Juvenile Rights Project

JUVENILE LAW READER

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TIPS FOR HANDLING RESTITUTION ISSUES

By Christa Obold-Eshleman

Youths adjudicated in any delinquency case must be ordered to pay restitution if the court finds, from information presented by the district attorney, that "a victim suffered injury, loss or damage." ORS 419C.450. Although the face of victims' rights is the human being who has been directly harmed, many youths are also being ordered to pay restitution to insurance companies and the Criminal Injuries Compensation Account, sometimes in amounts of tens or hundreds of thousands of dollars. Staggering awards such as these can shadow teenagers well into their adult lives.

Preserve Arguments for Appeal

JRP is currently handling a number of cases on appeal which address the legitimacy of such restitution awards. If trial counsel preserves either of the following arguments, JRP is accepting referrals for such appeals.

Statutory Arguments

No appellate case has yet been decided regarding whether the legislature intended to require juveniles to repay insurance companies or the Criminal Injuries Compensation Account, and statutory arguments can be made in the negative. In 1996, the Court of Appeals decided *State v. Spino*, 143 Or App 619, 622, 925 P.2d 101 (1996) which held that the Criminal Injuries Compensation Account was a "person" within the meaning of ORS 137.103(4). In 2005, the Criminal Injuries Compensation Account and insurance carriers were explicitly added as victims under the adult code definition of "victim" in ORS 137.103(4). *See* Or Laws 2005, ch 564 §1. Therefore, the adult criminal code as it is now revised differentiates between a "person" as described in (a) and (b) of ORS 137.103(4) and insurance companies or the Criminal Injuries Compensation Account, described in part (c). *See* ORS 137.103(4)(a)-(c). Insurance companies, are arguably now only "victims" for purposes of the adult criminal code by virtue of the language of ORS 137.103(4)(c), *not* because they are "persons" under subsection (a).

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Furthermore, the only provision of the adult restitution statutes incorporated into the juvenile code is the definition of "restitution" found in ORS 137.103. *See* ORS 419A.004(23). The appellate courts of Oregon have never held that *Spino* applies to the restitution provisions of the juvenile code. Following the amendment of the definition of "victim" in the adult code, the legislature added a *different* definition of "victim" to the juvenile code in 2007. 2007 Or Laws 609 §7, *codified in* ORS 419A.004(31). That definition includes only "persons." Notably absent are the insurance companies and Criminal Injuries Compensation Account explicitly made victims in the adult code. Arguably, this demonstrates legislative intent to not define these as "victims" for the purposes of the juvenile code.

Constitutional Arguments

An entirely different approach is the argument that, with recent legislative changes, juvenile restitution orders are essentially civil compensatory awards, thus implicating the rights to a jury trial found in Article I, section 17 of the Oregon Constitution and the 7th Amendment to the U.S. Constitution.[1]

Although *State v. Hval*, 174 Or App 164 (2001) directly negated this argument for a former version of the adult restitution statute, the law has since changed in significant ways, undermining some of the court's analysis in that case. The law now requires awards in the *full* amount of the victim's economic damages, without regard for the defendant's ability to pay. Additionally, the principal question for the court is no longer what amount of restitution serves rehabilitative and deterrent purposes. Arguably, the most significant distinctions from civil awards have been erased.

Satisfying or Discharging the Restitution Judgment

If ultimately unsuccessful in arguing against restitution awards, defense attorneys should make their clients aware of the possibility of discharge of restitution judgments against them. Under ORS 419C.450(5), restitution judgments may be found satisfied if the youth complies with legal requirements and has paid 50% or 10 years have passed. Bankruptcy is another possibility. In at least one circuit, federal courts have found that restitution ordered pursu-

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Juvenile Rights Project
401 NE 19th Ave., Suite 200
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503.232.2540

The **Juvenile Rights Project** 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, JRP became an independent 501 (c) (3) nonprofit children's law firm in 1985.

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www.jrplaw.org

ant to juvenile delinquency proceedings are dischargeable in Chapter 13 bankruptcy because a juvenile adjudication is not a criminal conviction. *See United States v. Brian N.*, 900 F.2d 218, 220 (10th Cir. 1990).

[i] Credit for bringing this approach to our attention goes to Ryan Scott, OCDLA member and motion maven.

WAIVER OF COUNSEL UPDATE

by Ingrid Swenson, Executive Director, Office of Public Defense Services

The Public Defense Services Commission (PDSC) received testimony at its March 4 meeting from George Yeannakis of Team Child in Washington State and from Jordan Bates, a recent University of Oregon Law School graduate, about the frequency with which youth waive counsel in juvenile delinquency proceedings in Oregon. Data provided to the commission indicated that more than 30% of youth waive counsel and in some counties up to 60% of youth are unrepresented in delinquency cases. Mr. Yeannakis described a multi-year effort in Washington State to expand access to legal representation in delinquency cases which culminated in the passage of a uniform court rule prohibiting youth from waiving counsel except with the assistance of counsel and requiring the execution of a detailed waiver form by the youth and his counsel.

PDSC members expressed significant concern with the number of youth proceeding without counsel in Oregon and appointed Hon. Elizabeth Welch to convene a small workgroup to examine more closely the reasons for waiver and

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possible solutions. Commissioner Welch, with the assistance of Office of Public Defense Services (OPDS) staff, will meet with interested justice system partners to explore the issue further and recommend corrective action.

Readers who are concerned about waiver practices in their counties are invited to contact OPDS executive director, Ingrid Swenson (Ingrid.Swenson@opds.state.or.us) to assist the commission in gathering information and identifying solutions.

READER ARTICLE ASSISTS EASTERN OREGON ATTORNEY

Ms. Hill's research (see "Waiver of Counsel: Oregon Needs Youth Standards" by Whitney Hill, Attorney, in the February/March issue of the *JRP Juvenile Law Reader*) assisted OCDLA member Kent Anderson successfully litigate a motion to withdraw an uncounseled waiver of both counsel and trial. At the time the youth waived, he believed the restitution being sought was $1,000. However, after the state indicated it would be seeking in excess of $137,000, Mr. Anderson was appointed. On Mr. Anderson's motion, the judge permitted the youth to withdraw his admission, and the case was ultimately resolved with an agreed upon restitution amount of $2,000.

HANDY TIPS FOR JUVENILE DRUG CASES

Dealing with Confidential, Reliable, Testifying Informants

by Liz Sher, Attorney

My client was charged with Unlawful Distribution of a Controlled Substance (Cocaine) within 1,000 feet of a School for an incident involving an undercover drug buy in North Portland. The alleged transaction was part of a Portland Police "operation," pursuant to which they had numerous undercover operatives involved in multiple undercover buys in the same day or series of days, including snitches, and routinely cited and released any suspects. My client was the alleged accomplice in the transaction; he never handled the drugs, but allegedly took the money from the CRI (hereinafter referred to as "the snitch").

File discovery motions

Insist that the DA turn over the identifying information for the snitch, which includes name, date of birth, race and criminal history. This is statutorily required when the testimony of the snitch goes to guilt or innocence. ORS 135.855(1)(b). If you run into resistance, ask for a hearing.

Don't rely on the DA's version of the snitch's criminal history

Run your own OJIN check in all of the counties (or at least nearby ones) in Oregon. Check for civil cases, too. Don't forget domestic relations cases or restraining orders; an ex-spouse or girlfriend could provide valuable information. In my case, my investigator ran the snitch in Clark County, Washington as well, revealing that the snitch had a pending felony theft charge.

Read the police report carefully

Be on the lookout for the experience the officer has had with the snitch involved: how many convictions the person has facilitated, the fact that

the information provided has proved reliable on many occasions, etc.

Never assume the police officer a.k.a. "handler" really knows much about the snitch

As previously mentioned, the snitch in my case had a pending theft and I was able to make a lot of hay on cross-examination of the officer. Don't forget the ever-helpful "were you aware" questions for the officer.

Never assume that the handler actually knows the police procedures manual

In my case, I knew that the snitch had the pending felony in Clark County. The Portland Police Bureau manual has a section on informants and what sort of behavior is to be expected from them, etc. One of the sub-categories is "invalidation of informants" and mentions as one of the factors, "involvement in criminal activity." Again, highly fruitful for cross-examination of the officer.

Use the police report as a source of other discoverable information

In my case, the report said that the snitch was compensated for his undercover work with PPB. It did not specify the amount, but the report was quite detailed about how reliable this snitch had been over a period of many years. I subpoenaed the handler officer *duces tecum*. My theory was that, if this snitch had in fact been so reliable over the years according to this officer, then I wanted to see the reports from those other cases.

The City Attorney's Office filed a motion to quash my subpoena, arguing that it was much too difficult for them to compile this number of records. At the hearing on the City's motion to quash, the court did not order the City to turn over the records from each case the snitch had previously worked, but did order the City to provide the defense with records of the snitch's compensation, which went to bias. I received a multiple-page document, listing pay-outs to this snitch over a nine-year period, adding up to many thousands of dollars.

My case turned solely on the snitch's identification of my client as one of the suspects involved in this particular sale. The case was fifteen months old, which also helped. I tested the snitch's memory by asking about how many busts were involved on that particular day. Moreover, I cross-examined him with the multi-page list of nearly one hundred payments and transactions that he'd had with the police. I questioned his memory of one particular transaction from more than a year before, on a day when there had been multiple transactions and multiple arrests, and the fact that he'd been involved in numerous other operations since the day of my client's arrest.

In my case, they also did not photograph my client on the day of his arrest, so the snitch's memory was even more vital. When he was asked by the DA during direct examination to identify my client, he did so unequivocally, which just was not believable.

The judge ruled from the bench, saying that she could not find beyond a reasonable doubt that my client was the person involved in this drug buy, aka he was not within the jurisdiction of the juvenile court (for those non-juvenile practitioners, that's NOT GUILTY).

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EXTREME CONDUCT CASES

Summary of 2008 OCAP Paper

by David Sherbo-Huggins, Child Advocacy Fellow, The Oregon Child Advocacy Project

In July of 2008, the Oregon Child Advocacy Project (OCAP) published a paper entitled *Termination of Parental Rights in Extreme Conduct Cases* which was reprinted and discussed in Volume 5, Issues 5 and 6 of the *JRP Juvenile Law Reader*. The authors of the paper analyzed Oregon's extreme conduct statute, 419.B502, in light of *State ex rel DHS v. Rardin*, 340 Or 436 (2006), *State ex rel DHS v. Keeton*, 205 Or App 570 (2006), as well as decisions from courts in Florida and Illinois interpreting similar termination statutes. The authors concluded that:

"[g]iven the important constitutional interests of the parents at stake, the statute would likely be held unconstitutional as applied if it were interpreted to allow the termination of a parent's rights in the face of other evidence that the parent was able to care for the child safely. To avoid this result, courts should resolve the ambiguity in the meaning of the statute in such a way that renders it constitutional. A possible interpretation that preserves the requirement that the state prove the parent's unfitness but that does not overlap with provisions of ORS 419B.504 is that proof of one of the listed acts would be sufficient to satisfy the state's burden of production on the issue of unfitness, but the fact finder would consider other evidence on this issue as well, and the state would have the burden to persuade the judge by clear and convincing evidence of the ultimate issue, that the parent was unfit."

Since the article was written, the Court of Appeals has decided another case under the statute. *In re A.M.*, 227 Or App 216 (2009). At the outset it must be noted that neither of prior Oregon cases—*Keeton* and *Rardin*— dealt with a constitutional challenge to the statute. Both cases dealt entirely with statutory interpretation and the discussions of ORS 419B.502 in both cases were merely dicta.

In *Rardin*, The trial court terminated father's parental rights based on ORS 419B.504, not ORS 419B.502. The Supreme Court's opinion analyzed whether ORS 419B.504 (conduct or condition) required a present showing of unfitness. The Court held that ORS 419B.504 by its language requires a showing of present unfitness, and by way of contrast cited to ORS 419B.502, which it suggested provided an avenue for termination, "based upon past conduct, even when the parent might be a 'fit' parent at the time of the termination proceeding." *Id.* at 449-450. The following sentence in the opinion is: "However, under ORS 419B.504, *the statute at issue in this case*, the parent's pres-

ent fitness is controlling." (emphasis added)

In *Keeton*, just weeks after *Rardin* was published, the Court of Appeals seriously questioning the soundness of the dictum in *Rardin* and in its own dictum stated:

> "Having raised that question of statutory construction however, we need not resolve it here. Regardless of the correct construction of ORS 419B.502 . . . , the state has not established, by clear and convincing evidence, that termination of mother's parental rights would be in the children's best interests."

Rather than reconsider the problems with ORS 419B.502 as identified by *Keeton*, and without any analysis of either the statute's linguistic ambiguity or its constitutional deficiency, the court in *In re A.M.*, 227 Or App 216 (2009), adopted the dictum from *Rardin*.

The *A.M.* court wrote, "unlike ORS 419B.504, ORS 419B.502 'provide[s] a procedure for terminating parental rights based upon past conduct, even when the parent might be a 'fit' parent at the time of the termination proceeding' and 'even if the court determines that the conduct will not recur.'" *Id.* at 227 (*citing State ex rel DHS v. Rardin*, 340 Or 436, 448-49 (2006)).

While *A.M.* is the first appellate decision to terminate parental rights based solely on a finding of "extreme conduct" under ORS 419B.502, it sheds little light on the serious problems presented by the statute. The Court was not presented with any argument from the parent that she was presently fit to parent. Nor was the statute challenged on due process grounds. Because these issues were not presented to the court, it is still uncertain how Oregon courts will resolve these questions in the future.

2010 Update on Termination of Parental Rights

by Professor Leslie J. Harris and Child Advocacy Fellow David Sherbo-Huggins, The Oregon Child Advocacy Project

In *In re A.M.*, 227 Or App 216 (2009), the Oregon Court of Appeals held that a petition to terminate parental rights under ORS 419B.502 on the grounds that the parent had abused the child, resulting in serious physical injury, does not require proof that the parent is presently unfit at the time of the termination hearing. The case apparently resolves a conflict between dicta in two earlier cases, *State ex rel DHS v. Rardin*, 340 Or 436, 134 Pl3d 940 (2006), and *State ex rel DHS v. Keeton*, 205 Or App 570, 135 P3d 378 (2006). However, the attorney for the mother in *A.M.* did not present evidence that she was presently fit to parent or press the statutory construction issue. For these reasons and because of serious questions about the constitutionality of terminating the rights of a parent whom the court found to be fit at the time of trial, the scope of ORS 419B.502 is still not clear.

In *A.M.*, as in many other termination cases, the state petitioned to terminate on alternative grounds—extreme conduct under 419B.502 and condition or conduct detrimental to the child which is unlikely to change under ORS 419B.504. The evidence showed that the mother in *A.M.* shook her six-month-old son so hard that he suffered a life-threatening subdural hematoma. The child was removed to foster

care several days later following an investigation, and three months later the court found him dependent and entered a disposition that identified the permanent plan as adoption. DHS then filed a motion to terminate her parental rights; at the hearing on the petition, which occurred a year after the shaking incident, the court found that termination was in the child's best interests and that the mother had engaged in "extreme conduct" under ORS 419B.502. The evidence at the trial also indicated that the mother continued to present a danger to her child, as she had denied responsibility for the injuries, was unwilling to accept the need to modify her behavior, could not cope with stressful situations, and minimized the severity of the injuries. 227 Or App at 228. The mother did not argue that she was presently fit to parent the child. On appeal, the Court of Appeals affirmed the termination order under ORS 419B.502, observing that the alternative petition for termination under ORS 419B.504 had not been proven.

In July 2008, the Juvenile Law Reader published an analysis of ORS419B.502 by the Child Advocacy Project, which argued that the statute should be interpreted as so that proof of one of the acts listed in the statute would be sufficient to support a termination petition if no other evidence about the parent's present condition was presented. However, the paper also argued that if a parent presented evidence at the time of trial to show that s/he was not unfit, it would likely be unconstitutional to terminate parental rights unless the state proved that, notwithstanding the parent's evidence, s/he was presently unfit at the time of trial. Oregon Child Advocacy Project, *Termination of Parental Rights in Extreme Conduct Cases* (2008), 5(5) JUVENILE LAW READER 9 (Nov. 2008), 5(6) JUVENILE LAW READER 4 (Jan. 2009), and 5(7) JUVENILE LAW READER 6 (Mar. 2009). Because the facts of *A.M.* do not raise this issue and therefore, neither the statutory construction nor the constitutional issue was before the court, the opinion should not be read as the final word on the meaning of ORS 419B.502 in all situations.

JLRC AND KLAMATH FALLS ATTORNEY TEAM UP

Making Parenting and Domestic Violence Services Accessible to Parents Battling Substance Abuse

by Noah Barish, Law Clerk

In January 2010, Klamath Falls attorney Robert Foltyn sought help from the Juvenile Law Resource Center to challenge a local practice preventing his parent clients from engaging in court-ordered reunification services. Parents were being required to demonstrate 90 days of sobriety before entering parenting classes or domestic violence treatment. Foltyn recognized that this policy reduced parents' chances of reunifying within the short AFSA timelines and questioned whether these restrictions were supported by empirical research. The JLRC conducted an in-depth investigation of these concerns.

In fact, local and national experts agree that an extended period of sobriety is not a prerequisite

for participating in domestic violence services or parenting classes. Rather, research suggests that parents suffering from addiction should access substance abuse treatment and other counseling services simultaneously. For example, best practices in batterer intervention services call for programs to screen and refer participants to complementary substance abuse treatment. Likewise, research shows that improving parenting skills actually facilitates substance abuse recovery by altering neurological addiction pathways.

Oregon law also supports the position that a one-size fits all approach to services and a long waiting period to begin them is inconsistent with DHS obligation to make reasonable efforts to reunify families. Case law documents that parents have succeeded in services without first demonstrating sobriety. *See State ex rel Juv. Dept. v. D.T.C.*, 231 Or App 544 (2009). Moreover, DHS must give parents sufficient time to participate in services before the permanency plan can be changed. *State ex rel DHS v. Shugars*, 208 Or App 694 (2006).

Apparently, two local providers changed their admission practices as a result, and parents in Klamath Falls can now be referred for both domestic violence assessment and treatment, and a drug and alcohol assessment and treatment at the same time. They may also be referred for parenting classes on an individual basis and are no longer required, in every case, to wait for a predetermined period of sobriety.

For more information, see the new JLRC Fact Sheet on Sobriety Requirements for DV and Parenting Services: http://www.jrplaw.org/Documents/JLRCSoberDVFactSheet.pdf

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RECENT CASE LAW

Summaries by Angela Sherbo [A.S.], JRP Supervising Attorney, and Noah Barish [N.B.], Law Clerk

***Dept. of Human Services v. J.L.J./ L.L.L./ C.J.*, ___ Or App ___ (February 17, 2010) [N.B.] (Wollheim, P. J.) (Clackamas Co.) Affirmed in part and reversed in part.**

http://www.publications.ojd.state.or.us/A141958.htm

DHS appeals judgments of the juvenile court: (1) approving placement of child with father; (2) dismissing child's commitment to the custody of DHS and (3) setting aside and vacating a judgment terminating mother's parental rights. Father also assigned error to the juvenile court's denial of his motion for guardianship.

After the court terminated mother's parental rights in 2007, father signed a release giving custody of the child to DHS and authorizing adoption. He also signed an accompanying certificate stating that the release would be irrevocable after DHS placed the child in the physical custody of an adoptive placement. At the time, the child lived with a foster family whom

DHS had identified as a potential adoptive placement, but ultimately did not adopt the child.

A year later, DHS found that the father had significantly improved his circumstances and engaged him in a psychiatric evaluation, counseling, and visits with the 12-year-old child. After deciding that father could adequately parent, the juvenile court changed the case plan from adoption to reunification with father. At a shelter hearing, all the parties and the juvenile court agreed that it was in the child's best interests to live with father, but DHS represented that it could not certify placement with father because of the previously signed release and certificate of irrevocability. The juvenile court approved placement with father, dismissed DHS custody (continuing the child as a ward of the court), and, on its own motion, vacated the earlier judgment terminating mother's parental rights.

DHS argued that the father's release precluded the juvenile court from reunifying the child with the father and dismissing DHS custody. The Court of Appeals disagreed on both counts. First, the Court found that father's release did not affect a termination or severance of the parent-child relationship; such severance can only be accomplished by a court order. The Court also explained that the decision to reunify was consistent with the juvenile court's role to promote the child's best interests. Second, the Court noted that the juvenile court did not abuse its discretion by dismissing DHS custody in this case because ORS 419B.337(7)(a)(A) permits the juvenile court to dismiss a commitment when the ward has been safely reunited with a parent.

Finally, DHS contended that the juvenile court improperly set aside and vacated the judgment terminating mother's parental rights because there was no motion to set aside the judgment, the judgment was two years old and had been affirmed on appeal, and neither mother nor representative was present at or provided notice of the proceeding. The Court explained that, although ORS 419B.923(8) provides the juvenile court inherent authority to "modify" a judgment within a reasonable time (which might arguably include vacating that judgment entirely), "it would still be necessary for the particular circumstances presented to bring the case within the scope of the court's inherent power to vacate." Slip. Op. at 5 (citing *DHS v. B.A.S./J.S.*, 232 Or App 245 (2009)). Those circumstances include making a technical amendment, correcting a court error, or other extraordinary circumstances such as fraud, overreaching by a party, duress, breach of fiduciary duty, or gross inequity. Since there were no such extraordinary circumstances in this case, the juvenile court had no authority to vacate the termination judgment on its own motion.

***State v. J.G.*, ___ Or App ___ (February 17, 2010) (per curiam) (Jackson Co.) Vacated and remanded. [N.B.]**

http://www.publications.ojd.state.or.us/A142946.htm

Father appeals the juvenile court's judgment committing child to DHS custody, asserting that the allegation in the dependency petition (that father has a history of assaultive behavior) was an insufficient basis for jurisdiction. The state conceded that the allegation alone was insufficient and that the state did not prove facts curing the defect. The parties, however, agreed that father had ear-

lier stipulated to jurisdiction on the basis that he was unable to protect the child from mother. The Court remanded the case for judgment establishing jurisdiction based on the allegation admitted by father.

***Dept. of Human Services v. G.E.*, ___ Or App ___ (February 17, 2010) (per curiam) (Douglas Co.) Reversed and remanded. [N.B.]**

http://www.publications.ojd.state.or.us/A142930.htm

Mother appeals the juvenile court judgment changing the permanency plan for her daughter to adoption. She argued that the court did not include determinations required by ORS 419B.498(2) in its judgment, failed to make several required findings of fact, and erred in approving the change in plan. The Court of Appeals agreed with mother's first contention, noting that on the judgment, the checkbox corresponding to "[n] one of the circumstances in ORS 419B.498(2) applies" was left unchecked. In *State ex rel Juv. Dept. v. J.F.B.*, 230 Or Ap 106 (2009), the Court previously held that if the court changes the permanency plan to adoption, the judgment's failure to include the court's determination that "none of the circumstances enumerated in ORS 419B.498(2) is applicable" is a deficiency requiring reversal and remand. Consequently, the Court reversed and remanded without addressing mother's other arguments.

Juvenile Law Resource Center

The Juvenile Law Resource Center (JLRC) assists attorneys representing parents in child welfare dependency proceedings throughout Oregon. It provides written resources including case law updates, sample motions, practice guides and issue briefs. The JLRC offers trainings for parents' lawyers in areas identified as most important to practitioners in JRP's statewide survey, which is available on line. Additionally, JRP attorneys are available to consult with attorneys on individual cases. More information is available at http://www.jrplaw.org/juvresocent.aspx. Check periodically for updates.

***State v. L.C.*, ___ Or App ___ (March 17, 2010) (Ortega, J.) (Polk Co.) Reversed and remanded. [A.S.]**

In this unusual case, the state appeals from a permanency judgment establishing "achieve adoption" as the permanent plan and ordering DHS to file a petition to terminate the parents' rights. The parents had originally been the children's foster parents and eventually adopted them. Within a year of the adoption, the children claimed that father had abused them and neither they nor the parents wanted reunification.

On appeal, DHS argued that because the children were unlikely to be adopted, terminating the parents' rights would not be in the children's best interests. After analyzing the statutes governing permanency hearings and termination of parental rights, the Court of Appeals concluded that termination of parental rights is expected to be followed by adoption and where, as here, "there was no evidence in the record that an adoptive placement is likely and there is persuasive evidence to the contrary, the court erred in changing the permanency plan to adoption."

VIEW FROM THE BENCH

ON ASSUMING

by The Hon. Deanne Darling, Circuit Court Judge, 5th Judicial District, Oregon City, OR

According to my mother (a wise and capable woman) doing this makes an ASS of U and ME. Over time I have found her to be correct.

As we get busier and work at a more hurried pace—something has to suffer. All too often it is good judgment and careful reading. Under the pressure to do more and do it faster, there is often too little time for thinking. Given the gravity of most decisions that we make for ourselves, our clients or the litigants, I urge us all to return to a time of careful consideration. A rush to judgment or opinion serves no one well.

Sadly, I have noticed a trend among service/treatment providers to oversimplify reports. As a result, detail and nuances are lost. All too often we rely on what we think a report says—without seeking clarification. In the legal field, words are important and have precise meaning. That is not often true in the world of service providers.

> A good advocate will point out to the court what has been assumed and what has been proven and what is merely a conclusion.

I will share a recent example. The mother of two teen boys had her children removed from her care due to her drug issues. She was receiving treatment from the typical provider who had the A&D track and the mental health track—with different counselors. Over the course of time, the mother suffered medical problems that interfered with her ability to meet her treatment needs. According to the mother, her providers gave her conflicting information about her treatment requirements.

On the face of the report they sent in—things looked doomed for mom—she had failed to attend four sessions and some UA's. She had been sent a warning letter and told to schedule a meeting to resolve the perceived problem. She reportedly failed to appear and so had been terminated. All of this came on the brink of the return of the children to her care.

What was lacking was information on what dates she missed, the large number of dates she did appear for treatment, the number of UA's that she did appear for and pass, the date on which the warning letter was sent, and where it was sent. After about 30 minutes of questioning, it became obvious that the two providers—who worked in the same office—were not communicating and in

fact had not kept complete notes. In one incident, another client's information had been inserted in the narrative.

None of this was apparent on the face of the report. Mother had been told by one provider to stop attending groups and just do individual sessions—none of this was in the report—but all was in the treatment records. The warning letter had been sent to an address that was over a year old, and it had been sent the day before the deadline for her to call to rectify the situation. Had she failed to call? Yes. But, she did not know she needed to. The busy provider checked the DID NOT CALL box (which was true) but really never could have been true.

The caseworker (also busy) relied on the summary report and made judgments accordingly. No one took the time to look behind the conclusions and seek the evidence. All too often what the court receives are the conclusions, when the evidence would be more helpful.

Good advocates will not accept the conclusions without the supporting data. Do not assume that the check-off-the-box reports or the narrative are accurate: check it out. Get releases from your client, and get the records behind the report and analyze them. Call and ask questions. Subpoena people. A good advocate will point out to the court what has been assumed and what has been proven and what is merely a conclusion. Much of the work of the child welfare system involves judgment that contains personal bias and personal values. As advocates you must not **assume** that what appears to be **evidence** really is.

Remember the *Dragnet* TV cop show? "**JUST THE FACTS**." Present the facts and cull out the judgments. Or at least be sure the person rendering the judgment differentiates between the basis for the opinion (facts) and the opinion—and that the judge knows the difference.

Judge Darling can be reached at deanne.darling@ojd.state.or.us.

Oregon's Champion for Children in the Courtroom and the Community

JUVENILE AID AND ASSIST MOTIONS

Linn County Ruling

by Julie McFarlane, JRP Supervising Attorney

Seven Linn County juvenile defense attorneys filed motions relating to their clients' abilities to aid and assist counsel in the preparation and conduct of their defense. The individual cases were heard together on the "generic issue of whether such a defense exists at all in a juvenile delinquency proceeding." Jody Meeker and Mark Taleff argued the matter on behalf of the youths and Brandon Kane of the Linn County District Attorney's Office argued the matter on behalf of the State.

Judge Pro Tem Carl H. Brumund, in a seven page letter opinion, analyzed constitutional case law including: *Dusky v. United States*, 362 US 402 (1960); *Drope v. Missouri*, 420 US 162 (1975); *Goingey v. Moran*, 509 US 389 (1993)—all addressing the due process right of a criminal defendant to be competent when he is tried. Judge Brumund went on to analyze federal and state Supreme Court rulings addressing due process requirements in juvenile delinquency cases, including: *Breed v. Jones*, 421 US 519 (1975) [double jeopardy applies]; *McKeiver v. Pennsylvania*, 403 US 578 (1971) [the fundamental fairness required in juvenile cases does not require jury trial], and *State v. Turner*, 253 Or 235 (1969) upheld in *State ex rel Juv. Dept. v. Reynolds*. 317 OR 560 (1993) [no state constitutional right to juvenile jury trial]. From his analysis, Judge Brumund concluded that, ". . . it is clear the Due Process Clause of the 14th Amendment to the U.S. Constitution is applicable to juvenile court and its procedures. There must be fundamental fairness. It is also abundantly clear . . . that a person whose mental condition was such that the person 'lacked capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense may not be subjected to trial' [citing *Drope*]."

The trial court then went on to address the issue of whether the provisions of ORS 161.360-161.370 are applicable to juvenile proceedings, discussing how in the analogous case of *State v. L.J.*, 26 Or App 461 (1976), where the appellate court found that the defense of mental disease or defect, as found in ORS 161.795, could be raised in a juvenile delinquency proceeding, although a strict reading of the juvenile code did not allow for the defense. Judge Brumind finds *L.J.* to be rooted in the principal of fundamental fairness central to the due process clause, and interprets *L.J.* to also apply to application of ORS 161.360-161.370 to a juvenile delinquency case. Thus, the trial court reasons, "[c]ase law, as well as ORS 161.360 and 161.365(1), make it a responsibility of the court to ascertain the capacity of the defendant (or youth, if in juvenile court) to aid and assist once that capacity is placed in doubt and to schedule a hearing to allow parties to present evidence on that issue." The trial court also concludes that the state may have the benefit of the procedure set out in the statute, if it determines to do so.

For a full copy of the letter opinion: http://www.jrplaw.org/Documents/LinnCountyAidandAssist.pdf

For Mr. Taleff's legal memorandum and reply to the state's memorandum: http://www.jrplaw.org/Documents/LinnCompetencymemo.pdf and http://www.jrplaw.org/Documents/lynncoreply.pdf

FEBRUARY 2010 LEGISLATIVE SESSION WRAP-UP

by Maura Roche, Government Relations for JRP

The 2010 Oregon Legislative Session started the first of February and concluded its business before the end of the month. Most of the issues taken up had been worked on during the regular session or over the interim. However, there was a fair amount of bill-writing aimed at influencing the voters in the 2010 elections.

More than 200 bills were introduced during the session. House members were allowed to introduce one bill each, and Senate members were allowed two bills each. Additionally, committees were allowed to introduce committee-sponsored bills. More than 100 bills made it through the House and the Senate and went to the Governor's desk for his signature.

Juvenile Rights Project's (JRP's) top priority during the short session was the passage of HB 3664, which extends Oregon Health Plan (OHP) coverage to kids 18-20 who age out of the foster care system.

The February revenue forecast showed Oregon was still facing an almost $200 million shortfall despite the passage of Measures 66 and 67. The legislature had established some reserves in the original budget, but it was necessary to cut an additional $30 million from the existing budget and release funds from education reserves to provide the final $200 million targeted for K-12 education.

A bill that caught the attention of many juvenile and criminal justice stakeholders prior to the start of session was HB 3634. The bill was aimed at providing victims of crime with certain rights in court and post-conviction and post-adjudication proceedings, including the Psychiatric Security Review Board. The bill would have required the release of Juvenile Psychiatric Security Review Board records to victims who had requested to be notified of JPSRB hearings, as well. These records may include hundreds of pages of mental health, physical health and foster care records—the content of which can be highly sensitive. JRP and other stakeholders were successful in working with the committee chair to get these overly broad provisions removed from the bill.

Juvenile Rights Project's (JRP's) top priority during the short session was the passage of HB 3664, which extends Oregon Health Plan (OHP) coverage to kids 18-20 who age out of the foster care system. Former foster youth testified about the many challenges they face when they enter the world as young adults without a family support system, and they talked about the particular difficulties they experienced trying to maintain employment when they did not have health coverage.

Many parents are able to maintain coverage for their adult children to age 23 (which will be extended to age 26 under the healthcare reform legislation just passed by Congress). In the cases of youth who grow up in foster care and leave state custody after they reach adulthood, the state is their "parent," yet the state did not have the ability to extend health coverage to

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former foster youth in the same way. The bill, which has been signed into law by the Governor now extends coverage to a youth who was eligible for OHP as a foster child "immediately prior to the person's 18th birthday." Under the new law, OHP coverage for these newly-eligible young adults will begin in May 2010.

JRP also closely monitored the budget process and the latest round of cuts being made to ensure that Oregon Public Defense Services (OPDS) were not slated for additional reductions. Currently, OPDS and the Judicial Department are relying on a fee scheme passed in 2009 to provide additional resources to close the budget gap. Time will tell whether projections jive with what is actually being collected.

JRP and OCDLA also worked with coalition partners to preserve gains made during the 2009 session regarding sentencing structure. Efforts were largely successful in keeping a toe hold on those changes and preserving and strengthening the review and assessment of "earned time." The Secretary of State's office will be providing an additional performance audit in this area which will be available for the 2011 session. Hopefully this will help to establish precedent for more assessment and review of other areas of the justice system.

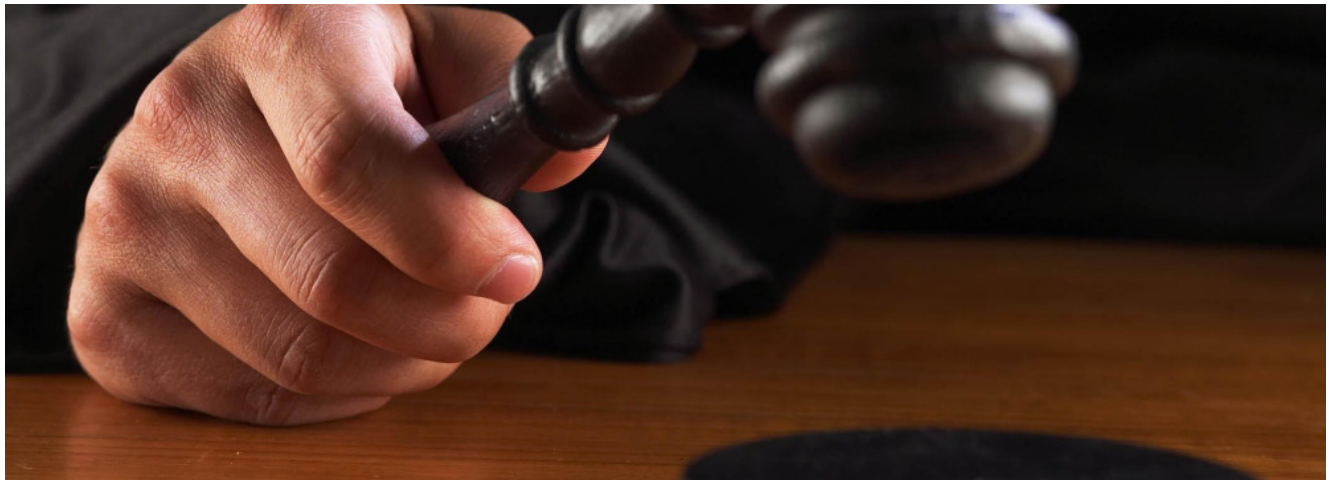
Savings in prison costs realized through the small expansion in earned time helped to prevent additional cuts in other parts of the justice system, including additional reductions to Oregon Youth Authority programs that would have occurred otherwise.

NATIONAL SYMPOSIUM

Delinquency Indigent Defense

by Julie McFarlane, JRP Supervising Attorney

Representatives from Oregon, the other 49 states, the District of Columbia and US Territories attended the 2010 National Symposium on Indigent Defense hosted by U.S. Attorney General Eric Holder and the U.S. Department of Justice (DOJ) in Washington D.C. in February. Oregon's representatives included: The Honorable Julie E. Frantz, Circuit Court Judge for Multnomah County; Alexander R. Gardner, Lane County District Attorney; Ingrid Swenson, Executive Director of the Office of Public Defense Services, and Julie



H. McFarlane, Supervising Attorney for the Juvenile Rights Project, Inc.

In his opening address to the Symposium, AG Holder noted that in the nearly half a century since the Supreme Court's decision in Gideon v. Wainwright, "these cases have yet to fully translated into reality." AG Holder also told the audience that the DOJ recognizes the special nature of juvenile defense. For the first time in such a national conversation about indigent defense, the unique issues of juvenile indigent defense were front and center, with many of the 145 speakers and workshops focusing on the special challenges of juvenile indigent defense. The Symposium reaffirmed AG Holder's recognition of the importance of developing juvenile specific approaches to indigent defense.

The National Juvenile Defender Center (NJDC) played a prominent role in shaping the agenda of the Symposium and identifying faculty and participants. NJDC also disseminated three talking points to infuse juvenile defense issues into the Symposium. Those messages included:

- The federal government must provide resources to support effective juvenile defense. Currently the government provides no such resources
- The federal government should recognize juvenile defense as a specialized area of law through practice and policy enhancements
- Innovations in Juvenile Defense Delivery Systems are necessary for improving practice and policy

It was also announced that the 2011 Obama proposed budget includes $13 million for demonstration projects to establish delinquency Juvenile Court Improvement Projects modeled on the HHS Juvenile Court Improvement Project which exist in every state to provide training and encourage collaboration toward making improvements in dependency cases.

OREGON'S JUVENILE SEX OFFENDER REGISTRATION

More Harm than Good?

Oregon has enacted some of the nation's most extreme juvenile sex offender registration laws, requiring the same lifetime registration for first-time youth offenders as for adult offenders. As a result, over 1,600 youth in Oregon currently suffer from the permanent effects of registration, even years after successfully completing probation and treatment. Most landlords refuse to rent to sex offenders, and residency restrictions further limit housing options. Major employers, including chain stores, health care providers, and the military, automatically reject youth sex offender applicants. Youth sex offenders endure social stigma, discrimination, and even physical violence in institutions and the community.

Empirical studies now show that applying the same strict lifetime registration requirements to both adults and juveniles constitutes poor public policy. Unlike adult offenders, youth offenders lack fixed abnormal sexual preferences, respond positively to treatment, and rarely re-offend. Lifetime registration of juvenile offenders is also costly for state governments and contradicts the traditional rehabilitative focus of juvenile justice systems. *The Economist*

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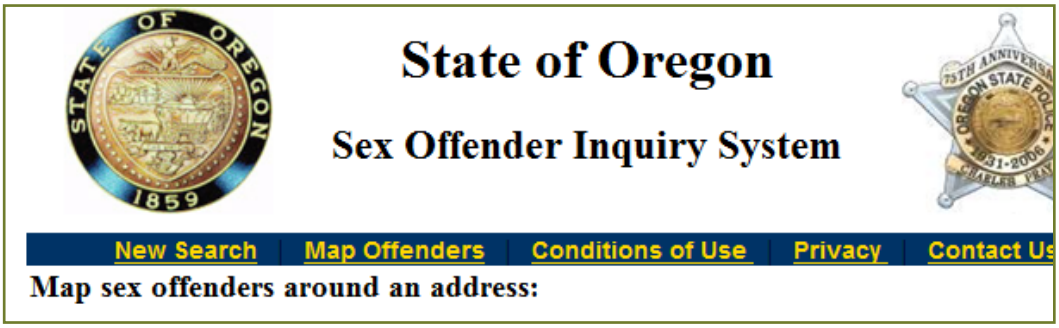
recently published a scathing critique of American sex offender policy entitled *Sex Laws: Unjust and Ineffective*, The Economist, August 6, 2009, available at http://www.uta.fi/laitokset/historia/sivut/english/nam/material/SexlawsEconomist060809.pdf

What is worse, is that Oregon law provides youth only a single, fleeting opportunity to challenge their lifetime registration by petitioning the juvenile court for relief. Youth become eligible for relief two years after the end of their probation, and remain eligible for only three years. No coordinated system exists to notify youth of their right to challenge their continued registration. Moreover, the petition process requires expert legal representation and psychological evaluations, and indigent youth have no right to appointed counsel. Only a few private attorneys in Oregon even undertake this type of specialized representation, and the fees are often beyond the means of juveniles and young adults struggling to get established in life with a label of registered sex offender. Even the filing fee for relief from registration is a significant barrier for our clients and is higher for juveniles than adults in some counties—$300 for the juvenile filing fee versus $189 for adults in Multnomah County for example.

It is imperative that attorneys make every effort, when possible, in these juvenile cases to help their clients avoid the many problems that will arise from a registerable sex offense. Considering the steep costs and lifetime consequences, clients should be urged to take viable cases to trial. Motion practice in such cases should be zealous. Consider your client's competency, possible defenses, and other strategies. If the victim is a child, challenge the child's competency as a witness. Resist efforts to introduce victim statements to evaluators. File motions to suppress.



Where trial is not viable, attorneys should try to obtain plea agreements for non-registerable offenses such as harassment, or seek alternative dispositions such as converting the case to a dependency case, conditional postponements or formal accountability agreements (where available). In some cases, the court will agree to consider a motion to set aside the adjudication after successful completion of treatment and probation – laying the groundwork at the disposition can help when you take the motion back to court years later and may also motivate your client to do well on probation. Further, there is no prohibition on the youth obtaining appointed counsel for the motion to set aside. At the dispositional hearing, attorneys should consider challenging the constitutionality of juvenile sex offender registration as applied to their juvenile client.

Attorneys should always advise their clients about their registration obligations and the narrow window of opportunity that exists for

relief. Attorneys should provide assistance to former clients by filing for relief from registration on the former client's behalf or seeking pro bono assistance for the former client to do so. Juvenile Courts imposing registration should be informed about the severe consequences and the increasing amount of research indicating that juvenile sex offender registration is unnecessary and harmful. Attorneys should also join the growing movement seeking to reform our nation's sex offender laws, especially those affecting juveniles.

A research brief prepared by Juvenile Rights Project, Inc. Certified Law Clerk, Katharine Edwards, and titled, ***Recent Studies and Literature Indicate that Juvenile Sex Offender Registration is an Inappropriate, Harmful, and Ineffective Method of Preventing Crime****, is available at: http://www.jrplaw.org/Documents/SexOfendnot.pdf*

READER RESOURCES

The Code of the Street and African-American Adolescent Violence

National Institute of Justice, February 2009

http://www.ojp.usdoj.gov/nij/pubs-sum/223509.htm

Yale professor Elijah Anderson's theory presents a bridge between the environmental and cultural factors examined in many previous studies of urban violence. The research discussed in this report emphasizes the need to consider this theory in future studies within African-American households, neighborhoods and communities.

Juvenile Rights PROJECT

UPCOMING CONFERENCES

OCDLA Spring Juvenile Law Seminar

Delinquency
April 16-17,Newport, Oregon
https://www.ocdla.org/seminars/shop-seminar-2010-juvenile.shtml

Oregon Judicial Department Citizen Review Board 2010 Annual Training Conference

"Every Day Counts"
April 23-24, Tigard, Oregon
http://courts.oregon.gov/OJD/docs/OSCA/cpsd/citizenreview/2010EveryDayCountsBrochure.pdf

OCDLA Annual Conference

Facts and Law Tango: Using the Law to Get the Most from Your Facts
June 17-19, Bend, Oregon
http://www.ocdla.org/seminars/shop-seminar-2010-annual.shtml

Oregon's Champion for Children in the Courtroom and the Community

JRP Family Night at the Timbers

Saturday, July 3 2010, 7 p.m., PGE Park

Portland Timbers vs. Vancouver Whitecaps

Tickets: $20

(value: $22; $10 benefits JRP)

CELEBRATING OREGON BOUNTY

Saturday, October 30, 2010 • 5:30 p.m.

The Nines Hotel • Portland

Tickets include wine tasting, silent & live auctions, dinner: $125

Sponsorships start at $500

Tickets and Info: Janeen A. Olsen, janeeno@jrplaw.org, 503.232.2540 Ext.231

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Juvenile Rights Project
401 NE 19th Avenue, Suite 200
Portland, Oregon 97232
503.232.2540
www.jrplaw.org