Juvenile Law Reader

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ATTORNEYS AT LAW

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Juvenile Law Resource Center

Lessons from the Oregon Supreme Court's Decision in *J.R.F.*

By Shannon Storey, Senior Deputy, Juvenile Appellate Section, Office of Public Defense Services

Does ORS 419B.100(1)(c) authorize the juvenile court to assert jurisdiction over a child based on its assessment that jurisdiction and wardship would be in the child's best interests?

Dept of Human Services v. J.R.F., 351 Or 570, 273 P3d 87 (2012) suggests not. In that case, the Oregon Supreme Court clarified that, as a matter of state law (ORS 419B.090)(4)), all provisions of the juvenile dependency code must be construed and applied consistent with a parent's Fourteenth Amendment right to direct the upbringing of his or her children, which includes the presumption that a fit parent acts in his or her child's best interest. Thus, the due process rights of the parent circumscribe the construction and application of every provision of Chapter 419B. That is, the parent's liberty interest in the care and companionship of his or her child, and the procedural protection attended therein, must be read into every provision of Chapter 419B.

In *J.R.F.*, the Department of Human Services removed the father's teenage daughter, D, from the father's home after D reported that the father had physically assaulted her. The father had three other children in his care, ranging in ages from 2 to 12 years old. The juvenile court asserted jurisdiction over only D. By the time of the post-jurisdictional review hearing that became the subject of the appeal, the father had produced the younger children to visit with D on one

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« *J.R.F. continued from previous page*

occasion. Further, the father had informed the department that he did not wish to participate in reunification services.

Neither the father nor D were present at the review hearing. The hearing consisted of the unsworn representations of the case worker, the representations of the attorneys, and three reports that the court considered but were never offered or received as exhibits, or judicially noticed by the court on the record pursuant to ORS 419A.253(1).

After reviewing the reports, the court expressed concern that D had not been having regular visits with her siblings. The department, the father's counsel, and D's counsel each expressed the belief that the court did not have authority to render orders as to children who were not subject to the court's jurisdiction. Nonetheless, the court ordered that "Father will not interfere or obstruct contact between [D] and siblings." 351 Or at 575-76.

The father appealed, arguing that the court acted without authority and violated his Fourteenth Amendment right to direct the upbringing of his children who were not subject to the court's jurisdiction. The department responded that the court's order was authorized because contact with her siblings was in *D's* best interests. The Court of Appeals affirmed, holding that ORS 419B.337(3) authorized the court's order. *Dept. of Human Services v. J.R.F.*, 244 Or App 363, 261 P3d 42 (2011), *rev'd*, 351 Or 570, 273 P3d 87 (2012).

On review before the Oregon Supreme Court, the father argued that ORS 419B.090(4) requires the court to construe all provisions of the juvenile code "in compliance with federal constitutional limitations on state action established by the United States Supreme Court with respect to interference with the rights of parents to direct the upbringing of their children." Because the father had not been adjudged "unfit" with regard to D's siblings, the father reasoned, no provision of the juvenile code, when properly construed, authorized the court's order. *See Troxel v. Granville*, 530 US 57, 68-70, 120 S Ct 2054, 2060-62, 147 L ED 2d 49 (2000) (fit parent entitled to the presumption that he or she acts in his or her children's best interest).

The department responded that the juvenile code conferred upon the juvenile court plenary authority to order anything that it deemed was in a ward's best interests. But, it acknowledged that the record (which, as noted, consisted mostly of the unsworn representations of the parties) was inadequate[1] for the court to review "the possible due process implications of the order[.]" *J.R.F.*, 351 Or at 577.

The Oregon Supreme Court reversed:

> "*[W]hatever authority may be said to have been conferred by the statutes that the parties dispute in this case - - an issue that we do not resolve - - that authority is bounded by the due process rights of parents.* As we have noted, DHS has conceded that, to the extent that the due process rights of parents are implicated in this case, the record is inadequate.
>
> "DHS's suggestion that we should narrow our focus and address the authority of the juvenile court as set out solely in the particular statutes that the parties have cited is untenable. In assessing the authority that those statutes confer - - indeed, in addressing any issue of statutotory construction - - we do not address each statute in isolation. Rather we address those statutes in context, including other parts of the same statute at issue.
>
> "DHS insists - - and the Court of Appeals agreed - - that father failed to preserve a contention that the trial court's order violated his parental rights under the Due Process Clause of the Fourteenth Amendment. Our decision, however, is not based on an unpreserved constitutional claim. Rather, it is based on our obligation to interpret the statutes correctly, which includes an obligation to consider relevant context, regardless of whether it was cited by any party. *In this case, that relevant context includes ORS 419B.090(4), which makes clear that the due process rights of parents are always implicated in the construction and application of the provisions of ORS chapter 419B.* Accordingly, in light of the DHS acknowledgement of the inadequacy of the record for review, we reverse the opinion of the Court of Appeals and vacate the order of the juvenile court."

J.R.F., 351 Or at 578-79.

The court's opinion in *J.R.F.*, has broader applicability than the limited factual circumstances of that case. The court held that, as a matter of state law, each provision of the juvenile code must be construed and applied in accordance with the presumption in favor of the fit parent and the parent's right to direct his or her child's upbringing. That principle should guide the parties and the court in all stages of dependency litigation, particularly at shelter hearings, jurisdictional hearings, and hearings on a parent's motion to dismiss.

For example, properly construed, ORS 419B.100(1)(c) does not authorize the court to assert jurisdiction on allegations that are premised upon the presumption that the parent is unfit, *e.g.*, the parent has refused to voluntarily engage in services (presumes parent needs services) or the child has special needs (presumes parent cannot attend to the child's needs). Unless and until some party proves, in the first instance, that the parent is not fit, the parent is presumed to act in the child's best interest, and the juvenile court has no authority

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to intervene (even if it believes that to do so would be in the child's best interest).

Further, in enacting ORS 41B.090(3) (State of Oregon recognizes the importance of sibling relationships) and ORS 419B.192(2) (requiring the department to make diligent efforts to place siblings together) the legislature recognized the importance of sibling relationships and directed the juvenile court and the department to do the same. But properly construed, in light of *J.R.F.*, ORS 419B.090(3) and ORS 419B.192(2) do not authorize the court to elevate the interests of siblings in maintaining their relationships with each other above a parent's interests in the care and control of each of his or her children. That is so because, unlike the parent-child relationship, siblings have no constitutionally protected liberty interest in their relationships with one another. ●

[1] For a comprehensive discussion of how to develop an adequate record for appeal see The Honorable David V. Brewer, Chief Judge, Oregon Court of Appeals, *View From the Bench*, Youth Rights & Justice Juvenile Law Reader, June 2011 /July 2011, at 4-5. *See also*, The Honorable Maureen McKnight, Multnomah County Circuit Court, *It's Been Said or Read — But is it in Evidence?*, Youth Rights & Justice Juvenile Law Reader, June 2011 /July 2011, at 5-9.

Case Summaries

By Eleanor Garretson, Volunteer Attorney

Dept. of Human Services v. B.B., 250 Or App 566 (2012), (June 20, 2012) (Per curiam) (Marion Co.) http://www.publications.ojd.state.or.us/Publications/A147227A.pdf

The Department of Human Services (DHS) petitioned the Court of Appeals for reconsideration of its decision in *Dept. of Human Services v. B.B.*, 248 Or App 715, 274 P3d 242 (2012). In that case, the court reversed the juvenile court's jurisdiction after it determined there was insufficient evidence that father's history of child sex abuse created a reasonable likelihood of harm to his children's welfare. DHS argued that the court misconstrued ORAP 5.40(8) when it reviewed the facts *de novo* absent a request from any party.

The Court of Appeals held that, under ORS 19.415(3)(b), it has sole discretion over whether to review a record *de novo* in an equitable action or proceeding. The opinion focused on what DHS should have included in its petition for reconsideration: (1) why the *de novo* review was detrimental to DHS's ability to adequately brief its position; (2) how its brief would have been different; and (3) how the facts reconsidered under the *de novo* standard should differ from those the court actually reviewed. Overall, DHS needed to demonstrate that it should have prevailed under a *de novo* review of the record. Adhering to its former decision, the court concluded that in the earlier proceeding DHS had fully briefed the facts adverse to father and made no argument that the court had considered facts unsupported by the record when conducting its *de novo* review.

Dept. of Human Services v. S.A., 250 Or App 720 (2012), (June 27, 2012) (Sercombe, J.) (Marion Co.) http://www.publications.ojd.state.or.us/Publications/A149996.pdf

Father appealed a juvenile court order establishing a guardianship for his child, C. The child's permanency plan was changed from reunification to guardianship in August 2010. Later the father requested that the plan be changed back to reunification and at the same time DHS moved to establish C's step-grandmother as guardian.

Father's first argument was that the juvenile court entered the order after a combined permanency and guardianship hearing on September 30, 2011, yet failed to include the permanency determinations required by ORS 419B.476(5) in the order. Father acknowledged he did not raise the issue below but contended that under *State ex rel Dept. of Human Services v. M.A.*, 227 Or App 172, 205 P3d 36 (2009) preservation is not necessary when a court errs by failing to make the required permanency findings. Until the order is issued a party has no way of knowing if it complies with the statute.

DHS argued this case was distinguishable from *M.A.* because the September 30TH hearing was not a permanency hearing. Because it was unclear whether father had abandoned his request for a permanency determination regarding C, he was required to preserve his claim that the court failed to make permanency plan findings. The Court of Appeals disagreed and held that it had been a permanency hearing because father's attorney had withdrawn a request that it also be a permanency hearing as to his other child T, the court had indicated it was a permanency hearing, and the court was obligated by statute to conduct its yearly permanency hearing around that time. The court erred by failing to enter the findings required by statute and father had not needed to preserve his objection at the earlier hearing.

Father also argued that there was no

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evidence to support the court's holding that the "proposed guardian is suitable to meet the needs of the ward and is willing to accept the duties and authority of a guardian" as required by ORS 419B.366(5)(c). The Court of Appeals reviews the juvenile court's factual findings to see if there is any evidence on the record to support them. It found that a DHS affidavit stating that the step-grandmother was able and willing to be a guardian and had an excellent relationship with the child satisfied the "any evidence" standard.

Dept. of Human Services v. S.N., 250 Or App 708 (2012), (June 27, 2012) (Sercombe, J.) (Marion Co.) http://www.publications.ojd.state.or.us/Publications/A149584.pdf

Father appealed a permanency judgment that changed the plan for his daughter, L, from reunification to placement with a fit and willing relative through a guardianship. L was born in 2005 when father was 58 years old and mother was 16 and was removed from mother's home in 2009. In April 2010, father obtained an order establishing his paternity. He admitted to the allegations in DHS's subsequent jurisdiction petition that he was aware of mother's drug and alcohol and housing problems but had done nothing to assert custody of L and that his own mental health problems interfered with his ability to safely parent and protect L.

At his psychological evaluation, father was diagnosed with a paranoid personality disorder which causes him to view the world as threatening and react inappropriately to others' benign behaviors. The psychologist recommended that L not be placed with the father, because his personality disorder made him unsuitable as a primary caregiver and there were no effective treatments for the disorder. DHS staff and father's adult daughter confirmed that he was frequently angry, difficult to deal with, and threatening.

After the evaluation, father attended a 10-week parenting class where he had perfect attendance and performed well. He also never missed his weekly visits with L and had positive interactions with his daughter. At the permanency hearing, the juvenile court concluded father was not capable of providing the stable, consistent, predictable environment necessary for the child's health and safety.

Father asserted that the court erred in finding DHS had made reasonable efforts toward reunification and that he had not made sufficient progress, findings required by ORS 419B.476(2)(a). The Court of Appeals agreed with the state that under these circumstances, DHS had made reasonable efforts to reunify the father and L. Given the psychologist's assessment of father's mental health issues and the likely ineffectiveness of any services, those DHS provided were reasonable. Father's completion of services did not necessarily mean that he made sufficient progress toward reunification because he continued to display angry outbursts throughout the process and displayed consistently poor judgment such as impregnating a much younger woman. Additionally, L suffered from PTSD and sensitivity to sound which could make her particularly susceptible to father's outbursts. Even given father's good performance in parenting class and positive visits with L, the juvenile court did not err as a matter of law.

Dept. of Human Services v. T.R., 251 Or App 6 (2012), (July 5, 2012) (Wollheim, J.) (Marion Co.) http://www.publications.ojd.state.or.us/Publications/A149823.pdf

Father and mother separately appealed the juvenile court changing the permanency plan for their daughter from reunification to adoption. At three months old, the parents brought their child to the hospital with injuries that doctors determined were the result of nonaccidental trauma or abuse. The parents participated in a variety of services including counseling and visitation with the child but never provided DHS with an adequate explanation of the injuries or acknowledged any responsibility.

The parents' argued that the juvenile court gave improper weight to the fact that they had not provided any explanation when changing the permanency plan. They contend DHS did not make reasonable efforts toward reunification and that their completion of services indicated they had made sufficient progress to allow safe reunification. The Court of Appeals agreed that DHS had made reasonable efforts because lack of information about the cause of the injuries made it unable to develop a service plan specifically tailored at addressing the abuse. It also found that absent any acknowledgment of wrongdoing by the parents, they had not made sufficient progress to convince the court they were rehabilitated or likely to prevent future abuse of the child.

Mother also argued that the juvenile court committed reversible error for failing to establish a deadline for DHS to file a petition to terminate parental rights and place the child for adoption as required by ORS 419B.476(5)(b)(B). The court had previously reversed several opinions for failing tomake determinations under ORS

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419B.476, such as permanency findings.

The court rejected this argument noting that those cases involved fatal errors that went to the heart of the decision to change a permanency plan whereas setting the timeline did "not reflect on the substance of the juvenile court's permanency determination."

Dept. of Human Services v. L.G., 251 Or App 1 (2012), (July 5, 2012) (Wollheim, J.) (Marion Co.) http://www.publications.ojd.state.or.us/Publications/A149648.pdf

Mother appealed a finding that her infant child, L, was within the jurisdiction of the court. The juvenile court found that conditions and circumstances endangered the welfare of the child because the mother had been subjected to domestic violence by L's father and could not protect L or her older child J from the father. J was physically abused by L's father and mother did not give J proper medical care after his birth.

Mother argued that the conditions and circumstances that gave rise to the original petition in April 2011 no longer existed by the time of the hearing in August 2011 since she no longer lived or had contact with L's father. The state argued that the mother's failure to recognize an abusive situation made it possible that a similar situation could occur in the future with a different individual. The Court of Appeals noted that juvenile court jurisdiction must focus on the child's *current* conditions and circumstances not what happened in the past. It agreed with mother and reversed the juvenile court's jurisdictional findings because mother was not currently in a relationship with an individual who might pose a risk to L.

Dept. of Human Services v. K.M.P., 251 Or App 268 (2012), (July 18, 2012) (Schuman, P.J.) (Coos Co.) http://www.publications.ojd.state.or.us/Publications/A150404.pdf

Mother appealed the termination of her parental rights arguing that her nonappearance at a pretrial conference was due to excusable neglect. Mother failed to attend the 9:00 a.m. hearing because she had accidentally written down that the hearing was at 2:30 p.m. and was unable to find transportation to the courthouse when she learned of her mistake. The juvenile court denied mother's motion to set aside the default judgment with no explanation.

ORS 419B.819(7) authorizes a juvenile court to terminate a parent's rights for failure to appear to any hearing related to the termination petition. The court also has discretion to set aside a judgment on the basis of excusable neglect. In *State ex rel Dept. of Human Services v. G.R.*, 224 Or App 133, 197 P3d 61 (2008), the Court of Appeals laid out a two-step analysis for evaluating excusable neglect. First, the court must determine whether the parent had established as a matter of law that the nonappearance resulted from excusable neglect, which includes a reasonable good faith mistake as to the time and place of a proceeding. Second, the court retains discretion to look at the totality of the circumstances, considering: (1) the nature and magnitude of the interest that was adjudicated; (2) the movant's promptness in attempting to rectify the nonappearance; (3) the extent to which the interests of other parties would be prejudiced if the motion was granted, including any detrimental reliance; and (4) whether the movant can present at least a colorable defense on the merits.

The Court of Appeals found that mother's excusable neglect warranted reversing the termination judgment. Mother satisfied step one because she made a good faith mistake when writing down the time of the trial, she had been actively preparing for trial, and acted promptly to rectify her mistake. As to step two, the court said the considerations related to discretion "militate decisively in mother's favor." Her interest in retaining her parental rights was profound, she moved quickly to set aside the judgment, no party had relied on the judgment to their detriment, and she had been working with her attorney to prepare herself and another witness for trial. The Court of Appeals concluded that the juvenile court had abused its discretion by denying mother's motion to set aside the judgment terminating her parental rights.

Dept. of Human Services v. T.C.A., 251 Or App 407 (2012), (July 25, 2012) (Ortega, P.J.) (Lane Co.) http://www.publications.ojd.state.or.us/Publications/A150003.pdf

Mother appealed from a judgment changing the permanency plan for her child AA from adoption to another planned permanent living arrangement (APPLA). In 2008, AA was removed from mother's care after she and father were arrested in a police raid of a marijuana grow operation. In 2009, the juvenile court granted a DHS petition to terminate mother's parental rights, which the Court of Appeals reversed after concluding that DHS had failed to prove by clear and convincing evidence that mother could not provide a safe home for AA within a

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reasonable timeframe. In a 2011 permanency hearing, the juvenile court approved changing the permanency plan from adoption to APPLA in the form of permanent foster care with AA's maternal grandmother.

On appeal, mother argued that DHS had failed to make reasonable efforts to reunite AA with mother and failed to prove that mother's progress was insufficient to allow AA to be safely placed in her care. These findings are required by ORS 419B.476(2)(a) which applies when the case plan at the time of the hearing is to reunify the family. The Court of Appeals noted that the governing statute was actually ORS 419B.476(2)(b) which applies when the case plan is something other than reunification and requires only that DHS make reasonable efforts to place the ward in accordance with the applicable plan.

APPLA is the least preferred permanency plan and if the juvenile court changes a plan to APPLA it must offer compelling reasons why it would not be in the best interests of the child to be returned home or placed in a more preferred plan. The Court of Appeals reviews the juvenile court's best interest determination for abuse of discretion. The court held that the juvenile court did not abuse its discretion because DHS adequately demonstrated that other permanency plans were not available. DHS could not pursue adoption without a second attempt at termination. Returning home was not in AA's best interest because mother had failed to maintain stable housing, had engaged in other dishonest behavior such as providing false information on a food stamps application, and consumed alcohol despite being on medication that made this extremely dangerous. Other alternative placements were not available and AA was thriving in his maternal grandmother's care. Finally, the court rejected mother's argument that DHS failed to comply with the administrative rules governing APPLA and affirmed the juvenile court's order changing the permanency plan.

Dept. of Human Services v. M.R., 251 Or App 387 (2012), (July 25, 2012) (Brewer, J.) (Multnomah Co.)

http://www.publications.ojd.state.or.us/Publications/A149109.pdf

DHS appealed a juvenile court order denying its motion to unseal mother's DHS records from a previous juvenile dependency case in which mother , as a minor, had been the dependent child. In 2006, she was involved as the mother in a dependency proceeding involving her eldest child. The court ordered that all material relating to mother's "history and prognosis" contained in mother's own juvenile dependency file was privileged and must be removed from any file "in this her child's dependency" and the information should be redacted from the social file "in this case."

In 2011, responding to an abuse report involving one of mother's younger children, DHS disclosed to evaluators information from mother's juvenile dependency record. Thereafter, mother made admissions that established juvenile court jurisdiction over her four younger children. At this proceeding, the juvenile court stated that the 2006 order continued to apply, rejecting DHS's contention that it only pertained to the eldest child.

In response, DHS filed a "Motion to Clarify Judgment" and "Motion to Unseal Mother's DHS Records As a Dependent," both of which the juvenile court denied. The Court of Appeals affirmed, noting that the juvenile court had not in fact "sealed" mother's dependency records in its 2006 order. Designating a record as privileged is not the same as sealing a record. A party can seek disclosure of privileged records whereas sealing closes and prevents access to a record and courts can only seal records when given specific statutory authority

Dept. of Human Services v. J.G., 251 Or App 515 (2012), (Aug. 1, 2012) (Nakamoto, J.) (Klamath Co.)

http://www.publications.ojd.state.or.us/Publications/A150208.pdf

Father appealed a finding that his son, AG, was within the court's jurisdiction based on allegations that his emotional and physical abuse toward his four stepchildren presented a danger to AG. In 2011, DHS filed a petition to establish jurisdiction over all five children due to the threat of harm from father. At the jurisdictional proceeding, father did not object to the hearing being about all five children.

The only evidence the court relied on to establish jurisdiction was out-of-court statements made by the stepchildren to two testifying witnesses: (1) a DHS case worker describing extensive abuse and (2) a medical examiner at CARES. Father timely objected that these statements were inadmissible hearsay. DHS argued the evidence was admissible under *State ex rel Juv. Dept. v. Cowens*, 143 Or App 68, 922 P2d 1258 (1996) in which the Court of Appeals held that a child's out of court statement was admissible nonhearsay against father as a statement of a party-opponent. It reasoned

Continued on next page »

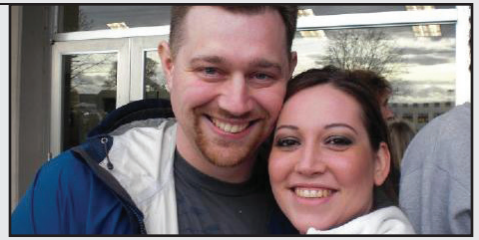
Juvenile Law Resource Center

« *Case Summaries continued from previous page*

that a child will always have interests adverse to the state because of an interest in maintaining the parent-child relationship.

Father argued that *Cowens* did not apply in this case because the stepchildren were not parties in AG's dependency case. DHS responded that though father limited his appeal to just AG, the juvenile court adjudicated petitions involving the stepchildren as well. The Court of Appeals agreed that the record indicated the stepchildren were parties because father did not object when mother's attorney told the court that the jurisdictional proceeding was for all five children and gave no indication of a desire to bifurcate the proceedings. The court also rejected father's argument that *Cowens* only applied to parent-child relationships because Oregon courts have recognized the existence of a parent-stepchild relationship.

However, the Court of Appeals found that the *Cowens* rationale did not apply to the testimony of the CARES examiner offered by the children's attorney. Children cannot be party-opponents when they offer their own statement, only when evidence is offered by the "adverse" party the state. Because the testimony of the DHS caseworker was sufficient to demonstrate father's physical and emotional abuse, it affirmed the court's jurisdiction over AG. ●



Nick Demagalski

Anyone who's called into the Youth, Rights & Justice office in the last fourteen years has likely spoken to Nick. He's been a legal assistant to most attorneys here, and for a short time for attorneys at Bertoni and Todd. He is now in need of our assistance. Nick has been diagnosed with cancer. A tumor was found in his brain a few weeks ago and then others were found in other areas. He begins an aggressive four-month chemotherapy plan this week, and as a result, will not be able to work for some time.

Nick is also a father and the sole breadwinner in his family. He has two small children, and his wife, Nicole, is about to give birth to their third child in about six weeks. He needs our help. A Wells Fargo account has been set up to take donations in his name. If you are interested in donating, you will need the following account number: 894 181 070 0. You can also donate online at http://fundrazr.com/campaigns/2LtSe#.UDOtbDC0fB4.mailto.

Thank you so much for any help you can give. Nick has been our rock through the years. Now it's our turn.

View From the Bench

Are We Better Off?

By Elizabeth Welch, Senior Judge

What effect did In Re Gault have on the Juvenile Courts? Are Juvenile Courts more effective today?

Prior to the US Supreme Court decision in 1967 which gave juveniles the right to counsel, a lawyer in Juvenile Court was a rare sight. Not only were there no lawyers for youngsters, there were rarely DAs either. Exceptions to this situation included murders and other very serious charges. Occasionally there was defense counsel when the parents hired their child a lawyer.

The important question is how did the system function. Pre-Gault and for many years thereafter, the most common form of disposition for youth referred to Juvenile Court was what was called Informal Probation. Essentially the Juvenile Court counselor decided whether the matter should be taken to Court or disposed of with a stern lecture or a brief informal period of probation. The standard used by the counselor included the likelihood of repeated misbehavior and the best interests of the child. It was widely recognized that children who entered the justice system suffered negative consequences which were to be avoided where possible. There was no adjudication; there was no publicly accessible offender history.

Prosecutors did not make the decision to charge except in the "infamous" or newsworthy offense and even then Juvenile Court counselors had a lot of influence. In DAs offices Juvenile Court work was not seen as legal work. If the Juvenile court counselor made the decision to proceed formally, i.e. file a petition, the DA would then pick up a file, usually on the day of the hearing, and present the evidence.

Those practices capture the true spirit behind Juvenile Courts, vis-a-vis children make poor choices and society needs to recognize the frailties of the teen years and, where appropriate, not treat kids as offenders.

After Gault was decided, the growth of the appointment of counsel was significant and with that there was increasing demand for the involvement of DA's. Simply, the Juvenile Court counselors wanted someone on their side. Informal probation was still alive and continued to be a common practice, to varying degrees until the 1990s.

In the early 1970's, the concept of diversion blossomed. This movement was a further recognition of the importance of keeping impressionable kids out of the justice system by establishing community based programs to which certain low level offenders would be referred for voluntary intervention services. There was a significant body of data that made clear that the further a youth penetrated into the system, the more tainted he was by the experience. "Labeling " a child an offender was shown to be a toxic message to the child.

The transition of the Juvenile Court system to a prosecutor based system occurred slowly over the succeeding years for a variety of reasons. Once lawyers were at Juvenile Court, they have a way of enhancing their role—human nature. With the advent of the Teen Menace in the late 1980's and 90's, gang violence and rising crime rates led to pressures to prosecute and incarcerate. Then of course there was Measure 11; this was the most dramatic development in Juvenile Justice since Gault. Accountability displaced the Best Interests of the Child as the guiding consideration.

It is interesting to note that there are still courts in Oregon where the DA's involvement is as litigator in support of the petition and not a major player in the decision to charge. Why these variations exist is an interesting question.

"Formal Accountability Agreements" was the compromise between the "old" system and the adult court model. Its use throughout the State is not well understood; it is not grounded in the best interests of the child.

Access to juvenile court records is much greater today; sexual offender registration has been established for youthful offenders. Collateral consequences for adjudicated juvenile offenders when considered together with the greater percentage of youth being adjudicated means that the connection to the basic principles of juvenile court are tenuous indeed.

Unfortunately, very important questions about the effectiveness of our basic institutions do not get asked. What are the goals of the Juvenile Justice system today? Are they what they should be?

Continued on next page »

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« *View from the Bench continued from previous page*

Has accountability erased "the best interest of the child?"

Were the goals of the old system more effective, more based in adolescent development?

Providing youthful offenders with attorneys when a petition has been filed is not a substitute for thoughtful, developmentally sensitive decision making for children referred to the juvenile court.

If the issue in the decision to charge a child with a crime is whether they are high risk kids or merely normal adolescents, what is there in the training of a lawyer that prepares him or her to make that call? ●

Oregon Enacts New Education Law

To Protect Services For Transition Students

By Brian Baker and Lynn Haxton, Attorneys

Last summer the Oregon legislature enacted House Bill 2283 to address the problem that many school districts in Oregon are providing less than full day programs to post high school students with disabilities who are in the school's transition programs. This law applies to all Oregon students who graduate with anything other than a standard diploma and includes students with a modified diploma, an extended diploma or an alternative certificate. It is also specific that a full day means the same thing whether the student is in high school or in a transition program. The language in ORS 329.451 explicitly requires that transition students:

> "(B) Have access to instructional hours, hours of transition services and hours of others services that are designed to; (i) Meet the unique needs of the student; and (ii) When added together, provide a total number of instruction hours and services to the student that equals at least the total number of instructional hours that is required to be provided to students who are attending public high school." (emphasis added)

The state minimum requirement for high school hours is 990 hours per academic year. That is 27.5 hours per week (5.5 hours per day) of instruction and services to the student for 36 weeks every year the student is in the transition program.

The new law also requires the school district to give written notice to the parent or guardian of any student receiving less than a full day of the right to a full day program. The school must obtain written acknowledgement from the parent or guardian that they were provided notice of this right and document in the student's Individualized Education Program (IEP) an explanation of why the student is not receiving a full day of school. This additional requirement means that all parents with children in transition programs should receive notice about the school district's obligation to provide a full day to their transition student.

A school district cannot unilaterally decrease the total number of hours of instruction and services regardless of the age of the student. It is the student's individualized education program team who decides the number of hours of instruction and services based on that student's needs. It is ***not*** the school district or the district's program that makes this decision. A transition student continues to be entitled to a full day program throughout his or her transition years unless the student's needs determine otherwise. This could be a student who is medically fragile and cannot tolerate a full day of school or a student who is attending a community college fulltime and desires less than a full day program because he or she is being successful in the college setting.

As HB 2283 is new legislation, some districts have yet to fully or adequately implement its requirements, and it is important that transition aged youth, their parents and community advocates review the youth's individual education plan (IEP) to determine if existing services meet the law's requirements and the youth's educational needs. If a youth is receiving less than full day services and it is unclear how services and service times were determined, a youth and or/his or her representative may request an IEP review of the transition plan.

The new legislation contemplates that transition age programming includes academic instruction, vocational instruction and other supportive services. Under federal

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"If someone is going down the wrong road, he doesn't need motivation to speed him up. What he needs is education to turn him around."

– *Jim Rohn*

« *Education Law continued from previous page*

and state law, when a request for an IEP review is made by the youth or parent, the district must provide a meeting to review the IEP. While a team may determine a youth will not access a full day programming for specified, individually determined considerations, the starting point in an IEP review should be the provision of full day programming comparable to peers attending the district's high schools.

Efforts to enforce HB 2283 protections

During the summer of 2012, attorneys at Youth, Rights & Justice (YRJ) and Disability Rights Oregon (DRO) collaborated on a state circuit court action for declaratory judgment based on Portland Public School's failure to comply with this new statute. Prior to filing, YRJ and DRO met with the special education administration at Portland Public Schools, Oregon's largest urban school district, to discuss concerns about the district's interpretation of the HB 2283 and district administrative practices that resulted in transition-aged youth receiving less than full day services. The settlement agreement requires the district to provide full day transition programming to students in its Community Transition Program (CTP), revise its notice to youth and parents regarding the provisions of HB 2283, develop additional program capacity to provide full day programming, and to maintain data on transitions' instruction and services and statistics on service provision times for the approximately 150 students served through the district's CTP. The data will be provided to the agency's attorneys over the next 3 school years to ensure compliance with the settlement agreement.

It is hoped the resolution of compliance issues with HB 2283 by the Portland Public school district through settlement of potential litigation, will provide precedent and impetus for other school districts throughout Oregon to examine local school district transition services and programs for compliance with HB 2283. YRJ and DRO attorneys will continue to investigate district programs that do not comply with state law to ensure Oregon's transition-aged youth with disabilities realize their full potential toward independence, employment and academic attainment. ●

Advocating for a Client Aging out of Foster Care

By Jennifer McGowan, Staff Attorney and Abigail Pfeiffer, Law Clerk

Every year 29,500 young people age out of the foster care system. These youth have grown up in high-risk families and neighborhoods. They enter adulthood long before the majority of their peers are expected to with low educational status, scant employment experience, mental health problems, high rates of homelessness, and limited social and financial resources. The transition is abrupt. Foster youth lose the support of the child welfare system that has assumed the role of guardian when they reach a particular age of majority. To ensure a successful transition into adulthood, these young people need advocates to aid them in accessing services and support.

The Department of Human Services (DHS) is required to actively pursue transition planning by the time the youth is 16, although, if it is appropriate, it can start planning when the youth is 14. ORS 419B.343(3). DHS often delegates this task to Independent Living Programs (ILPs). Yet, only about two-fifths of eligible foster children receive the independent living services from ILPs for which they are eligible and DHS is still required by law to plan for the remaining three-fifths.

Attorneys and other advocates need to ensure these youth receive services that will aid them in becoming successful adults. From an advocate's standpoint, this statutorily required planning provides a good framework for addressing the needs and goals that should be focused on during the transition time: housing, education, physical and mental health, employment, and community connections and supportive relationships. DHS must develop needs statements and goals in all of the identified categories. However, it is also essential that the young person and his or her advocates be involved in the planning process.

The following are a list of specific considerations for addressing each category:

Housing

There are two housing options for youth aging out of the foster care system that allows them to receive financial assistance in an independent living environment. The first, the Independent Living Subsidy Program (ILSP), requires that a young person still be in the custody of DHS. It requires a young person to spend 40 hours a week of productive time—employment and/or education—in order to qualify. The ILSP can provide funds to meet needs the young person is unable to meet through employment or financial aid from an education or training program. The ILSP can last for up to 12 months.

The other program is Chaffee Housing, which a young person can access if they were discharged from DHS care and custody **after the age of 18**. This program also offers financial assistance for up to a total of $6000, using similar criteria to the ILSP. Youth may access assistance until age 21, or until the youth has accessed a total of $6,000; whichever comes first.

While these housing programs are often available to the young people we represent, many of our clients are not in a position to qualify for these services. Some clients may not be able to maintain the required hours of work or education, others may find themselves earning above the limits to receive a subsidy through their employment or other sources of income. Instead many clients look to other housing options, subsidized housing lists, homeless youth organizations, or reconnecting with biological families. Whatever they decide, help them evaluate what they'll need to do to be successful in

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« *Aging Out continued from previous page*

their new homes, whether that means applying for an ILSP, budgeting for rent, or talking about how to reconnect successfully with their parents.

Education

All too often, young people aging out of care did not have enough support and stability through the early years of their educational career to achieve a level where they are able to take advantage of the educational vouchers and other funding programs now available to them. Many foster youth are inappropriately placed into special education classrooms that limit their future educational and employment opportunities. They also move schools often, leading to prolonged absences, missing records, lost credits, and enrollment in low-quality or alternative schools. To make sure these youth maximize their potential, advocates need to start early to engage the youth in services to benefit their education. Some of the services available include: tutoring and remedial tutoring, GED classes, SAT preparation classes, driver's education, vocational assessment, and special vocational training.

There are a number of funding options available to students seeking a postsecondary education. Education and Training Vouchers (ETV) allow a youth up to $5,000 per year if they meet eligibility requirements. There are also Casey Family Scholarships , which offer up to $10,000 to people under 25 who spent at least 12 months in foster care and were not subsequently adopted, and Chafee Education and Training Scholarships , which offer up to $3,000 per academic year for youth who are eligible for Chafee Housing and have graduated from high school or gotten a GED.

In 2011, the Oregon Legislature also passed a bill (HB 3471) that requires Oregon state universities, community colleges, and the Oregon Health and Science University to waive tuition and fees for current or former foster children less than 25 years of age. However, the youth will still be responsible for fees, like textbook costs and technology fees and some schools will only apply it after Pell Grants, so it might not be a completely free education.

The National Center for Youth Law, a non-profit working to ensure resources and support for low-income children, released a report outlining the common components of education advocacy systems. These common components include identifying and referring foster youth with unmet educational needs, providing the youth with case management services, maintaining a pool of specialized educational advocates, and ensuring successful system management. The report also offers concrete recommendations for stakeholders and policymakers, such as examining the current system in their area and issuing memoranda with procedural clarifications so that all providers are aware of how to make successful referrals.

http://www.youthlaw.org/child_welfare/foster_youth_education_initiative/

Physical and Mental Health

Although youth in foster care are supposed to receive life skills training, many report only receiving such instruction after turning 17. Even when they receive life skills training, it is often inadequate for a youth facing mental and physical challenges. Youth transitioning from foster care should have life skills training that will help them recognize the need for and develop skills to access services to promote their physical and mental health. These services include health care, transportation, counseling about substance abuse, shopping, emergency and safety skills, interpersonal and social skills, cooking, housekeeping, personal appearance, and leisure. This is a huge range of skills and information, so it is important that an advocate have meaningful conversations that address the needs of the individual youth.

There are also things every youth should know about their health and wellbeing, such as how to schedule a doctor's appointment, renew a prescription, and raise concerns about their health. No topic should be off-limits out of concerns of "softening the blow" as this does the youth a huge disservice.

Employment

Part of being an adult is being able to provide for oneself. Advocates should make sure that youths know about vocational services being offered. Depending on the youth, these services, usually provided by ILP or similar school-based programs, can range from consumer skills to job readiness and job search services. They can also include budgeting and financial planning services. Be sure that the services are really going to aid the youth in finding a job or managing their money successfully. Being able to write a cover letter is a valuable skill, but it is only part of the process. Try to ensure that they know some of the options available to them.

Community Connections

Many foster youth are more socially isolated and disenfranchised than their peers. When DHS guardianship ceases, they are often even more vulnerable to isolation. ILP services include peer groups, youth networks, retreats, and conferences. However, it's also important to have an open and honest dialogue with these youth about who will be there for them. Perhaps this means having a conversation about how to reconnect with a biological family without idealizing it too much or perhaps it means discussing different ways to get involved in the community. Although it might not seem like it, community connection is a vital part of a transition plan, and youth who have those connections have much better outcomes as they transition to adulthood.

As an advocate, your involvement with transition planning means holding DHS accountable for the services it is mandated by statute to provide. Only a fraction of eligible teens are getting the services they need to succeed as independent adults. Advocates have to expect and demand these services for the young people they advocate for. They also have to know what services are available and act as a referral point. Most importantly, they have to be

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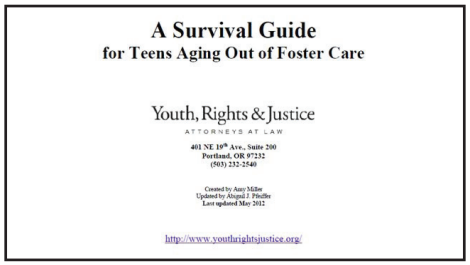
« *Aging Out continued from previous page*

able to have serious conversations with young people transitioning out of foster care about a variety of topics that will affect their mental, physical, and relational health, education, employment, and housing prospects.

For additional information, see the T1 and T2, which are transition planning templates used by ILP for transition planning purposes. They can be a framework for lawyers and other advocates working with teen clients when discussing transition planning and readiness. The T1 and T2 can be accessed at: http://www.dhs.state.or.us/caf/safety_model/procedure_manual/appendices/ch4-app/4-18.pdf.

Attorneys and advocates are encouraged to provide copies or electronic access for their clients to YRJ's publication *A Survival Guide for Teens Aging Out of Foster Care*. Access the *Guide* at:


A Survival Guide
for Teens Aging Out of Foster Care

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Created by Amy Miller
Updated by Abigail J. Pfeiffer
Last updated May 2012

http://www.youthrightsjustice.org/

Abigail J. Pfeiffer, Law Clerk for YRJ has revised and updated: A *Survival Guide for Teens Aging Out of Foster Care*. The *Survival Guide* is designed to help youth aging out of foster care to find the resources to be successful. The *Guide* focuses on legal rights and where to look for help when needed.

Sexting: Child Pornography or Normal Development?

By Diana Bettles, Law Clerk

It is developmentally normal for youth to experiment with their sexuality and risk-taking. As teens become more aware of their sexuality, they normally feel the need to share the information with their peers. In our technologically advanced society, the normal sexual experimentation has evolved into taking pictures and sharing those via text message - sexting. This advancement has created a less embarrassing alternative to face-to-face interaction for youth. Youth also have become accustomed to, and rely on, today's technology and frequently express themselves through electronic communication streams, especially the widely used cell phone. With the digital camera being available on most cell phones, youth are provided with an easy means to communicate digitally.

Research shows that the usual purpose and motivation behind sexting is typical adolescent exploration largely between partners in a relationship, or youth who are interested in dating: not to possess and distribute child pornography. Yet, the law literally defines child pornography as a depiction of a nude minor. Using this literal definition, prosecutors are able to charge teens, who are exploring their sexuality as part of normal development, with possession and distribution of child pornography. Child pornography is a felony crime, subject to long-lasting collateral consequences.

The concept of the juvenile court system recognizes that a juvenile's decision, although unwise, is not always criminal behavior. The Supreme Court in *Roper v. Simmons* relied on research that supported a finding that youth are less culpable than adults because their brain is still developing. Youth are generally less aware than adults of the risk of their behaviors due to their lessened knowledge and experience. This large difference between youth and adults was the reason the juvenile justice system was created separately from the adult criminal system, and was aimed to promote reformation and rehabilitation.

Youth are generally less aware than adults of the risk of their behaviors due to their lessened knowledge and experience.

By criminalizing sexting, a developmentally normal activity in today's society, the purpose and intent behind the juvenile justice system is diminished; the rehabilitative system becomes antagonistic. Also, the intent of protecting victims and preventing child sex abuse behind the child pornography laws is diminished when those children are the ones being punished and charged. The aim of child pornography laws is to target exploitive mechanisms central to the production and distribution of child pornography. More often than not sexting does not include that key element of exploitation. The youth who participate in sexting take pictures of themselves and share those pictures with others in their peer group.

Even if the act of sexting could fit nicely within the child pornography laws, the pictures sent do not always rise to the level of child pornography as defined by statute. Federal statute requires the minor be depicted in sexually explicit conduct defined as sexual intercourse, lascivious simulated sexual intercourse or graphic or simulated lascivious exhibition of the genitals or pubic area of any person. Many state statutes prohibiting child pornography similarly focus on the sexual gratification of the viewer. An adolescent's consensual act of self-expression via sexting runs counter to the intent of protecting child victims, and contrary to the express language of child pornography laws.

There are alternatives to prosecuting child pornography, which include lower-graded offenses with lowered collateral consequences, educational diversion programs and community outreach. Such programs may include provisions for cell phone carriers to provide information on the consequences of sexting, and education through diversion programs on the legal ramifications of sexting.

See more at: *Prosecuting Sexting as Child Pornography: a Critique*, Marsha Levick and Kristina Moon, 44 Val. U. L. Rev. 1035, Summer 2010. ●

Did Your Brain Make You Do It?

Neuroscience and Moral Responsibility

This opinion piece in NY Times, responding to conjecture about the culpability of Colorado shooter James E. Holmes, can provide clarity for juvenile defenders and judges struggling with determining culpability in light of factors such as juvenile brain development and trauma histories. If you are sure you know the answers to the following questions as applied to commission of an act which caused harm to another, you don't need to click on the link below:

- Do our brains always "make us do it"?
  True False
- Can a history of trauma "make you do it"?
  True False
- Do biological characteristics or anomalies in the brain "make us do it"?
  True False
- Does a brain characteristic cause unintentional behavior?
  True False
- Does an individual with trauma history have the ability to act intentionally despite the trauma?
  True False

http://www.nytimes.com/2012/07/29/opinion/sunday/neuroscience-and-moral-responsibility.html?_r=&pagewanted=print ●

An Eighth Amendment Analysis of Juvenile Life Without Parole

Extending *Graham* to all Juvenile Offenders

This law review article is set to be published in the upcoming volume of the University of Maryland's Law Journal of Race, Religion, Gender & Class. ●

Case Summary

Big Win in Juvenile Defense in California

By Diana Bettles, Law Clerk

The California Supreme Court has reinforced and further defined the scope of *Graham v. Florida*, 560 U.S. ___ [130 S.Ct. 2011] this month in *People v. Caballero*, __P.3d___, 12 Cal. Daily Op. Serv. 9382. http://www.courts.ca.gov/opinions/documents/S190647.PDF The Court in *Cabellero* held that the 110 year-to-life sentence of a 16 year old juvenile, who was convicted of three counts of attempted murder, constitutes cruel and unusual punishment in violation of the Eight Amendment. The US Supreme Court in *Graham* barred life imprisonment of juveniles for non-homicide offenses based on evidence of developmental and brain science studies that showed fundamental differences between juveniles and adults. The high court found a juvenile's brain is continuing to develop and more capable of change. Rendering a life-without-parole sentence would deny the juvenile a chance to "demonstrate growth and maturity." Additionally, the sentence is particularly harsh for a juvenile who will likely serve more years and a greater amount of his adult life in prison than typical adult offenders.

Due to a combined sentence of three convictions for separate counts, which totaled 110 years, rather than one conviction and sentence, the State argued that Caballero did not qualify for consideration under *Graham.* The Court disagreed citing *Miller v. Alabama*, 567 U.S. ___[132 S.Ct. 2455] (2012), which clarified that *Graham*'s ban on life sentences applies to all non-homicide cases regardless of the offender's criminal intent or the sentencing structure employed. When sentencing, a court must consider all mitigating circumstances in the juvenile's crime and life, including his or her age, whether the juvenile was a direct perpetrator or an aid and abettor and the juvenile's physical and mental development. Proper authorities may later determine whether the juvenile should remain incarcerated through parole hearings or a petition for writ of habeas corpus. However the State may not deprive juveniles at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. ●

"For years we were trying to convince the courts that kids have constitutional rights just like adults. Now we realize that to ensure that kids are protected, we have to recognize that they are actually different from adults."

– Marsha Levick, co-founder of the Juvenile Law Center, on the Supreme Court's ruling to ban mandatory life sentences for juveniles.

Resources

Appreciating Adolescence

The National Council of Juvenile and Family Court Judges has posted articles to help judges, attorneys and court personnel understand how to place the actions of adolescents into perspective:

Appreciating Adolescence: Risk Taking as

Continued on next page »

« *Resources continued from previous page*

Training for Adulthood- http://www.ncjfcj.org/appreciating-adolescence-risk-taking-challenges-adulthood

Appreciation Adolescence: The Role of Peers: http://www.ncjfcj.org/appreciating-adolescence-role-peers

Disproportionate Minority Contact

The Oregon Commission on Children and Families has released its report on statewide findings related to racial and ethnic disparities in the Juvenile Justice system of disproportionate minority contact are in the referral of African American youth into the juvenile justice system , as well as in the higher rates of detention for Native youth. Questions about Disproportionate Minority Contact in Oregon's Juvenile Justice System: Identification and Assessment Report (May 2012) may be directed to: Anya.Sekino@state.or.us

Helping Foster Kids Transition to Adulthood

We are all aware of the abysmal outcomes suffered by youth aging out of foster care, and what is worse, we now know that these youth are more likely to contribute these poor outcomes to their own children, contributing to a troubling multigenerational trend. The Edna McConnell Clark Foundation and the Bill and Melinda Gates Foundation are providing funding for the study of programs designed to break this cycle. For more information go to: http://www.governing.com/topics/health-human-services/col-helping-foster-kids-rransition-adulthood.html ●

Save the Date

Juvenile Law Training Academy

October 15-16, 2012

Valley River Inn

Eugene, Oregon

http://www.ocdla.org/seminars/shop-seminar-index.shtml

Governor's Summit on Reducing Disproportionate Minority Contact (DMC)

In The Juvenile Justice System

November 1–2, 2012

Spirit Mountain Conference Center

Grand Ronde, Oregon

http://cms.oregon.gov/oya/dmcsummit/2012/summit.htm ●

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