Juvenile Rights Project

JUVENILE LAW READER

Volume 7, Issue 5 October/November 2010

YAMHILL COUNTY CHILD ABUSE ASSESSMENT CENTER RULING

In an August 19, 2010 letter opinion, a three-Judge panel in Yamhill County addressed motions to compel discovery and a motion for protective order or to amend protective order submitted by defense attorney Paula Lawrence, challenging the practice of the district attorney's office of not providing records from Juliette's House, a regional child abuse assessment center in McMinnville to defense counsel. The case was heard *en banc* by Judges John L Collins, Ronald W. Stone and Carroll J. Tichenor with the intent of coming to a common ruling to apply to the five cases at issue, as well as other pending and future cases involving these records. All of the cases, including one juvenile case, involved alleged sexual offenses with child victims.

The panel found that the defense is entitled to access records of interviews of alleged child victims of sexual abuse, whether the interviews are conducted by law enforcement or as part of an assessment by Juliette's House as discovery governed by ORS 135.805 *et sec*. Ms. Lawrence further argued that Juliette's House records are under the constructive possession or control of the prosecution and therefore also subject to discovery from the district attorney. The panel agreed with this argument, citing the statutes governing child abuse assessment centers and child abuse teams, which make it mandatory that the child abuse assessment centers make records available to law enforcement, which in turn may make the records available to the prosecution when necessary.

The panel went on to examine the protective order provisions of ORS 135.873, noting that the statute applies to Juliette's House records and does not restrict the copying or dissemination of the material for specific defense related purposes, unless the court, on good cause shown, sets limits on copying and dissemination. The panel abandoned the position taken in previous decisions that the records are the property of an independent non-public agency, and consequently rejected the state's argument that there was good cause to restrict the period of time the defense may maintain possession of the records, and further found that even if there was good cause to restrict, the legal and ethical reasons argued by the defense would have to be factored into a

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decision to restrict the period of time the defense may maintain possession of the records.

Because of the sensitive nature of the material, the panel did find good cause for a protective order that defines responsibility for maintaining and protecting the records in order to guard against inadvertent disclosure or re-disclosure. The panel developed a form Protective Order for this purpose, and urged the state in each case to submit the Protective Order to the court for approval as soon as possible.

Noting that case law supports the position that an opportunity to inspect is an alternative method of compliance with the discovery statute, the panel suggesting a practical interpretation: that the state should copy what can be copied and allow inspection of what cannot, held that the court retains the authority to choose which method of compliance – copying or inspection – should be provided where parties cannot agree. The panel found that: "Under the circumstances of these cases and these types of cases in general, the defense should be entitled to the same unfettered examination of this critical evidence and interaction with experts as the state."

OREGON AND WASHINGTON SIGN ICPC BORDER AGREEMENT

After more than a decade of trying, on August 30, 2010, Oregon DHS and Washington DSHS finally signed a Border Agreement governing Interstate Compact on the Placement of Children (ICPC) cases between the two states. The Agreement, which becomes effective October 1, 2010, recognizes that the typical delays experienced in ICPC cases postpone the placement of children with their own family members and can negatively impact children's overall well-being. The Agreement is intended to facilitate more timely and efficient interstate placements of children between Washington and Oregon. The Agreement allows for a Provisional Placement Process and requires the receiving state to make a decision concerning a requested Provisional Placement within 7 working days of receipt of the request from the sending state. Courtesy supervision

The **Juvenile Law Reader** is published six times a year by the

Juvenile Rights Project
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Portland, OR 97232
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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.

The Juvenile Law Reader is distributed electronically free of charge.

It is partially funded by the Office of Public Defense Services. Tax deductible donations are welcome and can be sent to the JRP offices.

Queries regarding contributed articles can be addressed to the editorial board.

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by the receiving state must begin when the child is placed in the Provisional Placement. For a full copy of the Border Agreement go to: http://www.dhs.state.or.us/policy/childwelfare/manual_1/i-b342att1.pdf

THE EDUCATIONAL RIGHTS OF JUVENILE COURT INVOLVED STUDENTS

Continued from the August/September 2010 Issue

by Whitney Hill, Attorney

Special Education Eligibility Process

The special education eligibility process begins with a referral to special education through either Child Find (OAR 581-015-2080) or a request, preferably in writing, by a parent. Next come several meetings: an evaluation planning meeting, followed by an eligibility meeting, and finally an IEP development meeting (some school districts have a fourth type of meeting called a screening that occurs first; OAR 581-015-2790(b)). Each meeting date must fall within a timeline. Once the referral is made, the school must hold an evaluation planning meeting within a reasonable time, which is determined by the child's circumstances. From the date of parent's consent to evaluate, the school district has 60 *school* days to perform the evaluations and hold the eligibility meeting. If the child with a disability is found eligible for special education services, the school district has 30 *calendar* days from that finding to hold an Individualized Education Plan (IEP) development meeting. 34 CFR. 300.343. For more info:
http://arcweb.sos.state.or.us/rules/OARS_500/OAR_581/581_015.html
http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalArea%2C8%2C

Evaluation Planning Meeting (OAR 581-015-2115)

At the evaluation planning meeting a team meets to decide if the child needs to be evaluated and if so, which evaluations

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

should be undertaken by the school district. The team includes a general education teacher, special education teacher, evaluators, parent/guardian, and other adults invited by the parent/guardian, such as a lawyer, caseworker, juvenile court counselor, or anyone the parent believes has knowledge or expertise regarding the child. In considering which evaluations should be done, every possible category of eligibility should be assessed. For example, if a child's autism does not reach the specific eligibility for Autism Spectrum Disorder (ASD), the child may qualify under Other Health Impairment (OHI). Evaluation procedures and requirements can be found at OAR 581-015-2100 to 2125. A description of each eligibility category is found at OAR 581-015-2130 to 2180.

If a parent requests an evaluation for special education and the school district refuses, the parent must receive "prior written notice" (PWN). PWN is a term of art in special education law and triggers due process procedures (OAR 581-015-2310). At this stage, by law the parents should receive a booklet of Procedural Safeguards from the school district (OAR 581-015-2300 to 2385).

Occasionally, schools ask the parent for a medical statement *before* evaluating certain categories, such as ASD or OHI. Medical statements are required under Oregon regulations for certain categories as part of the school's evaluation process. The school cannot require a parent to produce a medical statement as a pre-condition to evaluating a child. However, if the school district requires such a statement, it must obtain one with permission from and at no cost to the parent. Certainly, if the parent has such a statement, releasing it to the school can expedite the process.

Eligibility Meeting (OAR 581-015-2120)
During the eligibility meeting, the evaluations are reviewed by a team. Because the child's team decides if the child qualifies for services based on the evaluations, it is important to obtain the evaluations in advance of the meeting in order to review them and formulate questions about their content and conclusions. Likewise, the parent can provide the school district with outside evaluations in advance to help inform the eligibility decision.

To qualify for special education under any category, the child's disability must have an adverse impact on his or her educational performance; merely having a disability is not enough. However, the key term "educational performance" is defined neither by federal nor Oregon law. Case law from other jurisdictions indicates that when undefined, it is limited to academic performance. However, states are permitted to define educational performance to also include non-academic areas of performance, such as social skills. In Oregon, persuasive arguments that "education" includes more than grades and test scores may sway a team, especially if backed up with specifics, such as the new Oregon Diploma requirements, which include communication and teamwork skills.

If in disagreement with the results of the school's evaluations, the parent has the right to an independent educational evaluation (IEE) at public expense, which should be requested in writing. If the school district disagrees with the parent's IEE request, the district's only options are to either timely request a due process hearing and prove that its evaluations were satisfactory, or provide the IEE at public expense. (OAR 581-015-2305).

Individualized Education Plan (IEP) Meeting (OAR 581-015-2200)
Federal and state law prescribes the contents of

an IEP. An IEP must contain a description of a child's strengths, present levels of academic and functional performance through narrative and reports of assessment scores, how the disability affects the child at school, and parent concerns regarding education. Sample forms are available on the Oregon Department of Education website (http://www.ode.state.or.us/search/page/?=2022). Parents should bring their concerns in writing and be prepared to ask questions of the team. The U.S. Supreme Court has issued several opinions emphasizing that the law promotes participation of the parent in the IEP process.

The IEP document describes each area where the child needs specially designed instruction (such as writing, communication, mathematics, or behavior) and the corresponding goals that the specialized instruction is designed to accomplish. Providing Specially Designed Instruction (SDI) means individualizing "the content, methodology, or delivery of instruction" in ways that address the child's disability-based needs and ensure the child has access to the general curriculum. OAR 581-015-2000(34). SDI is provided for a set amount of time each day, week or month and thus provides an area for a parent to monitor. For example, is the child actually receiving 50 minutes of SDI in math each day?

The goals that SDI is designed to meet should be comprehensive, specific and measurable, such as "will learn multiplication table up to 10 and recite accurately on 4 out of 5 opportunities." Goals may also be non-academic, such as "will wait his turn to speak" or "will respond to teacher requests with only one reminder." The quantifiable terms thus require the teachers to track the progress over time and provide progress notes. At a minimum progress notes are submitted to parents when general education students receive progress reports. Progress tracking should also be specific to the goals and explain whether and how the child is meeting the goals. A general statement such as "child is making adequate progress toward all goals" is not sufficient. In this way, a parent can monitor the child's progress toward the goals set out in the IEP.

In addition to SDI, children may receive related services such as specialized transportation or occupational therapy. The related services must be provided in the time allotment decided on in the IEP, stated as "daily" or for "1 hour each week", etc. A child can receive services and SDI in any area needed, even if he or she only qualified for special education under one category of disability.

IEPs are reviewed annually, but an IEP meeting can be requested by a parent at any time and as often as reasonably needed. Requests to convene an IEP meeting should be submitted in writing.

Occasionally, a school district offers multiple services, some of which are unpalatable to the parent or child. School districts often take the position that parents may not pick and choose services. However, see 34 C.F.R. § 300.300(d)(3) for federal regulations and Oregon Administrative Rule 581-015-2090(5)(c) for the state regulations for clarification that parents may refuse consent to certain services. The OAR states that: "A refusal to consent to one service or activity may not be used to deny the parent or child any other service, benefit, or activity of the school district, except as provided in this rule."

If a child's behaviors impede his or her learning, the child needs a Behavior Intervention Plan (BIP), based on data from a Functional Behavioral Assessment (FBA). An FBA is a data-based process of learning how the child develops

problem behaviors: the when, why and how of the targeted behavior and a goal of positive replacement behavior that will meet the same needs of the child. Parent consent is required to do an FBA. Once developed, the BIP should be referenced as a related service on the IEP. One practical result is that an IEP meeting is required in order to revise the BIP. This makes things more cumbersome, but also gives the parent more rights such as prior written notice of the IEP meeting and procedural rights if the parent disagrees with the changes to the BIP.

Reevaluation (OAR 581-015-2105)
Children previously found eligible are re-evaluated every 3 years. IEE rights do apply.

Placement (OAR 581-015-2240)
Special education students must be placed in the least restrictive environment (LRE), which means that the child has access to and spends time learning alongside non-disabled peers to the maximum extent possible. Children with disabilities should not be removed from general education without a demonstrated basis for doing so. A continuum of placements must be available. The IEP team, including the parent, makes the decision on which type of classroom is the most appropriate placement according to the child's needs. If it is stated that a child needs a lot of supervision and a smaller classroom size, be prepared for the proposal for a more restrictive placement in a special classroom where the teacher to student ratio is lower. If mainstreaming a child would require a one to one aide, this is costly for a school district and therefore unattractive. The LRE argument will be important because it takes fewer resources for a school district to educate children with disabilities together, rather than place them in mainstream classrooms with aides and other supports. This is one reason that the LRE mandate is written in the law.

Transition (OAR 581-015-2235)
One of the stated goals of the law is to provide transition planning from high school to college or to vocational training or employment. The law requires the IEP team to begin planning for transition from high school by age 16. Note that at age 18, a student can choose to revoke consent to special education services. Engaging the teenager in the special education process and making it work for him or her is therefore especially important if he or she will turn 18 prior to graduating from high school.

504 Plans

Children who do not qualify for special education under IDEA may qualify for a 504 Plan. Section 504 of the Rehabilitation Act of 1973 (reauthorized) is akin to the Americans with Disabilities Act (ADA) in that it is a civil rights, anti-discrimination law. Programs receiving federal funds, such as public school districts, discriminate against persons with disabilities at the risk of losing funding. The purpose of Section 504 is to ensure that children with disabilities have access to programs and services at public schools. Unlike IDEA, Section 504 does not give the person with disabilities positive rights, such as individualized instruction. Eligibility requires a child to have a disability which substantially impacts a major life activity. Under 504 definitions, having ADHD is a disability if the child's mental impairment–ADHD–substantially impacts a major life activity such as learning or getting along with others.

While a 504 Plan does not provide for specially designed instruction, it can be quite important as a shield against disciplinary proceedings imposed as a result of disability-related actions. (OAR 581-015-2390 -2395 covers hearing rights for Section 504).

Visitation as a Reunification Service – Overview

By Erin Cass
Juvenile Rights Project, Inc.
July 30, 2010

When a child is placed in Department of Human Services' (DHS) custody, visitation helps maintain the parent-child bond, eases the trauma of removal, and increases the likelihood of and speeds the process to family reunification. Indeed, the "frequency of parental visitation is a stronger predictor of reunification than parental characteristics, child characteristics, and the reason for child placement."[1] The strong correlation between visitation and reunification suggests that "visitation must be recognized for what it is: a critical element of the child protection system."[2]

Visitation that is appropriately designed to fit the needs of parents and children is highly valuable. Visitation between parents and children within the first few days of removal can: "(1) provide continuity and reassurance for children, (2) send a vital message of responsibility to the parent . . . and (3) allow for casework assessment of the likelihood of reunification to begin as soon as possible."[3] Frequent visitation both increases the likelihood of reunification and reduces the length of time the child is in DHS custody.[4] The frequency of visitation is also a significant predictor of whether or not reunification, once it occurs, will be lasting.[5]

Involvement with the dependency system can have dramatic effects on a child's sense of well-being and social abilities. Many of the harmful effects of the dependency system can be traced to an "inability to develop and maintain sufficiently supportive networks to replace those that were lost" when the child was removed from the parent's care.[6] Throughout childhood, children in foster care may manifest "continued difficulty in emotional regulation: irritability, protest, clinginess to [caregivers], anger at parent and/or foster parent, diminished appetite or food hoarding, disrupted sleep, and withdrawal."[7] Children may also be "very intense, confusing, needy and rejecting in their interactions."[8] Removed children are going "through the same stages of grief – denial, bargaining, anger, depression, and resolution – as if someone had died."[9] The appearance and severity of associated symptoms from this process depends on the child's age and developmental stage at the time of removal.[10]

Research shows that visitation has both positive and negative effects on the well-being of children in foster care.[11] Visitation promotes attachment, thereby reducing the stress of separation, which in turn permits a more normal developmental process.[12] It reassures children that they have not been abandoned by their parents, and thus clears the way for children to work through other emotions surrounding the removal.[13] When children are able to process their emotions in a healthy manner, they are less likely to display behavioral problems.[14]

Extended visitation, however, can create loyalty conflicts in children. For children who remain in state care for five years or more, frequent visitation is correlated with weaker bonds with the foster *and* biological parents than those of children who are not visited at all.[15] These children are at a "much greater risk for delinquency,

substance abuse, and depression later in life."[16] In contrast, one study showed that children with healthy attachments had "fewer behavior problems, were less likely to take psychiatric medication, and were less likely to be termed 'developmentally delayed'" than children with unhealthy or insufficient attachments.[17]

During visits, "children's behavior reflects their feelings about being separated from family members, about the neglect or abuse that preceded placement, and their confusion about living [in foster care]."[18] Parents and children may have intense feelings surrounding visitation, and these can interact to bring out the worst in all parties.[19] Before and after visits, children may display "regression (being babyish, whining, demanding, or scared), numbing or denying feelings, depression, nightmares, irritability, aggression, overactivity, and physical pains,"[20] but these are not necessarily indications that visitation should be made less frequent or stop altogether. The child's age, developmental stage, and overall temperament will all influence the child's reactions to visitation.[21] Because the meaning of the child's behavior can be unclear, attorneys should consult a mental health expert before making any significant changes to the visitation plan based on the child's reactions.[22]

In general, "[v]isitation should be viewed as a *planned, therapeutic intervention* and the best possible opportunity to begin to heal what may be a damaged or troubled relationship."[23] To promote reunification, visits should increase in frequency and duration, and decrease in supervision level, over time.[24] Parents' attorneys should advocate for frequent, minimally restrictive visitation between parents, wards, and siblings at every stage of a dependency case in order to accelerate and promote lasting reunification.

Read the full article at http://www.jrplaw.org/documents/VisitReunif.pdf.

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1 Sonya J. Leathers, *Parental Visiting, Conflicting Allegiances, and Emotional and Behavior Problems Among Foster Children,* 52 Family Relations 53 (2002).

2 J. Leonard P. Edwards, Judicial Oversight of Parental Visitation in Family Reunification Cases 11 (2003).

3 Memorandum from John B. Mattingly, Commissioner, Administration for Children's Services, to Executive Directors, Foster Care Contract Agencies 13 (Aug. 28, 2006).

4 Placement Rev. Comm., Visitation: Promoting Positive Visitation Practices for Children and Their Families Through Leadership, Teamwork, and Collaboration 13-14 (Peg McCartt Hess ed., 1999).

5 Amber Weintraub, Information Packet: Parent-Child Visiting 2 (Nat'l Res. Ctr. for Family-Centered Practice and Permanency Planning 2008).

6 Brea L. Perry, *Understanding Social Network Disruption: The Case of Youth in Foster Care,* 53 Soc. Problems 371, 387 (2006).

7 Marty Beyer, Visit Coaching: Building on Family Strengths to Meet Children's Needs 7 (2007).

8 *In re* F.W., 180 P.3d 69, 74 (Or. Ct. App. 2008).

9 Edwards, *supra* note 2, at 3. *See In re* F.W., 180 P.3d at 74 (finding a child who has become attached to her foster parents would go through the initial stages of grief if that attachment were disrupted by returning her to her parents).

10 Margaret Smariga, Visitation with Infants and Toddlers in Foster Care 4 (July 2007).

11 Leathers, *supra* note 1, at 62.

12 Edwards, *supra* note 2, at 8.

13 *Id.*

14 Leathers, *supra* note 1, at 54.

15 *Id.* (Some children in long-term foster care . . . might be unable to establish a secure relationship with either [biological or foster] parent figure without ambivalence and emotional distress.").

16 Smariga, *supra* note 10, at 3.

17 Lenore M. McWey & Ann K. Mullis, *Improving the Lives of Children in Foster Care*, 53 Family Relations 293, 294 (2004).

18 Beyer, *supra* note 7, at 2.

19 *Id.*

20 *Id.* at 7-8; *see In re* Krueger, 589 P.2d 744, 748 (Or. Ct. App. 1978) (a ward wet the bed, had nightmares, and inexplicably lost weight after visitation with his parents).

21 BEYER, *supra* note 7, at 7; Smariga, supra note 10, at 4.

22 Memorandum (2006), *supra* note 3, at 5 (emphasis in original removed).

23 SMARIGA, *supra* note 10, at 7 (emphasis in the original).

24 Memorandum (2006), *supra* note 3, at 8.

RECENT CASE LAW

DHS v. Three Affiliated Tribes of Fort Berthhold Reservation,

236 Or App 535, 238 P3d 40 (2010) (Hazelton, P.J.) (Wasco Co.) affirmed

http://www.publications.ojd.state.or.us/A143921.htm

The tribes appealed a decision of the trial court to designate the current foster parent as the adoptive placement, rather than the home of a relative designated by the tribe, finding "good cause" to depart from the placement preferences in the Indian Child Welfare Act (ICWA)

On appeal the Court of Appeals first addressed the standard of review, taking this opportunity to explain that since the 2009 amendments to ORS 19.415, juvenile cases, except termination of parental rights cases, are no longer reviewed *de novo* as a matter of right. Thus, in a case such as this one where *de novo* review was not requested or granted, the review is "limited to examining the record to determine if there is any evidence to support the trial court's factual findings." *G. I. Joe's, Inc. v. Nizam*, 183 Or App 116, 123, 50 P3d 1282 (2002).

After reviewing the history of the case, the parties contentions and the history and policy behind ICWA, the court addressed two issues: the proper standard of appellate review of a "good cause" finding and what considerations may be taken into account in such findings. As to the former, the court concluded that review is for legal error. Addressing the issue of what consideration apply, the court noted that many courts have looked to the non-binding Bureau of Indian Affairs (BIA) guidelines, but concluded that it need not address all that might apply because the determination was "ultimately predicated on a consideration that is legally sufficient by itself to establish 'good cause' and that is supported by evidence in this record." The evidence the court refers to is expert testimony that the trial court found credible and persuasive that the harm the children will suffer if moved from their present home will be serious and lasting and that exposure to the biological family if placed with the relative will damage one of the children.

> We agree with the trial court that both of those considerations are pertinent in determining whether good cause exists to depart from ICWA's placement preferences. We further conclude that, regardless of the trial court's assessment of the latter, the former is conclusive.
>
> We fully appreciate the fundamental and compelling policies that underlie ICWA. We are also mindful of the tribes' expressed concerns that those policies can be subverted or eroded through judicial decision-making that partakes of cultural biases, either implicit or explicit, especially with respect to "good cause" determinations. Further, we are fully cognizant from our extensive experience in juvenile dependency matters that in virtually every case involving a change of custody from a well-established placement, the affected child or children will suffer some degree of emotional distress and dislocation. The nature, severity, and

durability of that harm can vary greatly from case to case.

We are mindful of all of those things--and of our sworn obligation to apply ICWA consistently with that statute's mandates. But ICWA does not mandate effectuation of its placement preferences in every case. Rather, the statute explicitly provides that, notwithstanding a strong presumption of deference to the placement preferences, the presumption can, in special cases, be overcome by a showing of "good cause." "Good cause" properly and necessarily includes circumstances in which an Indian child will suffer serious and irreparable injury as a result of the change of placement. Here, as noted, the trial court explicitly accepted as credible and persuasive expert testimony that "the harm to [the children] will be serious and lasting, if they are moved from [foster parents'] home." That finding, substantiated by evidence in this record, is legally sufficient to establish "good cause" for purposes of 25 USC section 1915(a). (footnote omitted)

State v. S.T.S., 236 Or App 646, 238 P3d 53 (2010), (Landau, P.J.) (Jackson Co.) motion to dismiss den., affirmed

http://www.publications.ojd.state.or.us/A143524.htm

The first issue in this case is whether the appeal became moot when the juvenile court, after the appeal was filed, dismissed the case. Relying on an earlier case, State ex rel Juv. Dept. v. L. B., 233 Or App 360, 226 P3d 66 (2010), the court held that the effect of the juvenile court's judgment on further DHS investigations and the social stigma associated with it, meant that the appellate court's actions would have a "practical effect on the parties rights" and, thus, the appeal was not moot. The case involved domestic violence between the parents and the effect on the children. The trial court made specific findings, including that he found "no reasonable doubt in my mind that [father] has been a perpetrator of domestic violence against [mother], and that he's done it often, and that it was both physical and verbal. And I do find that it endangers the welfare of both these children."

On appeal the father argues that the court's factual findings do not meet the legal standard to establish juvenile court jurisdiction. Regarding the legal standard for "conditions and circumstances" cases, the court said

> Our cases have established that a child's "condition or circumstances" warrant the protection of juvenile court jurisdiction when, "under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child." *State ex rel Juv. Dept. v. Vanbuskirk*, 202 Or App 401, 405, 122 P3d 116 (2005) (citing *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 652-53, 853 P2d 282 (1993)). The focus of the jurisdictional inquiry is the *child's* condition or circumstances. *Id.* The state must prove, by a preponderance of the evidence, that there is a *current* risk of harm and not simply that the child's welfare was endangered at some point in the past. *See State ex rel Juv. Dept. v. S. A.*, 230 Or App 346, 347, 214 P3d 851 (2009) (accepting the state's concession that dependency petitions must allege a current risk to the child's welfare).

Although the "record is slim" on the issue of whether the parents' violence creates a current risk of harm to the children (even to the parents' newborn who has never lived with parents together), Court of Appeals could not say there was *no* evidence and therefore juvenile court jurisdiction was warranted.

DHS v. E.L. 237Or App 206, __P3d__ (2010) per curiam (Lane Co.) rev'd and remanded

http://www.publications.ojd.state.or.us/A144978.htm

In this appeal from a permanency judgment, father assigned as error the trial court's failure to enter the judgment within the time set by statute (20 days). The state conceded error.

State v. N.L. 237 Or App 133, __P3d__ (2010) (Ortega, J.) (Yamhill Co.) rev'd and remanded

http://www.publications.ojd.state.or.us/A143877.htm

In a procedurally complicated case, the Court of Appeals, after determining that the trial court lacked the authority to enter an amended judgment after the original one was on appeal, addressed the substantive question of whether father was denied adequate assistance of counsel.

The jurisdictional judgment in this case was entered after a hearing at which all counsel agreed that ICWA's higher burden of proof did not apply and at which there was no expert testimony, as required by ICWA. The judgment did not contain the required "active efforts" determination. In fact, ICWA did apply to the case.

The Court of Appeals reviewed the law on claims of inadequate assistance of counsel in dependency and termination of parental rights cases, reiterating that this is an issue that can be raised for the first time on direct appeal and that in addition to inadequacy, there must be a showing of prejudice.

The court noted that it would not ordinarily review "invited error" but in this case agreed with father that counsel did not act to gain a tactical advantage (noting no advantage could be gained by forgoing the heightened proof requirements in ICWA) and that he should not be penalized for counsel's mistake. The court then held that counsel's representation was inadequate and proceeded to the issue of prejudice.

On two of the allegations the court found that the outcome would have been different had counsel been adequate and that they did not form the basis for jurisdiction. On the allegation of medical neglect, the court found that the outcome would not have been different even had counsel been adequate –in other words, there was clear and convincing evidence of medical neglect, which the opinion chronicles in some detail. However, the trial court was required to make "active efforts" findings and because counsel's inadequacy prevented the court from doing so and because the outcome might have been different had the court addressed this determination, the case was remanded.

DHS v. R.H., __ Or App __, (September 15, 2010) (Schuman, P.J.) (Clackamas Co.) affirmed

http://www.publications.ojd.state.or.us/A144082.htm

As described by the Court of Appeals, father appeals "from a judgment of the juvenile court finding jurisdiction over his son, Z, and from parts of the dispositional judgment in the same case requiring father to undergo counseling in Oregon

and to participate in a psychosexual risk assessment."

In 2008 mother signed a voluntary placement agreement with DHS because she sought out of home care for her son, Z, who needed residential treatment. A few months later, father who had been absent for ten years returned. DHS having been made aware that at some point Z had made allegations of physical and sexual abuse against father asked mother to allow only supervised contact between them. Mother did so. Although Z told his caseworker that he stood by the allegations, his conversations with his therapist were less clear and the therapist concluded, as did the trial court, that he was confused about whether the abuse occurred or not.

DHS came to the family's home and mother signed a service agreement and father orally agreed to a psychosexual evaluation. A week later, without telling DHS or Z, mother, father and Z's twin sister moved to Hawaii. After they arrived, mother let Z know where the family was.

At the dependency jurisdictional trial held about four months later, the parents were not permitted to testify by telephone. After taking evidence from Z's caseworkers and therapist, the court made several findings, including that father had abandoned Z and fled from Clackamas County to avoid involvement with DHS.

Father first argued on appeal that the juvenile court erred in failing to strike several of the allegations in the state's dependency petition because they were insufficient to establish jurisdiction. These errors were not preserved and the Court of Appeals did not address them.

Father next contended that the state failed to prove that father abandoned Z, arguing that abandonment requires intention to relinquish his rights. The Court of Appeals agreed with father on the legal standard but found that father did indeed intend to relinquish his rights, stating,

> It is exactly father's move to another state and failure even to attempt to contact Z, immediately following a 10-year period of complete lack of contact, that directly supports the inference that father intended to relinquish his parental rights.

Lastly, father argued that the juvenile court's order requiring an evaluation and participation in counseling in Oregon did not bear a rational relationship to the jurisdictional findings. Once again, the Court of Appeals disagreed.

> Because it is unclear whether sexual abuse did occur and it is clear that Z is confused about what happened, the evaluation is a rational way to see if father does, in fact, pose a risk and, if so, what treatment is necessary.
>
> Lastly, the court's order that father return to Oregon for therapy and treatment is also rationally related to the reasons why the court took jurisdiction. Z has suffered because he feels abandoned by his family, and the court took jurisdiction because it found father fled the state and abandoned Z. By requiring father to return to the state and to begin building a relationship with Z, the court was requiring father to be an active presence in Z's life in order to remedy one of the reasons why the court took jurisdiction in the first place.

RECENT CASE LAW

By Rochelle Martinsson, Law Clerk

State ex rel Juvenile Department of Hood River County v. H.S., ___ Or App ___ (September 22, 2010).
http://www.publications.ojd.state.or.us/A140663.htm

Youth appealed a juvenile court judgment finding him within the jurisdiction of the court for acts that, if committed by an adult, would constitute first-degree burglary, first-, second-, and third-degree theft, and unlawful entry into a motor vehicle. Of youth's four assignments of error, the Court of Appeals addressed only youth's challenge to the sufficiency of evidence supporting the charge of second-degree theft. Youth argued that at best, the state could only prove third-degree theft, based on the value of the stolen property.

At trial, the victim testified that the cost of replacing his stolen cell phone was $50. No testimony was given as to the approximate value of the stolen cell phone, or as to any similarity between the stolen cell phone and the victim's new cell phone. Youth moved for a judgment of acquittal, arguing that the victim's testimony did not establish that the stolen phone itself cost $50, but the court denied the motion on grounds that it cost the victim $50 to replace what was taken.

Construing ORS 164.115, which governs the valuation of property for purposes of theft statutes, the Court of Appeals found that "to prove the value of stolen property through evidence of the cost of replacement property, the state must prove that the stolen property and the replacement property are of 'equal effectiveness' or have the 'same utility.'" The Court found that in the absence of any evidence of comparison between the stolen cell phone and the victim's new cell phone, the victim's testimony was legally insufficient to establish that the stolen cell phone itself was worth $50 or more. The Court held that the state had failed to prove that the youth committed second-degree theft, that the juvenile court erred in denying youth's motion for judgment of acquittal, and that the juvenile court should have adjudicated youth for the lesser-included offense of third-degree theft, which applies to theft of property worth less than $50. Accordingly, the Court reversed as to the second-degree theft charge, remanded for entry of amended judgment, and otherwise affirmed.

State v. C.A.S., ___ Or App ___ (September 15, 2010).
http://publications.ojd.state.or.us/A142189.htm

After youth drove a car without the owner's permission and was subsequently involved in an accident, a juvenile court referee ordered that youth pay restitution to the victim and the victim's insurance carrier, totaling over $4,500 to cover the costs of repairing the car. Youth sought review of the restitution order, arguing that the insurance company was not a "victim" for purposes of ORS 419C.450, the juvenile restitution statute. Although the juvenile court agreed with youth, it made the total amount payable to the victim, instead of to the insurance carrier. Youth again sought review.

The Court of Appeals affirmed the second restitution order, finding that because the juvenile court awarded restitution to the actual victim and not the insurance carrier, the meaning of the word "victim" under ORS 419C.450 had no bearing on the ultimate correctness of the restitution award. The Court of Appeals noted that "the real question is what constitutes the "full amount of the victim's injury, loss or damage" [under the statute] in light of the fact that an insurance company paid for

repairs to the victim's car," but because youth had not preserved that argument, the Court did not address it.

California State Foster Parent v. Wagner, ___ F3d ___ (Ninth Circuit, August 30, 2010)

This case originally arose as a suit against officials of the State of California under 42 U.S.C. § 1983, claiming violation of foster parents' federal right to payments under the Child Welfare Act. Plaintiffs, three associations representing individual foster parents, sought to compel the State to revise its payment schedule upward, out of concern that the State's payments were not covering foster parents' costs to the extent allegedly required under federal law. Although the merits of plaintiffs' case were subsequently resolved via mediation and case law, the specific issue of whether the Child Welfare Act creates an enforceable federal right remained. The United States Court of Appeals for the Ninth Circuit answered this question in the affirmative, holding that the Child Welfare Act grants foster care providers a federal statutory right to payments that cover certain enumerated costs, and that this right is redressable under § 1983. The Court reached its decision in light of "controlling Supreme Court and Ninth Circuit authority governing when federal statutes create federal rights enforceable through 42 U.S.C. § 1983." (citing *Gonzaga University v. Doe,* 536 U.S. 273 (2002); *Blessing v. Freestone,* 520 U.S. 329 (1997); *Price v. City of Stockton,* 390 F.3d 1105 (9th Cir. 2004)).

The federal Child Welfare Act provides money to state governments to pay for children's foster care and adoption assistance programs. 42 U.S.C. § 670 *et seq*. The Act spells out the specific foster care provider expenses that states' payments are supposed to cover, and states then distribute the funds to actual families and institutions that provide foster care services. The two principal statutory provisions at issue in the instant case were 42 U.S.C. § 672(a), which requires states to make "foster care maintenance payments" on behalf of each foster child, and § 675(4)(A), which defines the term "foster care maintenance payments" as payments to cover enumerated categories of costs. At the district court level and on appeal, the State argued that these provisions do not create an individually enforceable federal right.

Citing several U.S. Supreme Court decisions and federal appellate case law, the Ninth Circuit Court of Appeals explained that "a federal statute can create an enforceable right under § 1983 when it explicitly confers a specific monetary entitlement on an identified beneficiary." Applying the three-part test of *Blessing v. Freestone,* 520 U.S. 329 (1997), the Court first identified the particular statutory provision (i.e., the asserted right) at issue as § 675(4)(A) and the right to foster care maintenance payments covering the costs of expenses enumerated therein. Second, the Court found that it was Congress' unambiguous intent that foster care maintenance payments under §§ 672(a) and 675(4)(A) benefit individual foster parents, such as those in the instant case. Third, the Court found that § 672(a), the provision giving rise to the right at issue, is couched in mandatory, rather than precatory, terms. Accordingly, the Court held that "§§ 672(a) and 675(4)(A) of the Child Welfare Act establishes a presumptively enforceable right under § 1983 to foster care maintenance payments from the State that cover the cost of the expenses enumerated in § 675(4)(A)." Further, the Court held that because the State had not rebutted the presumption, and in the absence of an express prohibition on enforcement in the Act or any administrative mechanism through which aggrieved foster parents can

seek redress for inadequate maintenance payments, plaintiffs had access to a remedy under § 1983 to enforce their federal right.

SAVE THE DATE

October 18, 19

Juvenile Law Training Academy
Hilton Eugene and Conference Center

Oregon Judicial Conference
http://www.ocdla.org/pdfs/seminars/jlta.pdf

October 20-23

NACC 33rd Child Welfare, Juvenile & Family Law Conference
Hilton, Austin, TX
http://www.naccchildlaw.org/?page=National_Conference

October 21, 22

OCDLA's Annual Public Defense Management Conference
Agate Beach Inn, Newport, OR
http://www.ocdla.org/seminars/shop-seminar-index.shtml

October 29, 30

ACLU Northwest Civil Liberties Conference
Lewis & Clark Law School

Keynote Speaker is Charles Hinkle, prominent civil litigator and partner at Stoel Rives LLP.
http://bit.ly/9YqbuK

November 16

Shoulder to Shoulder Conference
Oregon Convention Center

Keynote Speaker is Judge Patricia Martin on "Fostering Resilience in Children and Families in the Child Welfare Systems."
www. Oregon.gov/DHS/children/fostercare/conference

RESOURCES

"Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile ***Delinquency Representation,"*** **by Professor Barbara Fedders, Lewis & Clark Law Review, Summer 2010.**
http://www.lclark.edu/livewhale/download/?id=4802

"Healing Invisible Wounds: Why Investing in Trauma-Informed Care for Children Makes Sense," **Justice Policy Institute, July 2010.**
http://www.justicepolicy.org/images/upload/10-07_REP_HealingInvisibleWounds_JJ-PS.pdf

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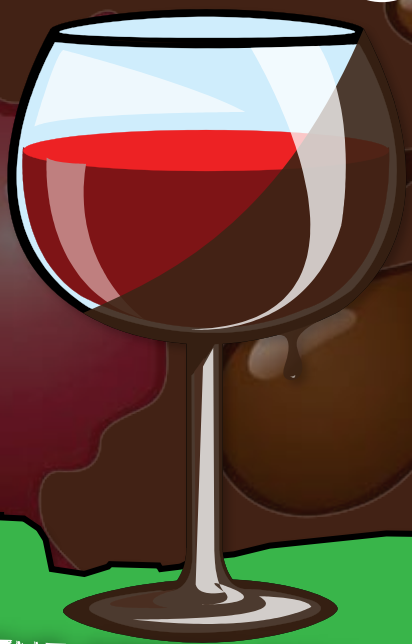

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