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U.S. Supreme Court Action Affects Juvenile Justice

By Rochelle Martinsson and Adam Shelton, Law Clerks

Part One: U.S. Supreme Court Grants Review of Two Juvenile Life Without Parole Sentences

In what appears to be a departure from its position in *Roper v. Simmons*, the U.S. Supreme Court has granted review of two juvenile life without parole sentences. In *Roper*, the Court declared capital punishment for juveniles to be unconstitutional, but implied that life without parole sentences for juveniles are not. By reviewing the decisions in *Graham v. Florida* and *Sullivan v. Florida*, both of which involve defendants who were sentenced to life without parole when they were juveniles, the Court may have signaled a willingness to alter its position on this highly controversial issue.

Both *Graham* and *Sullivan* are appeals from the District Court of Appeal of Florida for the First District. The cases raise similar issues with regard to juvenile life without parole sentences, but will be argued separately during the Court's Fall term, beginning October 5, 2009. The fact that the Court decided to hear the cases separately supports the possibility that it is open to changing its previous position. It may have intentionally left itself the flexibility to find that one case does not represent an appropriate vehicle for change while the other does. Regardless of the outcome, the Court's decisions in *Graham* and *Sullivan* are sure to bear significantly on the well being of juvenile defendants in the United States.

At the age of 17, Terrance Graham was given a life without parole sentence when a Florida court found he had violated his probation. Graham had previously been convicted of armed burglary and attempted robbery and was sentenced to three years of probation. Later allegations leading to his probation violation and life without parole sentence pertained to an armed home invasion robbery. Citing Graham's "escalating pattern of criminal conduct," the trial court found that it could not deter Graham or help him any further, and that it therefore needed to focus on protecting the community from Graham's actions.[1] The Florida appellate court affirmed the trial court's imposition of a life without parole

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sentence.

In response to Graham's argument that *Roper* should apply to his case, the appellate court distinguished *Roper*, commenting that "death is different" [than a life sentence].[2] Graham's attorney on appeal to the U.S. Supreme Court is John S. Mills of appellate litigation firm Mills, Creed & Gowdy. The specific question being considered by the U.S. Supreme Court in Graham's case is whether the Eighth Amendment's ban on cruel and unusual punishments prohibits a life without parole sentence for a juvenile convicted of a non-homicide.

Joe Sullivan's appeal to the U.S. Supreme Court is more narrowly tailored. It specifically raises the question of whether a life without parole sentence on a *thirteen-year-old* for a non-homicide violates the Eighth Amendment's prohibition on cruel and unusual punishments. At the age of 13, Sullivan was sentenced to life without parole when convicted of the rape of an elderly woman. The Florida appellate court affirmed Sullivan's sentence without issuing an opinion, and the Florida Supreme Court denied review.

Sullivan's attorney on appeal to the U.S. Supreme Court is Bryan A. Stevenson of Equal Justice Initiative, a non-profit organization providing legal representation to indigent defendants and those who have allegedly been denied "fair and just treatment in the legal system."[3] A major focus of Stevenson's appeal is the "freakishly rare" imposition of life without parole sentences on 13 year-olds convicted of non-homicide crimes, as evidence of the inappropriate nature of such a punishment.

The arguments set forth in the petitions for review are similar in *Graham* and *Sullivan*. Mills and Stevenson both urge the U.S. Supreme Court to find that life sentences without parole for juvenile offenders convicted of non-homicide crimes are in violation of the Eighth Amendment. Mills and Stevenson also seem to be in agreement on several points: that juveniles should be treated differently from adults; that juvenile offenders are more deserving than adult offenders of forgiveness for their misbehavior; that the international community condemns the practice of imprisoning juvenile offenders for life; that there is a national consensus against imposing life without parole sentences on juveniles guilty of non-homicide crimes; and that life without parole sentences imposed on juveniles guilty of non-homicide crimes are ethically suspect.

It is unclear how much weight the U.S. Supreme Court will give to any of these or other arguments, but what is clear is that the decisions in Graham and Sullivan will significantly affect how juvenile offenders are adjudicated in the U.S. If the Court finds that either case presents a viable opportunity to unqualifiedly invalidate the practice of imposing life without parole sentences on juveniles convicted of non-homicide crimes, it will be an enormous victory for children and juvenile rights activists.

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[1] See *Graham v. State,* 982 So. 2d 43, 3-4 (2008) at http://www.scotusblog.com/wp/wp-content/uploads/2009/05/08-7412_lower_op.pdf.
[2] Id at 6.
[3] See http://eji.org.

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Part two: The Practical Effects of *Louisiana v. Montejo* on Juveniles

The *Miranda*[1] case and its progeny demonstrate a rarely seen jurisprudential power: that of establishing bench-opinions as long-lasting, fundamental American law. *Miranda* fostered a new era of criminal procedure and practice with a lengthy and complicated 5th Amendment interpretation, which has been further defined and clarified by subsequent case law.

Despite a myriad of television and film portrayals of the judicial system, it is unclear exactly how the public perceives and understands *Miranda* rights. Even more unclear is how the millions of juveniles involved with the criminal justice system each year understand those rights. Studies show that youth, and children in particular, have a difficult time asserting basic rights in many settings, as they are often eager to please adults or are the subject of adult intimidation. Unfortunately for these youth, that difficulty in asserting rights just became a lot harder.

On May 26th, the U.S. Supreme Court issued a 5-4 opinion in *Louisiana v. Montejo*[2], expressly overruling the nearly 25 year-old *Michigan v. Jackson*[3] decision. *Montejo* simultaneously removes the presumption that waivers to the 6th Amendment right to counsel are invalid, and eviscerates the practical distinctions between 5th and 6th Amendment rights to counsel. The Court's holding has far-reaching implications for police, attorneys, and any defendants involved in adversarial proceedings with the state.

Miranda and its "progeny" must be understood in order to appreciate the effect the *Montejo* decision has. *Miranda* required officers to inform accused persons of their rights to remain silent and to have an attorney present. *Miranda* held that if an accused indicates a desire to remain silent or to have an attorney present, the interrogation must stop.[4] The Court held these rights derived from the 5th Amendment, as necessary implied components of the right against self-incrimination.[5]

In 1981, the Court decided *Edwards v. Arizona*[6], which addressed what constituted a valid waiver of the 5th Amendment rights to remain silent and to have an attorney present. In that case, the defendant was brought into police custody, invoked his 5th Amendment right to silence, and indicated he wanted to speak to an attorney. The questioning stopped that evening, but detectives returned the next day and told the defendant he had to talk. The defendant again stated that he did not want to talk without a lawyer, but the detectives convinced him to answer questions. The Court held that while a defendant can make a valid waiver of 5th Amendment rights under *Miranda*, that waiver must be completely voluntary, intelligent and knowing. The Court also held that it is the burden of the state to prove by a preponderance of the evidence that such a waiver occurred. *Edwards* reaffirmed prior holdings that if a defendant invokes his *Miranda* rights, questioning **must** stop, and that the only way a defendant can thereafter make a valid waiver is to approach or talk to the officers on his own initiative. The Court was not deciding a 6th Amendment issue[7] in *Edwards*, but the opinion would have importance for 6th Amendment cases to come.

In *Michigan v. Jackson*[8], the Court clarified the protections of the 6th Amendment right to counsel. In that case, the defendant was charged with murder, and at his arraignment he requested counsel. The next morning, detectives obtained statements from him before he was able to consult with an attorney. The Court applied the *Edwards* logic on 5th Amendment invocations, holding that the same protections apply to a request for counsel at arraignment under the 6th Amendment.[9] The state attempted to argue that a 6th Amendment invocation of the right to counsel only applied at formal legal proceedings, and not subsequent interrogations with police.[10] The Court rejected this view, noting that the 6th Amendment right to counsel at post-arraignment interrogations required at least the same protections that a 5th Amendment invocation would provide.[11]

The Court also held that the waiver analysis should be the same as in *Edwards*, that the waiver must be voluntary, knowing and intelligent.[12] Using a direct analogy to the *Edwards* logic, the court held that in order to make a valid waiver **after** invoking the right to counsel (this time under the 6th Amendment), a defendant must initiate communication with police. The Court stated that "if police initiate interrogation after a defendant's assertion… of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."[13]

Twenty-five years later, the Court has reversed its decision in *Edwards* and denigrated the plain meaning of the 6th Amendment. The issue before the Court on appeal was whether the defendant, who stood mute at his arraignment where counsel was appointed for him, invoked his 6th Amendment right to counsel.[14] The Court did not directly answer this question. Instead, it insisted that the only question in *Jackson* and before the court in *Montejo* was whether 6th Amendment waivers after arraignment are presumptively invalid.[15] First, this is an

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Legislature Adjourns

By Maura Roche and Mark McKechnie

Legislature Adjourns

After a session dominated by budget issues, the 75th Oregon Legislative Assembly adjourned on June 29, 2009. The Legislature was able to avert the most devastating cuts to child welfare, juvenile justice, the courts and public defense by raising approximately $1 billion in new revenue. In addition, a number of bills of interest to juvenile practitioners were passed.

Juvenile Delinquency Legislation

· SB 512-Pre-adjudication Notice to Schools: PASSED

JRP participated in an Oregon Law Commission work group throughout the interim to modify a law passed during the 2008 Supplemental Session, SB 1092, which requires schools to be notified if a student is charged with a delinquent offense. The original legislation, which was rushed through the "short" Session, was riddled with drafting errors and overly broad language. The law would have been very intrusive, but would not have greatly improved safety. When at the end of the "short" Session it was clear that consensus on the law could not be reached, JRP developed an amendment to require the Oregon Law Commission to review the legislation and prepare a report to the 2009 Session with possible changes to improve the bill.

The Oregon Law Commission provided a list of such changes, and an agreement was eventually reached that was satisfactory to all concerned. The list of crimes that would trigger notice is now far narrower than in the original bill, and JRP was able to build in safeguards to protect youth from self-incrimination.

· HB 2477-Invasion of Personal Privacy: PASSED

Rep. Huffman introduced a bill in response to a high profile case in his district, where the perpetrator was installing "potty cams" in restrooms and then uploading the images to a website in real time. The goals of the legislation were to increase penalties, require sex offender reporting, and modify some provisions of existing law to address exceptions (e.g., family members taking "bath tub" photos of infants/toddlers).

JRP testified on the bill in the House Judiciary Committee, seeking to modify specific provisions as they applied to juveniles. JRP was also invited to participate in a workgroup led by Reps. Stiegler and Huffman, whereby an agreement was reached to allow juveniles to be charged with a misdemeanor on a first offense, and to remove sex offender registration for juveniles. Before being passed, the bill was amended to make the crime of invasion of privacy, regardless of age, a Class A misdemeanor instead of a felony. The sex offender registration provisions were dropped, due largely to the fiscal impact.

Treating Juveniles Differently

· HB 2536-NOT PASSED

HB 2477 was one of two bills this session that JRP was able to modify to treat juveniles different from adults. The other bill, HB 2536 would have elevated Robbery II to Robbery I when crimes are committed with "look-alike" fire arms.

JRP testified in the House Judiciary Committee about concerns regarding the bill, including how it might disproportionately impact youth who are more likely than an adult to use a "toy" gun in the commission of a crime. Another of JRP's concerns was that while first time offenders charged with Robbery II are potentially eligible for probation or non-Measure 11 sentences, this option is not available to defendants convicted of Robbery I. JRP was successful in having the bill amended to apply only to perpetrators over the age of 18. However, the bill failed, resulting in no change to robbery law in this regard. Nonetheless, JRP made significant progress this session advocating the notion that there should be further statutory distinctions regarding the treatment of juveniles and adults.

· HB 309-Recordation in Law Enforcement Facilities: PASSED

This bill was a top priority for the Oregon Criminal Defense Lawyers Association this session. The bill requires a custodial interview by peace officers in a law enforcement facility to be electronically recorded if the interview is conducted in connection with the investigation of aggravated murder, crimes requiring imposition of mandatory minimum sentencing, or crimes requiring adult prosecution of 15-, 16- or 17-year-old offenders.

JRP issued a Floor Letter in the Senate supporting the bill and generally assisted OCDLA with the bill's passage.

· HB 2175-Interstate Transfer of Juveniles: LAW

This bill modifies the class of non-Oregon convictions or juvenile delinquency adjudications that require sex offender reporting. It authorizes prosecution for a sex offender's failure to report following the move to a new residence, and requires an administrator to make diligent efforts to ensure that the state in which a delinquent juvenile resides notifies the youth of the obligation to report.

JRP testified on the bill and raised concerns about youth knowing what is required of them with regard to reporting. JRP also offered amendments to the bill in the

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House Judiciary Committee, which were adopted but later discovered to violate the Interstate Compact on Juveniles. The bill was modified again by the Senate before ending up in conference committee.

Juvenile Dependency Legislation

· HB 2050 Increases Time Required to Establish Non-Related Foster Care Relationship: PASSED

This bill increases the time required to establish a non-related foster parent caregiver relationship from six to twelve months. JRP testified in Committee and voiced its concern that the bill represents the third or fourth adjustment to the time requirement. JRP further expressed concerns about any change that could limit permanency options for children in foster care. The Oregon Foster Parents Association agreed, but the bill enjoyed strong support from DHS and Legislators.

· HB 3114-Psychotropic Medications for Foster Kids: PASSED

This bill, which was spearheaded by Rep. Kotek, requires DHS to develop procedures for assessment of all children in foster care by a qualified mental health professional or licensed medical professional, prior to issuance of a prescription for more than one psychotropic medication. It also requires annual review of prescriptions by a licensed medical professional, or a qualified mental health professional other than the prescriber, when a child in foster care has more than two prescriptions for psychotropic medications, or when a foster child under six years of age is prescribed any psychotropic medication. Additionally, the bill prohibits age inappropriate prescriptions for psychotropic medication.

JRP testified in support of the bill, and participated in a work group to address concerns of DHS and mental health care practitioners. Adjustments with regard to a child's age and the number of drugs prescribed were made, and the bill advanced.

· SB 630 –Minority Overrepresentation in Foster Care: PASSED

This bill creates the Task Force on Disproportionality in Child Welfare Foster Care. It sunsets the task force on the convening date of the next regular biennial legislative session, when the law will be effective upon passage. JRP testified on the bill and urged the State to take advantage of the substantial research and information already available regarding disproportionality in the foster care system. JRP also expressed the hope that DHS and the Task Force can focus on quickly implementing strategies to reduce the significant overrepresentation of Native American and African American children in foster care.

Budget Note for School Transportation

Funding for the implementation of 2005's HB 3075 continues to be a challenge for DHS and school districts. The law allows children to stay in the same school after being placed in foster care or moved to a new foster placement, if the court finds that it is in the child's best interests. In 2009, the Oregon Department of Education issued a memo to school districts indicating districts are responsible to transport children who remain in the same school after moving outside the district in cases where a court has made the required best interests finding. JRP proposed and DHS agreed to a budget note confirming that $700,000 in System of Care flexible funds are available to pay for school transportation under ORS 339.133(5), to leverage school district funds, or to provide school transportation to foster children under the statute.

Budget

The 2009 Legislature was able to avert devastating cuts to child welfare, juvenile justice, the courts, and public defense by raising approximately $1 billion in new revenue through tax increases on higher income individuals and profitable corporations, and fee increases through various state agencies, including the courts. Opponents have vowed to try to repeal the tax increases through ballot measures, which would require the Legislature to implement much deeper cuts across state agencies (approximating $ 1 billion) that would endanger children, the disabled, seniors, and public safety.

· HB 5040-Oregon Public Defense Services Budget

The 2009 legislative appropriation leaves OPDS with a potential deficit of $10.6 million to cover the projected public defense caseload for the full 2009-11 biennium. OPDS informed the Legislature that it will have to cease funding trial-level representation approximately five weeks before the end of the biennium (during May 2011) if the additional funds are not appropriated before that time.

Legislators are aware that OPDS requires an additional appropriation before that time and have directed OPDS to report to the 2010 legislature regarding the projected deficit at that time. One potential source of additional funding would be revenue generated by HB 2287 (the court fee measure), which could amount to $3.6 million pre-supplemental session (Feb 2010) and $6.5 million post-supplemental session (March 2010).Total restoration via HB 2287 would be $10 million, just $600,000 short of the estimated need.

Trauma of Removal and Foster Care Placement
By Noah Barish, Law Clerk

Several new studies suggest that children who are removed from their homes and placed in foster care experience significantly worse long-term outcomes than similarly maltreated children who remain in the home. This article describes the effects of removal on children and reviews recent scientific evidence detailing the long-term negative consequences of foster care placement.

Trauma of Removal

Theoretical research and expert opinion indicate that removing a child from the home causes serious trauma. Though informative, these findings are categorically different from the empirical studies discussed later in this article which actually examine outcomes for large groups of children placed in foster care. Many sources acknowledge that separating a child from a parent for even a relatively short time can have a devastating emotional and physical impact on the child.[1] For some children, separations may be experienced as a significant rejection or loss that affects the formation of attachments.[2] Children who are removed from parents often come to expect parental unavailability, which distorts adjustment to surrogate caregivers and the foster home environment.[3] Experts also note that disruptions in the parent-child relationship may "provoke fear and anxiety in a child and diminish his or her sense of stability and self."[4] Thus, by removing children from parents, removal undermines children's attachments, identity, and subsequent caregiving relationships.[5]

For children in homes where there is domestic violence, the consequences of removal to foster care can be more severe. One court noted expert testimony that "if a child is placed in foster care as a result of domestic violence in the home, he or she may view such removal as 'a traumatic act of punishment… and [think] that something [the mother] has done or failed to do has caused this separation.'"[6] Additionally, for children already experiencing separation anxiety, removal from a battered parent's custody will serve to further intensify those feelings by interrupting a positive attachment to the non-abusing parent.[7] Another expert concluded the removal heightens the child's sense of self-blame, and that children exposed to domestic violence are at a significantly above-normal risk of suffering separation anxiety disorder if separated from their mother.[8]

The impact of removal from a parent also varies with age. One expert declared, "[c]hildren have a built in sense based on the urgency of their instinctual and emotional needs . . . . Emotionally and intellectually, an infant or toddler cannot stretch her waiting more than a few days without feeling overwhelmed by the absence of her parents. For children under the age of five years, an absence of parents for more than two months is intolerable. For the younger school-age child an absence of six months or more may be similarly experienced."[9] Another expert noted that "when a young child is separated from a parent unwillingly, he or she shows distress . . . . At first, the child is very anxious and protests vigorously and angrily. Then he falls into a sense of despair, though still hypervigilant, looking, waiting, and hoping for her return . . . ."[10]

Harm of Foster Care Placement

Empirical research identifies certain long-term effects associated with removal and foster care placement. For example, a study of 160,000 children in California using administrative data found lower delinquency rates on average for children who remained at home, especially for those who received in-home services.[11] Additionally, a study of over 9,000 women in California found that a history of out-of-home foster care placements are associated with a broad range of adverse psychosocial outcomes, including mental health problems, poor substantive health, smoking, obesity, low educational attainment, living in poverty, and use of public assistance in adulthood.[12] Finally, a study of over 700 children found that instability in foster care placement has a significant negative impact on behavioral well-being.[13]

Despite these findings, child welfare researchers continued to disagree about whether abused and neglected children benefit more from remaining with parents or being placed in foster care.[14] Some researchers find that children removed to foster care fare better than those who remain in the home. For example, one prospective study compared over 90 children split into three different groups: children who remained at home, children who were removed to alternative care, and children who remained at home despite a social worker's decision to remove them. The study measured children's quality of life at the time of the intervention and six months afterward. Results revealed that the quality of life of the children who were removed from home had im-

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proved; the quality of life of the children who remained at home in accord with the workers' decisions remained roughly the same; and the quality of life of the children for whom the decision to remove was not implemented actually declined. Researchers concluded that children at risk may fare better in an out of home placement than remaining at home.

Other research results also support the notion that placing children in foster care may actually be preferable to reunification with parents. One series of studies examined the effects of reunification with birth parents after children spent at least five months in foster care. Initially, children who were selected for reunification demonstrated fewer behavioral problems than children who did not reunify.[15] But, researchers found that children who reunified subsequently deteriorated, demonstrating more self-destructive behavior, substance abuse, and total risk behavior than children remaining in foster care.[16] Overall, the effects of reunification were complex; researchers found that children who reunified experienced lower perceptions of social isolation but also suffered increased stress caused by family dysfunction and instability.[17]

Considering these mixed results, many researchers have lingering methodological concerns with existing research. For example, researchers fear that negative outcomes for children placed in foster care could be attributed to the abuse or neglect already suffered in the home, not to the experience of removal and foster placement.[18]

Several recent studies now advance previous research by explicitly comparing outcomes for children placed in foster care against outcomes for children who remained in the home despite maltreatment. These studies indicate that removal and foster care placement, not other pre-existing characteristics, cause long-term negative outcomes for children placed in foster care. Overall, these studies more strongly than ever demonstrate the traumatic effects of removal and placement.

One study, conducted by researchers from the University of Minnesota, compared 189 children divided into three groups: those who were maltreated and placed in foster care, those who were maltreated but remained in the home, and those who had not experienced foster care or maltreatment despite at-risk demographics similar to the other two groups.[19] The study tracked measures of children's behavior problems, including attachment, problem-solving, task-teaching, impulse control, emotional health, teacher reports, and psychopathology.[20] The researchers tested all children at pre-placement, release from care, and during high school at age 16.[21]

Findings from the study showed that children who were placed in foster care displayed higher levels of behavior problems than children who were maltreated but remained in their home.[22] Further, the children placed in foster care continued to exhibit higher levels of behavior problems even after they had left foster care, and the effect continued throughout adolescence.[23] The effect was even more drastic for children placed into foster care after kindergarten. Children placed in foster care at an older age exhibited an immediate increase in behavior problems, and the problems continued even after departure from foster care.[24] Finally, the study revealed that children placed in stranger foster care had significantly higher behavior problems than children placed in either familiar care (relative or family friend) or remaining at home.[25]

The authors of the study hypothesized that several factors may account for the traumatic effects associated with removal and out of home placement. First, the researchers proposed that foster care as an intervention exposes children to difficult developmental challenges. Second, they contended that weakness within the foster care system in providing comprehensive psychological services and in responding to the educational, social, and familial changes contributed to increased behavior problems. Finally, the researchers posited that the ambiguity of removal and foster placement with no delineated endpoint contributed to children's emotional difficulties.[26]

Another series of studies tracking thousands of children found huge increases in negative long-term outcomes for children placed in foster care compared to those remaining in homes despite maltreatment. In these studies, MIT economics professor Joseph Doyle, Jr. found that children on the margin of placement who were placed in foster care experienced drastically higher juvenile delinquency rates, adult arrest rates, teen motherhood rates, and unemployment rates than children experiencing similar abuse or neglect who remained in their homes.[27]

Part II of this article will provide a detailed explanation of Doyle's findings, review the statutory framework governing removal, and suggest concrete strategies for practitioners to advocate for family preservation instead of removal.

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National Conference Rallies Parent Attorneys

By Dover Norris-York, Pro Bono Attorney

History was made in Washington D.C. this May when close to 150 attorneys from around the country met to discuss representation of parents in dependency cases. The ABA Center on Children and the Law, put on the two-day conference entitled "Improving Representation in the Child Welfare System: The First National Parents' Attorneys Conference." It represented years of work by the National Parents' Counsel Organization, whose mission is "procedural and social justice for all families involved with child welfare systems, through legal, legislative, and policy advocacy." Toward that end, the conference provided a great combination of motivational speakers, practical skills workshops, and networking opportunities. As an attorney entering the field of juvenile dependency law, I benefited from all the conference had to offer. Here are some highlights:

· In the opening session, several people testified to the severe lack of justice within the child welfare system. Anecdotal stories described incidents leading to removal, which if they had occurred in more affluent families, would never have been reported, let alone investigated. Sharwline Nicholson, a mother and past domestic violence victim, spoke of her experience working with attorneys in her successful civil rights case against the New York child welfare department. *Nicholson v. Williams*, 344 F.3d 154 (2nd Cir. 2003). In New York, ninety-seven percent of children in foster care are nonwhite, resulting in a system of apartheid within the United States, in the view of Martin Guggenheim, Professor NYU Law School. The simple fact that her attorneys returned her phone calls led Ms. Nicholson to trust them, after having had an attorney in the dependency case who failed to learn anything about her situation from her or any other source.

· The final plenary speaker, Bryan Stevenson, a highly recognized death penalty attorney, described his experiences fighting the injustices of that system and efforts to raise public awareness. Mr. Stevenson argued that methods to increase public awareness about racial disparities in death penalty cases should be employed in child welfare cases. **Robin L. Wolfe**, who attended the conference from Portland, had this to say about Mr. Stevenson:

> *When Bryan Stevenson told Rosa Parks what his mission was, she said, "Boy, that is going to make you tired, tired, tired." Mr. Stephenson is the most phenomenal speaker I've heard.*

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Non-Custodial Parent Placement and Custodial Parent Relocation Remain Murky under the ICPC
By Jason Gershenson, Law Clerk

In its April 2009 article, *THE NEW ICPC: BETTER RECOGNITION OF PARENTS' RIGHTS?*, the Juvenile Law Reader highlighted problems with the current Interstate Compact on the Placement of Children (ICPC) and the controversial "new" ICPC, which will not become effective until it has been adopted by a critical mass of states. The current Compact is often criticized for its lack of clarity on procedures for sending a child to a parent in another state. Further, court decisions have blurred the line between situations where custody with a parent in another state is subject to the requirements of the ICPC. The issue of ICPC applicability arises both when a non-custodial parent residing in another state seeks custody of a child involved with the juvenile court, and when a custodial parent seeks to relocate to another state with a child involved with the juvenile court.

There are many situations in which it is clear that the ICPC applies (e.g., when a child is sent across state lines by a "sending agency" for a "placement"). ORS 417.200, Article II, *Interstate Compact on the Placement of Children: Guidelines for Placing Children Across State Lines*, DHS Handbook No. 9053 (6/2008) [available online at: http://dhsforms.hr.state.or.us/Forms/Served/DE9053.pdf]. The ICPC refers to interstate placements such as "family free or boarding home or a child-caring agency or institution." According to the DHS Handbook, "placement" includes foster care and arrangements prior to adoption. Oregon case law has found that a dependency court order placing a child with an out-of-state non-custodial relative is governed by the ICPC. *State ex rel. Juvenile Dept. of Curry County v. Campbell*, cite (the juvenile court's *knowledge* of a non-custodial grandfather's intent to move out of state after acquiring guardianship of his grandson yielded ICPC status).

Does the ICPC Apply to Change of Custody for a Nonoffending Out-of-State Parent?

Nationwide discrepancies in ICPC application are prevalent in the case of out-of-state parents. Some states consider a change in custody is a "placement" for ICPC purposes and others do not. The California Court of Appeals, in *In re John M.*, 47 Cal Rptr 3d 281 (2006), did not require an ICPC report prior to placing the child with the nonoffending father in Tennessee, because there was no foster care or pre-adoption placement. On the other hand, in *C.K. v. Dep't of Children and Families*, 949 So.2d 336 (2007), the ICPC was applied when a Florida court ordered a child to live with his nonoffending father in Washington.

Many child welfare agencies, including Oregon's DHS, interpret the ICPC to apply to out-of state non-custodial parents being given physical custody to resolve the safety concerns that led to the filing of the juvenile court case. Unfortunately for the non-custodial parent and child, in such cases a home study must be conducted by the receiving state before the sending state can place the child across state lines. Such home studies may take weeks, or even months, to complete, often causing the child to remain in stranger foster care for lengthy periods. See, e.g., Sankaran, Vivek S. "Out of State and Out of Luck: The Treatment of Non-Custodial Parents under the Interstate Compact on the Placement of Children." Yale Law & Policy Review 25, Fall 2006, 63.

Counsel for the out-of-state parent and the subject child may seek to make an end-run around the frustrations of ICPC compliance, by arguing that the ICPC does not apply in these cases. A number of courts have made such rulings, reasoning that the text of the ICPC does not require application to these situations, because allowing a parent to retrieve his/her child is not a "placement" covered by the ICPC. In *In re Alexis O.*, 2008 NH Lexis 122 (NH Oct. 29, 2008), the New Hampshire Supreme Court found that ICPC processes are not required for placement with a birth parent and imposing such a requirement would produce an anomalous result: for example, a state placing a child through the ICPC may have a duty to provide financial support for the child despite being in their parent's care. The court also held that its ruling was consistent with constitutional cases holding that a parent's fundamental liberty interest requires that a parent is presumed fit until found otherwise.

Fortunately, if and when it goes into effect, the new ICPC will clarify that placement out of state with a non-custodial parent does not require application of the ICPC process.

Is the Relocation of a Parent with Physical Custody a "Placement" under the ICPC?.

Due to confusion over the process of relocation under the current ICPC, parents with physical custody who seek to move their children across state lines are not treated uniformly either. Parents who

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RECENT CASE LAW AFFECTING PARENTS AND CHILDREN

Summaries Prepared by
Rochelle Martinsson and Jason Gershenson, Law Clerks

***DHS v. K.C.J.*, _____ Or App _____ (April 29, 2009)**

http://www.publications.ojd.state.or.us/A139884.htm

At issue was termination of Father's parental rights as to three children under the Indian Child Welfare Act (ICWA). The children, two, four, and five at the time of trial, were removed from their parents' care after Mother tested positive for methamphetamine use.

The family had been receiving services from their tribe and DHS for nearly six years, but had continued to exist in "crisis mode." The children suffered from not receiving appropriate medical and dental care.

Father was found to suffer from significant cognitive deficits and was diagnosed with a personality disorder. Father also had a significant criminal history and was unresponsive to services available to him and the family. Following the parents' separation and in light of the fact that Father had not made progress, DHS filed a termination petition, which the trial court granted.

On appeal, Father argued that DHS failed to prove his unfitness beyond a reasonable doubt and had not made active efforts to reunify him with his children, as required under ICWA. While DHS argued that not every finding to support termination must be established beyond a reasonable doubt, the Court of Appeals found that it is, in fact, what ICWA, as incorporated in ORS 419B.521(4), requires. Nonetheless, the Court found that DHS had met this standard on all pertinent issues and affirmed the trial court's termination of Father's parental rights.

***State ex rel DHS v. C.B.*, _____ Or App _____ (April 29, 2009).**

http://www.publications.ojd.state.or.us/A140247.htm

Mother appealed the judgment of the juvenile court regarding the validity of a DHS administrative rule that defines "relative" for purposes of placing a child in foster care to include adoptive parents of the child's biological siblings.

The juvenile court rejected Mother's argument that "relatives" should be limited to individuals biologically related to the child, but entered a judgment that did not alter the child's placement with a biological relative. Mother appealed, and DHS argued that the case was not justiciable, due to the fact that the juvenile court's judgment did not adversely affect Mother.

The Court of Appeals agreed with DHS and dismissed the appeal. The Court declined to comment on the juvenile court's decision concerning the validity of the challenged administrative rule.

***State ex rel DHS v. R. T., Sr.*, _____ Or App _____ (May 27, 2009).**

http://www.publications.ojd.state.or.us/A132701.htm

The Court of Appeals reversed a trial court's termination of parental rights. Mother and Father appealed, arguing the court erred in terminating their parental rights on the grounds that they were both unfit, and that Father had neglected the child.

The child was born six weeks premature, following a domestic violence incident between Mother and Father. The child's doctor found that upon delivery, the child demonstrated neonatal drug withdrawal symptoms. A clinical social worker evaluated the child and determined that he was at risk for reactive attachment disorder.

Although at the time of trial both parents had engaged in services and made significant progress, the state's psychologist testified to having diagnosed each with personality disorders and antisocial tendencies. The psychologist also testified that despite progress made by the parents, an immediate conclusion about whether they could care for the child was not possible. A social service specialist with DHS testified that the parents were incapable of making necessary changes within a time frame reasonable for the child.

On *de novo* review and after consideration of all the evidence, the Court of Appeals found that the state had not met its burden of proof with regard to the parents' fitness, and Father's culpability for neglect. Relying on ORS 419B.504, *State ex rel SOSCF v. Sullivan*, and *State ex rel Dept. of Human Services v. R. O. W.,* the Court found that the trial court erred in terminating the parents' rights based on unfitness, because the state had not proven by clear and convincing evidence that integration into their home was improbable within a reasonable period of time. Relying on ORS419B.506, the Court also found that the trial court erred in terminating Father's parental rights on alternative grounds, because the state had not proven neglect by clear and convincing evidence.

***Weismandel-Sullivan v. Sullivan*, _____ Or App _____ (April 29, 2009).**

http://www.publications.ojd.state.or.us/A134629.htm

Mother appealed a dissolution

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judgement that awarded full custody of her three children to their father. She claimed that the trial court erred in failing to apply the statutory presumption requirement pursuant to the Family Abuse Prevention Act (FAPA), to preclude an abusive parent from obtaining custody rights. Following an incident of abuse directed at Mother by the Father, Mother petitioned for a FAPA restraining order, which was ultimately vacated as part of a settlement agreement.

In affirming the trial court, the Court of Appeals found that the existence of an ex parte restraining order was not enough to trigger statutory denial of full custody to the subject of the order. The Court also found that for a presumption against an award of custody, the court must declare that abuse within the meaning of FAPA actually occurred. The Court held that abuse was not established because Father never had an opportunity to contest the allegations of the FAPA restraining order.

***State ex rel Juv. Dept. v. K. D.*, _____ Or App _____ (May 20, 2009).**
http://www.publications.ojd.state.or.us/A139987.htm

A dependency petition was filed when DHS learned that Mother was allowing her child to have contact with Father, an untreated sex offender. The child then became a ward of the court. A case plan was established, requiring the Mother to divorce Father and "demonstrate a protective capacity by recognizing unsafe individuals."

In the initial permanency hearing, the juvenile court determined that it was possible that the child could be returned if Mother adopted a viewpoint directed more toward her children other than her own self absorption. Between the first and second permanency hearings, Mother had also divorced Father.

Just prior to the second permanency hearing a new case plan was developed which included independence from abusive family members, development of appropriate parenting skills, and working with required programs.

At the second permanency hearing, the trial court approved the change to the child's permanency plan from reunification to adoption. The court determined that Mother had not made sufficient progress under the established case plan, and that DHS had made all reasonable efforts to safely return the child to Mother's home.

Mother appealed, arguing that the evidence did not support insufficient progress toward reunification with the child, and that there was a compelling reason to avoid petitioning to terminate her parental rights.

Reversing the trial court, the Court of Appeals found that the previous DHS case plan should have been used in determining the sufficiency of Mother's progress, because there had been a reasonable amount of time to comply with the requirements of that plan.

***State ex rel DHS v. A. C.*, _____ Or App _____ (May 20, 2009).**
http://www.publications.ojd.state.or.us/A139628.htm

Mother's parental rights were not terminated when the trial court dismissed the state's petition.

On appeal, the state argued that the trial court erred when it failed to find Mother unfit. The state cited Mother's failure to complete programs, such as obtaining her GED as a drug court graduation requirement, and failure to participate in anger management treatment. Testimony in the trial court indicated that additional steps may be necessary for Mother to rehabilitate; however, her progress had been exceptional.

In upholding the trial court's decision, the Court of Appeals found that indicators of Mother's unfitness cited by the state did not sufficiently rise to "such a level as to justify termination of parental rights."

Affirming the trial court, the Court of Appeals found that the state had failed to meet the burden of proof necessary to establish that Mother's child could not be returned to her custody within a reasonable time.

As to the father, the State introduced evidence at trial related to the husband's criminal history as a sex offender, suggesting he posed a risk. However, a psychologist testified that the husband desired to lead a "socially acceptable life, " and the Court of Appeals cited evidence of the husband's intent to reform.

***State ex rel DHS v. A. L. S.*, _____ Or App _____ (May 27, 2009).**
http://www.publications.ojd.state.or.us/A139698.htm

Mother, since 1997, had been in and out of drug treatment for addictions to alcohol, marijuana, and methamphetamine. Following her child's birth in 2003, Mother sporadically had custody of the children due to DHS involvement as a result of her drug addictions. A trial court terminated Mother's parental rights after considering her drug and alcohol addictions, testimony indicating her inability to maintain a sober lifestyle, and the poor conditions of the child.

On appeal, Mother argued that

Continued on next page

RECENT CASE LAW—Continued from previous page

she had not used alcohol for four months prior to the termination hearing, that continued alcohol use after treatment was related to her recovery process, and that the child could adjust to continued disrupted placements.

The Court of Appeals employed the analysis supplied by ORS 419B.504 by considering: (a) whether the mother had engaged in conduct characterized by a condition; and (b) whether that conduct or condition was seriously detrimental to the child. Also in accordance with the statute, and in determining whether Mother was unfit, the Court considered the probability of the child's integration into Mother's home within a reasonable time.

An expert psychologist testified that given Mother's cyclical history of recovery relapse, she could not be considered to care for the child until 18 to 24 months after her last use of alcohol. The psychologist also testified that the child should not experience the risk of another displacement during that time.

The Court found that the state had proved by clear and convincing evidence that Mother's treatment was not successful in resolving her addiction problems, and that Mother would not maintain long-term sobriety. The Court also found that Mother's conduct was seriously detrimental for the child because the child was currently in a stable placement, reasoning that waiting for Mother to reform would amplify the child's seizure disorder, adjustment disorder, and MSRA (methicillin –resistant staphylococcus aureus). Finally, the Court determined that it had been established by clear and convincing evidence that the child could not be integrated into Mother's home within a reasonable time.

Considering the immediate need for permanency and the implausibility of Mother offering a safe home for the child in a reasonable period of time, the Court affirmed the termination of Mother's parental rights.

***State ex rel Juv. Dept. v. C. D. J.*, _____ Or App _____ (June 17, 2009).**

http://www.publications.ojd.state.or.us/A140644.htm

The Court of Appeals reversed termination of Father's parental rights, holding that for a permanency plan to result in adoption, DHS must make reasonable efforts for reunification and prove that the parents did not make sufficient progress to allow the child's safe return home. Additionally, sufficiency requirements for the parents must be reasonable according to the circumstances.

DHS obtained custody of the child as a result of Mother's substance abuse problems. Father, incarcerated at the time of child's birth, was served by DHS with a letter to establish paternity. The letter was to be returned within 14 days, but Father returned it five months later, voluntarily acknowledging paternity. At the permanency hearing, the juvenile court took jurisdiction when Father admitted to substance abuse and perpetration of domestic violence. The trial court changed the permanency plan to adoption upon finding that Father had not made sufficient progress to place the child in his custody.

On appeal the Court found that DHS made reasonable efforts in establishing Father's paternity prior to the permanency hearing, but had requested "nothing more than the father's cooperation." DHS had only asked the father for acknowledgement of paternity, and his cooperation in paternity testing. Thus, the Court found that Father had made sufficient progress toward reunification under the circumstances.

***State ex rel DHS v. N. S.*, _____ Or App _____ (June 17, 2009).**

http://www.publications.ojd.state.or.us/A140237.htm

Mother appealed an order establishing guardianship for her child under ORS 419B.366.

DHS became involved with the family as a result of domestic violence between Mother and Father. The child was removed from Mother's care when six months old, and has remained in foster care since. Mother and Father later separated, and Father had moved out of state. However, DHS discovered that Mother's brother had been convicted of third-degree sodomy and had not completed sex offender treatment. When an unidentified male answered Mother's phone, DHS became concerned that Mother's brother was present in the home and having contact with the child. Throughout Mother's involvement with DHS, a primary concern had been her inability to recognize and protect her child from threats to the child's safety.

The juvenile court found that, at the time of the hearing, Mother continued to have difficulty protecting her child. The court noted that despite services Mother had completed to help her recognize threats to the child, Mother continued to receive mail addressed to her brother, continued to reside near him, did not acknowledge him to be a threat, and possibly allowed him in her house.

However, on de novo review, the Court of Appeals found insufficient evidence to establish that Mother's brother poses a risk of harm to the child and reversed the juvenile court's establishment of guardianship.

ICPC—Continued from page 9

wish to relocate their children for safety purposes, or to gain support of family and friends in another state by moving to that state, may or may not be subject to the lengthy interstate transfer-of-custody process, depending on whether DHS and the court deem the move to be a "placement." Obviously, if it is determined that such a relocation is a "placement", then the parent's home must be pre-approved by the receiving state, presenting a catch 22—how can a receiving state evaluate a parent's environment for safety if the ICPC prevents the parent from relocating with the child in the first place?

The relocation provisions of the ICPC recognize this catch-22 and describe relocation as the one time when placement can occur in another state prior to the approval of the receiving state. Regulation No. 1, ICPC Model Regulations; DHS Handbook, supra. Again, however, counsel for the relocating parent and child may wish to argue simply that the ICPC does not apply to such a situation. In State Dep't of Child and Family Serv.s v. L.G., the District Court of Appeals of Florida applied the plain meaning of the statute to hold that the ICPC did not apply when a mother with physical custody of her dependent child sought to relocate to Georgia, because the relocation was not a "placement." 801 So 2d at 1048. In that case, the dependent child, M.G., had remained in her mother's physical custody throughout the case. Id. at 1049. The court approved the move to Georgia as in the best interest of the child without giving advance notice to and obtaining approval from Georgia. Id. In upholding this order, the Court of Appeals determined the order allowing relocation effected no change in custody as required for "placement" under the ICPC. Id. at 1051.

Parent-child relocations will likely remain a problem, if and when the new ICPC is adopted, as they are not addressed in the new ICPC. The new ICPC will be introduced to the Oregon Legislature for adoption in 2011.

The Association of the Administrators of the Interstate Compact on the Placement of Children has promulgated Model Regulations for the ICPC (available online at: http://icpc.aphsa.org/Home/home_news.asp), which include placements with parents. The Model Regulations however are not binding unless adopted in a state's statute, which Oregon has not done, and cannot expand the scope of the statute. See *McComb v. Wambaugh*, 934 F.2d 474 (3d Cir. 1991).

Juvenile Law Resource Center Surveys Juvenile Bar About Training Needs

By Angela Sherbo, Supervising Attorney

Because the newly created Juvenile Law Resource Center (JLRC) is committed to providing training responsive to the needs of parents' attorneys, we reviewed attendance at the last five juvenile law conferences and then asked attorneys what their greatest needs were.

Between April of 2008 and April of 2009 there were five relatively low cost and very high quality juvenile law trainings in a number of locations throughout the state. In April of 2008 the University of Oregon's Child Advocacy Project sponsored a training entitled Putting the Puzzle Together. In the Fall of 2008 the Juvenile Court Improvement Project conducted its annual "Road Show" and in October the annual Attorney Academy training was held. In February and April of 2009 the OSB Juvenile Law Section and the Oregon Criminal Defense Lawyers Association each held its annual conference.

Despite this wealth of training opportunities, a review of the attendance at these events revealed that a large number of OPDS juvenile contractors attended none of them. Of the 279 lawyers who handle some juvenile court appointments, 146 attended none of the trainings, 63 attended only one and 45 attended two. Twenty people attended three of the five trainings, four people attended four and one person (the Juvenile Law Reader will be sending this unnamed person a wonderful gift) attended all five.

To determine how to make trainings more useful to those who have not attended in the past, the JLRC, with assistance from OPDS, surveyed approximately 270 practitioners. The response rate was excellent, with 117 people answering the survey. Overall trends were:

· The majority of attorneys (51.7%- 62) spend less than ¼ of practice representing parents

· The parent representation bar is relatively balanced in terms of age of practitioners. In fact, almost half of responding lawyers representing parents were within the first 10 years of practice (47.5%)

· Nearly 70% already receive the Juvenile Law Reader

· Although the majority of practitioners want to receive written resources by email (78.3%) or

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JLRC Surveys Juvenile Bar About Training Needs—Continued from previous page

website (54.8%), a sizable group wishes to have resources mailed to them (32.2%)

· Caw law updates are the single most requested written resource by responding attorneys (90.4%)

· Although most attorneys prefer to access individual assistance by email (76.1%), many attorneys (58.4%) want to receive individual assistance over the phone

· In addition to substantive legal information (72.6%), many attorneys wanted individual assistance accessing model motions/briefs (69%)

· Most attorneys wanted training at a state-wide conference (77%) or with other attorneys in their communities (65.5%). At the same time, some attorneys would benefit from accessing the trainings online (31.9%) or through an audio recording (23%).

· Most demand for trainings on: validity of parenting capacity tests (69.6%), parents with mental health diagnosis (67.8%), TPR trial strategies (61.6%), and trauma of removal (59.8%).

Save the Date: Juvenile Court Improvement Program Training

JCIP and DHS/CW will be joined by JRP and the Office of Public Defense Services this year, to provide training the afternoon after the Road Show for attorneys representing children and families in the Child Welfare System. There will be sessions on the Fostering Connections to Success and Increasing Adoptions Acts of 2008, as well as further training on the Oregon Safety Model, recent legislation, and more. The schedule is as follows:

- **Astoria** for Clatsop and Columbia Counties:Wednesday, September16
- **Portland** for Multnomah County: Wednesday, November 18
- **Hillsboro** for Washington and Tillamook Counties: Thursday, November 19
- **McMinnville** for Yamhill, Polk and Lincoln Counties: Thursday, September 17
- **Salem** for Marion and Clackamas Counties: Friday, November 20
- **Eugene** for Linn, Benton, Lane and Douglas Counties: Wednesday, November 4
- **Medford** for Jackson and Josephine Counties: Tuesday, November 3
- **The Dalles** for Hood River, Wasco, Sherman, Gilliam, Morrow and Wheeler Counties: Tuesday, October 6
- **Bend** for Jefferson, Crook and Deschutes Counties: Tuesday, September 29
- **La Grande** for Umatilla, Union, Wallowa and Baker Counties: Monday, October 5
- **North Bend** for Coos and Curry Counties: Monday, November 2
- **Burns** for Klamath, Lake, Harney, Malheur and Grant Counties: Monday, September 28

Conferences and CLEs

SAVE THE DATE!! Juvenile Law Training Academy Seminar—October, 2009

The fifth annual Juvenile Law Training Academy seminar is scheduled for October 19-20, 2009, during the Oregon Judicial Conference. It will be held at the Hilton Hotel in Eugene, Oregon. The seminar will focus on: changes in law and practice for juvenile lawyers; recent developments in the legislature, at DHS, and in case law; and essential information about special areas of law (e.g., immigration, ICWA, and paternity). Additionally, there will be an extended session on professionalism in the context of permanency hearings and child abuse reports. The seminar is for all juvenile court lawyers, including state's attorneys and attorneys for children and parents, as well as for CASAs.

Oregon Criminal Defense Lawyer's Association "All Things Cannabis" Conference—September, 2009

The "All Things Cannabis" conference will be held September 11-12, 2009 at the Red Lion Hotel, Convention Center in Portland, Oregon. The conference may have relevance for attorneys who handle dependency cases, which are frequently impacted by medical marijuana, as well as pre– and post-natal marijuana use issues. For more information, go to: http://ocdla.org/seminars/cannabis.html.

The Role of Counsel for Children and Youth

Contributed by Ingrid Swenson,
Executive Director of Public Defense Services

During the course of numerous site reviews over the last four years, OPDS has noticed significantly inconsistent practices regarding the role of appointed counsel for children in both dependency and delinquency cases.

For example, some attorneys believe that it is not necessary to meet and confer with child clients.

It is hoped that this statement will clarify what OPDS believes to be the role of counsel for children in dependency cases and youth in delinquency cases. The statement is being sent to all public defense providers. If you have questions about the role of counsel as outlined in this statement, please contact OPDS's General Counsel, Paul Levy at (503) 378-2478.

Role of Counsel in Dependency Cases

In juvenile dependency cases, the role of the attorney appointed to represent a child will depend on the age of the child and the child's capacity for considered judgment.

An attorney for a child capable of considered judgment must advocate for the child's express wishes. The attorney for a child not capable of considered judgment must advocate for the child's best interest as determined by the attorney's independent investigation and exercise of sound judgment. Some children are capable of considered judgment with respect to some decisions that need to be made in the case but not with respect to others. Standard 3.4 of the Specific Standards for Representation in Juvenile Dependency Cases of the Oregon State Bar's Principles and Performance Standards[1] outlines the analysis to be used in deciding the appropriate type of advocacy in a given case.

Regardless of that ultimate determination, the child is a "client" and OPDS contracts require the contractor to speak to and conduct initial interviews, in person, with clients who are in custody within 24 hours of appointment whenever possible; and to arrange for contact, including notification of a scheduled interview time, within 72 hours of appointment for all clients who are not in custody. Children are not excepted from this rule.

In addition, Rule 1.14 of the Oregon Rules of Professional Conduct (ORPC) requires counsel for persons with diminished capacity (which includes children not capable of considered judgment) to maintain, as far as reasonably possible, a normal client-lawyer relationship with the client. The ORPC require attorneys to maintain contact with their clients, to keep them reasonably informed about the status of their cases (ORPC Rule 1.4), to promptly comply with reasonable requests for information (*Id*), to explain matters to the extent reasonably necessary to permit the client to make informed decisions about matters regarding which the client who is capable of considered judgment (*Id*), to abide by the decisions of a client who is capable of considered judgment concerning the objectives of representation (ORPC Rule 1.2), and to consult with the client regarding the means by which the objectives of representation are to be pursued (*Id*). These rules apply regardless of the client's age or capacity.[2]

Role of Counsel in Delinquency Cases

Attorneys for youth in juvenile dependency proceedings are bound to advocate for the expressed wishes of the youth. While the attorney has a responsibility to advise the youth of legal options that the attorney believes to be in the youth's best interest and to identify potential outcomes of various options, the attorney must represent the expressed wishes of the juvenile under the Rules of Professional Conduct as an attorney owes to an adult criminal defendant.

If an attorney determines that a youth is not capable of aiding and assisting in the youth's defense, the attorney shall move the court to dismiss or amend the petition, as discussed in Standard 2.8(2) of the Specific Standards for Representation in Criminal and Juvenile Delinquency Cases.

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[1] The full text of the 2005 version of the Principles and Standards for Counsel in Criminal, Delinquency and Dependency Cases can be found on the bar's website at http:www.osbar.org/surveys_research/performancestandard/index.html

[2] For those attorneys who lack the information or skills to have an age appropriate discussion with a young or disabled client, an online training is available at the following link: http://www.cwpsalem.pdx.edu/teen/.

NACC ANNUAL CONFERENCE—EFFECTIVE ADVOCACY IN TODAY'S WORLD

The 32nd National Juvenile and Family Law Conference of the National Association of Counsel for Children will be held in Brooklyn, New York August 19-22, 2009. The conference will feature national speakers and five concurrent session tracks: Abuse & Neglect; Ethics; Juvenile Justice; Policy Advocacy, and Children's Law Office Project. For registration and more information go to: www.NACCchildlaw.org

Fostering Connections Legislation: Providing Funding & Programs to Keep Kids in Foster Care up to 21, and Promoting Permanency and Relative Placement

By Adam Shelton, Law Clerk

Introduction

On October 7, 2008, H.R. 6893 (P.L. 110-351, 42 U.S.C.A. Chapter 7[1]), The Fostering Connections to Success and Increasing Adoptions Act, was signed into law to amend Title IV-B and IV-E of the Social Security Act. These amendments will improve the well-being and stability of children in foster care, and facilitate more efficient adoption procedures and permanency plans. The act now extends federal support to children up to age 21, and affords the same protections and funding to American Indian Children.

Promoting Permanency and Family Connections Grant

One of the primary goals behind the enactment of The Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections or "The Act") was to help formalize and mandate permanent placement plans for children with relatives, where possible. Section 103[2] of the act requires state agencies to exercise due diligence to notify the grandparents and other adult relatives, within 30 days of a child's removal from home. This notification will encourage relatives to get involved with the child early in a dependency case, with the hope that capable relatives will vie to care for the child rather than rely on the state to place the child in foster care with a stranger. Sec. 206[3] requires that all states must make reasonable efforts to place siblings together in foster care, unless it is contrary to the best interests of a child.

The Act provides major permanency funding through the authorization a new Family Connections Grant.[4] This new grant guarantees $15 million a year in federal matching grants for intensive family finding efforts, family group decision-making meetings for children, substance abuse treatment programs, and state kinship navigator programs. Kinship navigator programs help to divert children from foster care by providing assistance and information to relative caregivers about navigating the complexities of the system and obtaining support from the appropriate agencies.[5]

The Kinship Guardianship Assistance Program

Because permanency and family placement are major objectives of Fostering Connections, federal funding will now be appropriated to the states to support kinship guardianship assistance programs.[6] These kinship programs provide initiative and financial support for extended family that are willing to take care of children who have been removed from their homes. For relatives to qualify for this assistance, the child must reside with them for six consecutive months and be qualified for foster care maintenance payments. The state must also determine that neither the option of returning home or proceeding with adoption are appropriate permanency plans for the child, and that he/she would otherwise "age out" of foster care. Lastly, if the child is 14 or older, the state must consult with him/her about the kinship arrangement."

Adoption Incentives and Assistance

In addition to encouraging permanency with families, Fostering Connections also expands the current Adoption Incentive Grant program for an additional five years under sec. 401.[8] The amendment doubles the incentive amount given to families to $4000 a year for special needs children, and $8000 a year for older child adoptions. Although a $10,000 tax credit[9] was available to all adoptive parents prior to the passing of The Act, Fostering Connections now mandates that each state inform all persons presently adopting or considering adoption of the potential eligibility for the tax credit.[10] The amendment was implemented because parents who proceed with adoption through public welfare agencies are typically unaware of the adoption tax credit. This ensures that all adopted children will benefit from the tax credit by providing yet another incentive for potential parents to adopt.[11]

In addition to tax credit and grant incentives, The Act makes it easier for all qualified adopting parents to obtain adoption assistance (AA) for special needs children.[12] Previously, a special needs child's eligibility for AA was contingent on the home that the child was removed from having a particular income that met the residing state's Aid to Families with Dependent Children (AFDC) threshold. However, Fostering Connections makes it easier for children with special needs to qualify for AA by implementing much simpler eligibility requirements that "de-link" a child from the prior AFDC standards. Additionally, children who are eligible for social security income (SSI) on medical and disability grounds are now automatically defined in the statute as children with special needs. Because of Fostering Connections, AA eligibility requirements now reflect a child's individual needs, not their prior family income.[13]

Improving Outcomes for Older Youth and Children Who May Age Out of Care

Fostering Connections also appropriates funding for a more effective support-infrastructure for older children in foster care, and to those children who may age out of care. Youth who have experienced foster care are statistically more likely to become homeless, incarcerated or unemployed, and tend to face a variety of other challenges when they age out of care. Most youth in foster care lose the support of the foster care system when they turn 18. Studies now show that youth who remain in care until age 21 have a much better chance to succeed when they leave care.[14]

Fostering Connections also allows certain youth to remain in care and receive foster care maintenance payments up to age 21, by changing the definition of

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"child" in § 475 in Title IV-E of the Social Security Act.

Under the new definition, a youth may continue to receive Title IV-E payments up to age 21 if they are either: enrolled in a post-secondary or vocation school; completing secondary school; participating in an "employment barrier-removal" program; employed at least 80 hours a month;[16] or incapable of any of these due to a documented medical condition.

Although most youth in America continue to reside with their parents from ages 18-24, this is usually not an option for youth in foster care.[17] Thankfully, Fostering Connections obliges child welfare agencies to assist children in foster care in the transition to adulthood.[18] Ninety days immediately prior to emancipation from foster care, the child welfare agency must now help the child develop a personal transition plan, including information about detailed options on housing, health insurance, education, employment, and continuing support services when applicable.

Providing Educational Stability

Educational research consistently shows that each change in school placement for a child can result in a loss of up to six months of educational progress. Numerous placements in, and transfers to, different schools are common occurrences for children in foster care, and can be a huge detriment to the development of a child's education and his/her overall sense of stability.[19] Fostering Connections seeks to remedy that problem by mandating a plan for each foster child that will assure educational stability.[20]

Under The Act, the state must also ensure that children placed into foster care remain in the school they were enrolled in prior to placement, unless that placement is contrary to the child's best interests. Fostering Connections accomplishes this by amending the definition of foster care maintenance payments to include "the cost of reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement," provided that the court finds that this is in the best interests of the child. The state must also provide assurances that every school-age child, who is either in foster care or receiving adoption assistance, is enrolled as a full-time student or has completed secondary school.

Equitable Support for American Indian and Alaskan Children

Unless otherwise described by law, the Title IV-E requirements and provisions amended by Fostering Connections apply equally to children in tribal child welfare programs. The Act provides grants for technical assistance and to support Title IV-E plan development in tribes. (For more information on how Fostering Connections affects Native American and Alaskan Tribes, see http://www.hunter.cuny.edu/socwork/nrcfcpp/info_services/ACYF-CB-PI-08-05.pdf.)

Anticipating the Effective Date and Responding to Changes

Most sections in the Fostering Connections Act became effective immediately. The two notable exceptions include: the option to extend foster care support to age 21 takes effect on October 1, 2009. Many of the amendments that would otherwise take immediate effect contain a permissible delay exception if the Secretary of the U.S. Department of Health and Human Services determines that state legislation is required to comply with the Act.[22]

Checklist for Attorneys

Attorneys should be cognizant of these changes to the Social Security Act. No case law yet exists to supplement the understanding of the amendments, so careful and zealous advocacy should be utilized to extract positive results for clients who are affected by Fostering Connections. Legal firms and public advocacy agencies alike should be informed about the budgeting and procedural impacts, and state agencies should take all necessary steps to ensure legislative compliance. The following checklist for attorneys will help ensure that courts and agencies are in compliance:

- Is your child-client remaining at the same school they were enrolled in prior to placement in foster care?
- Is the cost of transportation to the school of origin being provided by the DHS or school district?
- Is transition planning taking place for your older child-client?
- Is guardianship assistance in place for relatives who are caring for a child?
- Has the agency used due diligence to search for relatives of the child removed from the home?
- Has the state informed all parties who are considering adoption of the potential tax credit?
- Has the state made reasonable efforts to place siblings together in foster care?

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[1] 31 U.S.C.A. § 323 (West 2008); 42 U.S.C.A. §§ 620-629i, 653(j), 670-677 (West 2008); I.R.C. § 152 (West 1986).

[2] 42 U.S.C.A. § 671(a) (West 2008).

[3] *Id.*

[4] *Id.* at §§ 620-629i.

[5] Natl. Conf. of State Legis., *Issues and Research, Human Services, Highlights of Recent Kinship Care State Legis. Enactments*, http://www.ncsl.org/IssuesResearch/HumanServices/HIGHLIGHTSOFRECENTKINSHIPCARESTATELEGISLATIV/tabid/16371/Default.aspx#kindship (last updated Feb. 2008).

[6] 42 U.S.C.A. §§ 671(a), 673, 674, 675(1), 677(a), (i)(2).

[7] Ctr. for Law and Soc. Policy, *Fostering Connections to Success and Increasing Adoptions Act (H.R. 6893) Summary, Kinship Guardianship Assistance Payments for Children Living in Foster Care with Relatives*, http://www.clasp.org/publications/FINAL_FCSIAA_LongSummary.pdf (last updated Oct. 14, 2008).

[8] 42 U.S.C.A. §§ 673(b), 673b(b)(2), (c)(2), (d), (e), (g).

[9] Adoptive Tax Credit refers to an amount subtracted from your annual federal tax liability. Any non-reimbursed costs associated with the adoption of a child can be off-set in tax filing with the federal $10,000 tax credit. However, the monetary limit for a particular year must be reduced

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Summer Law Clerks

Emily Marrer is a law student at the University of Oregon, where she just finished her first year. Before attending law school in Eugene, the "Double Duck" played Div. I soccer and received a Bachelor of Science degree in Political Science, with a minor in History, from the University of Oregon. Emily has worked as a teacher's aide with at-risk students and is currently a volunteer at Legal Aid in Eugene. When not studying, Emily enjoys traveling, reading and outdoor activities. As a summer law clerk at JRP, she will update and make electronic the TPR notebook and Formbook, research dependency issues and juvenile court sentencing, and write for the Juvenile Reader.

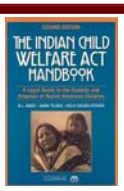
Adam Shelton will return to the University of Oregon this Fall for his second year of law school. Adam obtained a Bachelor of Arts degree in Political Science from Ohio University in Athens, Ohio in the Spring of 2008. After graduation, Adam worked with the Urban Mission International, a non-profit urban/rural renovation group based in the Upper Appalachian region of the U.S. In his free time, Adam enjoys various sports, including basketball, football, soccer, and martial arts. He is also an avid film and music lover. Adam will spend the summer as a JRP law clerk working primarily with Brian Baker on School Works projects, writing articles for the Juvenile Reader, and conducting independent projects.

Rochelle Martinsson is a law student at Lewis & Clark College in Portland, Oregon, due to begin her second year in the Fall. Prior to attending law school, Rochelle obtained Bachelor of Arts and Master of Science degrees in Criminology and Criminal Justice from Portland State University. In addition to working for JRP, Rochelle serves as an adjunct instructor of undergraduate Criminology and Criminal Justice courses at PSU, and assists the CCJ department with its online degree program. In her free time, Rochelle enjoys a variety of outdoor activities, including rock climbing and cycling. As a summer law clerk at JRP, Rochelle will coordinate with Jason Gershenson to produce three issues of the Reader, participate in Detention Alternatives, and manage the Helpline. Additionally, Rochelle will assist JRP attorneys in various research tasks.

Noah Barish finished his second year as a law student at the University of Washington in Seattle, where he is active in the Immigrant Families Advocacy Project, which serves immigrant survivors of domestic violence. Last summer, Noah was an extern for U.S. Magistrate Judge Paul Papak at the Federal District Court in Portland, Oregon. Before attending law school, Noah worked as a paralegal at the San Francisco public defender's office and was a health care advocate at the Medicare Rights Center in New York. Noah received a Bachelor of Science degree from Stanford University in Symbolic Systems, an interdisciplinary program combining linguistics, psychology, philosophy, and computer science. This summer, Noah will focus on expanding the Juvenile Law Resource Center and improving parent representation throughout the state.

Jason Gershenson is a student at the Willamette University College of Law in Salem, Oregon. A native New Yorker, Jason earned a Bachelor of Arts degree from the University of Miami, with studies in Political Science and African-American history. At Miami, he conducted spinal cord injury research at the Lois Pope Life Center, and participated in a movement to increase wages for on-campus janitorial staff members. Prior to beginning law school, Jason worked as a legal secretary for a criminal defender's office in Salem. He enjoys long distance running and live music. As a law clerk with JRP, Jason's responsibilities include developing material for the Juvenile Reader, doing Detention Alternatives, and providing Helpline services. Jason will be working with Rochelle on these tasks and with JRP attorneys on various research assignments.

Summer 2009 Law Clerks from left to right:
Noah Barish, Rochelle Martinsson, Jason Gershenson, Emily Marrer, Adam Shelton



The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children, Second Edition

An updated and revised version of The Indian Child Welfare Act Handbook is now available. The Handbook details the following with regard to ICWA: history and foundations; jurisdictional provisions; procedural requirements; placement provisions; program funding; case law that has developed since the first edition of the Handbook was published; and current application. The Handbook also discusses other federal laws relevant to child welfare practices involving Indian children.

The Handbook was published by the American Bar Association and is available in paperback.

Order online at www.abanet.org/abastore, or call 800-285-2221.

Jackson County Juvenile Defenders Challenge Juvenile Shackling
By Emily Marrer, Law Clerk

In the past several years, the practice of shackling juveniles brought to Juvenile Court proceedings has become a subject of increasing debate. Recently, the Jackson County Juvenile Justice Consortium (JJC) has filed, on behalf of their juvenile clients, a motion to dispense with the use of shackles in Jackson County Juvenile Court.[1] As the motion and order to dispense with the use of shackles filed by the JJC indicates, shackling is particularly egregious in Jackson County because the facility houses both the juvenile court and the juvenile department detention facilities making shackling unnecessary for security reasons.[2] "Youth are brought down the elevator unshackled and then shackled in the Intake room prior to court."[3]

More than 28 states continue to utilize shackles on accused juvenile delinquents in the courtroom whereas adult criminal defendants, are not shackled unless an "essential state interest" justifies restraint.[4]

In 2005, the Supreme Court in Deck v. Missouri, found blanket shackling policies in adult criminal trial and penalty hearings impermissible. Additionally, a state may only shackle a defendant if there is an "essential state interest."[5]

The utilization of blanket shackling policies on accused juvenile delinquents is contrary to the essential principles of treatment and rehabilitation, on which the juvenile court system was established.[6] Advocates have enlisted the support of social service and child welfare agencies, state legislatures, and the media. One of the many arguments made by juvenile advocates is that visible shackling in court is in direct conflict with the principle that one is innocent until proven guilty.[7]

Shackling opponents argue that shackling juveniles inflicts unnecessary shame along with physical and psychological harm,[8] while others argue that shackling impairs a youth's ability to communicate with his counsel.[9] The trauma experienced by a shackled juvenile is not only counter productive to rehabilitation but also unnecessary for the maintenance of safety.[10]

Proponents of shackling juveniles argue that shackling acts as a deterrent to future criminal conduct and maintains safety in the courtroom.[11] According to shackling proponents, since juvenile hearings are not before a jury, the youth's presumption of innocence is neither jeopardized nor prejudiced.[12]

Litigation is sparse on the issue of shackling, but some localities have been successful at ending the practice of shackling through motions to appear at proceedings free from restraint, while other courts continue to apply the blanket policy.[13]

Recently, attorneys in Miami initially tried to convince court administrators to end the practice of shackling but when unsuccessful, filed over one hundred motions, eventually, leading judges to grant individual motions for youth to appear at proceedings free from restraint.[14]

In New York, the Legal Aid Society successfully challenged the Office of Children and Family Services policy of shackling all juveniles, which lead to an agreement to apply an individualized assessment to determine whether shackling is justified by "serious evident danger to himself/herself or others" to similarly situated defendants.[15]

Both North Carolina and Connecticut have addressed the practice of blanket juvenile shackling policies through legislative reform.[16] For more information on the JJC's motion and order to dispense with the use of shackles contact Christine Kantas Herbert at: chritine@christineherbert.com

Recently, the Mail Tribune of Southern Oregon published a piece on Jackson County's practice of juvenile shackling and the JJC motion to end the practice. See: http://www.mailtribune.com/apps/pbcs.d11/article?AID=/20090626/NEWS/906260320.

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[1] PI.'s Mot. and Or. to Dispense with the use of Shackles in Jackson Co. Juv. Ct. (May 21, 2009).
[2] *Id.* at ¶ 1.
[3] *Id.*
[4] Anita Nabha, Student Author, *Shuffling to Justice: Why Children Should Not be Shackled In Court*, 73 Brooklyn L. Rev. 1549, 1567 (2008).
[5] *Deck v. Missouri,* 544 US 622, 624 (2005).
[6] Nabha, 73 Brooklyn L. Rev. at 1559.
[7] Brain D. Gallgher & John C. Lore III, *Shackling Children in Juvenile Court: The Growing Debate, Recent Trends and the Way to Protect Everyone's Interest,* 12 UC Davis J. Juv. L. & Pol'y 453, 460 (2008).
[8] *Id.* at 469.
[9] *Id.*
[10] *Id.*
[11] Nabha, 73 Brooklyn L. Rev. at 1571-1575.
[12] *Id.* at 1573-1574.
[13] *Id.* at 1567-1570.
[14] *Id.* at 1569-1570.
[15] *Id.* at 1570-1571.
[16] Gallgher & Lore III, 12 UC Davis J. Juv. L. & Pol'y at 464-468.

New Policy Brief Sheds Light on the Costs of Juvenile Confinement

By Rochelle Martinsson, Law Clerk

The Justice Policy Institute has issued a policy brief regarding the costs of juvenile confinement in the United States. The Institute's findings suggest that states should redirect resources from large, residential youth facilities to community-based alternatives. The Institute maintains that a "resource realignment" of this nature will result in better results for communities, taxpayers, and children, because community-based alternatives are cost-effective and rely on better policies (i.e., those that necessarily include prevention and intervention principles). The following is an overview of the Institute's major findings from its research into the costs of juvenile confinement within the U.S., included in the recently published policy brief.

The Institute found that states needlessly spend billions of dollars each year incarcerating nonviolent youth. The amount states spent in 2007 to incarcerate 64,558 *nonviolent* youth was estimated to be $5.7 billion, an average of $240.99 per day or approximately $88,000 per year for each youth. The policy brief notes that many of these youth had committed relatively minor crimes such as curfew violations, truancy, and underage drinking, which suggests a default incarceration strategy is rather ill-advised.

Another major finding of the Institute is that several states have successfully realigned fiscal resources away from ineffective and expensive state institutions, to more effective community-based services. The various programs that have been implemented to do so have generally resulted in reduced juvenile commitment rates, savings to states and taxpayers, and positive effects for communities.

The Institute also found that holding more youth in secure juvenile facilities is a non-rehabilitative approach, and can lead to costly litigation due to poor facility conditions.

The policy brief suggests that intermediate supervision, treatment, and other community-based services are less expensive and more effective alternatives. The brief also states that "locking up youth who do not need to be incarcerated takes away resources from youth for whom a secure residential facility is the most appropriate option" JPI, Page 8 (2009).

Perhaps more concerning than states' misuse of resources is the Institute's finding that imprisoning youth in often stressful conditions and overcrowded facilities can have severe detrimental effects on the youth, including suicidal behavior, stress-related illnesses, psychiatric problems, higher recidivism rates, and a reduced likelihood of educational or employment success later in life.

Further, the Institute found that policies favoring the incarceration of more youth do not even necessarily improve public safety. In fact, research cited in the policy brief suggests that states that significantly lowered the number of incarcerated youth were more likely to see greater drops in crime than states that increased their correctional populations.

Notably, the Institute found that community-based programs for youth actually *increase* public safety above what residential facilities are able to do. In consideration of the finding that community-based programs are more cost-effective than residential facilities, this conclusion is significant.

The Institute's policy brief concludes with various recommendations for policymakers seeking to improve outcomes for youth and communities, as well as how to best utilize scarce resources.

The Justice Policy Institute's policy brief, entitled "The Costs of Confinement: Why Good Juvenile Justice Policies Make Good Fiscal Sense," may be found at: http://www.justicepolicy.org/images/upload/09_05_REP_CostsOfConfinement_JJ_PS.pdf

Fostering Connections—Continued from page 17

by the amount of expenses taken into account in prior years for the same adoption (For more information, see http://www.irs.gov/taxtopics/tc607.html).

[10] 42 U.S.C.A. § 671(a).

[11] *Outreach about the Adoption Tax Credit*, *supra* n. 7.

[12] 42 U.S.C.A. § 673.

[13] *Federal Support for Adoption Assistance for More Children with Special Needs*, *supra* n. 7.

[14] American Bar Assn. and Casey Family Programs, *Foster Care and Education Q & A, Federal Laws that Increase Education Opportunities for Older Youth in Out-of-Home Care*, http://www.abanet.org/child/education/publications/ga_older_youth_final.pdf (2008).

[15] 42 U.S.C.A. § 675(8).

[16] http://www.kidlaw.org/admin.asp?uri=2081&action=15&di=1352&ext=pdf&view=yes

[17] *Continuing Federal Support for Children in Foster Care after Age 18*, *supra* n. 7.

[18] 42 U.S.C.A. § 675(5)(H).

[19] *Promoting Educational Stability*, *supra* n. 7.

[20] 42 U.S.C.A. § 675(1)(G).

[21] *Id.* at §§ 670 et seq.

[22] U.S. Dept. of Health and Human Serv. & Admin. For Children and Fam., *New Legislation— The Fostering Connections to Success and Increasing Adoptions Act of 2008*, http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2008/pi0805.htm (Oct. 23, 2008).

inaccurate portrayal of the *Jackson* case, in which admittedly, waiver was one of the issues. However, the main issue in that case was whether counsel is mandatory at interrogation subsequent to arraignment, if the defendant has invoked his/her 6th Amendment right in court. *Jackson* concluded that the right to have an attorney present did carry into all subsequent interrogations.[16]

The majority in *Montejo* has now overruled *Jackson*, drastically changing the procedural safeguards for defendants in custody. The Court borrowed Justice Kennedy's main point of contention in *Texas v. Cobb*[17] and concluded that *Jackson* takes away a defendant's voluntary "right" to waive their right to counsel.[18] The very statement seems strange when read aloud, but it summarizes the mentality of the majority, led by Justice Scalia. Scalia correctly interpreted the defendant's position that because of *Jackson*, under no circumstances can "police-initiated interrogation" be allowed after a defendant has requested an attorney at arraignment.[19] However, what *should* have been at issue was whether the 6th Amendment right instantly attaches when a defendant does not vocalize his right, but rather remains silent while a court-appointed attorney is assigned to him. Instead, Scalia ignored the question and rejected *Jackson's* interpretation of the 6th Amendment.[20]

Practically speaking, the defendant's position in *Montejo* was problematic, because it assumed that all police-initiated interrogation must cease as soon as the **right** to counsel attaches.[21] In other words, the defendant argued that as soon as an arraignment or preliminary hearing starts, the right to counsel is inherently invoked, regardless of whether the defendant actually requests counsel. However, this is not what *Jackson* established. *Jackson* simply stated that after an actual request for counsel under the 6th Amendment at arraignment or similar proceeding, subsequent police-initiated interrogation is prohibited without a valid waiver.[22] As mentioned, the *Montejo* Court side-stepped the former question in overruling *Jackson*.

The result of the *Montejo* holding is that an invocation of right to counsel at arraignment under the 6th Amendment does not implicate a right to counsel during subsequent interrogation.[23] *Miranda* rights, which only apply during interrogation, need to be separately and unequivocally invoked under the 5th Amendment .[24] The Court reasoned that a person can never invoke *Miranda* rights or right to an attorney during interrogation anticipatorily.[25] The majority attempted to comfort the dissent by insisting that the three "layers of prophylaxis" laid down in *Edwards*, *Miranda*, and *Minnick* are sufficient protections against coerced waiver.[26] However, while making sure to distinguish 5th and 6th Amendment rights[27], the Court failed to acknowledge that the protections affirmed in those cases were within the context of the 5th Amendment right to counsel only.

According to the majority, the *Jackson* case was "voluntariness on stilts," literally prohibiting a defendant from voluntarily waiving his 6th amendment right to counsel.[28] The implications of Montejo are very troubling for juvenile law, because youth especially have a difficult time invoking any of their rights. Attorneys should be readily advising clients of all ages that if they are charged or arraigned before they have been questioned, they will now need to invoke the right to counsel in both settings: once at the arraignment (6th), and then again at any subsequent interrogation (5th amendment).

Montejo has overruled multiple Supreme Court precedents and decided that the 6th Amendment has nothing to do with interrogation. There is no evidence that the *Jackson* rule was unworkable, impracticable, or disfavored by multiple courts, as Scalia seemed to suggest[29], and only two cases had ever openly disagreed with *Jackson* prior to *Montejo*[30]. Further, the Court overruled *Jackson* despite the fact that neither party to the case requested it to do so.

On its face, *Montejo* appears only to address the 6th Amendment waiver rule, but it has weakened the practical effects of the "judicially-created *Miranda* right" under the 5th Amendment. Prior to *Montejo*, invoking the 6th Amendment right meant also implicitly invoking the 5th Amendment right to an attorney during interrogation. *Montejo* has done away with this presumption. Scalia, subtlety showing disdain for the *Miranda* decision, has convinced the Court to remove *Miranda's* practical effects from post-arraignment questioning, unless a defendant is smart enough to invoke the right to counsel twice.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).
[2] Louisiana v. Montejo, 129 S.Ct. 2079 (2009).
[3] Michigan v. Jackson, 475 U.S. 625 (1986).
[4] See, *Miranda*, 384 U.S. at 444-445.
[5] *Id.* at 460.
[6] Edwards v. Arizona, 451 U.S. 477 (1981).
[7] *Id.* at 480.
[8] Jackson, 475 U.S. 625.
[9] *Id.* at 636.
[10] *Id.* at 633.
[11] *Id.* at 632.
[12] *Id.* at 634.
[13] *Id.* at 635.
[14] Montejo, 129 S.Ct. at 2079.
[15] *Id.* at 2085.
[16] Jackson, 475 U.S. at 636.
[17] 532 U.S. 162, 175 (2001) (KENNEDY, concurring).
[18] Montejo, 129 S.Ct.at 2085-2086
[19] *Id.* at 2086.
[20] *Id.* at 2091.
[21] *Id.* at 2087.
[22] Jackson, 475 U.S. at 636.
[23] Montejo, 129 S.Ct. at 2091.
[24] *Id.* at 2090, 2091.
[25] *Id.* at 2091.
[26] *Id.* at 2090.
[27] *Id.* at 2085.
[28] *Id.* at 2090
[29] *Id.* at 2087-2089
[30] U.S. v. Bird, 287 F.3d 709 (8th Cir.(S.D.) Apr 23, 2002); State v. Hernandez, 842 S.W.2d 306 (Tex.App.-San Antonio Aug 31, 1992) (NO. 04-91-00039-CR), rehearing denied (Oct 20, 1992), petition for discretionary review refused (Feb 03, 1993).

National Conference—Continued from page 6

It's no secret that sometimes we do get tired. Mr. Stephenson not only made me feel okay about that, but he also inspired me to redouble my efforts ... time and time again. You should go out of your way to hear him speak.

Workshops varied from parents-rights groups explaining their efforts, to practice tips for employing social workers and bonding with clients. Often it was hard to choose which of the three simultaneous workshops to attend. **Jamie Troy** of Portland found the workshop by Jay Elliott, J.D. on the Tyranny of the Experts especially helpful: "All practitioners should become more familiar with what actually constitutes expert testimony and what only purports to be, especially from those who claim to be child abuse experts." Many presentations integrated discussion of practice variations across the country with hopes that, over time, all states will develop the best system for helping families involved with DHS. Many states have Juvenile Court Improvement Projects helping attorneys in practice and effecting state-wide changes.

Wide variations exist in compensation for attorneys representing parents, with Washington State being a model for reasonable case loads and compensation. Across the country, attorneys are paid by the hour or by the case. In Pennsylvania, an attorney is paid a total of $500 for a case for the first year and then $350 for the second year working on the same case. Wyoming recently switched from $175 per case to $100 per hour. In part of Texas, counties pay attorneys $100 per hour. In Washington D.C., the rate is $90 per hour with a low yearly cap of $1,400. Georgia pays $45 per hour for out-of-court work and $60 for court time. Finally, in North Carolina, attorneys are paid $75 per hour, but the state ran out of money by June and deferred payment until August.

Looking forward, conference attendees used remote control-like devices to provide input on what they would like to have happen at the national organization level. A national listserve for parent attorneys began prior to the conference and attorneys affirmed that it is a helpful resource for information sharing. To join the Parents' Attorneys listserv group: send a message to listserv@mail.abanet.org with "SUBscribe child-parentsattorneys YOUR NAME" in the body of the message.

Other interests were national policy and laws, and generally building a movement to increase awareness of the child welfare system and needed changes. Attorneys also requested training on child welfare issues and trial skills. Conference organizers expressed doubt over the ability to meet annually despite an interest to do so. This year the conference was immediately followed by the annual conference on Children and the Law, making attendance at both more feasible.

Judge Leonard Edwards of Santa Clara County, California concluded the conference with a very impassioned talk relating the history of child welfare since 1980, problems with the system, and positive changes he has made to the practice in his courtroom. In his cases, prior to the first hearing, an attorney is appointed and there is a family team meeting involving extended family to figure out an immediate plan and ideas for a long-range plan. He believes mediation is an effective tool at the trial level because it gives power to the family members to be part of the problem solving. Finally, he shared the view that, to be fair to families, the system needs the participation of judges and attorneys who want to practice this area of law, and retention of such people is necessary for continued improvements in dependency law.

The talk by Judge Edwards was the best ending to a very fulfilling two days. It was a privilege to hear so many experienced and impassioned speakers share anecdotes of travesty and triumph. The practical knowledge gained was superior. Practice tips were geared at both new attorneys and experienced ones. Another highlight was hearing the head of the Washington state public defense services share how they got legislative support for an effective system of parent representation that proved cost-effective and successful in reducing days in foster care and in increasing reunifications. As an attorney just entering this field, the conference provided a formative experience that will have a lasting effect on my practice of juvenile law and my dedication to improving the child welfare system in Oregon. I look forward to attending the next conference and encourage more Oregonians to attend.

Recent Case Law Affecting Youth

By Rochelle Martinsson, Jason Gershenson, Adam Shelton, and Emily Marrer, Law Clerks

***State ex rel Juv. Dept. v. M. A.-J.*, _____ Or App _____ (April 29, 2009).**

http://www.publications.ojd.state.or.us/A140247.htm

A juvenile appealed the judgment of the trial court on the basis that it erred in denying his motion to suppress evidence of a firearm that was found during an officer patdown.

The youth was seen by a police officer on a MAX station platform. The officer noticed that the youth was wearing baggy clothing and clothing of a particular color and pattern common to gang attire. The officer also noticed that the youth was with an individual that the officer had seen before in the company of an admitted gang member. Based on this information, the officer decided to pat the youth down for weapons, and the officer found a loaded pistol.

At trial, the youth moved to suppress the evidence of the piston on the ground that the patdown was unlawful. The trial court denied the motion, finding that it was reasonable under the circumstances for the officer to suspect gang affiliation based on the clothing the youth wore, the fact that the youth fit the description of a gang member, and the fact that one person the youth was with had been seen with a gang member.

Relying on State v. Bates, 304 Or 519 (1987), the Court of Appeals reversed the trial court's denial of the motion to suppress, finding the trial court had erred because the patdown was unlawful. According to Bates, an officer may have reasonable suspicion based upon "specific and articulable facts that a citizen might pose an immediate threat of serious physical injury to the officer or to others then present". Id at 524. In this case, the Court of Appeals held that an individual wearing baggy clothing and seen in the company of someone who appears to know someone else who is in a gang is not enough to satisfy the Bates standard.

State ex rel Juv. Dept. v. J. J., _____ Or App _____ (May 27, 2009).

http://www.publications.ojd.state.or.us/A135826.htm

Youth admitted to committing acts that would amount to unlawful use of a weapon and unlawful possession of a firearm if committed by an adult. The juvenile court then placed him in the custody of the Oregon Youth Authority.

On appeal, the youth claimed that the trial court erred by failing to make written findings as required by ORS 419C.478(1). The state conceded to this error, but relied on case law to argue that if such a failure is not objected to, it cannot be reviewed as plain error.

The Court of Appeals held that it may be inappropriate to exercise discretion to review an error in certain circumstances, but not all. Vacating the juvenile court's judgment, the Court of Appeals found it appropriate to exercise its discretion in this case, and that the juvenile court must produce the statutorily required findings.

Forest Grove School District v. T. A., _____ U.S. _____ (June 22, 2009).

(http://www.supremecourtus.gov/opinions/08pdf/08-305.pdf)

The Supreme Court of the U.S. has held that the Individuals with Disabilities Education Act (IDEA) authorizes the reimbursement of the cost of a child's private special education services.

The youth in the case had attended Forest Grove Public schools from kindergarten until his junior year, and he had difficulty paying attention and completing assignments. He was later diagnosed with several learning and attention disorders. Upon advice from the private specialist who diagnosed the youth, his parents placed him in a private school that focused on educating children with those type of disorders.

His parents requested a due process hearing from the school district to determine his eligibility for special-education services. The school district maintained that his ADHD did not have a sufficiently adverse effect on his educational performance, and declined to offer him an individualized education program (IEP). But the special hearings officer issued a finding in support of establishing an IEP for the youth. The officer also found that the district failed to meet its IDEA obligations to identify special-education eligible students. Because the school failed to provide the youth with a "free and appropriate public education" (FAPE), they were ordered to reimburse the youth's parents for the cost of private-school tuition.

The District court agreed with the hearings officer's ruling in fact, but held that the 1997 amendments to the IDEA categorically barred reimbursement for private-school tuition for students who had not been previous recipients of special education services. The 9th circuit reversed, noting that courts have allowed reimbursements under equity in prior cases.

The Supreme Court affirmed the 9th circuit, holding that the amendments to the IDEA did not alter the authorization of reimbursements to be paid for private special-education services when 1) the public school district failed to provide a FAPE and 2) where private school placement is

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appropriate. The school district's main opposing argument was that the youth wasn't eligible for IDEA funding because he hadn't received prior special education benefits at the public school. The court also held that the reimbursements are authorized regardless of whether the child previously received special education through the public school.

Justice Stevens, writing for the majority, gave several reasons for upholding the reimbursement, including the need to respect *stare decisis,* and the need to give parents an adequate and speedy remedy when a school unreasonably fails to identify a special education eligible youth. The majority opinion also attempted to put fears to rest about a possible proliferation of private school enrollments, explaining that these reimbursements must be verified by both a hearings officer and federal judge, and only require the district to "belatedly pay expenses they should have paid all along." Courts also continue to retain discretion to reduce any amount, if equity so warrants.

The Court also held that courts and hearing officers must consider all relevant factors, including notice provided by parents and school district's opportunities for evaluating the child, in determining what potential reimbursements are appropriate.

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U.S. Supreme Court Rules on Strip Search of Student
By Adam Shelton, Law Clerk

Safford Unified School District #1, et al., v. Redding, ___ S.Ct. ---___ (June 25, 2009) (http://www.supremecourtus.gov/opinions/08pdf/08-479.pdf)

The U.S. Supreme Court recently upheld a 9th Circuit ruling against the Safford Unified School District. At issue was the strip search of a 13 year-old female student, which the Court found to have been in violation of her 4th Amendment rights. However, the Court granted school administrators qualified immunity for the illegal search.

Following the receipt of information that Redding possessed and was distributing to other students prescription-strength and over-the-counter drugs, Redding was ordered by school officials to strip down to her bra and panties. She was then instructed to stretch both articles out and shake them in order to reveal any hidden contraband, but the search produced nothing.

Writing for the majority, Justice Souter cited *New Jersey v. T.L.O.* and held that although school officials initially had reasonable suspicion to search Redding, the scope of the search was excessively intrusive and thus unreasonable under the 4th Amendment.

However, the Court granted qualified immunity to the two female school officials who conducted the search and the school principal who ordered it, because the majority conceded that varying interpretations of *New Jersey v. T.L.O.* did not make 4th Amendment requirements clear with regard to strip searches of students. The case was remanded so that the school district's liability could be addressed under *Monell v. New York City Dept. of Social Servs*.

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