Juvenile Law Reader

Youth, Rights & Justice
ATTORNEYS AT LAW
An independent, not-for-profit law firm, Est. 1975

Volume 15, Issue 2 • Summer 2018

"Engaging competent and effective lawyers for parents and children is one way to guard against harmful removals and to keep foster stays as short as possible."

Washington State Expands Parent Representation Program and Oregon Follows Suit

Legal Representation for Parents and Children Delivers Better Results

By Amy S. Miller, Acting Deputy Director, Office of Public Defense Services

Studies suggest that when parents and children have good lawyers, it reduces the amount of time children spend in foster care. Lawyers for parents and children ensure that rights are protected and that wishes are clearly and effectively voiced. In addition, quality legal representation for parents and children has been shown to contribute to increased engagement in case planning and

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court-ordered services, increased visitation, expedited permanency, and savings to states as a result of reduced foster care use.[1]

State interference in the lives of families, even when absolutely necessary, is a traumatic experience with long-standing consequences. Foster care is not a benign intervention; the longer children stay in foster care, the more likely they are to move from foster home to foster home, with worse and worse long-term outcomes.[2] According to a study of adverse childhood experiences of foster children, children in foster care are much more likely to have experienced ACEs than children across different socioeconomic thresholds and differing family structures.[3]

In 2007, Joseph Doyle, a professor at MIT, completed a largescale study that looked at "marginal" cases of elementary school aged children—cases in which an investigator might reasonably have left a child at home or taken a child into foster care—and found that later in life, children taken into foster care had significantly worse outcomes in areas of employment, homelessness, and teen pregnancy. According to

Doyle, this research supports a policy and practice emphasis on family preservation.[4]

Furthermore, judicial authorization of removal typically happens at a shelter hearing, after the removal occurred. Although judges determine whether a child should remain out of the home and whether reasonable efforts were made to prevent removal, judicial authorization is rarely obtained before removal.[5] And, once the child has been removed from the home, the courts rarely decide against the agency. One national survey found that less than 4% of judges had ever ruled that the agency had failed to make reasonable efforts to stabilize the family before removing the child from his or her parents.[6]

Engaging competent and effective lawyers for parents and children is one way to guard against harmful removals and to keep foster stays as short as possible.[7]

Washington state... A national leader

In 2000, Washington State was spending three times more on lawyers representing its child welfare system than on lawyers representing parents fighting that system. The state underwrote an additional $500,000 in parent representation, capping caseloads at 80 parents per lawyer and requiring quality representation and significant oversight. Afterward, reunifications increased—from 37 percent of cases to 56 percent.[8] The resulting Parent Representation Program

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The Juvenile Law Reader is published four 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.

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started out as a small pilot and expended incrementally for nearly two decades. In 2017, the expansion was completed. The legislature provided enough funding—8 million dollars—to cover the handful of counties not participating in the PRP.[9] By July 2018, all parents who qualify for public defense across the state will benefit from improved legal representation provided by attorneys within the PRP.[10]

Washington's Parent Representation Program is the national model for competent and effective legal representation in juvenile dependency cases. Key elements of the Parent Representation Program include: caseload limits and professional attorney standards; access to expert services and independent social workers; state agency oversight; and ongoing training and support. The PRP has been studied a number of times and has consistently shown to improve outcomes. According to a 2011 study, the children served by the Washington PRP reach reunification one month sooner and other permanency outcomes one year sooner than those not served by the program.[11] Jurisdictions that want to improve parental representation and shorten the time children are in foster care should consider a program similar to Washington's PRP.[12]

Oregon makes incremental progress with PCRP expansion

In 2014, Oregon began its own two-county pilot program to improve the quality of legal representation for parents and children in juvenile court cases. Based on the Washington State model, Oregon's Parent Child Representation Program aims to ensure competent and effective legal representation throughout the life of the case by capping attorney caseloads, providing access to social workers, and requiring adherence to best practices for attorney performance. The goal of the program is to achieve positive outcomes for children and families through the reduction of the use of foster care and reduced time to permanency for children.

Three years of data signals Oregon's program is on the right track. Grounded in strong legal advocacy and collaborative problem solving, the quality of legal representation in PCRP counties has improved. Lawyers are now present at all court hearings, including initial shelter hearings, and are expected to spend a significant amount of time with clients. Children in PCRP counties are more likely to experience timely permanency, with 77% of children finding permanency in 24 months compared to 66% across the state.[13] In PCRP counties, families are reunited more quickly. The average time to reunification in PCRP counties has consistently decreased and now averages 7 months. Conversely, the state time to reunification remains consistent at 12 months.[14]

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However, lawyers for parents and children experience a significant funding disparity compared with their counterparts representing the Department of Human Services. On a per-party basis, the state spends double the amount on government lawyers and legal services than it does on lawyers for parents or children.[15]

In 2018, recognizing funding disparities and the potential for improved case outcomes, the legislature funded an expansion of the Parent Child Representation Program into Coos and Lincoln counties, bringing the total number of counties within the program to five. Within the legislature, there is strong support for the data-informed model of the PCRP. Advocates, lawyers and policy-makers recognize that legal representation plays a role in reforming Oregon's troubled child welfare system.

Footnotes

[1] US DHHS ACF Children's Bureau, *Information Memorandum ACYF-CB-IM-17-02 on High Quality Legal Representation for All Parties in Child Welfare Proceedings* (January 17, 2017), https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf.

[2] USA Today, *Study: Troubled homes better than foster care* (July 30, 2007) http://usatoday30.usatoday.com/news/nation/2007-07-02-foster-study_N.htm.

[3] Turney and Wildeman, *Adverse childhood experiences among children placed in and adopted from foster care: Evidence from a nationally representative survey*, Child Abuse & Neglect (February 2017), https://www.sciencedirect.com/science/article/abs/pii/S0145213416303180.

[4] MIT News Interview with Joseph Doyle, *Kids Gain More From Family than Foster Care* (July 2007), http://news.mit.edu/2007/sloan-fostercare-study-0703.

[5] According to Oregon's Department of Human Services, "A survey of the 36 counties indicates that there is significant variance in the practice of seeking a protective custody order from the court prior to taking a child into protective custody." However a breakdown of the larger counties shows the following averages: Multnomah 15%, Washington 10%, Clackamas 2 cases/year, Lane 8 cases/year.

[6] Blustain, *Defending the Family: The Need for Legal Representation in Child-Welfare Proceedings*, The Nation (January 2018), https://www.thenation.com/article/defending-the-family-the-need-for-legal-representation-in-child-welfare-proceedings/.

[7] *Id.*

[8] *Id.*

[9] Washington State 2017-2019 Operating Budget (June 30, 2017) http://leap.leg.wa.gov/leap/Budget/Detail/2017/soSummary_0630.pdf.

[10] Washington State Office of Public Defense Parent Representation Program, https://www.opd.wa.gov/program/parents-representation.

[11] Courtney, Hook & Orme, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes*, 34(7) Children and Youth Services Review 1337 (2012).

[12] Cohen and Cortese, *Cornerstone advocacy in the first 60 Days: achieving safe and lasting reunification for families*, ABA Child Law Practice (May 2009).

[13] Average rate of change in PCRP county permanency within 24 months 2014-2017, Oregon child welfare data set report PA.08 Permanency in 24 months (of those entered care 24 months ago).

[14] Average change in PCRP county time to reunification per year, 2014-2017, Oregon child welfare data set report CM.15 Median Length of Stay at Foster Care Exit, Of children discharged, the median number of months to discharge (median is middle score where half were more and half less), by admin level.

[15] For Fiscal Year 13/15, Oregon spent $38.4 million on lawyers and paralegals to prosecute juvenile dependency cases and $52 million on lawyers to defend children and parents. A typical dependency case includes an attorney for each parent (mom and dad) and for the child(ren) as well as a government attorney. Equal funding would require $115 million be spent on lawyers to defend parents and children. http://www.oregon.gov/gov/policy/Documents/LRCD/Oregon_Dependency_Representation_TaskForce_Final_Report_072516.pdf.

Eighth Amendment Case Study

By Addie Smith, YRJ Attorney

Kinkel v. Persson, 363 Or 1 (2018) is a post-conviction relief case in which six justices of the Oregon Supreme Court upheld the trial court's decision to sentence a 15-year-old to 112 years in prison—a sentence which the Court deemed the "functional equivalent of a life sentence without the possibility of parole."

Rule of Law Announced

Under the Eighth Amendment, a life sentence without the possibility of parole for a juvenile is not categorically disproportionate. Rather, "Only those juveniles whose homicide reflects irreparable corruption rather than the transience of youth are eligible for a life sentence without possibility of parole." Factors that may allow a determination of "irreparable corruption," and the imposition of a life sentence, include:

- The number and nature of the crimes;
- A permanent mental condition unrelated to youthfulness.

The Crime

Petitioner, who was 15 at the time, shot both of his parents at home and covered their bodies. The next day, he drove to school armed with three guns. He proceeded to shoot and kill two students, shoot and wound 24 more students, and place his gun on a student's head and pull the trigger (but his gun had run out of ammunition). He later attacked an officer with a knife.

Trial

The state charged petitioner with four counts of aggravated murder, and 26 counts of attempted aggravated murder, among other things. Before trial, petitioner moved to dismiss the aggravated murder charges, arguing that the possibility of life in prison without parole for a 15-year-old constituted cruel and unusual punishment in violation of the Eighth Amendment. Specifically, petitioner reasoned that because of children's immaturity and ability to change, the constitutional prohibition on sentencing a 15-year-old to death extends to life without parole. These arguments were virtually the same as the arguments that later informed the Supreme Court's decision in *Miller v. Alabama*, 567 US 460 (2012). The sentencing court denied this motion.

Petitioner then pleaded to 4 counts of murder and 25 counts of attempted murder (all lesser-included offenses of the charged crimes). The Supreme Court noted that under Oregon law, this plea meant that petitioner admitted to killing four people with intent to kill, as well as attempting to kill the 24 students he wounded and the one he attempted to shoot. Petitioner entered a nolo contendere plea regarding his attack of the officer, and the trial court found him guilty of attempted murder for that act as well. As part of the plea, petitioner stated, "by permitting the Court to enter a guilty plea on my behalf, I knowingly waive the defenses of mental disease or defect, extreme emotional disturbance, or diminished capacity."

The plea resulted in four 300-month sentences (25 years); one for each of the murder convictions that the court was obliged to order consecutively. Because the sentencing court was not bound to order each of the 26 90-month sentences consecutively, the court held a hearing to determine the appropriate course of action.

During the sentencing hearing, the majority of youth's mitigation evidence consisted of expert testimony describing youth's mental health and diagnosing him with a schizoaffective disorder. These experts presented testimony that youth had been hearing voices for three years, that it was those voices that "commanded him" to commit the murders and attempted murders in question, and that youth's felonious behaviors "were directly the product of his psychotic process." They also testified that youth could not be cured, and if his condition were not adequately treated and managed with medication, structure, and extensive support, he would remain dangerous. The court also heard from students and their parents, who described how petitioner's actions affected their lives.

Petitioner made his earlier Eighth Amendment arguments that the sentences should be concurrent because of the age of youth, in reasoning nearly identical to *Miller*.

The sentencing court ruled by

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dividing each mandatory sentence into two parts, providing that 40 months of each of the 26 90-month sentences would run consecutively to each other and the four 25-month murder sentences, while 50 months of each of the 90-month sentences would run concurrently. This left a total sentence of "slightly less than 112 years."

Post-Conviction Petitions and Appeals

Petitioner challenged his aggregate sentence on direct appeal, contending that it violated Article I, section 16, of the Oregon Constitution, and the Eighth Amendment. In 2002, the Court of Appeals rejected these arguments. A year later, petitioner filed a timely post-conviction relief petition which was denied by the post-conviction court, affirmed by the Court of Appeals and denied review the by the Oregon Supreme Court in 2011. Approximately one year later the United States Supreme Court issued *Miller*. Petitioner then filed a second post-conviction petition. The post-conviction court ruled that the statutes barred petitioner from raising his Eighth Amendment claim under ORS 138.550(3) (because the issue could have been raised in his first post-conviction petition). The Court of Appeals affirmed based on ORS 138.550(2) (because the issue had been raised on direct appeal), finding that *Montgomery v. Louisiana*, ___ US ___, 136 S Ct 718, 193 L Ed 2d 599 (2016), did not override that statute.

Opinion of the Oregon Supreme Court

The Oregon Supreme Court granted review. The parties raised three primary issues:

> "The first is whether, as a matter of state law, petitioner's Eighth Amendment claim is procedurally barred. See ORS 138.550(2) (barring post-conviction petitioners from raising grounds for relief that were or reasonably could have been raised on direct appeal) * * * . If it is, the second issue is whether *Montgomery v. Louisiana*, ___ US ___, 136 S Ct 718, 193 L Ed 2d 599 (2016), requires this court to reach petitioner's Eighth Amendment claim despite the existence of that state procedural bar. Third, if petitioner's Eighth Amendment claim is not procedurally barred, the remaining issue is whether and how *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012), applies when a court imposes an aggregate sentence for multiple crimes committed by a juvenile."

The Court first held that it "need not resolve the parties' procedural arguments to decide the case. Even if we assume that petitioner is not procedurally barred from relitigating his Eighth Amendment claim on state post-conviction, we conclude that the Court of Appeals decision may be affirmed on other grounds."

Noting that Eighth Amendment proportionality cases fall into two general classifications: 1) the number of years in light of the circumstances in a case, and 2) categorical limits on certain sentencing practices; the court determined that the argument in this case related to categorical limits.

The Court then recited the applicable case law on categorical limits. *Roper v. Simmons*, 543 US 551 (2005) stated that the "unique characteristics" of juveniles made that class of offenders ineligible for the death penalty under the Eighth Amendment. *Graham v. Florida*, 560 US 48 (2010) stated that both the age and crime bear on the analysis and that the Eighth Amendment categorically bars a sentence of life

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without the possibility of parole for a non-homicide offense committed by a juvenile. *Miller v. Alabama*, 567 US 460 (2012), used *Roper* and *Graham* to find mandatory life without parole in a homicide case to be unconstitutional, noting that a juvenile homicide case where life without parole would be appropriate would be "uncommon" because the "juvenile offender whose crime reflects unfortunate yet transient immaturity and the rare juvenile offender whose crime reflects irreparable corruption" will be difficult to distinguish. *Montgomery v. Louisiana*, __ US ___ (2016), clarified that Miller "rendered life without parole an unconstitutional penalty for a 'class of defendants because of their status'—that is juvenile offenders whose crimes reflect the transient immaturity of youth.'"

The Court also expounded on the Eighth amendment limits on aggregate sentences, repeating the words of the United States Supreme Court in *O'Neil v. Vermont*, 144 US 32 (1892): "If [a defendant sentenced to an aggregate sentence for multiple offenses] has subjected himself to a severe penalty, it is simply because he has committed a great many such offenses."

The court then rejected youth's argument that *Miller* and *Graham* collectively lead to a categorical rule that when a juvenile's aggregate sentence is equivalent to life without possibility of parole, then the severity of the sentence and the age of the offender will always lead to the conclusion that the sentence violates the Eighth Amendment. Instead, the Court found that those cases "do no limit a sentencing court to consider only the severity of the sentence and nature of the offender. Rather, those decisions make clear that a sentencing court can and should consider the nature and number of the juvenile offender's convictions." The Court concluded that, given the "nature and number of the crimes that petitioner committed, we are hard pressed to say that his aggregate sentence is constitutionally disproportionate even taking his youth into account."

The Court then stated, however, that although it might be possible to uphold petitioner's sentence against the Eighth Amendment based on the number and magnitude of crimes, "we need not go that far to decide this case [because] petitioner comes within the class of juveniles who, as *Miller* recognized, may be sentenced to life without parole for a homicide."

> "As *Miller* explained and *Montgomery* confirmed, if a single juvenile homicide reflects the transience of youth, the possibility of reformation is too great for life without possibility of parole to be constitutionally permissible. * * * However, when the traits that led to the commission of the homicide are fixed or irreparable, rather than transient, then that characteristic no longer bars imposition of a life sentence without possibility of parole for a single homicide. Additionally, the homicide must reflect a level of corruption sufficient to impose life without possibility of parole on a juvenile."

Turning to the facts in this case, the Court found that where the sentencing court determined that youth committed the crimes in question because of "a deep-seated psychological problem that will not diminish as [petitioner] matures," that finding was "inconsistent with a determination that petitioner's crimes 'reflect the transient immaturity of youth.'"[1] The Court also found that the crimes "are the sort of heinous crimes that, if committed by an adult, would reflect an 'irretrievably depraved character' or irreparable corruption.'" It therefore held that petitioner's aggregate sentence did not violate the Eighth Amendment of the Constitution.

Dissent by Justice Pro Tempore Egan

In his dissent, Justice pro tempore Egan took issue both with the majority's conclusions that petitioner's crimes did not reflect the transient nature of youth and that petitioner's crime reflected irreparable corruption and irretrievable depravity.

The dissent stated that "petitioner's youth is inextricable from his crimes," and therefore "[p]etitioner's

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crimes were the result of a set of circumstances that were products of both his age and mental disorder." Justice pro tempore Egan pointed to expert testimony and *Roper* for the proposition that "[i]t difficult even for trained practitioners to differential between unfortunate yet transient immaturity, and the rare juvenile offender who crimes reflect irreparable corruption."

With the understanding that petitioner's crimes were "horrendous," Justice pro tempore Egan stated that the crimes were not the product of irreparable corruption but rather that "a brief but horrible psychotic break with horrific consequences." Because there was no evidence that petitioner retained a disregard for human life and because the only evidence showed that youth's disregard was a temporary product of his mental disorder – which, although not curable, was manageable, meant that he was not "irreparably corrupt."

The dissent also discussed the far-reaching policy ramification of the majority's decision:

> "The onerous and disproportionately severe sentencing of child offenders with treatable mental illness that manifest in terrible criminal acts tends to drive the public narrative in the wrong direction. * * * * * We obscure the issue of race, ethnicity, social class, and politics when we allow mass shootings to represent all gun crime and when we stop using "mental illness" as a medical diagnosis and change it into a sign of gun violence. The facts surrounding this particular mass shooting are well known and irrefutable.
>
> "The facts about mental illness are now common knowledge and irrefutable as well. One in five Americans experience some detectable measure of mental illness in a given year; one in 25 American adults experience a serious mental illness in a given year; and one in five American youths ages 13 to 18 experience a severe mental illness. These numbers illustrate the fact that children with severe mental illness mature, and become law abiding adults. The largest share of adults with mental illness live without any limitations in their activities of daily living. Only a small fraction of severely mentally ill youths become severely mentally ill adults. The principles that the Court relied on in *Miller* cannot allow a conclusion that it is acceptable to imprison for the entirety of their lives any of these youth offenders whose mental illness will likely result in treatable conditions in adulthood without some manifestation of irreparable corruption. In doing so, we buy in to the narrative that the problem is mental illness."

Ultimately, Justice pro tempore Egan would have concluded that the petitioner's sentence of incarceration was unconstitutional.

Footnote

[1] The court noted that "because petitioner's psychological problems diminish his culpability for reasons that unrelated to his youth, they are independent of and are separate from the concerns that animated the Court's Eighth Amendment holdings in *Roper*, *Miller*, and *Graham*."

More Valuable than Gold?

Social Workers, Parent Mentors, and Child Welfare Research

By Amy S. Miller, Acting Deputy Director, OPDS

Last month I attended the inaugural American Bar Association National Interdisciplinary Family Defense Conference. This conference was focused on the integration of parent mentors and social workers within the practice of representing parents and children in juvenile court. Over 200 lawyers, parent mentors, and social workers representing 24 states spent two days together discussing child welfare research, exploring legal frameworks, and learning team-based strategies to better advocate for parents and children.

Interdisciplinary practice and, in particular, the use of social workers as part of the legal representation team is recommended by the American Bar Association, the National Juvenile Defender Center,

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the National Association of Counsel for Children, and the Oregon State Bar.[1] The 2016 Report of the Oregon Task Force on Dependency Representation highlights access to social workers as a key component of quality parent and child representation. Well-trained social workers, acting to supplement the work of attorneys, are able to visit child clients, engage in collaborative problem-solving with foster parents, and advocate for the unmet needs of foster children. Social workers partner with attorneys to assess and address client needs, motivate clients to engage, develop alternative safety and visitation plans, facilitate relative placement, and identify solutions to expedite permanency for children. Parent mentors bring a unique skill set to the team—having experienced the system themselves, they provide essential engagement support, translate a very complex system, and amplify the voices of parents. Most importantly, parent mentors provide hope and serve as role models. Because social workers and parent mentors are part of the legal representation team and their work falls within the scope of attorney-client privilege, they are more easily able to develop trusting and accountable relationships with clients.

In a handful of Oregon counties, lawyers have access to social workers or case managers as part of the defense team. Some counties have parent mentor programs but I'm unaware of any parent mentors that serve as agents of defense attorneys. However, after attending the conference, I've seen the value and return on investment of an integrated dependency practice and will continue to support expansion of this model in Oregon.

Using child welfare research to improve case outcomes was another topic discussed frequently throughout the conference. I learned about a study that quantifies the negative effects of agency caseworker turnover on timely permanency (Flower, McDonald, Sumski, 2005), that children in foster care are at 3.7 times the risk of experiencing institutional abuse compared to children in kinship placements (Winkour, Holtan, & Batchelder, 2018), and that children on the margins of entry into the foster care system likely fare better with their biological families (Doyle, 2007).

Michael Heard and Amelia Watson from the Washington State Office of Public Defense created the detailed bibliography that follows. It is reprinted here with their permission.

Footnote

[1] *See* American Bar Association, Standards of Practice for Attorneys Representing Parents http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/parent_standards_passed.doc, National Juvenile Defender Center, Juvenile Defense Standards http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf, National Association of Counsel for Children, Recommendations for Representation of Children http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/Standards/NACC_Standards_and_Recommend.pdf, Oregon State Bar Report of the Task Force on Standards of Representation in Juvenile Dependency Cases http://www.osbar.org/_docs/resources/juveniletaskforce/JTFR3.pdf.

Using Child Welfare Research to Improve Client Outcomes

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Oregon's Incarceration Rates: A Primer

By Mark McKechnie, MSW, YRJ Executive Director

A headline from Oregon Public Broadcasting reported on January, 30, 2018, stated: "Oregon Incarcerates Youth At Higher Rate Than Most States." The item went on to state: "Youth incarceration rates across the country have dropped 50 percent over the last decade. In comparison, Oregon's rates have dropped nine percent." (Kristian Foden-Vencil, OPB News)

Because Oregon has undertaken a number of initiatives to reduce pre-adjudication detention and post-adjudication incarceration, and because Oregon has also suffered budget cuts and other changes that have contributed to a reduction in capacity of the types of placements counted in this data, it was surprising to many people that Oregon's rates could remain so high compared to other states.

In fact, Oregon's incarceration rate is high, but it is also important to understand how these rates are determined. The types of placements and circumstances counted as "incarceration" is surprisingly broad, and includes both locked and unlocked settings. There were also significant differences in the Oregon data between pre- and post-adjudication "incarceration" rates.

This article is primarily intended to explain how this data is collected, what it includes, what it excludes, and some of its limitations. The first caveat is that states collect and report data to the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP). Because practices and data systems vary from state to state and jurisdiction to jurisdiction, there will necessarily be inconsistencies and flaws with the data and complications in comparing states with one another using this data. Nonetheless, OJJDP maintains a guide to states for collecting and reporting data and the available data set covers two decades of reports.

When I spoke with some local and national experts on Oregon's juvenile justice data, one of the first data points cited to provide context to Oregon's incarceration rates is that Oregon's rates of juvenile arrest have been and continue to be above national averages. The chart below includes some of the most recent data available. Note that Oregon's 2014 data was unavailable. But the graph below clearly shows that Oregon's youth arrest rate was substantially higher than the national average in the 1990s. While both rates have fallen, and Oregon's rate is closer to the national average than it was in the 1990s and early 2000s, it still remains higher than the average for the U.S.

Thus, it should not be terribly surprising that Oregon's incarceration rates are higher than average when

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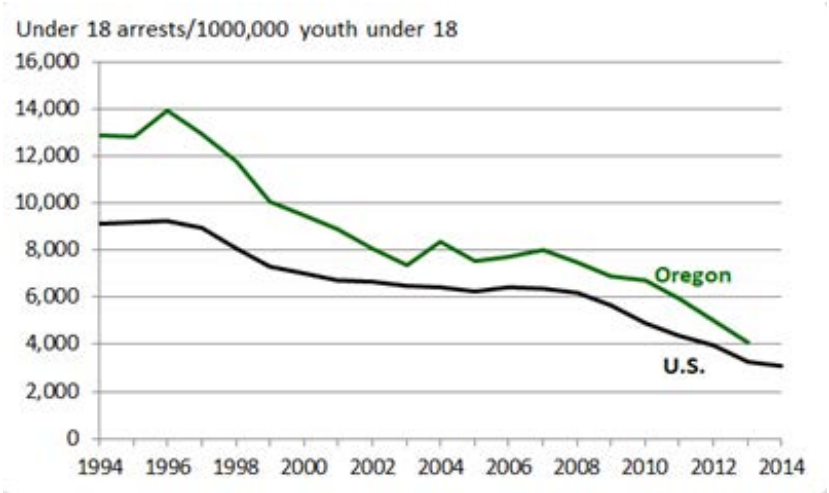

Source: OJJDP, Easy Access to FBI Arrest Statistics, 1994-2014
https://www.ojjdp.gov/ojstatbb/ezaucr/

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it has historically had higher rates of juvenile arrests, as well.

The data on "incarceration rates" cited recently was from the Easy Access to the Census of Juveniles in Residential Placement: 1997-2015, reported by the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP). In this data set, Oregon is ranked third highest in the nation (based upon youth under the age of 21 incarcerated per 100,000 of the youth population):

State	Total per capita	Committed	Detained
1. West Virginia	329	214	113
2. Wyoming	296	251	40
3. Oregon	**286**	**233**	**51**
4. Alaska	262	152	99
5. South Dakota	254	200	53
6. District of Columbia	251	107	143
7. Pennsylvania	228	196	31
United States Average	**152**	**100**	**50**

The definition of "incarceration" is much more expansive than most people might imagine. The two primary distinctions made are between Detained and Committed youth. "Detained" includes juveniles held prior to adjudication, as well as juveniles in detention after disposition who are waiting placement elsewhere. It also includes juveniles awaiting transfer to adult court or awaiting a hearing or trial in adult court. Oregon's detention rate compares more favorably: it is very close to the national average and lower than some comparison states with similar population sizes or geographically close to Oregon.

Committed youth include those placed in a facility as part of a court-ordered disposition, including those placed by a local or state juvenile justice or child welfare agency, or correctional agency, as the result of adjudication and disposition on a delinquency matter, as well as those sentenced in criminal court.

Data are collected based upon a snapshot on a single day during the collection year. The snapshot includes youth who are younger than 21 on the count date, including those awaiting transfer hearings or youth convicted in adult court. Thus, the data for Oregon include youth 15-17 years of age who were charged and convicted under Measure 11 or who were waived to adult court by a juvenile court.

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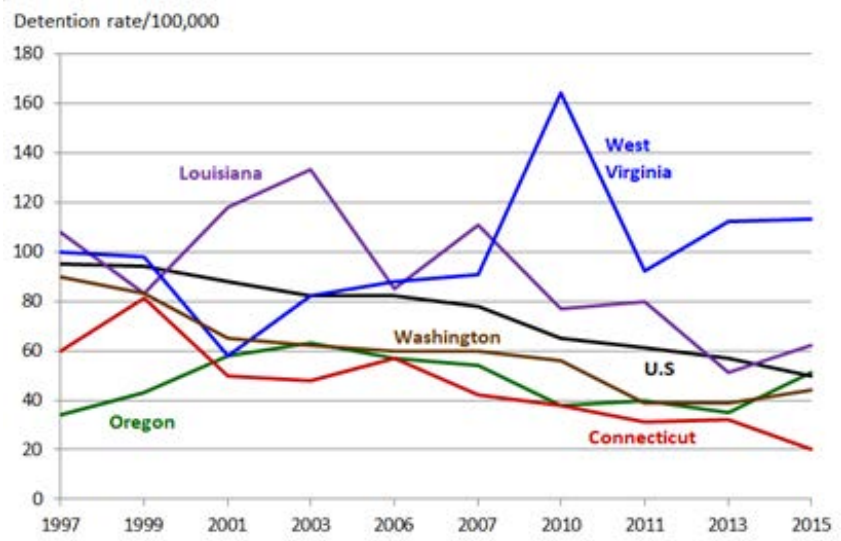

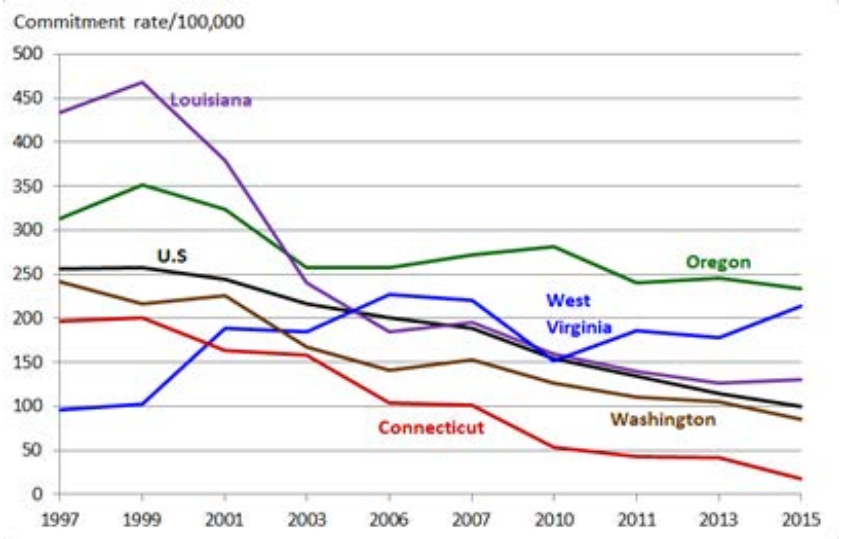

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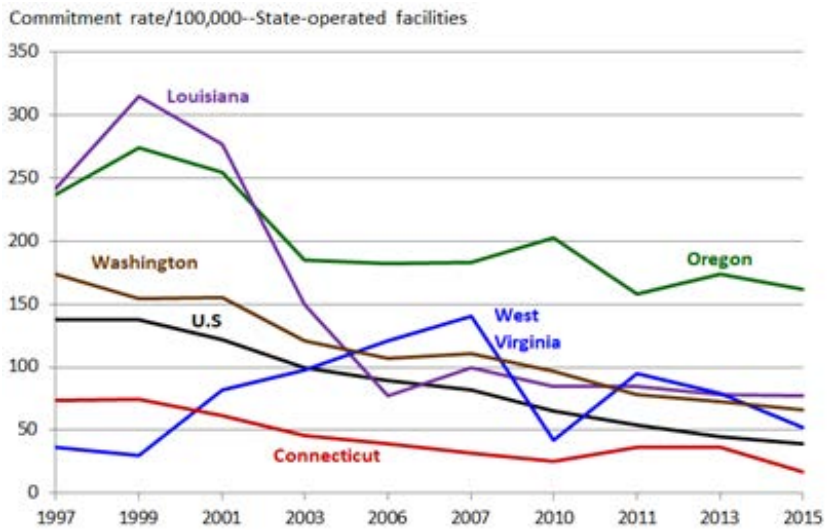

This also means that Oregon rates may be somewhat undercounted, since the age of juvenile court jurisdiction extends to age 25 for the purposes of placement by the Oregon Youth Authority. According to OJJDP, youth are no longer supposed to be included once they are 21 or older on the census date. In terms of the post-adjudication commitment rate, Oregon has remained higher than the U.S. averages and higher than comparison states (e.g., those with similar population sizes or are geographically close to Oregon).

When I contacted Melissa Sickmund, Ph.D., Director of the Research Division of the National Council of Juvenile and Family Court Judges, to better understand these statistics, she also observed that Oregon has a far higher rate of incarceration of youth charged with sexual offenses. While the national average is 9% of committed youth who have a charge related to sexual assault, the rate in Oregon is nearly three times the national average: 26%. But this is down from 40% of committed youth in Oregon, as recently as 2003.

Oregon's rate for commitments to state-operated facilities is noticeably higher than comparison states. Many other states have sent higher percentages of youth to privately-run facilities, while Oregon has maintained its public system of juvenile detention and state correctional facilities and camps. This may be a good thing in terms of accountability and standards in public versus private facilities. Pennsylvania, for example, has only about 15-20% of youth in state-operated facilities, compared to nearly 60% in Oregon.

One of the most remarkable elements to help explain the wide variation in "incarceration rates" among states is the broad continuum of facility and program types that are included under the "incarceration" category (as long as the placement relates to a delinquency or criminal petition, juvenile adjudication/ disposition or criminal conviction). They include both locked and unlocked placements:

- **Detention Center**: a short-term facility that provides temporary care in a physically restricting environment for juveniles in custody pending court disposition and, often, for juveniles who are adjudicated delinquent and awaiting disposition or placement elsewhere, or are awaiting transfer to another jurisdiction.

- **Shelter**: a short-term facility that provides temporary care similar to that of a detention center, but in a physically unrestricting environment. Includes runaway/homeless shelters and other types of shelters.

- **Reception/Diagnostic Center**: a short-term facility that screens persons committed by the courts and assigns them to appropriate correctional facilities.

- **Group Home**: a long-term facility in which residents are allowed extensive contact with the community, such as attending school or holding a job. Includes halfway houses. For data years 1997, 1999, and 2001 this category includes Residential Treatment Centers.

- **Boot Camp**: a secure facility that operates like military basic training. There is emphasis on physical activity, drills, and manual labor. Strict rules and drill instructor tactics are designed to break down youth's resistance. Length of stay is generally longer than detention but shorter than most long-term commitments.

- **Ranch/Wilderness Camp**: a long-term residential facility for persons whose behavior does not necessitate the strict confinement of a long-term

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secure facility, often allowing them greater contact with the community. Includes ranches, forestry camps, wilderness or marine programs, or farms.

- **Residential treatment center**: a facility that focuses on providing some type of individually planned treatment program for youth (substance abuse, sex offender, mental health, etc.) in conjunction with residential care. Such facilities generally require specific licensing by the state that may require that treatment provided is Medicaid-reimbursable. In data years 1997, 1999, and 2001 these facilities are included in the Group Home category.

- **Long-term secure facility**: a specialized type of facility that provides strict confinement for its residents. Includes training schools, reformatories, and juvenile correctional facilities.

- **Other: includes facilities such as alternative schools and independent living, etc.** (EZACJRP Glossary, https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/glossary.asp#FacilitySelf)

While one can question the very broad definition used for "incarceration" in these statistics, it is clear that Oregon authorities refer more youth to the justice system and more youth are placed, per capita, in both locked and unlocked out-of-home placements for those who are adjudicated delinquent, compared to the vast majority of other states. These trends bear further investigation and scrutiny.

For more information regarding this data or the collection methodology, you can visit the EZACJRP data site at: https://www.ojjdp.gov/ojstatbb/ezacjrp/

A description of the methods is here: https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/methods.asp

And the glossary of terms and categories used is here: https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/glossary.asp

Foster Kids' Attorneys Aren't the Problem: Guest Opinion

The following article is reprinted here with the permission of the author, F. G. (Jamie) Troy II, and *The Oregonian/OregonLive*, in which it was first published on June 1, 2018.

http://www.oregonlive.com/opinion/index.ssf/2018/06/foster_kids_attorneys_arent_th.html

As a Portland-based attorney who has practiced juvenile law for more than 20 years, I read Hillary Borrud's April 29 article, "Who speaks for the kids?," with a mixture of interest and dread. She pointed out the flaws in our representation of child clients. She noted some strengths, but mostly weaknesses in attorneys representing children and families in cases with "incredibly high" stakes. She pointed out that we have known for almost two decades that foster children face an "unreasonable likelihood of receiving poor representation."

You know who knows this? Our legislators. And most of our other elected officials. You know who elects those folks? We the People. And you know who's to blame for this broken system? We all are.

The sad truth is some of my kid clients would be better off if the Department of Human Services left them with their parents, despite those parents' significant faults. At least then some of my kid clients wouldn't be placed in upwards of 17 different placements, including hotels. Maybe some of my kid clients -- if left at home -- wouldn't quickly become homeless or incarcerated, as some do when they age out of foster care without being adopted or reunited with family. Children can be abused in foster care, sometimes worse than in their birth homes. Oregon gets sued for this abuse because it is responsible for kids in its custody. And some of the settlements that the state pays out are staggering.

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The Secretary of State's recent audit of the Child Welfare system found "chronic management failures and high caseworker caseloads jeopardize the safety of some of the state's most vulnerable children." Where are our priorities? We're being short-sighted with limited taxpayer dollars. If we better utilized lawyers, caseworkers and other folks working to heal families and care for children, we could protect more children, reunify more families and create better outcomes.

Birth parents trying to regain custody of their children need housing, substance-abuse recovery programs, mental health treatment, visitation opportunities and parenting education. All are scarce in our community. Caseworkers are denied money to pay for services designed to reunify families. These and other problems lead to low morale and high caseworker turnover at the Department of Human Services. Experienced attorneys often must pick up the slack on behalf of families whose caseworkers are young, untrained and lack knowledge about available resources or sometimes about basic social work concepts.

I have 90-plus cases and I carry the smallest caseload of any attorney in my office. We have a high volume contract with the state, as do most providers. The state can terminate inept providers. And it does -- not frequently, but it happens. Why not more frequently when the stakes are so high? Because public defense pays so little that few among us are willing -- or can afford -- to do it.

My firm's contract doesn't even pay us to represent individual kids. We get paid the same amount to represent four siblings as we would one child, unless they are in different placements. This contract, repeated throughout the state, overburdens public defenders. And our poor and most vulnerable kids pay for it. We systemically fail them.

I don't need to get rich. I am passionate about my work and I love my clients. But I cannot handle my current caseload. The truth is, none of us can. So we triage and save time where we can. I routinely send legal assistants or investigators to visit my child clients.

Many changes need to occur to help caseworkers at the Department of Human Services do good work, to improve the quality of foster homes and to reduce attorney caseloads. Recent leadership changes at the top of the human services department give us hope. But we have a long way to go and it will require increased investment.

Kids deserve safety. Kids deserve a voice. Kids are the reason we have a juvenile court system. If "We the People" care as much as we claim to about them, we will finally face the truth.

It's a broken system and we need to fix it.

Juvenile Law Resource Center

JLRC Contact Information

Alison Roblin is the contact person for trainings and other JLRC services.

To receive a call back within two business days from a JLRC attorney for advice, email the workgroup and please include your name, telephone number, county, and brief description of your legal question.

CASE SUMMARIES

By Addie Smith, YRJ Attorney, and Christa Obold Eshleman, YRJ Supervising Attorney

Dependency

Dept. of Human Services v. S.A.B.O., 291 Or App 88 (2018)

In *Dept. of Human Services v. S.A.B.O*, 291 Or App 88 (2018), the Court of Appeals reversed a juvenile court judgment that re-asserted jurisdiction over two children based on additional allegations presented in a second petition.

The original basis for jurisdiction was mother's admission in 2015 that, due to a conviction of fourth-degree assault against father, she needed the assistance of DHS and the court to "resolve the safety risk" to children. In 2017, the juvenile court held a second jurisdictional hearing on an amended petition. After dismissing allegations that mother exposed children to unsafe people and conditions and that mother lacked appropriate parenting judgment, the court found jurisdiction based on mother's mental health issues. Specifically, the court found that mother's mental health "put [mother] clearly at risk and * * * put her children at risk of situations that are physically dangerous at the very least emotionally and socially dangerous * * * [due to] what they have been exposed to, and what they would be exposed to without DHS involvement[.]"

The Court of Appeals began its analysis by restating the legal standard that applies to an additional allegation when a juvenile court has already taken jurisdiction over a child on one basis. Specifically, the court must:

> "examine whether sufficient evidence exists, from which a reasonable factfinder could conclude by a preponderance of the evidence, either that a current risk of harm to [the child] exists from the additional allegation standing alone, or that the additional allegation contributes to or enhances the risk associated with the already existing bases of jurisdiction."

Id. at 99 (quoting *Dept. of Human Services v. S. R. C.*, 263 Or App 506 (2014)).

Applying this test, the Court of Appeals noted that the children were never present for any of the three instances of domestic violence described and that the evidence did not show that "the domestic violence was so prevalent in mother's relationships that it created the kind of 'chaotic and physically threatening environment' that itself can be harmful to children." It then found that, although DHS had proven that mother's mental health problems may contribute to her being involved in violent relationships, that "does not itself, standing alone, establish that those relationships are reasonably likely to present a serious

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threat of harm to her children."

DHS also attempted to argue that the children were at risk of harm because current evidence showed that that mother's mental health contributed to her involvement in violent relationships and jurisdiction was originally established based on a single incident of domestic violence. The court did not find that argument persuasive. The court found that the original basis of jurisdiction provided no additional information about child's current risk of harm because the record established that the children were not present during that incident of domestic violence and did not identify what, specifically, the risk of harm to the child had been in 2015.

State v. G.V.L., 291 Or App 53 (2018)

In *State v. G.V.L.*, 291 Or App 53 (2018), the Court of Appeals reversed and remanded the juvenile court's decision to decline jurisdiction and to dismiss a dependency petition child had filed on his own behalf after fleeing Guatemala to live with his brother in Oregon.

At the jurisdictional hearing, the child was the only party that presented evidence. The uncontroverted evidence showed that the child had faced abuse at the hands of his father his entire life, that even after father moved out of his home father had beaten child and threatened to kill him, and that child's mother did not feel that she could protect him from father. In addition, child's immigration attorney testified that child would be deported unless he could show that he was eligible for some form of legal immigration status and that to apply for special immigrant juvenile status—the status most likely to offer child relief—a court must find the child to be a dependent due to abuse, abandonment, or neglect.

The juvenile court did not find the evidence insufficiently persuasive. Instead, the juvenile court found that the facts did not, as a matter of law, provide a basis for jurisdiction, stating:

> "The Court does not find that there is a current risk of serious loss or injury. The harm alleged is speculative and depends on whether [child] is deported, and whether he is returned to Guatemala. Even in the unfortunate event that [child] is deported, given his age and ability to travel on his own, the court is not convinced that juvenile court protection is warranted."

The Court of Appeals held that the "juvenile court's rationale [was] flawed and [could] not be legally supported." Specifically, the Court of Appeals explained that ORS 419B.100 authorizes a juvenile court to assert jurisdiction to protect a child from both harm and "substantial risk of harm." It then held that it is "axiomatic" that physical abuse like the abuse proven in this case, endangers a child's welfare. The Court of Appeals added that fact that an abusive parent or a parent unable to protect their child does not have physical custody at the time of jurisdiction does not defeat jurisdiction, as the trial court implied. It further noted that when a parent's abusive behavior has caused a youth to run from this home, and when that youth runs to a country where he lacks a legal guardian, this itself creates "a reasonable likelihood of harm" to the child's welfare. The Court of Appeals added that this harm is not made speculative, as the trial court asserted, simply because of the child's "age and ability to travel."

Citing to *State v. L.P.L.O.*, 280 Or App 292 (2016), the Court of Appeals also concluded that the fact that the child had turned 18 before the petition was adjudicated did not defeat the jurisdiction of the juvenile court.

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Juvenile Law Resource Center

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Dept. of Human Services v. J. J. B., 291 Or App 226 (2018)

In *Dept. of Human Services v. J. J. B.*, 291 Or App 226 (2018), the Court of Appeals reversed the juvenile court judgment asserting jurisdiction over a child based on one allegation of domestic violence and one allegation of substance abuse against mother and identical allegations regarding father.

The evidence presented showed that mother and father had had verbal disagreements in front of the child, including one disagreement where father punched a hole in the wall. The child told interviewers that the fighting hurt her feelings but not "so bad" that she cried, and that she had never seen the fighting turn physical. The mother indicated that she felt safe in the home "[m]ost of the time." A caseworker testified that at a meeting with the parents (where she believed them both to be under the influence of methamphetamine), she witnessed father become upset and controlling with mother. Both parents admitted to relapsing on methamphetamine and police discovered methamphetamine, cash, scales and other drug paraphernalia in their motel room. The child was not with the parents in the hotel room but at her grandmother's house where she often stayed.

Here, the Court of Appeals found that father could appropriately challenge all four allegations - the two regarding mother and the two regarding himself. Citing *Dept. of Human Services v. S.P.*, 249 Or App 76 (2012) the Court noted that the allegations and evidence regarding mother and father were "closely intertwined," and for that reason it would be inappropriate "to artificially separate the allegations regarding father from those involving mother for the first time on appeal to evaluate them independently."

The court of appeals began by stating "[t]he focus must always be on the child." It then declined to address father's arguments as to what constitutes "domestic violence," instead finding that DHS had failed to provide any evidence that parents' behavior "was of the type and severity that creates a current threat of serious loss or injury to [child] that is likely to be realized." Specifically, the court found that DHS had failed to prove that father's behaviors meant to assert "power and control" over mother and parents yelling in front of the child put the child at some type of risk of harm.

On the substance abuse allegations, the Court of Appeals reasoned that the presence of substances, and even the use of substances, does not create a *per se* risk of harm. Here, because DHS offered no evidence that the parents used methamphetamine in front of the child, that the parents failed to supervise due to methamphetamine use or that the child was placed in dangerous situations, they failed to prove the nexus between parents' behavior and a risk to the child. Concluding its analysis of the issue, by stating "[g]eneralizations and assumptions about people who use drugs are insufficient to establish jurisdiction."

Finally, the court also determined that this was not a case where two related allegations "present a more compelling case than either alone," because the evidence failed to establish a relationship between the two allegations.

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Dept. of Human Services v. T.M.D., 292 Or App 119 (2018)

In *Dept. of Human Services v. T.M.D.*, 292 Or App 119 (2018), in an *en banc* decision, with 5 judges dissenting, the Court of Appeals reversed a juvenile court judgment that had denied a termination of parental rights based on DHS's failure to prove termination was in the child's best interests. The juvenile court had held that although DHS had proved the child urgently needed a permanent placement, DHS did not prove that it was in child's best interests to have his mother's rights terminated, and to be adopted by his current caretakers—an aunt and uncle, rather than be placed in a permanent guardianship with the same people.

On appeal, neither party contested the juvenile court's determination that, due to long-time addiction exacerbated by psychological issues that resulted in mother perceiving herself to be in chronic pain, mother was unfit and integration into her home within a reasonable time was improbable. DHS argued that with these determinations, a presumption arose that termination of mother's parental rights was in the child's best interests, and that the court was required to terminate mother's parental rights in this case. DHS relied on the Oregon Supreme Court's statement in *State ex rel Juv. Dept. v. Geist*, 310 Or 176, 189, 796 P2d 1193 (1990), that, "[w]here a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time *** the best interests of the child(ren) generally will require termination of that parent's parental rights." Mother argued that the court should not rely on this because it was dicta, and there could be no presumption when DHS had the burden of proving the element of best interests by clear and convincing evidence. Mother asserted that here, the evidence did not establish that adoption was a better plan for child than permanent guardianship.

The Court of Appeals majority stated that it did not need to reach the proposed rules of law, because, on de novo review, it concluded that termination was in the child's best interests. The court cited mother's insufficient progress, and the testimony of a psychologist, McPhail, that the child needed "a permanent caregiver" as soon as possible, though did have a bond with mother. McPhail did not opine whether an adoptive parent or a permanent guardian would be better for the child. The majority expressed concern with the juvenile court's apparent reasoning that mother might someday be capable of parenting, and that door should be left open. The majority concluded that "because it is apparent to us that the juvenile court viewed the 'permanent' guardianship as a potentially temporary arrangement—one that could be set aside if mother were sufficiently motivated—many of the concerns that MacPhail expressed would not be alleviated by making child's foster parents his guardians." The majority went on to state that "unlike a 'permanent' guardianship, placement with [the aunt and uncle] for adoption would alleviate *all* of the uncertainties attendant to any temporary placement, no matter how durable that placement may appear." They also noted that "the juvenile code expresses a legislative preference

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that children be placed in the most permanent setting suitable to their needs."

The five dissenting judges argued, "though the majority declines to decide the question of whether such a presumption exists, it effectively applies such a presumption by conflating the best interests inquiry with the inquiry regarding unfitness and integration within a reasonable time." The dissent went on to state that there should be no such presumption, and: "the inquiry regarding a child's best interests must be separate from the inquiry regarding the parent's conduct or conditions and the likelihood of reunification." Applying de novo review to the facts of this case, because of the child's stable relative placement, positive attachment to mother, and lack of abuse in the case, the dissenting judges would have found that DHS failed to prove by clear and convincing evidence that termination of his mother's rights was in the child's best interests.

Delinquency

State v. R.Y., 291 Or App 246 (2018)

In *State v. R.Y.*, 291 Or App 246 (2018), the Court of Appeals affirmed the juvenile court's finding that youth was under its jurisdiction for acts that if committed by an adult would constitute one count of unlawful sexual penetration in the first degree, ORS 163.411, two counts of sexual abuse in the first degree, ORS 163.427, and three counts of coercion, ORS 163.275. The court addressed only the argument that the evidence was insufficient to prove each of the acts of coercion. The Court of Appeals "agree[d] with youth that, when a person is accused of a crime based solely on words spoken, evidence as to what words the person actually spoke is very important." Also stating that had youth only said "do not tell anyone," the court would have "face[d] a serious question about the sufficiency of the evidence." Because, however, the record included an interview where "the victim was asked whether someone 'told her not to tell' about the incident, [and] she responded, 'Yes, he threatened me and he said, 'Dude, I'll kill your mother and you and your brother'—* * * * * (Inaudible) kill my family,'" the court found the evidence of coercion to be sufficient.

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