat [the husband] does or does not pose to the children." (Internal quotation marks omitted). Further, J never actually suffered any harm, in fact, J was happy and healthy with no signs of injury. Next, the husband's probation officer allowed the husband to have limited contact with other minors. Also, there was no particularized finding that the husband posed a risk to minors. The condition of no-contact-with-minors was apparently applied indiscriminately as a broad statutory policy to all sex offenders regardless of the class of victim under ORS 144.102(4)(b).

Third, there was no evidence that mother's mental health issues posed any risk to J. Mother's unstable mental health, which caused her to consume a bottle of codeine in a suicide attempt, was only in response to the traumatic removal of her son, J, from her custody. Presumably, mother's mental health would pose no risk to J while she has custody of J. Thus, the state failed to meet its burden of proving that mother's mental health created a reasonable likelihood of harm to J.

The evidence presented, J's exposure to the husband and to mother's mental health issues, was insufficient to establish a risk of injury or harm to permit the juvenile court to exercise jurisdiction over J under ORS 419B.100(1)(c). Therefore, the juvenile court's jurisdictional determinations regarding mother, were erroneous. Accordingly, the Court of Appeals reversed. ●

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Documentary Tough Love

Premieres on OPB July 7, 2015 at 2:00 a.m.

What makes a good parent? How do you prove you are responsible after you've been deemed unfit? Having lost custody of their children to Child Protective Services, two parents — one in New York City and one in Seattle — fight to win back the trust of the courts and reunite their families in Stephanie Wang-Breal's moving film.

Acknowledging their past parenting mistakes due to poverty, poor choices and addiction, both Hannah and Patrick contend with a complex bureaucracy to prove they deserve a second chance. A co-production of ITVS. A co-presentation with the Center for Asian American Media (CAAM).

As we go to press, Oregon Public Broadcasting has Tough Love scheduled for 2:00 a.m. on July 7. To get updates on broadcast times and view the trailer, go here: http://www.pbs.org/pov/toughlove/ ●

CASE SUMMARIES

By Jennifer Stoller, YRJ Attorney

Waiver to Adult Court

State v. J.C. N.-V., 268 Or App 505, 342 P3d 1046 (2015), en banc, appeal docketed No. S063111 (Or Sup Ct, Nov. 9, 2015)

The 13-year-old youth was accused of aggravated murder, and the District Attorney sought to have him waived into circuit court for trial as an adult. The 20-year-old co-defendant told the youth of his intention to rob and murder the victim ahead of time, and the youth agreed to participate.

ORS 419C.352 allows for discretionary waiver of 12- to 14-year-olds if the juvenile court makes the findings required under ORS 419C.349(3) and (4). Under ORS 419C.349(3), the court must determine that the youth, "at the time of the alleged offense was of sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved." The court must additionally decide that, "retaining jurisdiction would not serve the best interests of the youth and of society," under specified criteria. ORS 419C.349(4).

Two expert witnesses evaluated the youth and provided testimony regarding the issues of "sophistication and maturity" under ORS 419C.349(3). Both experts found that youth was generally average in maturity for his age, though he had areas in which he was either more or less mature than his peers. In addition, another expert testified generally about adolescent brain development, particularly about the immaturity of the pre-frontal cortex. The court heard testimony about the susceptibility of youth to peer pressure. The juvenile court held that youth, "was of sufficient sophistication and the maturity to appreciate the nature and quality of the conduct of the alleged offense of Aggravated Murder." 268 Or App at 514.

On appeal, youth argued that the definitions of sophistication and

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maturity "involve behavior, intellect and emotions beyond those of an average thirteen-year-old" and, therefore, the legislature intended only youth of above-average sophistication and maturity should be waived into adult court. 268 Or App at 522. Youth also argued that the juvenile court should consider a youth's vulnerability to peer pressure and other factors.

The Court of Appeals held that, as used in ORS 419C.349(3), the phrase "appreciate the nature and quality of the conduct," describes "an appreciation of the physical nature and consequences of one's conduct, along with the wrongful or criminal quality of that conduct," but does not require the youth to have the ability to conform his conduct to the requirements of the law. 268 Or app at 521. As a result, an average 12- to 14-year-old may have the requisite maturity and sophistication to understand his actions in a physical sense and understand that those actions were wrong and may have criminal consequences.

Accomplice Liability

***State v. J.M.M.*, 268 Or App 699, 342 P3d 1122 (January 28, 2015) (Douglas County).**

The Court of Appeals reversed the trial court, finding that mere presence at the planning and scene of the crime and acquiescence in its commission are not enough to establish accomplice liability. The evidence established that the youth knew about the burglary and was present, but remained outside and did not serve as a lookout or participate in removing the stolen property. At trial the prosecution had argued that the youth's failure to remove himself from the scene made him guilty under an accomplice theory. The Court of Appeals cited *State v. Moriarty*, 87 Or App 465, 468 (1987): "[t] he smallest degree of collusion between accomplices is sufficient for aiding-and-abetting liability." However, under the facts of this case, the youth was "only a witness, not an accomplice," citing *State v. Crawford,* 90 Or App 242 (1988), and "must have done more to be liable as an accomplice." 268 Or App at 705.

Photo by Wayne S. Grazio CC by 2.0

***State v. E.L.-A.S.*, 269 Or App 171, -- P3d -- (February 11, 2015) (Douglas County).**

In a per curiam opinion, the Court of Appeals reversed a jurisdictional finding of theft in the third degree where youth was present when two boys stole sandwiches from a store and did not stop them. Citing *State v. J.M.M.*, 268 Or App 699 (2015), the Court found this conduct to be insufficient to constitute aiding and abetting. ●

Police Interviews of Children at School

By Anne Haugaard, YRJ Law Clerk

In 2009, the Ninth Circuit Court of Appeals ruled on an appeal of a District of Oregon case in which a two-hour interview of a child at school conducted by a caseworker and deputy sheriff, without consent, warrant, or court order, constituted an unreasonable seizure under the

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Fourth Amendment. Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009). The Ninth Circuit concluded that the caseworker and sheriff's deputy were protected by qualified immunity and not liable because they had not violated a clearly established constitutional right. In its ruling, the Ninth Circuit put government officials on notice that they need consent, warrant, court order, or exigent circumstances before conducting a law enforcement interview on school grounds. In 2011, the U.S. Supreme Court vacated the Ninth Circuit's decision as moot, since the student had moved out of the state and was about to turn 18.

In January 2015, the San Diego Police Department published regulations requiring department members to obtain parental/guardian consent or a court order prior to interviewing minor victims, suspects, or witnesses on public school grounds during school hours. There are "on-call" supervisors that are able to assist department members in obtaining court orders for cases involving sexual assault, child abuse, child molestation, or child neglect investigations. There is a separate team of supervisors and detectives to be contacted for all other cases involving juvenile victims, suspects, or witnesses. If the incident did occur on school grounds during school hours, a court order is not necessary. For more information see: San Diego Police Dept. Order OR 15-02: http://www.youthrightsjustice.org/media/3814/2015-sdpd-order-re-warrants.pdf ●

Photo from NASA Goddard Space Flight Center CC by 2.0

Additional Case Summaries

By Afton Coppedge and Joshua Olmstead, YRJ Law Clerks

Nevada Foster Youth Secure $2 Million Settlement

***Henry A. v. Willden*, 2015 U.S. Dist. (D. Nev. Jan. 16, 2015)**

The Federal District Court of Nevada has given final approval to a $2.075 million dollar settlement for seven former foster children injured while in the custody of the Clark County (Las Vegas) foster care system. Since 2010, the plaintiffs have sought damages from child welfare officials citing numerous violations of their constitutional and statutory rights, including improper use of psychotropic medications, physical and sexual abuse in foster homes, and inadequate Child Protective Services investigations. The Ninth Circuit Court of Appeals reversed the trial court's decision to dismiss the case. The Ninth Circuit held that the plaintiffs were entitled to proceed with their claims and the county was not entitled to immunity. The children had a constitutional right to adequate safety and proper medical care while in the county's custody. The court stated, "[a] reasonable official would also have understood that failing to respond to (plaintiff) Linda's reports of physical abuse in her foster home or the numerous reports of abuse in (plaintiff) Mason's out-of-state placement would constitute deliberate indifference to the children's right to safety in their foster care placements."

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« *Case Summaries continued from previous*

State v. D.C., 269 Or App 869, 346 P3d 562 (2015)

http://www.publications.ojd.state.or.us/docs/A150053.pdf

Youth appealed the juvenile court's denial of his motion to suppress evidence discovered during a search of his backpack. The police responded to a report of a residential burglary involving the theft of an Xbox. The victim identified youth, provided a description of what the youth was wearing and pointed them in the direction of youth's nearby residence. After searching for ten minutes, police encountered youth walking a few blocks away. As one of the officers pulled up alongside him, the youth dropped his backpack and took a step or two away from it before the officers initiated a discussion with him. Initial questioning confirmed that youth knew the victim and had been at his house earlier that day. Eventually, after further questioning from one of the three officers who knew the youth through his position as a school resource officer, youth admitted to having the Xbox, and agreed to open the backpack.

The juvenile court suppressed these statements, finding that by the time the school officer confronted youth, there was probable cause to arrest, and *Miranda* warnings were required and not given at that time. The court upheld the discovery of the Xbox on the grounds that it would have been inevitably discovered through a search incident to arrest.

The issue presented on appeal was whether the police officers had objective probable cause to believe that the youth had committed a crime in order to justify a search incident to arrest. Youth argued that mere presence near his house and the house of the victim, coupled with a largely unexplained accusation by the victim was insufficient. The court of appeals upheld the search, looking to the totality of the circumstances. The court reasoned that taken together: the presence of the youth near the victim's home, the "furtive" gesture of stepping away from the backpack, the fact that the backpack could reasonably hold an Xbox, the corroboration of the appearance of the youth from the victim's description and youth's admissions that he knew the victim, had played with the Xbox, and had been by the victim's house that day combined to provide "an objectively reasonable basis to believe that youth had committed a crime."

Counsel in Juvenile Removal Proceedings

In *J.E.F.M., et al., v. Eric H. Holder, et al.*, W.D. Wash. (C-14-1026 TSZ, 4/13/14), plaintiffs, nine immigrant juveniles of varying ages, on behalf of themselves and all juveniles similarly situated, asserted statutory and constitutional claims that they are entitled to legal representation in their removal proceedings. The district court, ruling on a wide-ranging motion to dismiss on jurisdictional and 12(b)(6) grounds, allowed the class action to proceed specifically on 5th amendment due process grounds. While the court denied plaintiffs' claims for class-wide injunctive relief, it allowed the case to proceed on a claim for declaratory relief and individual injunctive relief for the represented plaintiffs in the case.

The court rejected the government's claim that the needs of juvenile immigrants in court are analogous to those of adults, traditionally denied public representation in civil removal actions. The court noted that juvenile immigrants have a lesser ability to navigate the court system, and that they often face harsher consequences as a result of deportation. The court also rejected the government's claims that plaintiffs in such actions are required to exhaust all administrative remedies before filing an appeal, noting the difficulties in doing so without representation, and the fact that in most cases juveniles would turn 18 before exhaustion is feasible. For future proceedings, the court held that the appropriate test for the plaintiffs' due process right-to-counsel claim is the three factor balancing test in *Matthews v. Eldridge*, 424 U.S. 319 (1976). The court, while not coming to a final judgment on the test, suggested that given the potential consequences of deportation, coupled with the large risk of erroneous deprivation that would result from juveniles forced to defend *pro se*, there is a strong case for plaintiffs moving forward.

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RESOURCES

New Jersey Public Radio investigation finds black children more than twice as likely as white children to enter foster care when drugs are a parental risk factor

In May 2015, Sarah Gonzalez of New Jersey Public Radio reported on the staggering level of overrepresentation of black children within the New Jersey child welfare system. In the first of two reports, Ms. Gonzalez noted that, according to child welfare data on children entering foster care in New Jersey between 2009 and 2013, black children are four times more likely than white children to enter foster care in New Jersey. The article suggests that, even when presented with a similar set of family circumstances, there is a possibility that race is an influencing factor in the level of risk associated with those family circumstances. In New Jersey, almost half of all child welfare workers are black and the New Jersey Division of Child Protection and Permanency is committed to helping workers understand the impact their personal views may have on the job. However, the majority of child abuse and neglect allegations come from outside of the child welfare system. Hospitals, neighbors and schools play a large role in determining which families come to the attention of the child welfare system.

Photo by Dustin Coates CC by 2.0

In her second report, Ms. Gonzalez, examines how external reporters, such as schools, neighbors, and hospitals, may contribute to African American overrepresentation. The report finds black mothers who use public hospitals particularly vulnerable to child welfare system involvement. According to Oronde Miller, Executive Director of the Institute for Family and Child Well-Being, "African American mothers in particular are so much more likely to be tested for substances when they give birth and to have their children removed if they test positive." In New Jersey, drug use is a factor in about one-third of cases which result in foster placement. And, in these cases, black children are more than twice as likely as white children to enter foster care.

For more information or to listen to the reports, go to:

Black Mothers Judged Unfit at Higher Rate than White Mothers in NJ
http://www.wnyc.org/story/black-parents-nj-lose-custody-their-kids-more-anyone-else/?utm_source=local&utm_medium=treatment&utm_campaign=daMost&utm_content=damostviewed

When Race and Drugs Intersect, Children More Likely to Enter Foster Care
http://www.wnyc.org/story/role-drugs-child-removal-cases-new-jersey/

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Detention and Subsequent Psychiatric Disorders and Violence

By Katherine Levinson, YRJ Intern

"Psychiatric Disorders and Violence: A Study of Delinquent Youth After Detention" by Katherine S. Elkington, PhD, Linda A. Teplin, PhD, Karen M. Abram, PhD, Jessica A. Jakubowski, PhD, Mina K. Dulcan, MD, Leah J. Welty, PhD, a study published in the Journal of the American Academy of Child & Adolescent Psychiatry examines the relationship between psychiatric disorders and violence in delinquent youth after detention. Data was gathered through the Northwestern Juvenile Project, a prospective longitudinal study of delinquent youth from the Cook Country Juvenile Temporary Detention Center in Chicago, IL.

In order to explore the relationship between psychiatric disorders and violence in these youth, researchers examined the prevalence of violence three and five years after detention, the contemporaneous relationship between violence and psychiatric disorders as youth age, and whether the presence of psychiatric disorder predicts subsequent violence.

Via self-report at the detention center and again between three and five years following detention, 1,659 youth were assessed. Researchers examined seven diagnostic groups, including manic episode or hypomania, MDD or dysthymia, any anxiety disorder (GAD, PTSD, or panic disorder), any DBD (CD, ODD, or APD), alcohol use disorder, marijuana use disorder, and other drug use disorder (SUD – Substance Use Disorder).

Results indicated that most disorders were contemporaneously associated with violence as youth aged, with SUDs being the only disorder that predicted subsequent violence. Alcohol, marijuana, other drug use disorders, DBD, and anxiety disorders were all contemporaneously associated with violence. Mania and hypomania were also contemporaneously associated with violence in males, and MDD and dysthymia were also contemporaneously associated with violence in females.

SUDs did predict subsequent violence, but the degree of the violence depended on the specific substance used and gender, amongst other factors. The nature of the involvement in illegal drug trade and association with gangs or other violent individuals can influence the association between illegal drug use and violence as well.

Though the results from this study are informative, there are several limitations. Due to the fact that data was gathered from a single site, the findings may not be generalizable to youth not detained in urban centers with similar demographic composition. The findings are also reliant on the accuracy of self-reporting and cannot determine any causal relationship between psychiatric disorders and violence. In addition, the study could not examine how mental disorders or violence are affected by incarceration. ●

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Save The Date

16th ABA NATIONAL CONFERENCE ON CHILDREN AND THE LAW

Advancing Access to Justice for Children and Families

July 24-25, 2015

Pre-Conference: Best Practices to Support Kinship Families

July 23, 2015 &

4th ABA NATIONAL PARENT ATTORNEY CONFERENCE

Achieving Justice Against the Odds

July 22-23, 2015

Pre-Conference: Trial Skills for Parents' Attorneys

July 21, 2015

Washington, D.C.

For Registration: http://www.americanbar.org/groups/child_law/conference2015/Rates.html

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NCJFCJ 78th Annual Conference
July 26-29, 2015
JW Marriott Austin Hotel
Austin, Texas
More info: http://ncjfcj.webfactional.com/78th-annual-conference

WESTERN JUVENILE DEFENDER CENTER LEADERSHIP SUMMIT
July 31-Aug 1, 2015
Portland, Oregon
For more information contact:
George Yeannakis
george.yeannakis@teamchild.org
(206) 322-2444x107
Susan Roske
roskesd@clarkcountynv.gov
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Maurisa Gates
mgates@mpdlaw.com
(503)225-9100

JCIP THROUGH THE EYES OF A CHILD, XVIII
August 9-10, 2015
More info: http://courts.oregon.gov/OJD/OSCA/cpsd/courtimprovement/jcip/pages/eventcalendar.aspx

ODAA 2015 SUMMER CONFERENCE
August 19-21, 2015
Riverhouse Hotel & Convention Center
Bend, OR
More Info: http://odaa.oregon.gov/events.htm

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
Conference brochure available May 2015.
www.naccchildlaw.org

YRJ 40TH ANNIVERSARY WINE & CHOCOLATE EXTRAVAGANZA
October 24, 2015
World of Speed

Presented by Tonkon Torp
Tickets $150. register at:
https://jrplaw.ejoinme.org/MyEvents/EventHome/tabid/670773/Default.aspx
Sponsorships available.
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janeen.o@youthrightsjustice.org