Juvenile Law Reader

Youth, Rights & Justice
ATTORNEYS AT LAW

An independent, not-for-profit law firm, Est. 1975

Volume 9, Issue 5 • November 2012

"More than 10,000 juveniles under 18 and without lawful immigration status come into the United States each year without an adult or a parent..."

Options for Undocumented Youth

By Sydney Boling, Law Clerk

The debate over undocumented youth was brought back to the mainstream recently with President Obama's executive order, announced on June 15, 2012, regarding those undocumented youth brought here by their parents. Undocumented youth face many obstacles: they are unable to work legally, unable to obtain in-state tuition at universities, and face possible deportation.[1] While some undocumented youth are brought to the United States by their parents, others make their way to the US on their own, often by bus or train. While there are various provisions within the law aimed at protecting undocumented minors in vulnerable situations, many children are unaware of these opportunities or are unable to find an attorney to assist them. Juvenile law practitioners may come into contact with these juveniles and it is important to be aware of the possible legal options for them.

More than 10,000 juveniles under 18 and without lawful immigration status come into the United States each year without an adult or a parent in the United States; they are referred to as unaccompanied alien minors.[2] Eighty percent of these unaccompanied alien minors come from Latin America, driven here by poverty,

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« *Undocumented Youth continued from previous page*

abuse in the home, drug-related crime, and/or gang violence. Some are trafficked into the United States for sexual exploitation.[3] Many of these children are taken into custody immediately upon crossing the border and start attending court hearings to see if they will be able to stay in the country or be deported.[4]

Those that are not taken into custody may end up living in substandard conditions, unable to work legally and living in fear of deportation. There are also an estimated 1 million to 2.1 million juveniles living in the United States, subject to deportation because they were brought to the United States by their parents without legal permission.[5]

Special Immigrant Juvenile Status (SIJS) is the most common method of obtaining legal status for an undocumented alien minor, whether defensively while a child is in deportation proceedings or affirmatively, when they are not in proceedings.[6] The protection was originally created by the Immigration and Nationality Act of 1990 and was expanded in 2008 by the Trafficking Victims Protection and Reauthorization Act of 2008.[7] In order for a youth to be eligible, a juvenile court must either have declared the youth to be a dependent of the court, or have committed or placed the youth with an individual, entity or state agency, pursuant to state laws.

Padilla Project

Attorneys representing undocumented youth in delinquency cases are required to advise their clients about the immigration consequences of juvenile adjudication or plea to delinquent acts.[22] Attorneys who do not have immigration law expertise should obtain a consultation with an immigration law expert. An excellent resource for information about immigration consequences is the *Padilla* Project, which can be accessed at: http://www.mpdlaw.com/immigration.

A state agency, such as DHS, or any attorney may file a SIJS petition on behalf of the youth asking that the court declare the youth dependent and requesting certain findings by the court. These findings can also be requested in the course of delinquency proceedings if the court places the youth outside the parents' home. The court must find that the youth cannot be reunified with one or both parents due to abuse, neglect, abandonment, or similar basis under state law; and that it is not in the youth's best interest to be returned to the home country.[8] The juvenile judge

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The Juvenile Law Reader is published six times a year by:

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Youth, Rights & Justice is dedicated to improving the lives of vulnerable children and families through legal representation and advocacy in the courts, legislature, schools and community. Initially a 1975 program of Multnomah County Legal Aid, YRJ became an independent 501 (c) (3) nonprofit children's law firm in 1985. YRJ was formerly known as the Juvenile Rights Project.

The Juvenile Law Reader is distributed electronically free of charge. It is partially funded by the Office of Public Defense Services.

Tax deductible donations are welcome and can be sent to the YRJ offices.

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

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or a presiding judge must set out these necessary findings in an order. From there, the child can go through the immigration procedures to apply for lawful permanent residency.[10] While youths with a juvenile delinquency history may seek this status, in order for an applicant to adjust status to a lawful permanent resident, they must otherwise be admissible and certain types of juvenile adjudications can pose problems.[11]

Asylum is another means of assistance for undocumented minors who fear to return to their home country, "based on having suffered past persecution or fearing future persecution on account of their race, nationality, religious beliefs, political opinions, and perhaps primarily, their membership in a particular social group."[12] This is an option for those persecuted because of sexual orientation, persecution by a gang, recruitment as a child soldier or prostitute, or political activities of their parents. This area can be complex and attorneys for children with a possible claim should consult with an expert.[13]

A **T-Visa** may be issued for juveniles that are victims of trafficking, including sex trafficking and labor trafficking.[14] With a T-visa, the child may be eligible to adjust status after three years. Generally an adult must demonstrate a hardship if removed from the US and must cooperate with law enforcement, although these requirements do not apply to those under 18.[15]

A **U-Visa** may be issued to anyone who was a victim of a qualifying serious crime in the United States and cooperated with law enforcement while they were investigating or prosecuting the crime. Any person can apply if as the victim of the crime they suffered physical or mental abuse.[16] A youth may be eligible as a derivative of a sibling or a parent, or in their own right. Once granted the visa, the juvenile may adjust status after three years.[17]

A **Violence Against Women Act (VAWA) petition** may be filed by a juvenile who does not have legal status and is or has been abused by a parent who is a US citizen or a lawful permanent resident. Again, permanent residency may be achieved.[18]

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On June 15, 2012, President Obama announced ***Deferred Action for Childhood Arrivals*** (DACA), which allows individuals to request temporary relief from deportation. "While the juvenile is undocumented and subject to deportation, the government agrees to 'defer' any action to remove them."[19] Thus, while this action does not provide a path to permanent residency or citizenship, it does allow the individual to stay in the US and apply for a work permit valid for two years.[20] Individuals can now submit requests for deferred action and applications for work visas, which are granted on a case-by-case basis based on various factors including that the individual came to the United States before the age of 16 and has been in the US continuously for five years prior to June 15, 2012.[21]

If you have a juvenile client who may qualify for one of these provisions, Catholic Charities Immigration Legal Services, http://www.catholic-charitiesoregon.org as well as Immigration Counseling Service, http://www.immigrationcounseling.org are two local agencies that provide legal assistance regarding these immigration benefits. ●

1 Priya Konings, *An advocate's Guide to Protecting Unaccompanied Minors*, American Bar Association, June 2012, at 2.
2 *Id.* at 1.
3 *Id.* at 2.
4 *Id.*
5 *The Dream Act*, (ACLU, New York, N.Y.).
6 Michelle Abarca, et al., *The ABCs of Representing Unaccompanied Children*, 2011-12, AILA 586 at 590.
7 *Id.*
8 *Immigration Benchbook*, Immigration Legal Resource Center, http://www.ilrc.org/files/2010_sijs_benchbook.pdf (last visited Sept. 17, 2012).
9 *Id.*
10 *Id.*
11 *Id.*
12 Michelle Abarca, et al., *The ABCs of Representing Unaccompanied Children*, 2011-12, AILA 586 at 590
13 *Id.*
14 *Id.*
15 Priya Konings, *An advocate's Guide to Protecting Unaccompanied Minors*, American Bar Association, June 2012, at 4.
16 *Id.* at 3.
17 *Id.*
18 *Immigration Benchbook*, Immigration Legal Resource Center, http://www.ilrc.org/files/2010_sijs_benchbook.pdf (last visited Sept. 17, 2012).
19 *Id.*
20 *Id.*
21 *Id.*
22 *Padilla v. Kentucky*, 130 S Ct 1473 (2010).

Child Welfare Data From 2011 Released

Shows Some Progress and Some Regression

By Mark McKechnie, MSW

The Oregon Department of Human Services released its "2011 Child Welfare Data Book" in late October 2012. DHS has previously reported problems with the implementation of its new ORKids database and its ability to produce reliable data reports. This report has historically been released around April each year with data for the previous year.

In the report, DHS highlights some positive changes in Oregon's child welfare data, including increasing numbers of children with founded abuse or neglect incidents who remain at home and receive services. The report also reiterates a commitment to reduce disparate treatment of families of color. Unfortunately, African-American and Native American children continue to be over-represented in foster care, relative to their numbers among Oregon's general population.

African American children represent 2.1% of Oregon's children but 8.2% of Oregon's children in foster care, meaning that they are over-represented by a factor of 3.9 times. Native American children represent only 1.3% of Oregon's child population but 5.9% of Oregon's foster care population, which means they are overrepresented by a factor of 4.5 times. Native American children represented 6.9% of children in foster care just a year earlier, so their rate of overrepresentation has dropped from 5.3 times to 4.5.

While the number of children entering care declined from 4,736 in 2010 to 4,398 in 2011, the number of children leaving care also declined; however, there was still a net decline in the total number of foster children in Oregon. Among children leaving foster care, 10.7% left within three months of entry.

Also among children leaving foster

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Look for Youth, Rights & Justice in the 2012 Willamette Week Give!Guide

« *Child Welfare Data continued from previous page*

care, the proportion who were reunified with one or both parents increased slightly, from 63.2% in 2010 to 64.1% in 2011. The proportion of children exiting to guardianship also increased slightly, while the portion of those children who exited care to adoption declined. There was a significant decrease in finalized adoptions in 2010 (781) and 2011 (731), compared to 2009, when 1,104 adoptions were finalized.

Legislation passed in 2007 required DHS to improve its efforts to place children with relatives and to place siblings together in foster care. In 2011, 27% of all foster children were placed with a relative. DHS reports that 33.7% of children in "family foster care" are placed with relatives. The report also notes that 4,143 children in foster care at the end of 2011 were part of a sibling group and that 84.2% of them were placed with at least one other sibling.

Moves in foster care is another important issue for foster children, 63.5% of children had two or fewer placements as of June 30, 2011, while 12% had experienced six or more placements.

The report shows that the number of reports of abuse and neglect received by DHS has increased each year over the last decade, from 40,255 reports in 2002 to 74,342 in 2011. The number of reports received in 2011 increased by 3.4% compared to the year before. Last year, 32,328 reports were referred for investigation and 7,492 were founded for abuse, neglect or threat of harm. Children were removed from their homes in 33% of founded cases.

Mandatory reporters continue to make approximately three-quarters of all reports of suspected abuse and neglect. Non-mandated reporters account for 20.7% of reports and 4.9% of reports were made by a parent and/or "self."

The top three family stress factors associated with founded allegations continue to be parent/caregiver substance abuse (46.8%), domestic violence (35.2%) and parent/caregiver involvement with law enforcement (27%).

The report can be accessed on-line at: http://www.oregon.gov/dhs/abuse/publications/children/2011-cw-data-book.pdf. ●

Two Benefits for Nick Demagalski

Anyone who's called into the Youth, Rights & Justice office in the last 14 years has likely spoken to Nick. He's been a legal assistant to most attorneys here. Nick has been diagnosed with neuroendocrine cancer and needs our help. Please join us for one, or both, of the upcoming benefits.

Love & Jazz Live Big Band Dancing

Raffle and Silent Auction
$10 Admission
Friday, November 30
7 to 10 pm
Tigard Ballroom
8900 SW Commercial Street, Tigard

Sweets and Savories with a Little Silly on the Side

Comedy and Silent Auction
Friday, December 7
4 to 7 pm
Performance Works NW
4625 Southeast 67th Ave., Portland

If you cannot attend, but would like to make a donation, please go to:
https://fundrazr.com/campaigns/2LtSe#.UDOtbDC0fB4.mailto

Juvenile Law Resource Center

Case Summaries

Summaries by Eleanor Garretson

***A.F. v. Dept. of Human Services*, ___ Or App ___, ___ P3d ___ (Aug. 8, 2012) (Brewer, J.) (Multnomah Co.)**

http://www.courts.oregon.gov/Publications/docs/A148861.pdf

DHS appealed a trial court judgment reversing the agency's administrative determination that mother had neglected her child. Responding to a report by school officials, Child Protective Services (CPS) conducted an investigation in December 2009 of the family and determined that mother had neglected her five-year-old child, T.R., by allowing father, a predatory sex offender, to live in the same house. In a January 2010 dependency proceeding, mother stipulated that she was aware father was a convicted sex offender and felon and yet allowed T.R. to have contact with father, placing the child at risk of harm. Subsequently, DHS issued a final administrative order determining that the report of child neglect was founded.

Mother filed a petition for judicial review and the trial court held that DHS's order was not supported by substantial evidence and that DHS had failed to demonstrate risk of actual harm to the child.

The Court of Appeals noted that per statutory and regulatory requirements, DHS issues a founded determination when, under the circumstances, there is reasonable cause to believe that child abuse or neglect occurred. This is a very low evidentiary threshold equivalent to reasonable suspicion. The court found that DHS had met this burden, reversed the trial court's findings, and upheld DHS's administrative order.

The court reasoned that mother's stipulation in the dependency hearing was a judicial admission and was a proper basis for DHS's administrative determination. Additionally, the facts that DHS discovered during the CPS investigation were sufficient to establish reasonable suspicion irrespective of mother's stipulation. T.R. had reported to school officials that father behaved erratically and threatened to stab him. DHS had previously informed mother that father must have no contact with T.R. and mother admitted during the investigation that she was aware of this restriction. Finally, father consistently failed to abide by the conditions of his parole, was not amenable to sex-offender treatment, and had been sentenced to 60 days incarceration for parole violations. The court found that under these circumstances, DHS properly determined that mother placed T.R. in threat of severe harm of child abuse or neglect by allowing father to reside in the home.

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« *Case Summaries continued from previous page*

***Dept. of Human Services v. D.L.H.*,___ Or App ___, ___ P3d ___ (Aug. 22, 2012) (Nakamoto, J.) (Linn Co.)** http://www.courts.oregon.gov/Publications/docs/A149947.pdf

Mother and father separately appealed a combined dispositional and permanency judgment of the juvenile court which changed the permanency plan for the children, J and A, from reunification to adoption. Father is a tribal member and his child A is subject to the Indian Child Welfare Act so DHS had to make "active efforts" toward family reunification for A while it needed only to make "reasonable efforts" to reunite J with mother. Both mother and father were incarcerated at the time of the consolidated hearing.

A and J were removed from mother's care after an August 2010 incident, where she attempted to physically remove the children from their grandmother's home while intoxicated. At a February 2011 jurisdictional hearing, the juvenile court made J and A wards of the court. The consolidated dispositional and permanency hearing was held in May 2011 and the court found that DHS had made sufficient efforts toward family reunification.

Mother's first argument on appeal was that the court was required to enter reunification as the primary permanency plan. The Court of Appeals found that no statute or rule required reunification to be ordered as the initial case plan and also that the initial plan at the time of the dispositional hearing actually had been reunification. Mother also argued that DHS had not made active efforts toward reunification with A because it did not contact her, allowed no visitation with her children, and made no effort to provide substance abuse treatment besides offering an evaluation. The court found that DHS had made sufficiently active efforts because it attempted to contact mother, decided against visits only after consulting with the children's therapist, and could not provide treatment programs because of Department of Corrections' policies. Furthermore, DHS had offered a substance abuse evaluation that had been rejected by mother. Because DHS made the active efforts to reunite A with mother it also satisfied the lesser standard of making the reasonable efforts required as to J.

The Court of Appeals found that DHS had failed to make active efforts to reunify A with father. While the agency did make an effort to establish a parental relationship by allowing communication between A and father, it did not make any effort to help father act appropriately as a parent by offering parenting classes. While father objected at the dispositional hearing to the court *ordering* parenting classes, he did not refuse to attend classes if they were available.

Finally, the court rejected mother's argument that the juvenile court erred in concluding that reunification was not possible in a reasonable amount of time. DHS contended that there is no statutory requirement that the juvenile court make a "reasonable time" finding after a permanency hearing. The Court of Appeals agreed that while ORS 419B.476 gives the juvenile court discretion to order a parent to participate in services if it concludes a parent and child can be reunited within a reasonable time with the aid of services, the statute does not require any "reasonable time" determination.

***Dept. of Human Services v. H.P.*,__ Or App ___, ___ P3d ___ (Sept. 19, 2012) (Schuman, P. J.) (Washington Co.)** http://www.courts.oregon.gov/Publications/docs/A150718.pdf

Father appealed a judgment changing the permanency plan for three of his children from reunification to

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adoption and subsequent judgment continuing the permanency plan. Father's children were removed from his custody in 2009. The court changed the plan to adoption at an October 27, 2011 hearing and issued a permanency judgment on January 11, 2012. In this order, the court checked a box stating that DHS had made reasonable efforts toward reunification and noted that a "Fact Findings" document was attached. While the court had admitted a one-page exhibit into evidence at the hearing that listed the services DHS had offered father, this document was not attached to the judgment. On January 25, 2012, after another hearing, the court entered a judgment continuing the permanency plan of adoption with the same check the box findings and no additional attachments.

Father argued that both the judgments failed to satisfy the requirements of ORS 419B.476(5)(a) because they did not include "a brief description of the efforts the department has made with regard to the case plan in effect at the time of the permanency hearing." DHS responded that father's assignment of error was unpreserved because he did not object to the January 11th judgment at the subsequent hearing. Since *State ex rel DHS v. M.A.*, 227 Or App 172, 205 P3d 36 (2009), the Court of Appeals has reversed and remanded judgments that do not contain the required findings under ORS 419B.476(5), without regard to whether a parent objected to that error below. DHS argued that father could have raised the issue at the second permanency hearing. However, the court noted that the only mechanism for father to object would be ORS 419B.923 which allows a juvenile court to "modify or set aside any order or judgment made by it." The Court of Appeals rejected this approach because it was unwilling to change the optional procedure in ORS 419B.923, which depends on a court's discretion, to a mandatory mechanism for preserving claims of error.

On the merits, the Court of Appeals found that the judgment did not comply with the requirements of ORS 419B.476(5)(a). It distinguished this case from *Dept. of Human Services v. H.R.*, 241 Or App 370, 250 P3d 427 (2011), where the Court of Appeals had upheld a permanency judgment adopting an unattached DHS report as its written findings because the judgment identified the report by date and name and the report was contained in the trial court file. The court held that father's case was more similar to *State ex rel Dept. of Human Services v. T.N.*, 230 Or App 575, 216 P3d 341 (2009), where a judgment failed to satisfy the statutory standards when it incorporated "attached reports" by reference but did not actually attach the reports and gave no indication of which reports it intended to incorporate. Because the juvenile court did not expressly include its findings in the judgment it failed to comply with the requirements of ORS 419B.476(5)(a).

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Department of Human Services v. R.V., ___ Or App ___, ___ P3d ___ (Sept. 26, 2012) (Per Curiam) (Washington Co.)
http://courts.oregon.gov/Publications/docs/A150945.pdf

Summary by Fumi Owoso, Attorney

Mother of child, C, appealed a Washington County Circuit Court judgment which found her to be within the court's jurisdiction under ORS 419B.100(1)(c) based on allegations which included that mother had a history of choosing unsafe partners and had knowingly failed to protect her child from abuse. The Court of Appeals found that the trial court erred in finding that C's welfare was endangered at the time of the hearing where ORS 419B.100(1)(c) requires that the state prove "that there is a *current* risk of harm and not simply that the child's welfare was endangered at some point in the past". The state conceded the error and the appellate court accepted the concession, reversing the trial court's decision. ●

Resources

Special Issue: Making a Better World for Children of Incarcerated Parents

The Family Court Review has published a special issue dedicated to children of incarcerated parents. The special issue explores matters that impact children of incarcerated parents:

- Moving Beyond Generalizations and Stereotypes to Develop Individualized Approaches for Working with Families Affected by Parental Incarceration
- When the Cost is Too Great: The Emotional and Psychological Impact on Children of Incarcerating Their Parents for Drug Offenses
- Moving Beyond Generalizations and Stereotypes to Develop Individualized Approaches for Working with Families Affected by Parental Incarceration
- Barriers to Reunification for Incarcerated Parents: A Judicial Perspective
- Services for Children of Incarcerated Parents
- Re-Entry Courts: Providing a Second Chance for Incarcerated Mothers and Their Children

Prof. Myrna S. Raeder, Guest Editor for the special issue, eloquently identified the importance of the impacts on children with incarcerated parents when she wrote:

> "The punitive sentencing regime that has branded the United States as the Country incarcerating the largest number of its inhabitants has also imposed a terrible punishment on the children of incarcerated parents. These youth are at risk, not only for continuing an intergenerational cycle of crime, but also for entering the pipeline that extends from foster care, to school failure, homelessness, unemployability, poverty, and institutionalization. Even those who escape the more draconian collateral consequences of the parents' incarceration face a stigma and shame that may affect their development."
>
> - 50 Fam. Ct. Rev. 23 (January 2012)

The Truth About Failed Adoptions and What to Do About It

Those of us in the trenches are often aware of a fact little known by the public: there are a far greater number of failed or broken adoptions than the public would ever guess. Practitioners see adopted children re-enter the child welfare system or enter the system through delinquency cases. Dawn J. Post and Brian Zimmerman, New York City attorneys who represent children in Family Court, have explored the issue and make thoughtful recommendations to assess and address broken adoptions in their article, "The Revolving Doors of Family Court: Confronting Broken Adoptions". 40 Cap. U. L. Rev. 437 (Spring 2012).

Report on Court-Based Child Welfare Reforms Released

Discusses Public Defense Enhancements

By Mark McKechnie, MSW

The American Bar Association Center on Children and the Law, the State Policy Advocacy and Reform Center (SPARC) and First Focus released the report, "Court-Based Child Welfare Reforms: Improved Child/Family Outcomes and Potential Cost Savings," in August 2012.

The report highlights the role that juvenile court systems play in serving to monitor quality of child welfare systems and services, expanding access to services for families, expediting critical decisions and improving outcomes. Improved outcomes, such as more frequent, more timely and more successful reunifications, translate into cost savings for states.

The second section of the report focuses on improved representation for parties in child welfare cases. One of the most familiar to us in Oregon is the Parent Representation Program of the Washington State Office of Public Defense (OPD). The program provides additional funding to reduce the caseloads of attorneys appointed to represent parents. The maximum caseload per attorney is 80. In addition to the caseload limits, the program included higher standards of practice for court-appointed attorneys, OPD oversight of attorneys, additional training and support, increased access to experts, and greater access to social workers who assist attorneys (one social worker for every four attorneys).

The pilot began with two Washington Counties and was eventually expanded to 25. OPD contracted with private attorneys in rural areas and public defenders in larger, urban areas. Because the reforms have not been expanded to the entire state thus far, the program is able to compare data between pilot and non-pilot counties. A 2010 audit found a 39% increase in reunification rates.

Another evaluation looked at the impact of the program upon 12,000 children between 2004 and 2007. Compared to non-pilot counties, pilot counties had 11% higher reunification rates, 104% higher adoption rates and 83% higher guardianship rates. On average, reunification was achieved 27 days sooner and adoptions were achieved one year earlier in pilot counties, resulting in savings from fewer child-days in foster care.

The report summarized feedback from court and child welfare agency representatives regarding the impact of the pilot project: "Reduced caseloads enable attorneys to meet with clients and prepare cases in advance. Attorneys establish rapport early and communicate regularly with clients throughout the case. Parents are more willing to engage in services, so there are fewer parental rights terminations. When families cannot reunify, OPD attorneys advise clients about adoption and guardianship options that allow continued contact, and work to negotiate those outcomes."

The report also describes more recent programs in California and New York that include improved training for attorneys, caseload limits and access to social workers and investigators.

The first section of the report focuses on court-based reforms, providing examples of a Family Treatment

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Court (FTC) in Jackson County, OR, the Family Wellness Court in Santa Clara County, CA, and the Expedited Reunification Docket in Wayne County, MI.

The report cites a 2010 evaluation of the Jackson County FTC, which found that parents participating in FTC were more likely to complete drug and alcohol treatment (73% vs. 44%). Children of parents involved in FTC spent fewer days in foster care: 264 days vs. 367 days. Participating parents were more likely to reunify with children, and reunifications occurred sooner. These parents were also less likely to have their rights terminated. Improved outcomes were estimated to save $5,593 in public funds per program participant, as the result of fewer re-arrests and shorter stays in foster care for their children.

The third section of the report discusses mediation and restorative justice approaches, as they have been applied to child welfare cases. They include New York City's Child Permanency Mediation Program, Yellow Medicine County, Minnesota's Circle Program, which is based upon a restorative justice model, and the National Council of Juvenile and Family Court Judges' Preliminary Protective Hearing Benchcard, which has been used by judges in Multnomah County, OR.

In a comparison study of the PPH Benchcard, cases involving judges who used the tool resulted in an increase in the percentage of children going home after the first hearing, from 12% to 30% in Multnomah County. The study also found an increase in rates of reunification in cases where the Benchcard was used.

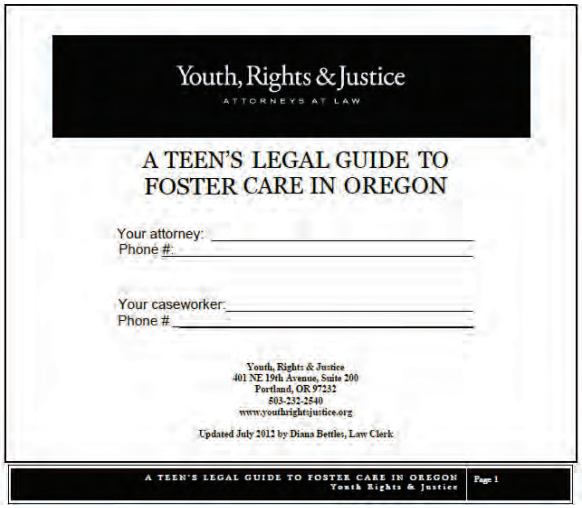
Also included in the report are examples of court-based programs in which the courts monitor the quality of child welfare agency activities and partnerships between legal organizations and child welfare agencies. The report discusses cost savings that were actually realized or projected savings from various approaches. The report can be found on-line at: http://www.firstfocus.net/sites/default/files/Court-Based%20Child%20Welfare%20Reforms%20Final%208-7-2012.pdf. ●

What are the Rights of a Teen in Foster Care?

By Diana Bettles, Law Clerk

Youth largely have no choice when they are placed in foster care. Taken from their home, their parents and sometimes their siblings, the youth blindly navigate the child welfare system with little understanding of the process and their involvement. The system is viewed as a super agency, all powerful and encompassing to youth, who similarly view themselves as very small, somewhat insignificant, pieces to be placed and controlled by the agency. The foster home is unfamiliar, different and houses other youth who have also found themselves unwillingly uprooted.

Yet youth in foster care have a voice. Youth in foster care have rights; including the right to their basic needs, teens also have the right to be informed about their case and the right to discuss their case with an attorney. What other rights do youth have? *A Teen's Legal Guide to Foster Care in Oregon* provides answers to those questions, and others about the child welfare system. The guide provides a resource to youth navigating the child welfare system. It describes the individuals involved in and making decisions about the youth's welfare, explains the legal steps necessary in attempting to reunify the youth with their families, educates them about their rights and empowers them to ask questions about their situation. See the Guide here: http://youthrightsjustice.com/media/1987/Teens%20Legal%20Guide%20to%20Foster%20Care%20in%20OR.pdf ●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Updated July 2012 by Diana Bettles, Law Clerk

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Fair Sentencing for Youth Act Signed into Law in California

California Governor Jerry Brown has signed into law Senate Bill 9, the Fair Sentencing for Youth Act, which allows youth sentenced to juvenile life without parole to petition the courts to review their sentence after they serve 15 years in prison. On review their sentences can be lowered to 25 years if they demonstrate remorse and are taking steps towards rehabilitation. ●

Project POOCH

By Jaclyn Leeds, Law Clerk

Founded by Joan Dalton in 1993, Project POOCH is a non-profit, 501(c)(3) organization that has successfully paired youths incarcerated at the MacLaren Youth Correctional Facility in Woodburn, Oregon, with homeless shelter dogs. Per the organization's website: "Youths (guided by professionals) learn to train the dogs, groom them, and find them new adoptive 'forever homes.' The dogs leave the program ready to be great pets, while their trainers re-enter the community with new job and personal skills and increased compassion and respect for all life."

Dr. Sandra Merriam of Pepperdine University surveyed POOCH participants and reported that "[p]rogram youth . . . felt they had changed and improved in the areas of honesty, empathy, nurturing, social growth, understanding, self-confidence and pride of accomplishment." Dr. Merriam found zero recidivism among the POOCH youth. Project POOCH takes two high at-risk populations—dogs on euthanasia lists and incarcerated males—and provides both an opportunity to learn from each other. For more information, please visit: www.pooch.org. ●

Case Summaries

State v. C.S., 252 Or App 509, ___ P3d ___ (Sept. 26, 2012) (Duncan, J.) (Coos Co.) http://www.courts.oregon.gov/Publications/docs/A146043.pdf

Summary by Eleanor Garretson, Attorney

A 13 year old youth appealed a trial court judgment denying her motion to withdraw an earlier admission to first-degree theft. At the initial plea hearing the youth was unrepresented by counsel and admitted to an allegation of the theft of a gym bag. The attorney appointed to represent the youth at her restitution hearing filed a motion to partially withdraw her admission. The youth claimed that she had meant to admit to the theft of two shirts in the gym bag but not the bag or all its contents. The trial court denied the motion and ordered restitution for all the items in the gym bag.

The youth appealed, arguing that the court erred in concluding that she had voluntarily, knowingly, and intelligently waived her rights to counsel and to trial. She asserted that under the test set out in *State v. Meyrick*, 313 OR 125, 831 P2d 666 (1992), the trial court's colloquy with the youth before she waived her rights was inadequate to inform her of the disadvantages of not being represented by counsel.

The Court of Appeals agreed with the state that the youth had failed to preserve her argument when she made the motion to partially withdraw her admission to the theft. Youth's counsel at the motion hearing made no argument that her earlier waiver of counsel as not knowing, voluntary, and intelligent but limited the argument to what specifically she had intended to admit. When the court had cut off youth's counsel and stated that the basis of the motion was solely about whether she

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admitted to stealing all the contents of the gym bag and not about her rights, youth's counsel had replied "okay." At no point did counsel indicate that the motion also addressed the validity of the youth's waiver of counsel.

The Court of Appeals also rejected the youth's second argument that there was a plain error on the face of the record. The court determined that while the youth asserted an error of law, the point was reasonably in dispute so the trial court's decision did not constitute a plain error. At the plea hearing, the trial court had engaged in a colloquy with the youth concerning the waiver of her rights. Relying on neurological studies of adolescent brains, the youth argued that, given the age of the youth, the court should have refrained from asking leading questions and have had the youth repeat back her understanding of the rights waived. The Court of Appeals found that this position would extend the *Meyrick* requirement in situations involving adolescents facing charges, and thus could not conclude that there was a plain error of existing law.

***State v. Fuller*, __Or App__,__P3d__(September 26, 2012)(Armstrong, P.)(Multnomah Co.)** http://www.publications.ojd.State.or.us/Publications/A147724.pdf

Summary by Si Nae Solomon, Attorney

The Defendant appealed a judgment that convicted her of two violations. She assigned error to the trial court's denial of her motion to be tried by a jury and proved guilty beyond a reasonable doubt. She also assigned error to the admission of hearsay evidence. The Court of Appeals reversed and remanded on Defendant's first assignment of error and did not reach Defendant's second assignment of error.

Defendant was charged with two misdemeanor offenses, third-degree theft, ORS 164.043, and attempted first-degree theft, ORS 164.055 because of an incident where she was accused of shoplifting. The Defendant was arrested on the charges and incarcerated for a short amount of time. The State chose to prosecute the charges as violations at the time of arraignment rather than misdemeanors. The Defendant's motion for a jury trial and to be proved guilty beyond a reasonable doubt was denied. The Defendant was found guilty by the trial court on a preponderance of the evidence and fined $300 for each conviction.

The Defendant argued that her prosecution and conviction of the charges had the characteristics that made the prosecution a criminal prosecution. The State argued that the Defendant was not entitled to the protections she was seeking because it was a violation proceeding and not a criminal prosecution.

Under ORS 161.566(1), the State can choose to treat most misdemeanors as Class A violations if the State makes that election at or before the Defendant's first appearance on the charge. If the State chooses to treat the misdemeanor as a Class A violation, then the violation is tried without a jury and the prosecution has the burden of proving the charge only by a preponderance of the evidence. ORS 153.076(1),(2).

The Court identified five factors that determined whether the prosecution

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of a defendant on a specific charge subjects the defendant to a criminal prosecution. The five factors are the type of offense, the nature of the prescribed penalty, the collateral consequences associated with conviction, the significance of the conviction to the community, and the pretrial practices associated with an arrest and detention for the offense. *Brown v. Multnomah County Dist. Ct.*, 280 Or 95, 102-108, 570 P2d 52 (1977).

The Court stated that the type of offense and its significance to the community can be analyzed together. The type of offense favors treating the prosecution and conviction of an offense as a criminal prosecution if the offense was a crime at common law or when the Oregon Constitution was adopted or if it involves *mens rea* elements. *Brown*, 280 Or at 102. The significance to the community factor is dependent on the type of stigma that our society places on a conviction for the offense. *State v. Thomas*, 99 Or App 36, 780 P2d 1198 (1989). The Court applied both factors in this case and concluded that society has considered theft to be a crime for a very long time that predates the common law and our constitutions. Further, a conviction for theft has always involved proof of *mens rea*. The penalty factor focuses on the penalty that the defendant is exposed to by prosecution for the offense. *State v. Page*, 200 Or Ap 55, 62, 113 P3d 447, *rev den*, 339 Or 450 (2005). Under ORS 161.566(2)(b), a defendant convicted of a misdemeanor that is prosecuted as a violation is subject to the same fine that a defendant would have been subject to if the State prosecuted the offense as a misdemeanor.

The Court did not discuss collateral consequences of the violation convictions because the Defendant admitted that a violation conviction for theft does not cause any collateral consequences that indicate a criminal prosecution.

The pretrial practices associated with arrest and detention for theft are the same regardless if the offense is prosecuted as a misdemeanor or as a violation. As a result, the Court concluded that the pretrial procedures favor treating the prosecution and conviction of the Defendant of the theft offenses as criminal prosecutions.

The Court held that as a result of the above factors and the legislature's decision to reverse the default principle for the prosecution of misdemeanors, that is to prosecute them as misdemeanors rather than violations unless the State elects otherwise, the prosecution and conviction of the Defendant of third-degree theft and attempted first-degree theft as violations pursuant to ORS 161.561 has too many characteristics of a criminal prosecution to deny Defendant the protections of a jury trial and an evidentiary standard of proof of the offenses beyond a reasonable doubt.

State v. White, 08FE1173MS, 2012 WL 5286166 (Or. Ct. App. Oct. 17, 2012) (Sullivan, J.) (Deschutes Co.) http://www.publications.ojd.state.or.us/docs/A146936.pdf

The State appealed a pretrial order that excluded expert testimony regarding delayed reporting of abuse. Defendant was charged with first-degree unlawful sexual penetration, first-degree rape, first-degree sexual abuse, first-degree criminal mistreatment, unlawful use of a weapon, and strangulation. The trial court ruled that, because Defendant did not intend to use the complainant's five-year delay in reporting the alleged abuse to impeach her credibility, expert testimony regarding "delayed reporting" was not relevant to any fact at issue in the case. The State argued that the expert testimony was relevant to explain possible reasons for the delay and to counter a possible inference that the complainant's delay in reporting the alleged abuse means that it did not occur.

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The Court clarified that *State v. Perry*, 347 Or. 110, 218 P3d 95 (2009), which held that expert testimony was relevant in cases where a defendant indicates that he intends to use the delay to impeach the victim's credibility, did not preclude the finding here where a defendant does not intend to call attention to the delay, but it nonetheless remains an inherent weakness in the State's case. The Court of Appeals reversed and remanded, holding that the trial court erred in excluding the evidence as irrelevant.

State v. Wall, 252 Or App 435 (2012), (Sept. 26, 2012) (Brewer, J.) (Douglas Co.)

http://www.publications.ojd.state.or.us/docs/A146689.pdf

Adult Defendant appeals a judgment of conviction, following conditional guilty pleas, for driving under the influence of intoxicants (DUII), and recklessly endangering another person. In her sole assignment of error, Defendant challenges the trial court's denial of her motion to remove a leg restraint that had been placed under her clothing for appearance at trial.

A trial judge has "the discretion to order the shackling of a defendant if there is evidence of an immediate and serious risk of dangerous or disruptive behavior." *State v. Moore*, 45 Or App 837, 839-40, 609 P2d 866 (1980). In exercising that discretion, the court must receive and evaluate relevant information and must make a record allowing appellate review of its decision. *State v. Kessler*, 57 Or App 469, 473 (1982). Although a sheriff's deputy or a prosecutor may provide helpful and necessary information, the trial court must make an independent determination that restraint is justified. *State v. Bird*, Or App 74, 77, 650 P2d 949, *rev den*, 294 Or 78 (1982). Here, the State failed to establish any risk that the defendant would be disruptive or dangerous, beyond noting the jail staff's preference for her to be shackled. While she had 13 prior felony convictions, she had never been convicted of escape. The State's argument focused on the fact that the restraint was not visible, and therefore prejudice was not as significant and should not be presumed.

The Court squarely addresses the issue of whether there is a difference in standards for determining the propriety of ordering a defendant to wear a nonvisible, as opposed to a visible restraint, reaching the conclusion that for the purposes of the threshold showing that is required before restraints may be lawfully imposed, "the distinction between visible and nonvisible restraints is, indeed, one without a difference."

There are three foundations for the common-law and constitutional safeguards against the unfettered impositions of restraints on criminal accuseds: "(1) impingement on the presumption of innocence and the dignity of judicial proceedings; (2) inhibition of the accused's decision whether to take the stand as a witness; and (3) inhibition of the accused's consultation with his or her attorney." *State ex. rel Juv Dept v. Millican*, 138 Or App 142, 146-47, 906 2d 857 (1995), *rev den*, 323 Or 114 (1996). All three of these concerns apply whether or not the restraint is visible. Therefore, the Court finds that, regardless of the circumstances, the state must adduce evidence that would permit the court to find that the defendant poses an immediate or serious risk of committing dangerous or disruptive behavior, or that he or she poses a serious risk of escape, before the defendant may be restrained. The Court notes that, after making such a finding based on sufficient evidence in the record, the court may have more discretion to impose nonvisible, as opposed to visible restraints in certain circumstances and the application of harmless error principles may vary accordingly. However, based on the facts of this case and the lack of evidence presented by the State in the record, the trial court erred in denying Defendant's motion to remove her leg restraint.

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Look for Youth, Rights & Justice in the 2012 Willamette Week Give!Guide

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***State v. Sarich*, SC S059926** (Nov. 1, 2012) (De Muniz, J.)
http://www.publications.ojd.state.or.us/docs/S059928.pdf

The Supreme Court affirms a trial court's orders declaring Defendant's son, Z—a 19-year-old man who suffers from autism and developmental disabilities—not competent to testify at trial and excluding from evidence a video involving out-of-court statements and drawings made by Z. Defendant is charged with aggravated murder of Z's caregiver, and the State sought to introduce Z's testimony and evidence in order to prove Z's knowledge of the death of the victim.

At trial, the court concluded Z was not competent to testify because he could not discuss with particularity certain past events or individuals. The Supreme Court held this ruling to be correct because Z did not have sufficient ability to perceive, recollect, and communicate, and therefore it was "not worthwhile for [him] to testify."

The State also sought to introduce a video of Z allegedly directing investigators to the site where the victim was found, as well as four statements and eight drawings made by Z in the course of his interviews with the detective. However, there iss evidence that supports the trial court's conclusion that the probative value of the video was substantially outweighed by the danger that video would be unfairly prejudicial, would confuse the trial issues, and would mislead the jury. Therefore the Court finds that the trial court did not abuse its discretion in excluding the video under OEC 403. Because the State offered the video, Z's statements, and Z's drawings as a whole, and did not make specific arguments regarding each piece of evidence, the Court affirms the trial court's order excluding the statements and drawings as well.

***Mueller v. Auker*, 11-35351, 2012 WL 5328669 (9TH Cir. Oct. 25, 2012) (Trott, J.)**

The Muellers brought claims against the doctors, the hospital, the City of Boise, and the police officers, regarding the removal of Ms. Mueller from the operating room when her infant daughter underwent a medical emergency procedure for the treatment of meningitis. Ms. Mueller opposed the procedure, however, the doctor determined that it was necessary in order to save her from imminent danger of serious bodily injury, including the possibility of death.

The Court of Appeals finds that while the Muellers have a liberty interest in the "care, custody, and control of their child," the constitutional rights of parents step aside when the children are subject to immediate or apparent danger of harm. *Caldwell v. LeFaver*, 928 F. 2d 331, 333 (9TH Cir. 1991). In declaring the infant to be in imminent danger, the police officer was objectively reasonable in his reliance on the opinions of qualified medical professionals, and therefore he was entitled to qualified immunity from the lawsuit and from the Muellers' Fourth Amendment claim. This

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was an emergency situation where a hearing regarding termination of parental rights was not required.

The Court also finds that the district court did not err in admitting the doctor's expert testimony at trial, nor was there a valid 1983 claim against the hospital, because it did not become a state actor merely by complying with state law and reporting possible child neglect. Finally, the Court also dismissed claims by the Muellers regarding false reporting by the doctor, battery, inadequate jury instructions, denial of a motion for a new trial, failure to train officers by the City of Boise, grant of a protective order, and class certification. ●

Resources

Kids in Solitary

The American Civil Liberties Union and Human Rights Watch has released its study: "Growing Up Locked Down – Youth in Solitary Confinement in Jails and Prisons Across the United States." This study documents the truly heart-breaking stories of the kind of torture our children are subjected to in the criminal justice system. If you need a good cry – or maybe just the motivation to keep on fighting injustice click here: http://www.hrw.org/reports/2012/10/03/growing-locked-down

The 8TH Amendment Evolves

For an excellent discussion of the Supreme Court's shift in Eighth Amendment analysis of sentencing practices involving juveniles, see: "The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence" by Marsha Levick, Jessica Feierman, Sharon Messenheimer Kelley, Naomi E.S. Goldstein and Kacey Mordecai in 15 U. Pa. J. L. & Soc. Change 285 (2012).

Preventing Crossover from Foster Care into the Delinquency and Criminal Justice Systems

Hear the voices of foster care alumni in the Congressional Coalition on Adoption Institute's 2012 Foster Youth Internship Report – "Hear Me Now". This compilation includes individual foster youth reports on:

- Preventing Crossover from Foster Care into the Criminal Justice System
- Educating Congress: The Value of Investing in Post-Secondary Education for Foster Youth
- Age of Accountability
- Care for Youth in Care: The Need for High-Quality Foster Parents
- Transitional Foster Youth, Post-Secondary Education & Mentor Programs
- Life's Transitions Do Not Occur Overnight
- Foster Youth for Sale
- AfterCare.gov: An Information Database for Foster Youth
- Putting Home Back in Group Home
- Leaving No Indian Child Behind
- Having Options Provides Empowerment
- Lifelong Connections: You Determine My Fate
- A Pill for Every Problem: Overmedication and Lack of Mental Health Services among Foster Youth

Access the Report at: http://www.ccainstitute.org/images/stories/foster/fyi/final%20fyi%20report%20high%20resolution.pdf

YRJ Updates Guides for Clients

Thanks to the work of YRJ's summer law clerks, guides that are designed to help inform clients about the law and the system(s) they are involved in have been updated and are available on the YRJ website. The guides are copyright free and attorneys are encouraged to access them for their clients. The updated guides include:

- *A Family's Guide to the Child Welfare System adapted for Cases in Oregon Juvenile Courts*;
- *A Teen's Legal Guide to Foster Care in Oregon*;
- *What Your Attorney Wants You to Know About Your Juvenile Delinquency Case.*

And a new guide for youth starting on probation:

- *What Your Attorney Wants You to Know Now That You are on Probation* ●