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"An attorney wishing to preserve the *Colby* issue must, at a minimum, ask the court to make a record of its understanding of the elements of the offense."

Court of Appeals Holds Trial Court Must "Disclose Its Understanding of the Law"

***By** Kyle Krohn, Deputy Public Defender*

In State v. Colby, 295 Or App 246, ___ P3d ___ (2018), the Court of Appeals reversed a criminal conviction after a bench trial, because the trial judge refused to make a record of her understanding of the elements of the offense. The Court of Appeals held that the defendant's right to appeal included a right to meaningful appellate review of whether the court—acting as factfinder—had a correct understanding of the elements of the offense. *Id.* at 249-51. To enable meaningful appellate review, the court was required to make a record. The court committed reversible error when it refused "to disclose its understanding of the law that it was applying to convict defendant." *Id.* at 253.

That requirement is analogous to the practice of giving jury instructions in a

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jury trial. Indeed, in criminal bench trials, practitioners frequently refer to the idea that the court "instruct[s] itself" on the law. *Id*. at 252. Virtually every jury trial includes instructions that the court gives the jury throughout the proceeding. At the beginning of the trial, the judge gives preliminary instructions like "turn your phones off" and "don't discuss the case with friends or family." During the trial, the judge may give curative instructions like "disregard that statement" or "you may consider that evidence only for impeachment and not for its truth."

The instructions most relevant to Colby are those given at the conclusion of the case, when the judge tells the jury the elements of the offense. Those instructions are given both orally and in writing, and they enumerate each element along with its mental state. For example, "To establish the crime of assault in the fourth degree, the state must prove beyond a reasonable doubt the following two elements: (1) The act occurred on or about December 1, 2018; and (2) The defendant, Bugs Bunny, recklessly caused physical injury to the victim, Daffy Duck."

Although jury instructions are given in every case, the attorneys do not need to reinvent the wheel each time. Rather, practitioners and judges frequently consult the Uniform Criminal Jury Instructions (UCrJI). The UCrJI are created by a committee of the Oregon State Bar. They represent years of work by experienced criminal attorneys and judges to distill statutes and case law into concise statements that lay jurors can easily understand. They are organized by the type of crime, and each instruction cites the statutes and case law that it draws from. Some instructions also discuss controversies or ambiguities in the law, which practitioners can use to pursue further research. Every member of the Bar has free access to the UCrJI via BarBooks on the OSB website.

The holding of *Colby* may apply to any case where the trial court sits as factfinder and the losing party has a statutory right to appellate review. That includes juvenile delinquency cases. Juvenile attorneys should therefore be prepared to raise the issue when appropriate, and judges should be prepared to rule on it. Fortunately, in most cases, complying with *Colby* should not be burdensome. The requirement of *Colby* is triggered only when a party requests it, and the court can satisfy the requirement in a variety of ways. *Id*. at 250-52.

An attorney wishing to preserve the *Colby* issue must, at a minimum, ask the court to make a record of its understanding of the elements of the offense. The request should come before the court renders its verdict or immediately thereafter. *Id*. at 252 n 3. Before the court deliberates, it

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may also be helpful to give the court proposed jury instructions or written or oral argument regarding the law. If the judge makes a record, and the attorney disagrees with the judge's understanding of the elements and wants to preserve the issue for appeal, objection and legal argument will be necessary if not already done.

For judges, a *Colby* request triggers a requirement to make a record of the judge's understanding of the law. That record need not take any particular form; rather, "what matters is only that an appellate court can perform its function on the issue whether the [substantive issue] was decided on the right legal premises." *Id*. at 251 (quoting *State v. Hull*, 286 Or 511, 517, 595 P2d 1240 (1979)). If one party has offered jury instructions or otherwise expressed its view of the elements, and the judge agrees with that party's assessment of the law, the judge could simply say so.

In nearly any case, it would likely be sufficient for attorneys to offer the relevant UCrJI and for judges to say that they have read the uniform instruction and adopted it as the law. However, keep in

mind that the UCrJI are not the law and are not legally binding. Many of them have never been approved by an appellate court. And sometimes they are wrong. Uniform instructions have been reversed because they quoted dictum from an appellate opinion instead of the language of the statute. See *State v. Lopez-Minjarez*, 350 Or 576, 582-83, 260 P3d 439 (2011). Others have erred because they quoted the language of the statute instead of a contrary holding from an appellate opinion. See *State v. Etzel*, 264 Or App 732, 739-41, 333 P3d 1147, *rev den*, 356 Or 575 (2014).

Thus, practitioners can benefit from using the UCrJI as a starting point, but they may want to do further research—such as reading the relevant statutes and checking for appellate opinions interpreting them. Judges will not necessarily need to go beyond the UCrJI if all that the party requests is a record of the elements that the court is applying. However, if the parties disagree about the elements or disagree with the UCrJI, it will be necessary for the judge to make a ruling on the parties' arguments. Ultimately, *Colby* imposes only one requirement: the record must be sufficient for appellate review of whether the court correctly understood and applied the legal elements of the offense.

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It's been Said or Read—But is it in Evidence?

Making Your Record in Juvenile Dependency Cases

By Elizabeth Oshel, Attorney at Law and the Hon. Maureen McKnight, Multnomah County Circuit Court

This article first appeared in Vol. 8, Issue 3, of the Juvenile Law Reader published in June 2011. It is reprinted here with the permission of its authors. Judge McKnight remains on the Multnomah County Circuit Court Bench and Elizabeth Oshel, her former Judicial Clerk, is now an Associate City Attorney in Bend, Oregon.

Scene 1: At the shelter hearing, Mother asks that infant Kayla be placed with her in residential treatment, which she promises to enter. The Judge presiding at the hearing is the judicial officer who terminated Mother's parental rights to another child 3 months ago and is very familiar with Mother's severe substance abuse problems. DHS argues against return at this point, asking the Court to delay a return decision until a second shelter hearing "given all that was just established at the termination trial."

Scene 2: At a permanency hearing, attorney for Father notifies the Court that Father has separated from

(non-compliant) Mother, is living with his brother, has a room available for the child there, and has just found employment at a gas station. The Court asks Father's Attorney how many witnesses the Attorney will be calling and the Attorney answers: "None."

Scene 3: At a termination trial, the State's attorney asks the Court to "take judicial notice of the social file." At the same hearing, Mother's Attorney asks that her client's Certificate of Completion of a parenting class be judicially noted as well.

All of these scenes involve issues about the record in juvenile court. While everyone at a dependency hearing is focused on the decisions at hand, practitioners have to be attentive not just to the immediate results but also to the record. It really does matter whether what was said, read, or remembered is actually in evidence. For clients, no stakes—not even incarceration—are higher or have such potentially long-lasting results than the loss or lengthy disruption of the parent-child relationship. For attorneys as well, investment in making an adequate record is important. At risk are malpractice liability, skills development, and professional reputation. Whether one intends to practice juvenile law for an entire career or switch at some point to another specialty, understanding the basics of making a record is a fundamental component of legal advocacy. It involves both an understanding of the law and familiarity with the mechanics of presenting evidence. This skill is as necessary as the power to persuade and one cannot afford to learn it late or poorly. While the culture of dependency work sometimes clouds aspects of legal formality in the courtroom, the bottom line is a bright one: juvenile court is a court of record and decisions are based on evidence. What can come into evidence in dependency cases is often subject to less rigorous standards than those applicable in other case types, but come into evidence it must. And as Justice Brewer's sidebar highlights, the Court of Appeals will not make your record for you.[1] This article discusses briefly a few issues implicated in making a record in juvenile dependency cases.

Record on Appeal vs. Evidentiary Record

It probably helps to start out by distinguishing the "record on appeal" from the "evidentiary record." Usually, the former contains the latter but they are not the same. ORS 19.365(2) and ORAP 3.05 provide that the record on appeal consists of those parts of the "trial court file, exhibits, and record of oral proceedings" that are designated in the notice of appeal. "Trial court file" is itself defined at ORS 19.005 and means "all the original papers filed in the trial court." So if the entire trial court file (or "the legal file") is designated, it is in the record for appeal. It might not be in evidence, as discussed below, but the Court of Appeals will have access to it. Correspondence between the parties and the court comes within this

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category. *State ex rel Dept. of Human Services v. Lewis,* 193 Or App 264, 89 P3d 1219 (2004). So do the summons and proofs of service and the original petition in the case, even though trial occurred on the amended allegations. Even a recipe is in the record for appeal if that recipe was filed and the entire trial court file has been designated for appeal. But merely submitting a document for filing does not place that item in the evidentiary record. Filing a document does not even mean the item is relevant to the case. (When one of the authors was practicing, an adverse party placed a list of her client's sexual partners in the court dissolution file. This wasn't relevant and wasn't in evidence, but it was in the trial court file.) Also in the record for appeal are all exhibits that were offered, received or not. So are all the facts and arguments attorneys relay in opening and closing statements, all their objections, and the court's various rulings. Each is part of the oral record of the case which has likely been designated for appeal. In sum, the record on appeal can be as broad as whatever is in the legal file, offered as an exhibit, or said in court.

In contrast, it may be helpful to think of the evidentiary record as a box with a screen over the top. In juvenile dependency cases, that mesh is very, very wide. A lot gets through. In juvenile delinquency cases, that mesh is far finer. But the box is only for facts and unless something gets into that box, the court cannot consider it when making a decision. A judge cannot take into account facts mentioned solely in trial memoranda or closing statements, in letters mailed to the court but not admitted, or information about a party the judge knows from an adult criminal probation violation hearing the judge handled two years ago, or testimony the parent gave in a divorce trial last week. **Only four ways exist to get something into the evidence box for that proceeding: (1) testimony, (2) admitted exhibit, (3) stipulation, and (4) judicial notice**. The facts have to come from some place other than the judge's personal memory or an attorney's relayed recall. Updates to the social file[2] (Department of Human Services court reports and other social history material) are not "automatically" in the box even if the Judge has read them. They need to be offered by a party and admitted as exhibits – in that proceeding. If a psychological evaluation was admitted at the last review hearing in October 2010, it is not part of the evidence for the April 2011 permanency hearing unless it is placed in the new "box." If not in that box already, because of the unique language of ORS 419A.253 the Judge must independently identify any material the Judge intends to consider. Then, subject to objection, the court may take judicial notice or have the material marked and received as an exhibit. The "subject to objection" language is significant and often overlooked.

Judicial Notice

Asking the court to take judicial notice is sometimes used by practitioners as shorthand for "just put this in the record, please, Your Honor." That may be the goal but that may not be the right vehicle. Judicial notice is the evidentiary shortcut for getting a fact (or law) into the evidentiary record without the need for other proof. The court's recognition that a given fact is true (or a given law exists) replaces the need for proof. But judicial notice of facts is proper only when no reasonable dispute exists about those facts. Whether June 6, 2011, was a Monday can be judicially noticed. So can the distance between Portland and Medford, or the fact that Judge Smith found Daniel Jones to be Justin's father in a General Judgment of Dissolution dated May 18, 2011. But it is critical to distinguish between taking notice of the <u>existence</u> of information ("A Proof of Service document *is in* the legal file;" "Judge Jones *found* at the shelter hearing in this case that Mother was *intoxicated* during the hearing") and notice of the <u>truth</u> of that information ("A Multnomah County sheriff's deputy *served* Father with the dependency summons on June 2, 2011"; "Mother was *intoxicated* at the shelter hearing"). The latter statements can't be judicially noticed because the truth of those statements could be disputed. See, for example, *Frady and Frady,* 185 Or App 245, 58 P3d 849 (2002) on the proof of service issue.

This distinction plays out when the Court is asked to "take judicial notice of the legal file." What fact or facts the attorney is asking that the court take notice of? That a legal file exists? The court can do that but why would one want to, as what good is that? Doesn't the attorney really mean that she wants the court to take judicial notice of certain *facts* contained in that file? If so, what

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facts? This is a situation that calls for carefully parsed requests rather than casual, loosely phrased generalities. The Court can take judicial notice that something is in the file, but as previously mentioned, mere presence in a legal file doesn't mean a fact is true. The Court can take judicial notice of a specific (or all) prior findings, conclusions, and rulings in that file and therefore consider what that same or different Judge thought about a particular situation or party at a given point. In fact, attorneys may want to consider asking routinely that the court do exactly that if they want the favorable conclusions from a prior proceeding in the case made a part of the evidentiary record for the current proceeding. But that step is analytically distinct from finding *true* all those prior facts. Similarly, the content of DHS court reports is rarely, if ever, subject to judicial notice because those materials are a compendium of facts about which disputes not only may exist but almost always *do* exist. ("Mother is not in treatment," "Father had contact with Mother," or "Mother appeared for 43 out of 67 visits since the child was placed in care.") The appropriate practice is instead to offer the DHS report as an exhibit.

A final point to remember about both judicial notice and exhibits in dependencies is the right to object. Just because notice was requested or an exhibit was offered by a party, or even if the Judge identifies it as being considered, a document or fact is not part of the decision-making if an objection is sustained. ORS 419A.253(1) allows a challenge to judicial notice or the admission of reports that are submitted and even already read where notice is improper or admission inappropriate. See "Evidence and Social History," below.

Impact of Consolidation

Consolidation of dependency hearings with other domestic relations cases or simultaneously conducted hearings with other cases complicates the discussion of the record in the case. A key principle in consolidation is that the hearings are combined temporally in some way (and physically for file storage in some courthouses, prior to the advent of eCourt) but the procedural and substantive law do not merge into one unit. ORS 419B.806(3) & (5). The pleading requirements, standards and burdens of proof, evidentiary rules, and hearing procedures applicable in each proceeding remain controlling for each. The court may admit evidence as social history in a dependency case but not consider it as objected-to hearsay in the domestic relations modification hearing that is heard simultaneously or immediately after the dependency. Depending on how the consolidated hearings are held, simultaneously or sequentially, there may be one audio record or two. Yet holding simultaneous hearings for dependency cases and other case types places the protected nature of the dependency audio record at risk, given the right of public access to the audio record in the other case type. Contrast ORS 419A.256(2)[3] and ORS 7.130. And each action requires findings and orders or judgments that conform to the legal requirements of the particular separate proceeding. Although it is common practice in consolidated cases in other contexts to place all the findings and rulings in one document with a double caption and file a signed original in each of the legal files, juvenile court confidentiality provisions compel preparation of two different documents to avoid placing juvenile findings in a domestic relations or criminal file accessible to the public. ORS 419B.806(6) and ORS 419A.255(3).[4]

Evidence Rules and Social History

The Oregon Evidence Code does not apply, except for privileges, to "proceedings to determine the proper disposition of a child in accordance with ORS 419B.325(2)." ORS 40.015(4)(h) and OEC 101(4). So while jurisdictional hearings in dependency cases include the

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full panoply of OEC protections, the bread-and-butter of juvenile dependency work – the dispositional inquiries in reviews and permanency hearings – is done under the "social history or prognosis" umbrella of ORS 419B.325(2). See ORS 419B.449(2) regarding reviews and ORS 419B.476(1) regarding permanency hearings. ORS 419B.325(2) allows testimony, reports, and other material relating to the child's mental, physical, and social "history and prognosis" to be received without regard to competency or relevancy concerns. Shelter hearings are also dispositional but have an even broader standard than that set out in 419B.325(2). In shelter hearings, any evidence relevant to the findings required is allowed, without regard to admissibility under the OEC except for privilege. ORS 419B.185(1)(g).

Whether evidence "relates" to the child's social history or prognosis is an issue viewed broadly by Oregon appellate courts. Such evidence must relate to the "child's medical, psychological, and social (personal and family) background and predicted future condition or status." *Kahn v. Pony Express Courier Corp*., 173 Or App 127, 141, 20 P3d 837, 846 (2001). Significantly, information relevant to a forecast or prediction of how the ward will fare in the future "necessarily includes information about the ward's future potential caregivers." *State ex rel DHS v B.J.W.*, 235 Or App 307, 312, 230 P3d 965, 968 (2010). So while the qualifier "child's" doesn't limit the social history umbrella from also covering information about prospective caregivers, the statute does not compel admission categorically. ORS 419B.325(2) allows the court discretion to admit social history/prognosis evidence; it does not mandate admission. Surely there is some evidence produced by hearsay levels so numerous or sources so questionable so as to compromise the utility of the evidence beyond practical value. What about the following, in a case in which the Court is monitoring the enforcement of a "no contact" ruling between the parents:

DHS caseworker says . . .

That Mother's Neighbor says . . .

That Neighbor's 7 year-old Son says . . .

That Son's Friend (age not established) saw a "scary" man who looked like Father coming out of Mother's apartment one morning . . .

Without objection, the evidence is in for sure.

Witnesses Sworn In?

Since the evidence code doesn't apply in dispositional hearings for dependencies, do witnesses have to be sworn in? After all, it is OEC 603 that requires an oath or affirmation from every witness testifying. Is it "no code, therefore no oath?" Or is it instead "no oath, therefore no competent witness?" Oregon appellate courts discuss witness competency in terms of personal knowledge, recollection of the relevant events, capacity to communicate that knowledge, and ability to recognize the necessity of telling the truth. S*tate v. Bumgarner*, 219 Or App 617, 628, 184 P3d 1143, 1149 (2008). The oath about truthfulness is a clearly denominated element of witness competency. *State v. Millbradt*, 305 Or 621, 623-625, 756 P 2d 620, 620-622 (1988), citing OEC 603. But as discussed below, while "competent" evidence is needed at reviews and permanency hearings, the subset of information that concerns social history and prognosis may be admissible without regard to competency. And after all, it is hard to imagine what evidence offered at a review or permanency hearing isn't related to the child's social history and prognosis and would need to meet a competency standard. So perhaps the Legislature intended we get by in dependencies without swearing in witnesses. Aren't informal hearings more conducive to the dispositional planning needed anyway? Certainly those arguments can be made. On the other hand, is it more likely that the Legislature instead intended only that the "personal knowledge" component of competency be inapplicable? This view would hold that witnesses still need to be sworn but allows in all the hearsay that typically constitutes the evidence given the planning and dispositional purposes of the hearing.

It is at least undisputed that the Juvenile Code does require <u>evidence</u> as the basis for dependency decisions. For shelter hearings, the parties are entitled to an "opportunity to present *evidence*" and the court may receive "*testimony*, reports and other *evidence*." ORS 419B.185(1) & (1)(g). In review and permanency hearings, the court must conduct the proceedings "in the manner provided in ORS 419B.310" (established by a preponderance of competent evidence, except for *testimony* and materials relating to social history/prognosis; and the court may hear the child's *testimony* outside the parents' presence). The question

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reduces to whether unsworn statements can be evidence. In *Rosiles-Flores v. Browning*, 208 OrApp 600, 602 n. 1, 145 P3d 328, 330 n. 1 (2006), unsworn statements made by Family Abuse Prevention Act petitioner in an *ex parte* request to a judge for a restraining order were not considered evidence. Older criminal cases note the requirement for an oath but deem the error waived when no objection has been made. *State v. Doud*, 190 Or 218, 225 P 2d 400 (1950); *State v Cox*, 43 Or App 771, 604 P2d 423 (1979). The most recent guidance is only dicta but was made in the dependency context. The Court of Appeals noted in *State ex rel Juv. Dept. vs. K.L.* that,

> ORS 419B.325 and ORS 419B.476(1) make admissible reports, testimony, and other material related to the children's history and prognosis without regard to their competency or relevancy under the rules of evidence, but they do not provide for unsworn testimony. 223 Or App 35, 39 n. 2, 194 P3d 845, 846 n. 2 (2008) (emphasis added).

Because no party objected to the use of a record including extensive unsworn colloquies, the appellate court in *K.L.* did not address the issue further. But the flag has been raised. And consider finally the issue of fundamental fairness under the traditional procedural due process balancing of *Mathews v. Eldridge*, 425 US 319, 96 SCt 1551 (1976). On one side are the fundamental interests parents and children have in their relationship. On the other is the state's compelling interest in protecting children. When one adds to this scale an assessment of what burden is imposed by requiring oaths, the question arises whether oaths actually serve, rather than impair, that state interest. As a practical matter, swearing in all potential witnesses in dependency cases can be done initially and en masse, with the Judge instructing all those who intend to provide information to the court to raise their hands to be sworn in at the beginning of the case and then serially taking the affirmative "yes" of each on the record.

Attorneys as Fact Witnesses

Providing unsworn testimony is particularly troublesome in the context of dependency attorneys providing factual information. It is certainly a common practice in many counties, especially at reviews and permanency hearings, for attorneys to provide a summary of their client's situation and wishes and then not question their clients or call any other witness. But when that information is not going to get into the evidence "box" in some other way, how can the court rely on the factual statements of the attorney as substantive evidence? "The house looked clean, child-safe, and had suitable sleeping arrangements." "Mother was interacting appropriately with Samantha." "My assistant heard Father extensively denigrating Mother in Dylan's earshot." In no other area of law is the attorney allowed to offer personal observations or be a source of facts for the decision. Does ORS 419B.325(2) allowing social history/prognosis without regard to competency mean that attorneys may provide factual information? Even if so, how is that attorney cross-examined? And more significantly, how does this situation differ from any other legal action in which attorneys are explicitly prohibited by ethical restrictions from acting as advocates in proceedings in which they are witnesses. Oregon Rules of Professional Conduct (ORPC) 3.7(a). Nothing in the ORPC contains an exemption for juvenile court cases. While the rule excludes situations of "substantial hardship . . . to the client," rule comments reveal that this exclusion is for the "exceptional situation" where it would be manifestly unfair to the client for the lawyer to withdraw. *Bronson v. Dept. of Revenue*, 265 Or 211, 215, 508 P2d 423, 425 (1973) (interpreting an early precursor to the ORPC, the ABA Code of Professional Responsibility that

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had been adopted by the Oregon Supreme Court). Not every juvenile dependency case can be an "exceptional situation." Moreover, as a practical matter, "when a lawyer calls himself as a witness, his testimony is difficult to follow because it usually results . . . in a narrative statement containing many conclusions of the witness," as opposed to separating the factual statements from argument about the legal import of those facts. *Id.* This selectively offered and finessed blending of fact and argument is the current customary but questionable approach of many attorneys at dependency hearings. It cannot fall on the Judge to seek confirmation from the parent (if present) of the attorney's statements and to elicit actual evidence that the attorney failed to provide. Nor should it be the Court's obligation to ask the DHS caseworker to confirm what the assistant attorney general just relayed. The trial court is under no greater obligation to develop the client's record than is the Court of Appeals.

The difficulty is enhanced for children's attorneys. Must they actually have the child testify in order to produce child-generated evidence? Several options are available for children's or parents' attorneys reluctant or unwilling to call their clients. One is following the typical defense practice of using investigators or assistants who can report observations and even multiple-level hearsay statements. (We acknowledge but consciously skirt here the topic of indigent defense costs.) Another is ensuring that DHS, where aligned with the party's interests, has and can provide that same information in testimony or a court report that will be offered. Another alternative is seeking the stipulation of the parties that the statements of the attorney can be received as evidence. (Again, there are four ways to get that statement into the evidence box.) Stipulation here, although still problematic, may be more feasible for the child's attorney who is advocating from a best interests standpoint rather than express wishes.

The Court of Appeals has signaled the importance of an adequate record in juvenile dependency matters. Attention to this issue may be more tedious than other aspects of trial advocacy but is no less important. Practitioners are packing that evidence box for their clients, and clients have the right to rely on their attorneys knowing what, when, and how to put items in that box. Both stand to lose if something significant is missing due to the attorney's inattention or ignorance.

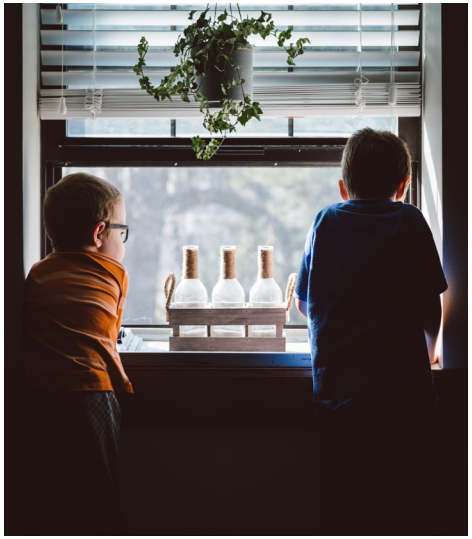
Footnotes

[1] This article originally referenced a short sidebar by Justice Brewer discussing then-recent appellate cases addressing the record on appeal.

[2] ORS 419A.252 *et seq*. now denominates what had been the 'social file' as the 'supplemental confidential file' to distinguish the latter from the 'record of the case' or legal file.

[3] Now ORS 419A.256(3).

[4] Now ORS 419A.225(1)(b).



OPDS Budget Update for 2019 Legislative Session

By Elizabeth Wakefield, Oregon Public Defense Services, Deputy General Counsel

The Public Defense Services Commission met on December 13, 2018 and approved the budget priorities for the 2019-2021 biennium. In addition to approving the current existing services levels, the commissioners approved three policy option packages submitted by Executive Director Lane Borg. Those included a policy option package that supports continued expansion of the Parent Child Representation Program (PCRP). The PCRP is a workload model of contracting with caseload limits, heightened oversight, and social worker support. This program has consistently reflected improved outcomes in juvenile dependency cases—those cases where public defenders represent parents and children in juvenile court. When compared to the state as a whole, families in PCRP counties are more quickly reunified, children attain permanency more quickly, and there is a declining trend in the use of foster care. This package expands the PCRP from its current five counties

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(Columbia, Coos, Lincoln, Linn and Yamhill) to one or more additional counties. The counties identified for expansion in the 19-21 biennium are Clatsop, Deschutes, Douglas, Malheur, and Multnomah.

The other two policy option packages endorsed by the Commission relate to stabilization and sustainability of trial level counsel (criminal and juvenile trial level). This package requests an increase in funding for trial level representation across the state. The Commission recognizes that, over the last five biennia, the business costs of providing trial level representation have increased while OPDS contract rates have remained relatively flat. As a result, in order to keep up with costs, contractors have seen increased caseloads and/or decreased compensation, either of which can negatively impact quality of services. Additional consequences include an inability to recruit and retain qualified attorneys, and case delays due to excessive caseloads. The Commission also approved a policy option package that would provide additional compensation for OPDS Appellate Division attorneys to provide OPDS attorneys with parity to the Department of Justice Attorneys.

Since the December Commission meeting, the Sixth Amendment Study final report was completed and submitted to both the legislature and the PDSC. The Study recommends that the State of Oregon make fundamental changes in the current process for providing trial level counsel. As a result of the Sixth Amendment study recommendations, the Commission is exploring several alternatives for providing trial level representation. The Sixth Amendment report and findings, along with years of informed feedback and testimony by public defense providers and administrators, were the motivation for the Commission to pass a resolution at the PDSC meeting on February 22, 2019. The Commission, while not endorsing all the findings of the Sixth Amendment report, did unanimously agree that they have had ongoing concerns regarding the constitutional adequacy of the current system based on the information received over the past several years.

OPDS participated in hearings before the Joint Ways and Means Subcommittee on Public Safety the week of March 18, 2019 regarding public defense funding. There is also a hearing scheduled on HB 3145 on March 26, 2019 at 1:00 pm before the House Judiciary Committee on a bill that will address the findings and recommendations of the Sixth Amendment report. Those hearings are available to watch on line through the Oregon Legislative Information System at https://olis.leg.state.or.us.

OPDS was grateful to receive recognition in Governor Kate Brown's proposed budget priorities. The Governor has long been a supporter of legal services to support the constitutional rights of individual Oregonians and Oregon's families and children. OPDS will continue to work with OCDLA, the courts and other interested stakeholders, including those impacted by public defense representation to ensure sufficient funding for public defense. With input from OPDS, OCDLA and others, legislators understand and appreciate the critical importance of the work done by attorneys appearing in juvenile court.

The next Commission meeting is Thursday, May 16, 2019 in Salem, OR. The Commission meetings are public. The agenda is available on line at https://www.oregon.gov/opds/commission/Pages/meetings.aspx.

If you have an interest in talking to your legislator, or if you are interested in presenting information to the PDSC, please contact: Lane Borg, OPDS Executive Director.

Sixth Amendment Center "Right to Counsel in Oregon" Report Released

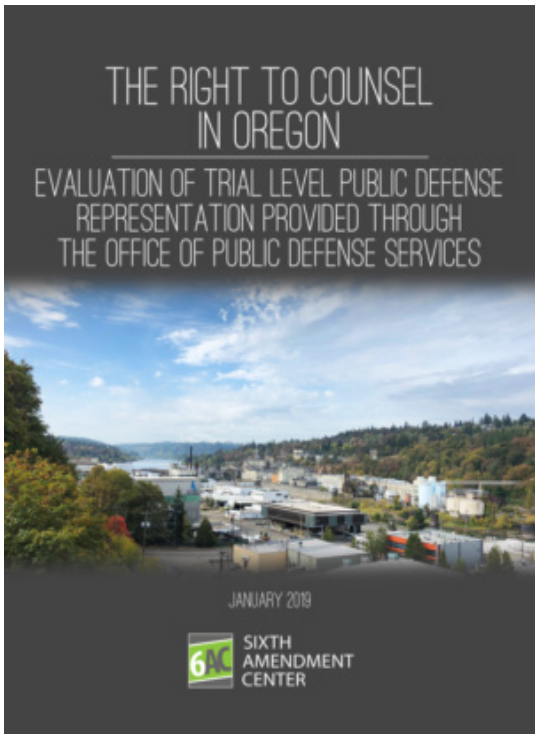
By Leslie Kay, YRJ Interim Executive Director

On January 23, 2019 the Sixth Amendment Center (6AC) released its final report, The Right to Counsel in Oregon, on the state of the public defense system in Oregon.[1] The 6AC is a non-partisan organization founded in 2013 based in Boston with a board of directors composed of a cross-section of justice system stakeholder groups.[2] The 6AC evaluates public defense systems nationwide. The Oregon report broadly concluded that the Oregon defense system, largely comprised of fixed fee contracts between Oregon Public Defense Services (OPDS) and public defender offices, private law firms, consortia of individual attorneys and law firms, non-profit organizations, and occasionally individual lawyers outside of the contract system, is not upholding its Constitutional obligations to provide effective representation and is woefully underfunded.[3]

The Oregon Public Defense Services Commission (PDSC) asked the 6AC to evaluate trial level right to counsel services provided through OPDS in 2018. The Sixth Amendment guarantees the rights of people accused of a crime to defense counsel, a public trial, an impartial jury and information about the charges and evidence against them. The right to effective counsel is an obligation of the states under the due process clause of the Fourteenth Amendment. Oregon is the only statewide system in the country that relies entirely on contracts to deliver public trial level defense services. The 6AC focused its study on nine counties: Clackamas, Douglas, Grant, Harney, Lane, Marion, Morrow, Multnomah and Umatilla, and conducted its site work between July and October of 2018. The 6AC presented its draft findings to the PDSC, the Oregon legislature and policymaker groups. The findings were widely reported in the press.[4] Right to Counsel violations have led to civil litigation challenging the constitutionality of public defense systems across the country.[5]

Notably, the 6AC called for the abolition of fixed fee contracts. Instead, the 6AC recommends that Oregon implement a case credit system for hourly rate compensation that accounts for overhead and a reasonable fee, or hire government employed attorneys for trial level service, or a combination of both:

1. The State of Oregon should require that services be provided free of conflicts of interest, as is constitutionally required, by abolishing fixed fee contracting and other forms of compensation that produce financial disincentives for public defense lawyers to provide effective assistance of counsel.



2. With the abolition of fixed fee contracting, PDSC/OPDS should pay private lawyers at an hourly rate that accounts for both actual overhead and a reasonable fee, and /or hire government employed attorneys for trial level services. OPDS should have the appropriate resources to provide oversight of such a private attorney and state public defender employee system.[6]

Constitutionally Effective Representation in Dependency Cases

In Oregon, nearly 8,000 children live in foster care and dependency cases represent approximately a third of the public defense caseload statewide.[7] The 6AC surveyed local juvenile practitioners handling dependency cases in the State. The report touched on the challenge of providing an adequate number of attorneys in dependency cases where typically all children

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and parents are financially eligible for appointed counsel.[8] The report also discussed the inequitable compensation of attorneys in dependency representation based on the case credit system.[9] The five counties where the Parent Child Representation Program (PCRP) operates in 2018 were not part of the Sixth Amendment Center study.[10]

The Public Defense Services Commission has held several meetings regarding the 6AC report and its ripple effect will be felt in the 2019 legislative session as lawmakers take up public defense system spending measures in the coming months.

Footnotes

[1]The Right to Counsel in Oregon: Evaluation of Trial Level Public Defense Representation Provided Through the Office of Public Defense Services. (Boston: Sixth Amendment Center, 2019), http://sixthamendment.org/6AC/6AC_Oregon_report_2019_withappendix.pdf.

[2] Id.

[3]David Carroll. "Oregon's Complex Bureaucracy Obscures Just Another Fixed Fee System." Pleading the Sixth (blog). January 23, 2019. Accessed February 19, 2019. http://sixthamendment.org/oregons-complex-bureaucracy-obscures-just-another-fixed-fee-system/

[4]"New report finds Oregon public defender system is flawed," Associated Press, December 13, 2018. https://www.apnews.com/593634e98b334ba7b6200ba1f1325398 ; Conrad Wilson, "Oregon's public defense system 'is not constitutional' report finds," Oregon Public Broadcasting, December 13 2018, https://www.opb.org/news/article/public-defense-oregon-unconstitutional/ ; Dirk VanderHart, "Early in legislative session, Oregon's justice system is clamoring loudest," Oregon Public Broadcast, January 30, 2019, https://www.opb.org/news/article/2019-oregon-legislative-session-justice-system/ ; Katie Shepard, "A new report says Oregon woefully underfunds public defense services and fails to monitor its contractors", Willamette Week, December 13, 2018, https://www.wweek.com/news/state/2018/12/13/a-new-report-says-oregon-woefully-underfunds-public-defense-services-and-fails-to-monitor-its-contractors/ ; Everton Bailey, Jr., "Oregon's public defense system fails defendants and their lawyers, report says" Oregon Live, https://www.oregonlive.com/pacific-northwest-news/2018/12/oregons-public-defense-system-fails-defendants-and-their-lawyers-report-says.html ; Fair Shot for All, "New report from 6th Amendment Center highlights urgent need to reform Oregon's public defense system" Fair Short for All Press Release, January 25, 2019. http://www.fairshotoregon.org/pressroom-posts/2019/1/25/fair-shot-for-all-new-report-from-6th-amendment-center-highlights-urgent-need-to-reform-oregons-public-defense-system.

[5]"Systemic Litigation & Federal Investigations," Sixth Amendment Center, accessed February 19, 2019, http://sixthamendment.org/the-right-to-counsel/systemic-litigation-federal-investigations/.

[6]Sixth Amendment Center, The Right to Counsel in Oregon, page V.

[7]Representation of Parents and Children in Dependency Cases, (Office of Public Defense Services, 2016), https://www.oregon.gov/gov/policy/Documents/LRCD/Oregon_Dependency_Representation_TaskForce_Final_Report_072516.pdf.

[8]Sixth Amendment Center, The Right to Counsel in Oregon, page 83.

[9]Sixth Amendment Center, The Right to Counsel in Oregon, page 172-74.

[10]The Parent Child Representation Program is a contracting model that utilizes a workload model instead of a per case model.

Juvenile Law Resource Center

JLRC Contact Information

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 Matt Steven, YRJ Attorney

Dependency

Dept. of Human Services v. K. J., 295 Or App 544 (Jan. 3, 2019)

Father appealed a permanency judgment in which he was ordered to undergo a psychological evaluation, in part because he had made false statements that he had renal cancer and other physical health conditions that could potentially interfere with his ability to care for K. The Court of Appeals reiterated the "low bar" that services ordered must bear a rational relationship to the jurisdictional bases and a psychological evaluation may be ordered when this standard is met, despite the absence of a specific mental health allegation.

The Court of Appeals reasoned that there was no rational relationship to the "medical condition" allegation in this case:

"If father does not have renal cancer, however, then knowing why father said at one point that he did might provide some insight into father's psyche but would not help DHS formulate services to resolve the actual jurisdictional basis."

Turning to the rational relationship between the psychological evaluation and the housing instability allegation, the court found "no evidence from which it is possible to infer that treatment of a mental health issue could enable father to find suitable housing any faster[.]"

The Court of Appeals reversed and remanded the permanency judgment.

Dept. of Human Services v. C. L. R., 295 Or App 749 (Jan. 24, 2019)

Mother appealed a jurisdictional judgment asserting dependency jurisdiction over her child on the basis that her mental health problems impaired her parenting ability. Finding the record below insufficient, the Court of Appeals reversed the judgment.

Mother had long-standing mental health issues, for which she had been participating in counseling. However, one evening she had a "mental breakdown" in which she felt extreme paranoia and imagined an intruder trying to get into her house. She called the police several times and took her child to several neighboring apartments. Her child was "tired, upset, and crying." The police took mother to a hospital, and DHS filed a petition on the child shortly thereafter.

Mother testified at the jurisdictional hearing. She acknowledged her mental health issues, that she had "freaked her [daughter] out" and that she was taking medication faithfully and had been taking it at the time of her breakdown. She also testified that she was going to add family therapy with her child to her ongoing treatment.

Mother's counselor testified to having done two medication management appointments since the breakdown, and to having increased the

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dosage of one of her medications. The counselor did not believe mother would decompensate again in the same way, saying that to assume so would be "speculation."

Father, who conceded that he was not a custodial resource at the time, testified that mother had no prior incidences of equally bizarre behavior.

The Court of Appeals noted that there had been no previous paranoid outbreak by mother, and that without a pattern of relapse, a court cannot assume that such conduct is likely to recur and endanger the child. Acknowledging that the child was frightened, the Court also found no risk of serious loss or harm proved in the record sufficient to justify jurisdiction. Although mother was not participating in counseling at the time of the hearing with her child, mother had agreed that it was necessary for them to move forward into a healthy relationship. The Court found that such a circumstance is not a threat of serious loss or injury to child.

Dept. of Human Services v. M. M. R., 296 Or App 48 (Feb. 6, 2019)

Mother appealed an order denying her motion to set aside the judgment terminating her rights to her daughter. The Court of Appeals granted DHS's motion to dismiss the appeal as moot on the basis that the juvenile court had no further authority to set aside the judgment now that the adoption petition had been granted.

Mother's motion to set aside alleged fraud, specifically that DHS made false statements on the stand and gave false information to the psychologist evaluating her. ORS 419B.923(8) reads, in part, that it "does not limit the inherent power of a court to * * * set aside an order or judgment for fraud upon the court." The Court of Appeals explained that fraud of the type alleged by mother would not be within the court's authority to set aside the judgment because it was intrinsic fraud: "acts that pertain to the merits of the case, such as perjured testimony."

Mother also alleged that the procedural bar of ORS 419B.923(3), forbidding the setting aside or modification of a termination judgment during the pendency of adoption proceedings, violated procedural due process. The Court of Appeals observed that mother had procedural mechanisms available which she had not employed to protect her rights, such as asking the court to enjoin DHS from consenting to the adoption during the pendency of the appeal.

Mother also argued that the case was not moot because a favorable resolution would invalidate the adoption. The Court observed that the juvenile court has neither statutory or inherent authority to set aside the termination judgment under the circumstances of this case.

Dept. of Human Services v. D. W. M., 296 Or App 109 (Feb. 13, 2019)

Father appealed a judgment finding his 14-year-old daughter to be within the jurisdiction of the court due to substance abuse and domestic violence. DHS and the daughter cross-appealed the juvenile court's dismissal of a sexual abuse allegation pertaining to father when it made an explicit finding that father sexually abused daughter. The Court of Appeals ruled in favor of both parties' assignments of error.

The Court of Appeals chose to review the case de novo, finding that it was an exceptional case meriting such review because the court's ultimate decision that father did not pose a current risk of sexual abuse did not comport with the court's factual findings, the record permitted it to infer the juvenile court's witness credibility assessments, and because of the urgency of the need to protect the child.

Child, age 14, testified that her parents would get drunk every night, occasionally use marijuana, and that they would get into pushing and shoving fights every month or two. Father had put mother into a choke hold, which was witnessed by the daughter, punched a hole in a wall, slammed the dog into the dryer multiple times, and committed other acts

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of violence. Child was afraid of him and feared for her mother's safety.

Child described several incidents of sexual abuse by father, starting at age seven or eight, which stopped after she disclosed it to a friend in third or fourth grade. After that, father no longer touched her but he would observe her dressing or in the shower, and continued to make inappropriate comments and look at her in a sexual way. The daughter's older sister testified that father had also sexually abused her throughout her high school years. Mother testified that father disclosed having touched the older sister's breast.

Child testified that she had started cutting herself, which went on for three years, had dreams of her father raping her and others, and was engaged in counseling for depression.

The juvenile court found the evidence sufficient for the substance abuse and domestic violence allegations against father with "few express findings." Regarding the sexual abuse allegation, the juvenile court found that there was "not really any dispute" that child was sexually abused in the past, but found that the abuse hadn't repeated itself beyond age seven or eight and that there wasn't enough evidence to prove a "current-day risk."

The Court of Appeals found that DHS had proved by a preponderance of the evidence that father had sexually abused the daughter and her sister, noting that the juvenile court implicitly found the testimony to that effect credible. Noting that a person's status as a sex offender is not enough in itself to be jurisdictional or create a presumption of risk to the child, the court considered several additional facts to be sufficient to show that the father presented a current risk of harm:

"[T]here is evidence that father sexually abused child herself four times and there is no evidence that he engaged in treatment or acknowledged the harm to child. Moreover, even after the abuse stopped, father continued to say sexually inappropriate things to child and to regard her in a sexual way. Additionally, there is evidence that father sexually abused child's sister when she was the same age as child is now, supporting a concern that child continues to be in the class of father's victims."

The Court of Appeals agreed with the juvenile court's finding that father had domestically abused mother, and that the daughter was exposed to it, and that father abuses alcohol. The Court rejected DHS's argument that the alcohol abuse increased the threat of domestic violence on the record before it and found that there was no evidence that father had injured or assaulted the daughter herself. The Court noted the "scant" evidence that the cause of child's depression and anxiety were harms resulting from the domestic violence or alcohol abuse. Observing that "bad parenting alone does not justify state intervention, the Court found that there was insufficient evidence for jurisdiction on those allegations.

Dept. of Human Services v. J. L. R., 296 Or App 356 (Feb. 27, 2019) (per curium)

In an Indian Child Welfare Act (ICWA) dependency case, Father appealed a judgment establishing jurisdiction over his daughter. Father argued that DHS had failed to comply with ICWA, including its notice requirement, and that the evidence was insufficient to support jurisdiction. DHS conceded its failure to satisfy the statutory mandate that it "notify the parent or Indian custodian and the Indian child's tribe." The Court of Appeals agreed, and reversed the jurisdictional judgment.

Dept. of Human Services v. S. J. K., 296 Or App 416 (Mar. 6, 2019)

Father appealed a permanency judgment changing the case plan for his child from reunification to adoption, arguing that an intervening change in the law entitled him to re-litigate the case with full notice of the correct standard. The Court of Appeals affirmed.

At the time father litigated the plan

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Juvenile Law Resource Center

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change, the Court of Appeals had issued its opinion in *Dept. of Human Services v. S. J. M.*, 283 Or App 367 (2017), placing the burden of proving that there are no compelling reasons to forgo adoption on the party seeking to change the plan, and that the record must contain sufficient evidence to support that.

After father filed his opening brief on appeal, the Supreme Court reversed S. J. M., holding, "the proponent of the plan change need prove only that DHS made reasonable efforts to reunify the family and that the parents had made insufficient progress to permit reunification" and that they do not have to prove no compelling reasons exist to forgo adoption.

Under the Supreme Court's standard, father conceded that the evidence was sufficient to support the plan change, however he argued that fairness required a remand of the case to the juvenile court so that he could frame his case in light of the change. Noting that the record did not suggest that father would have conducted his case any differently had he framed it under the new standards, the Court of Appeals observed that father could simply request a hearing at any time of his own accord under authority of ORS 419B.470(6), and that remand was therefore unnecessary.

Dept. of Human Services v. G. P. B., 296 Or App 391 (Mar. 6, 2019)

Mother appealed a permanency judgment changing the case plan for her children from reunification to adoption, arguing that an intervening change in the law in *Dept. of Human Services v. S. J. M.*, 283 Or App 367 (2017) entitled her to re-litigate the case with full notice of the correct standard. The Court of Appeals applied the same analysis as in S. J. K., summarized above, and affirmed.

The Court noted that the record "reveals little reason to believe that mother could persuade a juvenile court that she is successfully participating in services that will make it possible for the children to safely return home within a reasonable time" and observed that if mother had new evidence to offer to support a compelling reason not to change the plan, she could invoke ORS 419B.470(6) to request another permanency hearing.

Dept. of Human Services v. N. J. S., 296 Or App 741 (Mar. 20, 2019)

The issues and arguments in this appeal by father are virtually identical to those addressed in S. J. K., above, and the case was decided on the same grounds.

Dept. of Human Services v. A. O., 296 Or App 746 (Mar. 20, 2019)

Mother appealed the juvenile court's denial of her motion to set aside a judgment terminating her rights to her children. She argued that her failure to appear at the termination trial was due to "excusable neglect" under ORS 419B.923(1). The juvenile court denied the motion for "lack of prosecution" because mother was not present at the start of the hearing. On appeal, DHS agreed with mother that the denial for this reason was an abuse of discretion. The court should have ruled on the merits of the motion itself. The Court of Appeals observed that under that statute, it was not necessary for mother to be present for the motion hearing.

Dept. of Human Services v. P. W., 296 Or App 548 (Mar. 20, 2019)

Mother appealed an order denying her motion to set aside a judgment terminating her rights to her children after she defaulted. Mother also failed to appear at the motion hearing. On appeal, mother argued that

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her counsel was ineffective. The state responded that the record was not sufficiently developed for the issue to be argued. Agreeing, the Court of Appeals vacated the order and remanded for further findings on the ineffective assistance of counsel issue.

Delinquency

State v. S. S. T., 69 Or App 217 (Feb. 21, 2019) (per curium)

Youth appealed a probation condition that placed the discretion to impose detention as a probation violation sanction with the juvenile department. The state conceded, and the Court of Appeals agreed that under State v. B. H. C., 288 Or App 120, 404 P3d 1110 (2017), the court erred in imposing the following condition of probation:

"The youth be confined in a juvenile detention facility for a period of 10 days, to be served in no more than 5-day increments, which days are suspended and are to be used at the direction of a juvenile probation officer as a sanction in response to probation violations."

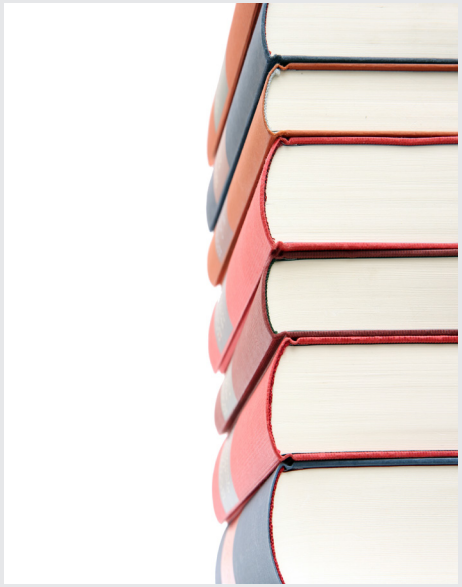
State v. A. S., 296 Or App 722 (Mar. 20, 2019)

Youth appealed a judgment finding him within the court's jurisdiction for unlawful possession of a firearm, ORS 166.250. Youth argued that the court should have granted his motion to suppress evidence of a gun found in his bedroom. He was present and refusing consent at the time of the search. His grandmother, owner of the house, gave consent. The Court of Appeals found that the grandmother's consent was valid because she had actual authority to give it.

Grandmother testified that she had told the officer to search the room because "[i]t was my home and apparently there was something going on that shouldn't have been going on in my home and I wanted it resolved." Grandmother would routinely go into the room without the youth's permission, and the court found that she had the "superior decision-making authority" because she frequently asserted her authority over the room.

The Court of Appeals explained that under the "common authority" doctrine, anyone who is a joint user or co-occupant of common premises is presumed to have actual authority to consent to a search of it. Youth argued that the lack of clarity about the level of control he and his grandmother exercised over youth's bedroom combined with his emphatic insistence that "it's his room" overcame the presumption of common authority. The Court of Appeals found that absent a clear agreement, youth "assumed all risk that the other will consent to a search."

Youth also cited to Georgia v. Randolph, 547 US 103 (2006) for the proposition that "the consent of one occupant to search common premises is not valid in the face of another physically present co-occupant's expressed objection to the search." The Court of Appeals distinguished Randolph by noting that that case involved "two adults whose relationship to each other and to the premises made them legal and social equals." Youth was a sixteen-year-old and not a "co-equal" tenant, and grandmother had "consistently made clear to youth that, while he lived in her home, he had to follow her rules, which included that she retained the unqualified right to have access to his room."



Resources

On January 23, 2019 the Sixth Amendment Center (6AC) released its final report, The Right to Counsel in Oregon, on the state of the public defense system in Oregon. You can find the full report here.

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