Juvenile Law Reader

Youth, Rights & Justice
ATTORNEYS AT LAW

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US Supreme Court Rules on Juvenile Interrogations

By Triston Dallas, Paul Grotzinger, Laura Wood, Sean Worley, Law Clerks

In a significant victory for children and their advocates, the Supreme Court held, in *J.D.B. v. North Carolina*, that police are required to consider a juvenile suspect's age when deciding whether to give *Miranda* warnings prior to interrogation.

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"Justice Sotomayor, writing for the Court, held that a child's age is a proper consideration in the Miranda custody analysis."

We dedicate this issue to the memory of Jeffrey M. Jenks.

Read the dedication on page 3.

OR Legislature Approves Modifications to Juvenile Registry

By Mark McKechnie, Executive Director

Oregon has been one of a few states in the U.S. to impose lifetime registration on juveniles adjudicated for felony or misdemeanor sex offenses. Since Oregon's law was enacted in the 1990s, there has been mounting evidence to show that youth who commit sex-related offenses are very unlikely to persist and commit similar offenses again in the future, particularly when youth receive appropriate treatment and other services. There is further evidence that sex offender registries offer little to protect the public from incidents of sexual assault, yet there are definite negative consequences for registrants and their families that stem from registry requirements and public notification.

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« *Interrogations continued from previous page*

Thirteen-year-old J.D.B. was removed from his seventh-grade social studies class by a uniformed police officer, taken to a closed-door conference room, and questioned for over thirty minutes in the presence of two uniformed police officers, the assistant principal, and an administrative intern. During questioning, he was urged by the principal to tell the truth and "do the right thing" and was told that he could be placed in detention. Eventually, J.D.B. confessed that he and a friend were responsible for the two home break-ins the police were investigating. It was at this point that the Miranda warning was given. J.D.B.'s motion to suppress his statements was denied by the trial court, which was affirmed by both the North Carolina Court of Appeals and Supreme Court. The U.S. Supreme Court granted certiorari to resolve the issue of whether the *Miranda* custody analysis requires consideration of a juvenile suspect's age.

Justice Sotomayor, writing for the Court, held that a child's age is a proper consideration in the Miranda custody analysis. When applying the standard to children, the Court, stating the obvious, said that children "will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave." Noting that "our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults," the Court ruled that "so long as the child's age was known to the officer at the time of questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test."

Writing for the dissent, Justice Alito expressed concern that the ruling will require a highly fact—intensive standard, which will complicate matters for police and the courts. The dissent also warned that for youths closer to the age of majority, the new protection is unnecessary because a 16-year-old defendant's reaction to police pressures is unlikely to be much different from the reaction of a typical 18-year-old. The majority countered that it would be absurd for police and the courts to evaluate circumstances specific to children, such as J.D.B.'s removal from a seventh-grade social studies classroom before interrogation, without considering the suspect's age. Furthermore, the Court noted, "that to hold, as the State requests, that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real life differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults." *J.D.B. v. North Carolina*, No. 09-11121, slip op. (S. Ct. June 16, 2011). ●

"A good head and a good heart are always a formidable combination."

– *Nelson Mandela*

« *Registry continued from previous page*

While Oregon law has provisions to allow persons required to register as juveniles to petition for relief from the registration requirement, only 13% of those individuals have ever successfully obtained relief. This is in spite of the evidence which indicates that fewer than 10% of youth offenders will re-offend.

The 2011 Oregon Legislature acted to modify Oregon's laws in response to the mounting evidence that such a broad registration requirement imposes unwanted consequences upon youth and their families without a discernable public safety benefit. Senate Bill 408 was signed by the Governor on June 7, 2011, after passing the Senate on a 29-1 vote and the House on a vote of 60-0.

The new law will make fundamental changes to Oregon's juvenile registry law once all sections are effective. All changes apply only to persons who were adjudicated in a juvenile court in Oregon or in another United States jurisdiction. These provisions of SB 408 are effective January 1, 2012:

1. Removes misdemeanor offenses from the list of offenses that require lifetime registration. Youth will no longer have to register for a misdemeanor adjudication, and all persons currently registered for a misdemeanor adjudication will be removed from the registry by the Oregon State Police between January 1, 2012 and January 1, 2013.

2. Imposes a shorter waiting period for youth adjudicated of Class C Felony

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In Memoriam

Jeffrey M. Jenks

The staff of Youth, Rights & Justice are shocked and saddened by the sudden passing of Jeffrey M. Jenks, our Operations Manager, on June 12, 2011. Jeff was a beloved friend and colleague who was dedicated to the Juvenile Rights Project and Youth, Rights & Justice for 17 years.

Jeff was born July 5, 1960, and grew up in Milwaukie, OR. He served in the U.S. Coast Guard in Yorktown, VA, and Portland, OR, for seven years. Later, Jeff was the office manager and paralegal for his father's law firm, Jenks & Weinstein P.C., in Portland. During that time, he served as the President of the Hollywood (Portland) Kiwanis Club and chair of their fundraiser to support summer camp programs for children with disabilities. Jeff was also a volunteer at The Salvation Army Greenhouse program for homeless youth. He co-founded a program called "Street Hoops," a recreational program for homeless youth that served nearly 600 young people.

Jeff joined Juvenile Rights Project in 1994, combining his interests in the law and services to vulnerable children and youth. He started as a legal assistant. Less than two years later, Jeff was promoted to Office Manager and Systems Administrator. He continued to serve as Systems Administrator and Operations Manager and filled many critical roles for the non-profit organization. No task was too big or too small for him to roll up his sleeves and pitch in.

Since we published our first issue in 1994, Jeff has been an integral player in producing the Juvenile Law Reader. We dedicate this issue to him.

Jeff was a self-described "car guy." He worked early on for an automotive shop and maintained his own cars. During the last few years, he was the pit crew chief for his friend Bruce Wilson's "Spec Miata" racing team. They won the SCCA Oregon Championship Series in 2010.

Jeff was devoted to his close-knit family and was the primary care provider to his father after he suffered a stroke. He also cared for his mother as her health began to fail at the end of her life. He was a devoted and proud uncle to his two nephews, as well. He could often be found on the sidelines at their football games, from youth football leagues through high school and, recently, college games. Jeff is survived by his brother Greg, sister-in-law Gretchen, and nephews Geoff and Gabe.

Jeff was a generous, hardworking, loyal and compassionate man who was taken from us far too soon. Our deepest sympathies are with all of his friends and family affected by his sudden passing.

"Only a life lived for others is a life worthwhile."

- Albert Einstein

« *Registry continued from page 2*

offenses to apply for relief from registration. They may petition the court for relief starting 30 days before the end of juvenile court jurisdiction and may request court-appointed counsel to assist them when they are still under the court's jurisdiction.

3. Provides a six-month time period for persons who move into Oregon from another state, who would be required to register based upon a Class C Felony adjudication, either to apply for relief from the juvenile court in their local jurisdiction or to register.

4. Lifts the three-year time limit on applications for relief. Youth with Class A and Class B Felony offenses will have to wait two years after the end of juvenile court jurisdiction to apply for relief; however, all juvenile registrants will have an unlimited time to apply for relief from registration once they become eligible to apply for relief.

5. Removes an additional $300 filing fee that had been imposed upon persons petitioning for relief from registration based upon a juvenile adjudication.

The full text of the bill can be accessed on-line at: http://www.leg.state.or.us/11reg/measpdf/sb0400.*dir/sb0408.en.pdf* ●

Learn more about who we are and what we do at:
www.youthrightsjustice.org

View From the Bench

By David V. Brewer, Chief Judge, Oregon Court of Appeals

I will begin with an assertion that I've made many times over the past decade and in which I believe with all my heart: *there is nothing more important in our judicial system than the timely and just handling of juvenile dependency cases, both at the trial and appellate levels.* To take that proposition seriously, courts and their stakeholders must pay special attention to the development, preservation and transmission of a complete and accurate record of all juvenile court proceedings. Caught up within that objective are concerns for confidentiality and the challenges of multiple, discrete, but related phases of the case that involve separately appealable decisions. Several recent appellate decisions highlight the pitfalls of failing to appreciate the complexities surrounding the need for an adequate record in dependency cases.

In *State ex rel. Dept. of Human Services v. Lewis*, 193 Or App 264, 89 P3d 1219 (2004), the court explained that the record on appeal in a dependency proceeding consists of the juvenile court file, exhibits received in evidence, and facts of which the juvenile court properly took judicial notice in the pertinent proceeding. We noted that, when, pursuant to ORS 19.365(3), the records section of the State Court Administrator's Office asks a trial court administrator to deliver the trial court record to the records section for use on appeal, the trial court administrator sometimes includes only the materials that the administrator has placed on the so-called "pleading side"—usually the right side—of the trial court file folder. Thus, the record transmitted often does not include correspondence, notices, and other materials that trial court staff may have placed on the other side of the file folder. However, correspondence between the trial judge and others pertaining to a case constitutes an "original paper" filed with the trial court for purposes of ORS 19.005(7). Therefore, it is part of the trial court file and, in turn, may be designated as part of the record on appeal pursuant to ORS 19.365(1).

In the wake of *Lewis*, the legislature updated and streamlined the statutory framework for creation, identification, and transmission of a juvenile court record. *See* ORS 419A.253 to 419A.257. However, problems with the record in dependency cases nonetheless have persisted.

In *State ex rel. Dept. of Human Services v. N.S*, 229 Or App 151, 211 P3d 293 (2009), the mother appealed an order establishing a guardianship under ORS 419B.366 for her child. Acting on DHS's motion, the juvenile court limited the scope of the evidence at the guardianship hearing to events that occurred after a preceding permanency hearing. The court reasoned that, at the permanency hearing, it had determined that child could not be returned to mother within a reasonable time, one of the requirements for an ORS 419B.366 guardianship. The court announced that "the information that was adduced" at the earlier hearing would be "incorporated" into the guardianship proceeding, that it "formally adopt [ed]" that information, and that its April 2008 permanency judgment reflected—and it had "a recollection of reviewing"—various documents, including a DHS letter and court report, notes from mother's treatment participation, an evaluation from the child's therapist, and various visitation notes.

With the exception of the DHS letter and a court report (the latter of which appeared to be an updated version of a report that was presented to the court at the permanency hearing), none of the documents mentioned by the court was received in evidence, and they did not otherwise appear in the trial court file. Accordingly, they were not part of the record on appeal. *See Lewis*, 193 Or App at 270. Although it is well established that courts may take judicial notice of records and prior proceedings in the same case, we did not interpret the juvenile court's vague statement that the information "adduced" at the permanency hearing was "incorporated" into the guardianship proceeding as taking judicial notice of that information.

On the record before us there was insufficient evidence of a risk to a particular child and, accordingly, we reversed the guardianship order.

In *DHS v. G.G.*, 234 Or App 652, 229 P3d 621(2010), the issue on appeal was whether the juvenile court had erred in denying the father's motion to transfer jurisdiction to a Montana court before allowing the parties to present facts and legal arguments related to communications between the juvenile and Montana courts concerning the motion.

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« *View from the Bench continued from previous page*

We concluded that the court erred in doing so, vacate the permanency judgment, and remanded.

The child had been born in Montana. Soon after the child's birth, Montana began a Child Protective Services assessment. When the parents learned about the investigation, the family left Montana for Oregon. DHS located the family, took the child into protective custody, and filed a dependency petition in the juvenile court. The court ordered the child to be placed in temporary DHS custody. Then the parents returned to Montana.

The Oregon court found the child to be within its jurisdiction. Before the permanency hearing, the father moved to transfer jurisdiction to Montana under the Uniform Child Custody Jurisdiction and Enforcement Act. During the permanency hearing, the court informed the parties that it would discuss that motion with the Montana court. After those discussions occurred, the court sent a letter to the parties stating that both courts agreed that Oregon should retain jurisdiction. The father then filed a motion requesting the juvenile court to disclose the record of its communications with the Montana court.

Before giving the parties an opportunity to present facts and legal arguments related to the juvenile court's communications with the Montana court, the court denied the father's motion to transfer jurisdiction. Thereafter, the court entered a judgment amending the permanency plan from reunification of the family to an alternative plan of adoption. Finally, the court entered an order denying the father's motion to disclose the record of the communications between the two courts.

The father appealed, assigning error to the denial of his motion to transfer jurisdiction and the court's failure to disclose the record of communications with the Montana court. After oral argument on appeal, the juvenile court sent a letter to the parties indicating that the record of communications between the juvenile court and Montana court had been placed on the left side of the legal file, which had not been made part of the appellate record. The state filed a motion to supplement the appellate record with the record of the communications between the courts, and the parties filed a joint motion to file supplemental briefs.

As in *Lewis*, the correspondence in *G.G.* between the juvenile and Montana courts was part of the trial court file. It was an "original paper" for the purposes of ORS 19.005(7),(3) and could be designated as part of the record on appeal. Accordingly, we granted the motion to supplement the record and considered the record of communications between the courts as part of the record on appeal.

In *N.S.*, the failure to make an adequate record in the pertinent proceeding may have contributed to the reversal of a guardianship decision. And, in *G.G.*, the failure to timely create and transmit a record of communications between two courts caused delay and unnecessary expense in the processing of an interstate jurisdictional dispute. Sensitivity to the principles set out in *Lewis* and familiarity with the statutory framework for identification and creation of a juvenile court record, ORS 419A.253 to 419A.257, will avoid most problems associated with record-related delay in the processing of dependency cases, both at trial and on appeal. ●

It's Been Said or Read – But is it in Evidence?

Making Your Record in Juvenile Dependency Cases

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

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

Scene 2: At a permanency hearing, attorney for Father notifies the Court that Father has separated from (non-compliant) Mother, is living with his brother, has a room available for the child there, and has just found employment at a gas station. The Court asks Father's Attorney how many witnesses the Attorney will be calling and the Attorney answers: "None."

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

All of these scenes involve issues about the record in juvenile court. While everyone at a dependency hearing is focused on the decisions at hand, practitioners have to be attentive not just to the immediate results but also to the record. It really does matter whether what was said, read, or remembered is actually in *evidence*. For clients, no stakes—not even incarceration—are higher or have such potentially long-lasting results than the loss or lengthy disruption of the parent-child relationship. For attorneys as well, investment in making an adequate record is important. At risk are malpractice liability, skills development, and professional reputation. Whether one intends to practice juvenile law for an entire career or switch at some point to another specialty, understanding the basics of making a record is a fundamental component of legal advocacy. It involves both an understanding of the law and familiarity with the mechanics of presenting evidence. This skill is as necessary as the power to persuade and one cannot afford to learn it late or poorly.

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While the culture of dependency work sometimes clouds aspects of legal formality in the courtroom, the bottom line is a bright one: juvenile court is a court of record and decisions are based on evidence. What can come *into* evidence in dependency cases is often subject to less rigorous standards than those applicable in other case types, but come into evidence it must. And as Justice Brewer's sidebar highlights, the Court of Appeals will not make your record for you. This article discusses briefly a few issues implicated in making a record in juvenile dependency cases.

Record on Appeal vs. Evidentiary Record

It probably helps to start out by distinguishing the "record on appeal" from the "evidentiary record." Usually, the former contains the latter but they are not the same. ORS 19.365(2) and ORAP 3.05 provide that the record on appeal consists of those parts of the "trial court file, exhibits, and record of oral proceedings" that are designated in the notice of appeal. "Trial court file" is itself defined at ORS 19.005 and means "all the original papers filed in the trial court." So if the entire trial court file (or "the legal file") is designated, it is in the record for appeal. It might not be in *evidence*, as discussed below, but the Court of Appeals will have access to it. Correspondence between the parties and the court comes within this category. *State ex rel Dept. of Human Services v. Lewis*, 193 Or App 264, 89 P3d 1219 (2004). So do the summons and proofs of service and the original petition in the case, even though trial occurred on the amended allegations. Even a recipe is in the record for appeal if that recipe was filed and the entire trial court file has been designated for appeal. But merely submitting a document for filing does not place that item in the evidentiary record. Filing a document does not even mean the item is relevant to the case. (When one of the authors was practicing, an adverse party placed a list of her client's sexual partners in the court dissolution file. This wasn't relevant and wasn't in evidence, but it was in the trial court file.) Also in the record for appeal are all exhibits that were offered, received or not. So are all the facts and arguments attorneys relay in opening and closing statements, all their objections, and the court's various rulings. Each is part of the oral record of the case which has likely been designated for appeal. In sum, the record on appeal can be as broad as whatever is in the legal file, offered as an exhibit, or said in court.

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

Judicial Notice

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

This distinction plays out when the Court is asked to "take judicial notice of the legal file." What fact or facts the attorney is asking that the court take notice of? That a legal file exists? The court can do that but why would one want to, as what good is that? Doesn't the attorney really mean that she wants the court to take judicial notice of certain *facts* contained in that file? If so, what facts? This is a situation that calls for carefully parsed requests rather than casual, loosely phrased generalities. The Court can take judicial notice that something is in the file, but as previously mentioned, mere

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

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

Impact of Consolidation

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

Only four ways exist to get something into the evidence box for that proceeding: (1) testimony, (2) admitted exhibit, (3) stipulation, and (4) judicial notice.

Evidence Rules and Social History

The Oregon Evidence Code does not apply, except for privileges, to "proceedings to determine the proper disposition of a child in accordance with ORS 419B.325(2)." ORS 40.015(4)(h) and OEC 101(4). So while jurisdictional hearings in dependency cases include the full panoply of OEC protections, the bread-and-butter of juvenile dependency work – the dispositional inquiries in reviews and permanency hearings – is done under the "social history or prognosis" umbrella of ORS 419B.325(2). *See* ORS 419B.449(2) regarding reviews and ORS 419B.476(1) regarding permanency hearings. ORS 419B.325(2) allows testimony, reports, and other material relating to the child's mental, physical, and social "history and prognosis" to be received without regard to competency or relevancy concerns. Shelter hearings are also dispositional but have an even broader standard than that set out in 419B.325(2). In shelter hearings, *any* evidence relevant to the findings required is allowed, without regard to admissibility under the OEC except for privilege. ORS 419B.185(1)(g).

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

DHS caseworker says . . .

That Mother's Neighbor says . . .

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> That Neighbor's 7 year-old Son says . . .
>
> That Son's Friend (age not established) saw a "scary" man who looked like Father coming out of Mother's apartment one morning . . .

Without objection, the evidence is in for sure.

Witnesses Sworn In?

Since the evidence code doesn't apply in dispositional hearings for dependencies, do witnesses have to be sworn in? After all, it is OEC 603 that requires an oath or affirmation from every witness testifying. Is it "no code, therefore no oath?" Or is it instead "no oath, therefore no competent witness?" Oregon appellate courts discuss witness competency in terms of personal knowledge, recollection of the relevant events, capacity to communicate that knowledge, and ability to recognize the necessity of telling the truth. *State v. Bumgarner*, 219 Or App 617, 628, 184 P3d 1143, 1149 (2008). The oath about truthfulness is a clearly denominated element of witness competency. *State v. Millbradt*, 305 Or 621, 623-625, 756 P 2d 620, 620-622 (1988), citing OEC 603. But as discussed below, while "competent" evidence is needed at reviews and permanency hearings, the subset of information that concerns social history and prognosis may be admissible *without* regard to competency. And after all, it is hard to imagine what evidence offered at a review or permanency hearing *isn't* related to the child's social history and prognosis and would need to meet a competency standard.

So perhaps the Legislature intended we get by in dependencies without swearing in witnesses. Aren't informal hearings more conducive to the dispositional planning needed anyway? Certainly those arguments can be made. On the other hand, is it more likely that the Legislature instead intended only that the "personal knowledge" component of competency be inapplicable. This view would hold that witnesses still need to be sworn but allows in all the hearsay that typically constitutes the evidence given the planning and dispositional purposes of the hearing.

It is at least undisputed that the Juvenile Code does require evidence as the basis for dependency decisions. For shelter hearings, the parties are entitled to an "opportunity to present *evidence*" and the court may receive "*testimony*, reports and *other evidence*." ORS 419B.185(1) & (1)g). In review and permanency hearings, the court must conduct the proceedings "in the manner provided in ORS 419B.310" (established by a preponderance of competent *evidence*, except for *testimony* and materials relating to social history/prognosis; and the court may hear the child's *testimony* outside the parents' presence). The question reduces to whether unsworn statements can be evidence. In *Rosiles-Flores v. Browning*, 208 OrApp 600, 602 n. 1, 145 P3d 328, 330 n. 1 (2006), unsworn statements made by Family Abuse Prevention Act petitioner in an *ex parte* request to a judge for a restraining order were not considered evidence. Older criminal cases note the requirement for an oath but deem the error waived when no objection has been made. *State v. Doud*, 190 Or 218, 225 P 2d 400 (1950); *State v Cox*, 43 Or App 771, 604 P2d 423 (1979). The most recent guidance is only *dicta* but was made in the dependency context. The Court of Appeals noted in *State ex rel Juv. Dept. vs. K.L.* that

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

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

Attorneys as Fact Witnesses

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

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where it would be manifestly unfair to the client for the lawyer to withdraw. *Bronson v. Dept. of Revenue*, 265 Or 211, 215, 508 P2d 423, 425 (1973) (interpreting an early precursor to the ORPC, the ABA Code of Professional Responsibility that had been adopted by the Oregon Supreme Court). Not every juvenile dependency case can be an "exceptional situation." Moreover, as a practical matter, "when a lawyer calls himself as a witness, his testimony is difficult to follow because it usually results . . . in a narrative statement containing many conclusions of the witness," as opposed to separating the factual statements from argument about the legal import of those facts. *Id.* This selectively offered and finessed blending of fact and argument is the current customary but questionable approach of many attorneys at dependency hearings. It cannot fall on the Judge to seek confirmation from the parent (if present) of the attorney's statements and to elicit actual evidence that the attorney failed to provide. Nor should it be the Court's obligation to ask the DHS caseworker to confirm what the assistant attorney general just relayed. The trial court is under no greater obligation to develop the client's record than is the Court of Appeals.

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

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

"Give me a lever long enough and a fulcrum on which to place it, and I shall move the world."

– *Archimedes*

Addressing the Intersection Between Foster Care and Reunification

By Rochelle Martinsson

Introduction

When the state takes protective action in the child dependency context, there can be tension between the rights of children and parents on the one hand, and the child welfare interests of the state on the other. The ideal balance between these competing interests is a delicate and important one, subject to many intervening factors. One such factor is the perspective of foster parents regarding the reunification of children with their parents, because the extent to which foster parents support and help facilitate reunification can significantly affect whether reunification is ultimately successful. In some cases, foster parents have assumed the role of caregiver in the hope of adopting a child. This may result in an overriding motivation on the part of the foster parents to form their own bond with the child, rather than facilitate reunification between the child and his or her parents. In other cases, foster parents may simply not be aware of the significance of their role to reunification. Regardless of the circumstances, it is important for state child welfare agencies, foster parents, and parents' attorneys to be aware of the rights of children and parents in the context of reunification, as well as the obligation of foster parents to support reunification when that is part of the permanency plan.

Constitutional and Jurisprudential Protection of the Parent-Child Relationship

The rights of parents in the context of child dependency proceedings may be found in constitutional protections of the family. Several United States Supreme Court decisions addressing the constitutional interests of parents in their children demonstrate a respect for family integrity. For example, in *Meyer v. Nebraska*[1], the Court recognized a liberty interest in parents, guaranteed by the Fourteenth Amendment, to "marry, establish a home and bring up children." In *Pierce v. Society of Sisters*[2], the Court expanded on the interests articulated in *Meyer* and recognized the liberty of parents "to direct the upbringing and education of children under their control." In *Pierce v. Massachusetts*[3], the Court noted that "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and obligations the State can neither supplant nor hinder."

In what is widely regarded as the most important U.S. Supreme Court decision addressing child dependency, the Court held in *Santosky v. Kramer* that before parental rights may be terminated, the state must prove its case by clear and convincing evidence – a heightened standard.[4] While this case did not address reunification, it is nonetheless illustrative of the Court's respect for the child-parent relationship in matters of state intervention. In *Santosky*, the Court noted that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody to the state."[5] The Court further stated, "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."[6]

Federal Legislation

Federal legislation also reflects the importance of family integrity, even where circumstances warrant state intervention in family affairs. A prerequisite for receipt of federal funding for use by a state child welfare agency is that the state make "reasonable efforts" to prevent removal of children from their homes, and to return children to their homes. Federal child welfare law has long reflected the importance of reunification efforts, beginning with the Adoption Assistance and Child Welfare Act of 1980 (AACWA).[7] AACWA was passed during the time of a reform movement which focused on reducing the number of children in foster care and promoting permanency planning. As noted in a 1996 law review article, AACWA was enacted largely in response to the problem of "foster care drift," or "the tendency of children in foster care to lose contact with their natural parents, move frequently between foster homes, and, as a result, fail to form enduring relationships with any parental figure."[8] Through AACWA, Congress sought to address agency delay and indecision which kept children in foster care for lengthy periods of time, by requiring states to make reasonable efforts to reunite families. This focus on family preservation continued during the 1980s and resulted in the Family Preservation and Child Protection Act of 1993, which authorized substantial funding for state family preservation services and community-based family support programs.

Somewhat weakening the protection of family integrity, Congress passed the Adoption and Safe Families Act (ASFA) in 1997

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in response to "concerns that AACWA had encouraged states to go too far in preserving parent-child relationships that were more harmful than beneficial."[9] ASFA amended the federal "reasonable efforts" requirement established by AACWA by making the child's health and safety the "paramount concern."[10] Still, ASFA contains several provisions conditioning state funding on certain state efforts and parental rights relevant to reunification. For example, Section 671(a)(15)(B) of ASFA provides that, unless certain circumstances exist, reasonable efforts are required to preserve and reunify families. This requirement includes reasonable efforts "prior to the placement of a child in foster care [and] to prevent or eliminate the need for removing the child from the child's home,"[11] as well as reasonable efforts "to make it possible for a child to safety return to the child's home."[12] Further, Section 675(5)(c)(ii) of ASFA provides that "procedural safeguards shall be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents."

These provisions suggest that the state is required to promote foster parent support for family reunification. In the event that a foster care provider is less than supportive of a reunification plan, the agency should address the issue as part of its reasonable efforts responsibility.

State Legislation

In Oregon, the "reasonable efforts" requirement is codified in several of provisions addressing child dependency proceedings. For example, ORS 419B.185(1)(a) states that at a hearing following removal of a child from his or her home, "[t]he court shall make written findings as to whether the Department of Human Services has made reasonable efforts . . . to prevent or eliminate the need for removal of the child or ward from the home and to make it possible for the child or ward to safety return home." This provision also requires that the court "include in the written findings a brief description of the preventive *and reunification* efforts made by the department."[13]

The court is also required to make a finding of reasonable efforts when it enters an order removing a ward from his or her home, or an order continuing care.[14] Further, ORS 419B.340 requires that if custody of a child is awarded to DHS, the court's disposition order shall include a reasonable efforts determination, including discussion of what preventive *and reunification* efforts the Department made, and "why further efforts could or could not have prevented or shortened the separation of the family."[15]

With regard to case planning, ORS 419B.343 requires reunification of the family to bear a rational relationship to the jurisdictional findings that initially brought the ward within the court's jurisdiction. At a permanency hearing where the case plan is to reunify the family, a lack of reasonable efforts by DHS to make it possible for a child or ward to safely return home is a compelling reason for DHS *not* to file a TPR petition.[16] Where a TPR petition is otherwise required under ORS 419B.498(1), an exception exists in situations where "[t]he department has not provided to the family of the child or ward, consistent with the period in the case plan, such services as the department deems necessary for the child or ward to safety return home."[17]

These provisions demonstrate the importance of family integrity, and they represent measures that the state must take in order to be in compliance with federal child welfare law. Again, where a foster care provider is less than supportive of a reunification plan, there is a strong argument that the agency must try to resolve the problem in order to satisfy its reasonable efforts obligation.

State Child Welfare Agency Administrative Rules and Policy

The administrative rules of a state child welfare agency can lend further support for this obligation. For example, the Oregon Department of Human Services' regulations obligate it to respect the rights of children and parents with regard to visitation and reunification. Under OAR 413-010-0180, each child placed in DHS custody has the right to be provided with services designed to reunite the child with his or her parent, except when there is clear evidence that the parent may not protect the child's welfare. Each child also has the right to visit and communicate with a parent within reasonable guidelines as set by the case plan, the visitation plan, and the court.[18] Further, OAR 413-070-0830(1) states that unless a parent or legal guardian objects to the contact and visit requirements and limitations imposed by the Department, children have the right to visit with their parents "as often as reasonably necessary to develop and enhance their attachment to each other" while the child is in substitute care.

Moreover, DHS has affirmatively acknowledged the significance of family integrity, as well as the agency's obligation to facilitate support for reunification plans by foster care providers. For example, under OAR 413-010-0300, DHS "recognizes the importance of preserving the family ties and relationships of a child or young adult who is placed in the legal custody of the Department."[19]

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Regulations Specific to Foster Families' Obligations and Training

Under OAR 413-200-0308(4)(c), certified foster families are required to respect and support a child's relationships with his or her birth family. Also, pursuant to OAR 413-215-0326, DHS must provide a training plan for foster parents that addresses the "importance of the child's family and working with the child's family." These values are further reflected in the agency's Child Welfare Procedure Manual, which explains the importance of family visitation and contact,[20] as well as that visitation and contact plans, as a service to children, must involve a child's substitute caregivers. The Manual also states that a representative of the agency must "[e]xplain to the foster parent the benefits of frequent visitation,"[21] and it makes clear that caregivers should be actively involved in developing visitation plans.[22] Finally, DHS policy with regard to the training of foster care providers states that the agency must emphasize the importance of birth parents, as well as the foster parent's role in the reunification process.[23]

Conclusion

It has been assumed as a "fairly non-controversial" principle that preserving the parent-child relationship is "presumptively primary to a child's health and safety."[24] With this in mind, state child welfare agencies must encourage and facilitate reunification between dependent children and their natural parents, which may, at times, involve specifically addressing the role of foster parents in facilitating reunification. Arguably, where the child welfare agency fails to respond appropriately in this context, its efforts do not meet the standards required by state law and agency policy. ●

[1] 262 U.S. 390, 399 (1923).

[2] 268 U.S. 510, 534 (1923).

[3] 321 U.S. 158, 166 (1944).

[4] 455 U.S. 745 (1982).

[5] 455 U.S. at 753.

[6] *Id.*

[7] 42 U.S.C. §§ 620 *et seq.*

[8] Louise A. Leduc 28, *No-Fault Termination of Parental Rights in Connecticut: A Substantive Due Process Analysis*, Conn. L. Rev. 1195, 1998 (1996). See also, Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. Tol. L. Rev. 321 (2005) (describing "foster care drift" and "foster care limbo" as a situation in which "children were moved from one foster family to another while waiting, sometimes for their entire childhoods, for the child protection agency to decide whether they should be reunited with their parents or whether alternative permanent plans should be implemented."); Marsha Garrison, *Why Terminate Parental Rights?*, 35 Stan. L. Rev. 423, 423-4 (1983) (noting that once a child enters foster care, he or she is likely to remain there for a significant period of time, and that the longer a child remains in care, the more likely he or she is to lose contact with natural parents and to change foster homes).

[9] Bean, *Reasonable Efforts, supra* n. 8 at 325.

[10] 42 U.S.C. §§ 670, *et seq.*

[11] 42 U.S.C. § 671(a)(15)(B)(i).

[12] 42 U.S.C. § 671(a)(15)(B)(ii).

[13] *Id.* (emphasis added).

[14] See ORS § 419B.337(b).

[15] ORS § 419B.340(2) (emphasis added).

[16] See ORS § 419B.498(2)(b)(C) (emphasis added).

[17] ORS § 419B.498(2)(c).

[18] *Id.* (Italics omitted.)

[19] *Id.* (Italics omitted.)

[20] Oregon Department of Human Resources [hereinafter DHS], *Child Welfare Procedure Manual*, Chapter IV, Section 26. The text of this policy is available at: http://www.dhs.state.or.us/caf/safety_model/procedure_manual/ch04/ch4-section26.pdf

[21] *Id.* at Section 26.A.9.

[22] See Appendix 4.15 of the Manual, titled *Principles of Good Visitation* Practice, available at: http://www.dhs.state.or.us/caf/safety_model/procedure_manual/appendices/ch4-app/4-15.pdf.

[23] See DHS, *Recruitment, Training, Support, and Retention of Certified Families – Child Welfare* is available at: http://www.dhs.state.or.us/policy/childwelfare/manual_2/ii-b12.pdf.

[24] See Bean, *Reasonable Efforts, supra* n. 8.

JLRC Case Summaries

By Rochelle Martinsson, Law Clerk, and Holly Telerant, OPDS

Jurisdiction

Dept. of Human Services v. G.E., __ Or App __ (June 15, 2011) (Schuman, P.J.)

Jurisdiction judgment reversed and remanded.

http://www.publications.ojd.state.or.us/A146271.htm

Mother appealed from a judgment denying her motion to dismiss jurisdiction and wardship, along with a judgment changing the permanency plan from reunification to adoption. Mother argued that she had ameliorated all of the conditions and circumstances that had formed the basis for dependency jurisdiction. Thus, mother argued, the trial court improperly denied her motion to dismiss and changed the permanency plan for her child on the basis of facts not previously pled or proven.

The court of appeals agreed that a juvenile court may not continue a wardship if the jurisdictional facts on which it is based have ceased to exist, or if the wardship is based on facts that were never alleged in a jurisdictional petition. The court concluded that although the original jurisdictional judgment put mother on notice that she needed to address her past substance abuse, the other original bases for jurisdiction (brother's use of a shotgun in the home, sanitary conditions in the home) did not give mother

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adequate notice of the trial court's reasons for ordering ongoing jurisdiction or for changing the permanency plan to adoption (failure to use a car seat properly, failure to prevent the child from potentially dangerous contacts with stairs, a litter box, and possibly spoiled food).

Finding that the trial court "may have based its decision on some facts that are extrinsic to the jurisdictional judgment," the court reversed and remanded.

Dept. of Human Services v. A.F., __ Or App __ (June 8, 2011) (Duncan, J.) (Klamath Co.)

Jurisdictional order reversed.

http://www.publications.ojd.state.or.us/A147231.htm

The court reversed a jurisdictional judgment that concluded that father "possessed sexually inappropriate materials" that "place[d] the children under a threat of harm." Father's computer stored a series of pornographic images, including several incomplete files of child pornography that had been downloaded from a peer-to-peer file-sharing network approximately five years before the time of trial.

The juvenile court ruled that father's possession of pornography endangered his children in two ways: (1) it created a risk that they would be exposed to pornography, and (2) it created a risk that father would sexually abuse them. Father argued, and the court agreed, that the record was insufficient to demonstrate a present threat of harm to the children. First, the state did not present any evidence to show that the children were likely to be exposed to the computers that contained the images, or that any such exposure would necessarily harm the children, let alone that father had possessed pornography since the police had confiscated his computers a year before the trial. Further, the state's experts were unable to conclude that father posed an actual risk of harm to his own children as a result of his possession of pornography.

The court noted that the fact that a parent engages in behavior that could negatively affect his or her parenting cannot, in and of itself, be the basis for juvenile court jurisdiction over a child where there is no evidence that the parent's behavior "endangers the welfare" of the child. Citing *Shugars*, 202 Or App at 321, the court emphasized that there must be evidence that the parent's behavior "gives rise to a current threat of serious loss or injury to the child." Accordingly, the court reversed, concluding that there was insufficient evidence in the record to demonstrate that the presence of old pornographic files in father's computer presented any likelihood of harm to the children's welfare.

Termination of Parental Rights

Dept. of Human Services v. P.P., __ Or App __, ___ P3d ___ (February 2, 2011) (per curiam) (Linn Co.)

Termination of parental rights affirmed.

http://www.publications.ojd.state.or.us/A146533.htm

Father appealed a judgment terminating his parental rights to his child. The Court of Appeals affirmed the judgment, finding that it was proper under ORS 419B.504, and declining to discuss the case further.

Dept. of Human Services v. B.J.B., ___ Or App ___, ___ P3d ___ (May 4, 2011) (Schuman, P.J.) (Jackson Co.)

Termination of parental rights affirmed.

http://www.publications.ojd.state.or.us/A146658.htm

Mother appealed a judgment terminating her parental rights as to her child, J.J.B. The juvenile court had found the following: (1) that mother was unfit by reason of extreme conduct (ORS 419B.502); (2) that mother was unfit by reason of conduct or conditions seriously detrimental to J.J.B., and integration of the child into mother's home was not probable within a reasonable time due to conduct or conditions not likely to change (ORS 419B.504); (3) that mother had failed or neglected without reasonable effort and lawful cause to provide for the basic physical and psychological needs of J.J.B. during the six months prior to the filing of a petition to terminate mother's parental rights (ORS 419B.506); (4) that mother had abandoned J.J.B. (ORS 419B.508); and that it was in J.J.B.'s best interests to be freed for adoption. The state did not contest mother's claim that abandonment had not been proved.

The mother had argued that the judgment should be reversed and remanded for entry of a judgment that did not find abandonment, arguing that there could be collateral consequences to that finding. Noting that all of the other allegations had been proven, the court commented, "It makes no sense

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Juvenile Law Resource Center

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for us to reverse a judgment that we have found to be correct; the judgment is that the mother's parental rights have been terminated, and the fact that not all of the allegations have been proven does not affect that outcome if at least one allegation has been proven. … On the other hand, mother has a valid concern. An opinion (or an affirmance without opinion) that affirms a termination without specifying which allegations we have found to be proven and which, if any, are not, can potentially have adverse collateral consequences in a subsequent proceeding.

These conflicting interests, however, can be accommodated. In the future, if a party specifies on appeal the collateral consequences that could result from a disposition that was based on some but not all of the allegations in a petition for termination of parental rights, we will, if appropriate, specify any allegations that play no part in our disposition. In the present case, then, we affirm the judgment below without determining the correctness of the trial court's finding regarding abandonment."

Dept. of Human Services v. A.L.M. (In re V.L.A.M.-C.), __ Or App __ (May 18, 2011) (Ortega, P.J.) (Lane Co.)

Termination of parental rights reversed.

http://www.publications.ojd.state.or.us/A145655.htm

Following up on *T.C.A.*, (2011), the court "assumed without deciding" that father was unfit at the time of trial, yet reversed the termination of father's parental rights based solely on the state's failure to prove that the child was unlikely to be integrated into father's home within a reasonable time.

The court acknowledged evidence in the record that father had been diagnosed with a personality disorder, engaged in inappropriate sexual contact with a 14-year old girl, violated a restraining order prohibiting contact with mother, and violated a pretrial release agreement prohibiting contact with minors — but noted that the record was devoid of evidence regarding the likelihood of timely reintegration of the child. The state's expert, father's psychologist, testified that father's need for further psychological treatment would not preclude his becoming a safe parent. However, the psychologist did not identify a specific timeframe in which father was likely to complete treatment, and the record contained no evidence about the child's need to achieve permanency.

In a dissenting opinion, Judge Riggs wrote that contrary to the majority's approach, Stillman compelled the court to determine the issue of unfitness before reaching the issue of reintegration. The dissent also noted that the record did not establish that father was likely to become a safe parent within any timeframe.

The majority rejected this analysis, noting that, to the contrary, father's psychologist testified that father could potentially become a safe parent in "months or years." However, it held that such evidence, without more, gave the court "no principled way to conclude that integration would be improbable in the possible timeframe of months or years," and no way of knowing if waiting "months or years" was unreasonable for the child. Thus, the court held that the record "falls short of clear and convincing evidence that integration was improbable within a reasonable time due to conduct or conditions not likely to change." ●

Speech Inspires Parent Advocates

By Triston Dallas, Law Clerk

On May 24, 2011, Matthew Fraidin, an associate professor at the University of D.C. Clarke School of Law, provided the keynote address to the 2011 Bergstrom Fellows preparing to embark on their summer clerkships in juvenile law firms and advocacy agencies. His speech characterizes the "narrative of child welfare." The inspiring speech identified the child welfare narrative as one of "brutal, deviant, monstrous parents, and children who are fruit that doesn't fall far from the tree." This perception leads to the statistic that "more than one-third of children removed to foster care should not be there." Professor Fraidin called upon lawyers to challenge their approach to legal services and argues that as lawyers "we can tell stories of competence, instead of trying to explain away our client's problems and needs." In the final section of his speech, "A Call to Action," Fraidin reminds us that "it is much more fun to practice law as if your goal is to make a difference. If your goal is to make a difference, you'll have to learn, instead of know." (Printed adaption forthcoming in the Georgetown Journal of Poverty Law and Policy, Volume XIX (2011)). Read the full Keynote Address here: http://www.jrplaw.org/Documents/FraidinSpeech.pdf. ●

Case Summaries

By Laura Wood, Law Clerk

State v. Hagstrom., __Or App__ (April 13, 2011)

http://www.publications.ojd.state.or.us/A140120.htm

After the state conceded that "the trial court committed reversible error by allowing the defendant to proceed *pro se* without first obtaining a valid waiver of counsel," the Court of Appeals reversed all three of defendant's convictions and remanded the case for a new trial. The court also upheld the trial court's denial of the motion for judgment of acquittal which had been based on the argument that a log was not a "dangerous weapon" under ORS 163.175. The court reasoned that the log was used in a similar fashion to the sidewalk used in *State v. Reed*, 101 Or App 277 (1990) (court found that a sidewalk was a "dangerous weapon" when the defendant struck the victim's head against it).

State v. Murrell., __Or App__ (April 20, 2011)

http://www.publications.ojd.state.or.us/A142010.htm

The inadvertent mislaying of a file by the state is not "good cause" for extending restitution orders beyond the 90-day statutory period found in ORS 137.106. Based on *State v. Biscotti*, 219 Or App 296 [in which the court held that the prosecutorial inadvertence or mistake was not good cause under ORS 137.106(1)(b)] or other similar statutes, the court found no good cause for extending the 90-day deadline and reversed the award of restitution in the amended judgment.

State v. Radtke., __Or App__ (April 20, 2011)

http://www.publications.ojd.state.or.us/A136543A.htm

A seizure of a person, post *State v. Ashbaugh*, 349 Or 297 (2010), by the authorities has occurred when, under the totality of the circumstances, the taking of an individual's written information, including name and date of birth, combined with other factors, creates a reasonable belief that the individual is not free to leave.

In this case, the Court of Appeals held that taking a person's identification for the purpose of checking on the person's status is one way in which a police officer can show authority that, in combination with other circumstances, can convey to the person that he or she is not free to leave. The court reversed the trial court's denial of defendant's motion to suppress noting several factors. First, the defendant observed that the person whom she was planning to meet was under arrest and in the "caged" back seat of a patrol car. Second, two uniformed and armed officers were present. Lastly, the officer also questioned defendant about illegal activity. The court found that the officers lacked reasonable suspicion and the record did not demonstrate any attenuation between the stop and the discovery of drugs.

State v. McLaughlin., __Or App__ (May 25, 2011)

http://www.publications.ojd.state.or.us/A142664.htm

To support a judgment for restitution, evidence of the nature and amount of damages must be introduced prior to the time of sentencing. The court found that the statute, ORS 137.106 (1), demands the presentment of timely evidence supporting that the victim suffered a 'particular type' of damage coupled with some evidence as to the amount of such damages. In this case, where defendant had removed a bronze plaque from the police bureau and abandoned it on the side of the street, and where the bureau found and remounted it, the state presented no actual evidence as to the amount of damages.

State v. Tyson., __Or App__ (May 25, 2011)

http://www.publications.ojd.state.or.us/A139425.htm

When a person engages in sexually explicit conduct with a child, that person falls under the scope of ORS 163.370(1) whether or not he/she is actively participating or observing.

In this case, the defendant appealed from a judgment convicting her of one count of using a child in a display of sexually explicit conduct (ORS 163.670). The defendant and her husband engaged in a series of sexual acts with a 13-year-old child and each observed the other. The defendant argued that she could not be convicted of ORS 163.670 because "it does not apply to participants in an activity that is not disseminated by performance or recording." In other words, the defendant argued that since her husband, the only other observer, had also participated in the sexual acts, ORS 163.670 does not apply. In opposition, the state asserted, "the statute applies whenever one person sexually abuses a child and *any* other person is permitted to observe."

The Court of Appeals held that the statute does not restrict its reach to observation by persons who have not also participated in sexually explicit conduct with the child nor to conduct that is visually recorded. Rather the court found that the statute makes it unlawful to compel or induce a child to participate in sexually explicit conduct for *any* person to observe. Accordingly, the defendant's actions fell directly within the statute's scope. In addition to the plain meaning of the statute's text, the court also concluded that the legislative history does not indicate the intention to preclude the statute from applying when a person both observes and engages in sexually explicit conduct with a child. ●

Resources

Running Away From Foster Care - Youths' Knowledge and Access of Services

By Sean Worley, Law Clerk

Michael R. Pergamit, Ph.D., Michelle Ernst, Ph.D., and The National Runaway Switchboard have produced *Running Away from Foster Care; Youths' Knowledge and Access of Services*, a report which constitutes the third part of a study on runaway youths. The study was conducted to "give youth a voice" by interviewing a sample of foster care youth in Chicago and Los Angeles who ran away from their placements at least once. The report provides a review of literature examining indicators for foster care runaways, youths' reasons for running away, and other statistics. Findings from the study are then discussed including the sample's foster care experiences and how they contributed to the decision to run away, runaway experiences in regards to number of episodes and why the youth returned to care, most recent runaway episodes, the runaways' knowledge, use, and barriers to the use of services when away from foster care, how to communicate with runaway foster youth, and suggestions from the runaway foster youth for preventing runaways and improving the foster care system.

The report is available on the National Runaway Switchboard website at: http://www.1800runaway.org/media/research.html

ICPC Advocacy Resources

Professor Vivek S. Sankaran, with the University of Michigan Law School, has compiled a website with links to resources for advocates interested in learning more about the Interstate Compact on the Placement of Children (ICPC), and efforts to reform the process. The website contains links to articles and publications, presentations, and sample briefs and motions. These resources highlight several problems with the current ICPC, the effect on families and children in foster care, discussions of current reform efforts, suggestions for further reform, and tips for effective advocacy when dealing with the ICPC, including constitutional arguments and creative suggestions for challenging denial of approval from a receiving state.

The ICPC Advocacy resource list is available at: http://www.law.umich.edu/CENTERSANDPROGRAMS/CCL/SPECIALPROJECTS/Pages/ICPCAdvocacy.aspx

Immigration Consequences of Criminal Convictions: Padilla v. Kentucky

Padilla v. Kentucky held that the Sixth Amendment requires defense counsel to advise a noncitizen client of the immigration consequences of a guilty plea in a criminal case. 130 S. Ct. 1473, 1483 (2010). The Office of Immigration Litigation (OIL) within the U.S. Department of Justice has produced *Immigration Consequences of Criminal Convictions: Padilla v. Kentucky*, a monograph to assist attorneys in obtaining the basic understanding of immigration law needed to meet *Padilla*'s requirement. The monograph is organized into convenient sections which enable it to be used as an introduction to immigration consequences of criminal convictions, as well as a resource when specific issues arise.

An overview of the removal process is provided, followed by discussions of the more common criminal grounds of removal, eligibility for discretionary relief from removal, when such relief may confer lawful status, as well as potential bars to such relief. Immigration consequences of guilty pleas other than removability or ineligibility for relief, such as restrictions on readmission and bars on naturalization are also discussed. If courts apply *Padilla* retroactively, the monograph will be a valuable starting point for research on the legislative history of the Immigration and Nationality Act. Furthermore, the monograph contains helpful appendices including a glossary of terms, a list of key immigration law resources, an explanation of what constitutes a conviction for immigration purposes, and explanations and examples of the methods for evaluating immigration consequences of criminal convictions.

The monograph is available on the U.S. Department of Justice website at: http://www.justice.gov/civil/docs_forms/REVISED%20Padilla%20v.%20Kentucky%20Reference%20Guide_11-8-10.pdf ●

Save the Date

OCDLA

Sex Cases: When a Child is Involved

September 16-17, 2011
Agate Beach Inn, Newport, Oregon

Info: http://www.ocdla.org/seminars/shop-seminar-2011-sex_cases.shtml

Seventh Annual Juvenile Law Training Academy

October 17 and 18, 2011
Valley River Inn, Eugene, Oregon

(during the Oregon Judicial Conference)

This seminar is intended to address issues of importance to all the attorneys who practice in juvenile court, regardless of the parties they represent. This year the program includes presentations on the impact of prenatal exposure to alcohol and drugs on children and families, how HIPAA affects access to records, the importance of visitation and how to increase the frequency and quality of visits, working with families with developmental delay, dependency law at every stage of the case, ethical dilemmas for state's attorneys, children's attorneys and parents' attorneys. Details about topics and presenters will be circulated in early August.

Registration for the program will remain at $125 for lawyers/$100 for non-lawyers due to the generous support of the Academy sponsors. In addition, the Valley River Inn is offering attendees a discounted room rate of $103 single or double occupancy.

Academy sponsors: the Juvenile Court Improvement Project, Youth Rights and Justice, the Oregon Criminal Defense Lawyers Association, the Office of Public Defense Services and the University of Oregon School of Law, with the invaluable assistance of the Department of Justice.

Training for Western Region Juvenile Defenders

Western Juvenile Defender Center (WJDC) in collaboration with the National Juvenile Defender (NJDC)

October 20, 2011
Sheraton Hotel, Seattle,

Washington

The training will precede the NJDC Summit (10/21-23) and will be free for juvenile defenders from the Western Region, which is comprised of Alaska, Idaho, Montana, Nevada, Oregon, Washington and Wyoming. The goal of the training is to share information and resources and promote collaboration among juvenile defenders in our region. Speakers and panels will address: Advocating for Un-Shackling Youth in Juvenile Courts; Raising Competency and Restorative Services for Youth Unable to Aid and Assist, and Strategies for Waiver and Direct File Cases. A limited number of $300 stipends will be available for juvenile attorneys who will attend. If you are interested in attending the training, please email Julie H. McFarlane at: julie@jrplaw.org and indicate whether you would be seeking a stipend.

National Conference on Juvenile and Family Law

March 21-24, 2012
Paris Las Vegas Hotel

Info: http://www.ncjfcj.org/content/view/1471/315/ ●

401 NE 19TH Ave., Suite 200 • Portland, OR 97232

Save the Date

Join us at the **Third Annual Wine and Chocolate Extravaganza** and help us improve the lives of children.

Saturday, November 12, 2011 5:30 p.m.
The Nines, Portland

Wine & Chocolate Tasting ~ Dinner ~ Auction

Tickets: $150

info@youthrightsjustice.org

Presented by:
Knowledge Universe

Honorary Chair:
The Honorable Ted Wheeler
Oregon State Treasurer

Emcee:
Stephanie Stricklen
Host of KGW Live @ 7

A Benefit For:

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

We Would Love to Hear From You

If you have any questions about who we are and what we do, please email Janeen Olsen at: JaneenO@jrplaw.org.

Youth, Rights & Justice
ATTORNEYS AT LAW

"You are as human as anyone over the age of 18 or 21, yet, 'minors' are one of the most oppressed groups of people in the world, and certainly the most discriminated against legally."

– *Grace Llewellyn*

MAKE A DIFFERENCE

You are invited to join the Wine & Chocolate Committee!

Meetings monthly at YRJ.

Help Oregon's vulnerable kids.

Have fun.

Info: teresa.c@youthrightsjustice.org

Youth, Rights & Justice
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Help us help youth.

We would love your financial support.

Please join our Monthly Giving Club.

By pledging just $10 a month ($120/year), you will help a child receive educational advocacy from a Youth Rights & Justice attorney for an entire month. Knowing we can count on these funds throughout the year empowers us to say yes to a child in need. We are able to assist more than 300 vulnerable children and youth each year through our SchoolWorks program, and the need is even greater.

Go to www.youthrightsjustice.org and click on DONATE to make a one-time or recurring monthly donation.

Thank you.

Youth, Rights & Justice is a 501 (c) (3) nonprofit.

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