JUVENILE RIGHTS PROJECT

JUVENILE LAW READER

November 2008

Volume 5, Issue 5

DHS Releases 2007 Report on the Status of Children

Oregon's Department of Human Services (DHS) has released it's *2007 Status of Children in Oregon's Child Protection System* report. The report presents statistical information regarding the thousands of abused and neglected children served by Oregon's child protection system in 2007.

During 2007 DHS received more than 63,500 reports of child abuse and neglect—one report every 10 minutes. Investigations confirmed abuse or neglect in 10,716 cases. Nearly 50% of the victims were younger than age 6 and nearly 75% were abused by one of their parents.

More than 15,000 children spent at least one day in foster care in 2007, with the average population on any given day between 9500 and 9800 children. 64% of children who came into state care in 2007 were safely returned home and most of these families did not need DHS services again. Although the numbers of children in foster care in Oregon declined in 2007, Oregon still places more children in foster care than most states.

Acknowledging that foster care is temporary and that children do best when their living situation is both safe and permanent, the report addresses DHS's goal of safely reducing the number of children in foster care.

To accomplish their goal, DHS is implementing a variety of strategies, including:

- Increasing supports to enable children to safely stay at home with their parents;
- Increasing placement options with relatives;
- Reducing the time it takes to finalize adoptions, and
- Focusing on reducing disproportionate representation of Native American and African American children .

NOVEMBER IS NATIONAL ADOPTION MONTH!

November is National Adoption Month, a time to celebrate the families and children brought together by adoption. Nationally there are 496,000 children in foster care of whom 130,000 are awaiting adoption. Many of these children are older, special needs children or children who are part of a sibling group.

AdoptUsKids and the Ad Council have recently focused television, radio and print ads on teens in foster care, plugging the message that:

"You don't have to be perfect to be a perfect parent. There are thousands of teens in foster care who would love to put up with you."

For more information go to www.adoptuskids.org

Inside this issue:

Juvenile Law Reader
is published by Juvenile Rights Project, Inc.
and Edited by Julie H. McFarlane

NEWS BRIEFS

OREGON YOUTH AUTHORITY SEEKS NEW DIRECTOR

The Oregon Youth Authority (OYA) has posted the announcement seeking an experienced leader to serve as the Agency Director. The OYA mission is to protect the public and reduce crime by holding youth offenders accountable and providing opportunities for reformation in safe environments. The Director selected will be responsible for the direction of the operation, including the management and administration of youth correctional facilities and field operations in Oregon. The announcement for this position can be found at: http://www.oregon.gov/DAS/jobs/ES415001.shtml

National Juvenile Justice Network Urges Advocates to Use Adolescent Brain Research to Inform Policy

New studies of juvenile brain development suggest that brain development is not fully complete in adolescence and reveal significant differences in the ways adolescents and adults use their brains. In light of this new research, the National Juvenile Justice Network (NJJN) has presented a paper to address how juvenile justice advocates can use this research to inform their advocacy and reform efforts for juveniles.

Due to advances in functional Magnetic Resonance Imaging (fMRI), researchers are now able to look at the actual physical changes that occur in the brain and see that during adolescence, several area of the juvenile brain are still developing. This research indicates that brain development takes place in stages and is not fully complete in adolescence. For example, the "executive" part of the brain, the prefrontal cortex, which regulates decision making, planning, judgment, expression of emotions, and impulse control, is one of the last parts of the brain to fully mature. Studies indicate that this region of the brain may not be fully mature until the mid-20s. Because of the changes in emotional and decision-making centers of the brain, adolescents behave differently in circumstances of "hot cognition" (situations of high emotional context) and "cold cognition" (situations of lower emotional context). The studies also suggest that a youth's decision-making is heavily influenced by context. Therefore, although a youth's intellectual capabilities can be as developed as adults, a youth's judgment may be driven by emotion rather than reason in contexts involving pressure.

This scientific proof that confirms what many have suspected for years, presents exciting advocacy and reform opportunities. NJJN identifies three major opportunities for those advocating in the juvenile justice field:

- The research opens the door to legislators' offices who never before thought about progressive juvenile justice reform;
- The research gives advocates and lawyers working on behalf of juveniles scientific proof for their claims that children are different from adults, are capable of change, and need support and opportunities for healthy development; and
- The research provides reluctant legislators from "tough-on-crime" districts a basis for a shift from punishment of juveniles to rehabilitation.

Continued on page 3.

FACTS AND FICTION ABOUT YOUTH WHO COMMIT SEX OFFENSES

The Justice Policy Institute has recently published an article addressing the negative implications of the federal Sex Offender Registration and Notification Act (SORNA), which mandates a national registry of adults and children convicted of sex offenses and expands the type of offenses for which a person must register. Ultimately, the article concludes that the zero-tolerance attitude and policies promoted by SORNA do not increase public safety, but rather alienate youth, disconnect them from communities, education and jobs, aggravating the likelihood that they may engage in future delinquency. In addition, the article notes the extreme costs of compliance with SORNA, often far more costly than the penalties for not being in compliance. Given the enormous fiscal costs of implementing SORNA, coupled with the lack of evidence that registries and notification make communities safer, the article suggests that states should think carefully before committing to comply with the Act.

The article goes on to address some of the most common misperceptions about young people convicted of sex offenses while highlighting the potential negative effects of branding young offenders as sexual predators in public registries. For example:

Fiction: Youth commit a large portion of sex offenses.

Fact: In 2006 less than 1% of all arrests of youth 17 years of age or younger were for sex offenses, and youth 17 years of age and younger accounted for only 18% of arrests for sex offenses.

Fiction: Youth convicted of sex offenses will become adults who commit sex offenses.

Fact: Research suggests that a young person who commits a sex offense is unlikely to commit another one.

Fiction: Sex offenses committed by youth are deviant and violent.

Fact: Many youth are charged with sex offenses for normative, if inappropriate behavior. Sex offenses committed by youth are generally not abusive or aggressive in nature and occur over shorter periods of time.

Fiction: Individuals convicted of sex offenses should be treated the same, regardless of their age.

Fact: Youth are particularly amenable to treatment designed to help end delinquency and treatment approaches designed for adults convicted of sex offenses will not work for youth.

Fiction: Putting youth on sex offender registries will make the community safer.

Fact: There is no evidence to suggest that registries and notification systems for people convicted of sex offenses are effective in improving public safety or deterring sexual violence. To the contrary, when applied to youth registry and notification systems impede a youth's ability to participate in social networks and access education and employment opportunities, which in turn increases the chance that a youth will participate in criminal or delinquent behavior in the future.

For a full copy of the article go to:

http://www.justicepolicy.org/images/upload/08-08_FAC_SORNAFactFiction_JJ.pdf

NEWS BRIEFS—Continued from page 2.

Despite these exciting opportunities, heavy-handed reliance on these findings can leave advocates in an uncomfortable situation: respecting the capabilities of a youth and yet, trying to make a case for age-appropriate treatment that recognizes the differences between adolescents and adults. Given this dilemma, the NJJN urges advocates to continually emphasize the tremendous potential of young people and their need for education, autonomy, guidance, nurturing, and responsibility at all stages of the juvenile justice process.

For more information: http://www.njjn.org/

ABA APPROVES CHILD-FOCUSED POLICIES

The American Bar Association has approved two significant new policies related to child welfare. The first policy recommendations seek improvement in racial and ethnic disparities in child welfare and requests law changes from Congress to require analysis of disproportionate representation as part of required reporting under Title IV-E and IV-B of the Social Security Act. The policy also calls on professionals in the field to obtain cultural competency training, and help identify and address such racial and ethnic disparities.

The ABA also reaffirmed its support for sound intercountry adoption practices with the full implementation of the Hague Convention on intercountry adoption April 1, 2008. The ABA's recommendations also call for nations to provide financial assistance and services to parents to keep families together.

For more information: www.abanet.org

RECENT CASE LAW

In the Matter of SRR, ___ Or App ___ (October 15, 2008). http://www.publications.ojd.state.or.us/A136343.htm

Youth was found to be within the jurisdiction of the juvenile court for acts that if committed by an adult, would have constituted second-degree arson and first-degree criminal mischief. The judgment ordered restitution in an amount to be determined later; however the restitution hearing was delayed by over a year. The youth appealed on the ground that the hearing had not occurred within 90 days of the entry of the jurisdictional judgment, in the absence of good cause, as required by ORS 419C.450(1)(a). The Court of Appeals held that "good cause…does not include prosecutorial inadvertence or neglect." Thus, because the "inadvertence of the prosecutor in failing to bring the restitution matter to hearing in a timely fashion" did not constitute good cause, the court vacated the judgment ordering restitution.

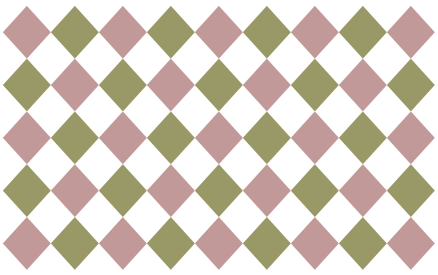
State v. Rader, ___ Or Aop ___ (October 15, 2008). http://www.publications.ojd.state.or.us/A132153.htm

The Oregon Court of Appeals reversed the Marion County Circuit Court opinion that elevated two incidents of domestic violence from a misdemeanor to a felony offense based on the finding that a minor child "directly perceived" the assault, ORS 163.160(3)(c). On appeal, the court agreed with defendant's contentions that the state's evidence was legally insufficient to prove the aggravating element that elevated the offense to a felony.

To establish that a minor child had heard the assault, the state elicited testimony about the size and acoustics of the apartment in which the assault took place. The victim of the domestic violence testified during trial that the apartment was between 800 and 900 square feet and that a person standing in the living room, speaking loudly, would be able to hear a person in the bedroom, even if the door was closed. The state did not call the minor child to the stand.

Preliminarily, the court determined that factors that elevate a fourth-degree assault to a felony are material elements of the offense that must be proved beyond a reasonable doubt. The court then relied on *State v. Bivins*, 191 Or App 460, 83 P3d 379 (2004), which noted that the difference between inferences that may be drawn from circumstantial evidence and mere speculation often turns on "the laws of logic." *Bivins*, 191 Or. App. at 467.

The Court of Appeals expressed hesitation that a fact-finder could permissibly infer the child heard the described noise at all. First, the television volume was set to an unspecified level, requiring the fact-finder to infer the volume was not so loud as to mask the sounds of the violence. Second, an inference that the child was paying attention to the dispute is required. Third, the fact-finder must infer that the child was mature and discerning enough to recognize the noise. Fourth, the inference that the child perceived the sounds as the product of the defendant's assault is required. Ultimately, the court concluded that too many intermediate inferences were required to reach the conclusion that the child "directly perceived" the defendant's assaultive conduct as required by ORS 163.160(4).



State ex rel Juv. Dept. v. CSW, ___ Or App ___ (October 15, 2008). http://www.publications.ojd.state.or.us/A137143.htm

Parents appealed, in juvenile dependency case, from a review hearing order, assigning error to juvenile court's finding that, during a particular 3-month period the Department of Human Services (DHS) made reasonable efforts to reunify them with their children. The state defended, and moved for dismissal, on the grounds that the appeal had been rendered moot by parent's reunification with their children.

The court reasoned that the question of whether a case is moot involves a two-part inquiry into whether the case is justiciable. First, the court examines whether a case presents a controversy between parties with adverse interests. If so, the court next considers whether its decision will have a practical effect on the rights of the parties. Under this framework, a case is moot, when because of a change in circumstances before review, a judicial decision would resolve an abstract question without any practical effect.

Under the facts presented in this case, the court found that the parties clearly had adverse interests, but that due to the length of time that the children had been returned to parent's care from substitute care, it was no longer possible for a decision from the court to have a practical effect on the parties' rights. Because determination of this issue would not have a practical effect on the obligation of DHS to file a petition or on the rights of the parents, the Court of Appeals granted the state's motion to dismiss.

RECENT CASE LAW—Continued on page 5.

State v. Cave, ___ Or App ___ (October 15, 2008).
http://www.publications.ojd.state.or.us/A129267.htm

On appeal from the Columbia County Circuit Court, the Oregon Court of Appeals held that 1) restitution must be causally connected to the conviction and 2) the misdemeanor crime of "attempt to elude" includes successful elusion, not just unsuccessful attempts at eluding officers.

The facts of this case are as follows: after repeated attacks while on horseback, the defendant disappeared, and police were unable to locate him when they arrived on the scene. On cross-examination at trial, the defendant testified that when he escaped, he knew the police were after him and that with this knowledge, he jumped into a pick-up truck and then ran on foot to escape. The defendant moved for a judgment of acquittal on the misdemeanor fleeing or attempting to elude a police officer charge, arguing that he did not flee or attempt to elude on foot because he had successfully eluded the police while still in the vehicle.

Based on the ordinary meaning of the statute, the Court of Appeals concluded the phrase "attempts to elude" means "to attempt to escape the notice or perception of." The court concluded that this meaning makes it possible for a person to "flee or attempt to elude the police officer" even after he or she escapes the line of sight of the police officers. The crucial focus of ORS 811.540(1)(b)(B) is on whether the person is "running] away from" or attempting "to escape the notice or perception of" the police officers when he or she gets out of the vehicle. Thus, if the pursuing police officers momentarily lose sight of the person, that does not mean that, at that moment, the person is no longer fleeing or attempting to elude the officers. Based on this reasoning, the Appellate court affirmed the trial court's denial of defendant's motion for a judgment of acquittal.

State ex rel Juv. Dept. v. KL, ___ Or App ___ (October 15, 2008).
http://www.publications.ojd.state.or.us/A137728.htm

This case presents the question of whether a court should allow a permanency hearing to be set over for ninety days, given the mother's recent compliance with services. The Oregon Court of Appeals held that under the specific circumstances presented in this case, the Jackson County Circuit Court should have granted DHS's request for a 90-day continuance of the permanency hearing to allow the mother to prove that she was serious about engaging in services.

The trial court rejected the request of the mother's Jackson County social worker, who recommended that the court allow a 90-day continuance before revisiting the issue of implementing the alternative plan of adoption. Because the court did not believe it could lawfully grant this continuance due to the length of time the children had been in substitute care, the court ordered DHS to implement the adoption plan, rather than work towards reuniting the mother and her children.

The trial court based its decision on two concerns: First, the court knew that in the absence of a compelling reason to do otherwise, ORS 418B.498 requires DHS to file a petition for termination of a parent's rights after the children have been in substitute care for 15 of the most recent 22 months. Therefore, the court expressed concern that because the children had been in placement for almost 14 months, reunification would not occur within a reasonable period of time.

The trial court further expressed concern that mother had moved from one relationship to another, rather than learning to live independently. Because of her new relationship, the court reasoned she might need a period of residential treatment to resolve her drug problems. This treatment would further delay reunification.

On appeal, the Court of Appeals disagreed with the analysis of the mother's actions and determined that the trial court was authorized to grant the requested 90-day continuance and should have done so.

ORS 419B.498(2)(b) authorizes DHS to defer filing a termination petition if there is a compelling reason, which DHS has documented in the case plan, that filing a petition would not be in the children's best interests. One of the nonexclusive possibilities for compelling reasons is as follows: the "parent is successfully participating in services that will make it possible for the child or ward to safely return home within a reasonable time. ORS 419B.498(2)(b)(A).

Further, the court of appeals framed the mother's actions, differently than the trial court, as evidence that she had finally broken free from an abusive relationship that placed reunification with her children in danger.

State ex rel Juv. Dept. v. J.H.-O., ___ Or App ___ (October 29, 2008).
http://www.publications.ojd.state.or.us/A133626.htm

The youth in this case, who was unrepresented at both her delinquency jurisdictional and dispositional hearings, was denied her constitutional right to counsel at her dispositional hearing because there was the potential loss of liberty at stake in the dispositional hearing. The dispositional judgment was reversed and remanded, but the youth's appeal of the jurisdictional judgment was denied because the youth did not file an appeal of that judgment within the statutorily required 30 days.

State ex rel DHS. v. A.T., ___ Or App ___ (November 5, 2008).
http://www.publications.ojd.state.or.us/A137955.htm

In this reversal of a trial court's denial of DHS's petition to terminate

Continued on page 11.

GUARDIANS AD LITEM FOR PARENTS IN DEPENDENCY AND TPR CASES

The Oregon Child Advocacy Project

Professor Leslie J. Harris and Child Advocacy Fellows Colin Love-Geiger and Annette Smith

Trying a dependency or termination of parental rights case against a parent who is incompetent to direct and assist his or her attorney violates due process, just as trying an incompetent criminal defendant does. *State ex rel Juv. Dept. v. Evjen*, 107 Or App 659 (1991); *Dusky v. United States* 362 US 402 (1960). However, the consequences of finding that a parent is incompetent are quite different from those of finding that a criminal defendant is incompetent. In a criminal proceeding, if the defendant is found incompetent to stand trial, the proceedings are stopped, and the defendant is committed to the state mental hospital until he or she regains competence. ORS 161.370(2).[1] In contrast, in a dependency or termination proceeding, a guardian ad litem is appointed to make decisions for the parent, and the case proceeds. ORS 419B.231. *See also State ex rel. Juv. Dept. v. Cooper*, 188 Or App 588 (2003); *State ex rel. Juv. Dept. v. Sumpter*, 201 Or App 79 (2005).

A guardian ad litem cannot be appointed for a parent unless a judge finds, following a hearing, that "(a) Due to the parent's mental or physical disability or impairment, the parent lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent's attorney on decisions the parent must make in the proceeding; and (b) The appointment of a guardian ad litem is necessary to protect the parent's rights in the proceeding during the period of the parent's disability or impairment." ORS 419B.231(4).[2] The court may hold the hearing on the written or oral motion of a party or based on the judge's own reasonable belief that grounds for appointing a guardian exist. ORS 419B.231(1), (2).

Criminal defense attorneys routinely raise questions to the court about their clients' competence to aid and assist in their own defense, since to do so is consistent with protecting the client's right to due process and since a finding of incompetence cannot result in the client being convicted of a crime.[3] Because an incompetent parent with a guardian ad litem may become subject to the juvenile court's dependency jurisdiction or even have his or her parental rights terminated, the parent's attorney who doubts the parent's competence is in a far different position than the criminal defense attorney. Most obviously, simply raising the question of the parent's competence to direct his or her attorney is likely, as a practical matter, to cast grave doubt on his or her ability to parent a child, even though ORS 419B.231(5) provides, "The fact that a guardian ad litem has been appointed under this section may not be used as evidence of mental or emotional illness in any juvenile court proceeding, any civil commitment proceeding or any other civil proceeding." Given this reality, the parent's attorney who doubts the capacity of the parent to direct the case or whose client's capacity is challenged by another is in a difficult ethical position.

The first part of this article discusses this problem. The second part addresses the relationship between the parent's attorney and the guardian ad litem.

A. The ethical duties of a parent's attorney when the parent's competence to direct the case is questionable or challenged

The Oregon State Bar Ethics Committee issued a formal opinion regarding the obligations of an attorney for a parent whose competence is in question five years before the legislature enacted ORS 419B.231, which creates a process for appointing a guardian ad litem for such a parent. *Zealous Representation: Requesting a Guardian ad Litem in a Juvenile Dependency Case*, OSB Formal Op. No. 2000-159 (2000). The legislation is not inconsistent with the ethics opinion, which, therefore, remains valid. The principal question that the opinion addresses is whether a lawyer for a parent may request that a GAL be appointed. Applying general ethical principles that govern attorneys' relationships with clients of diminished capacity, the opinion provides in relevant part:

> Although a marginally competent client can be difficult to represent, a lawyer must maintain as regular a lawyer-client relationship as possible and adjust representation to accommodate a client's limited capacity before resorting to a request for a GAL (citing Oregon Rule of Professional Conduct 1.14). . . [L]awyers should request GALs for their clients only when a client consistently demonstrates a lack of capacity to act in his or her own interests and it is unlikely that the client will be able to attain the requisite mental capacity to assist in the proceedings in a reasonable time.

OSB Formal Op. No. 2000-159 at 435-36.[4] The normal attorney-client relationship includes the lawyer's duties of diligence, competence,

Continued on page 7.

and loyalty to the client; the attorney must protect the client's confidences and avoid conflicts of interest. The duty of loyalty requires the lawyer to allow the client to determine the objectives of the representation and to seek to achieve them. It is, therefore, central to the attorney's duty to maintain as normal a relationship as possible with the client with diminished capacity. The commentary to ABA's Model Rule of Professional Conduct 1.14, which is identical to Oregon's Rule 1.14, recommends that the attorney think of the client's mental competency as being on a continuum, which allows an attorney to analyze which decisions can be left up to the client and which may require additional external input. The Oregon ethics opinion emphasizes that a lawyer "can most often explain the decisions that the client faces in simple terms and elicit a sufficient response to allow the lawyer to proceed with the representation." OSB Formal Op. No. 2000-159 at 437.

Oregon Rule of Professional Conduct 1.14, like the Model Rule, contemplates that the lawyer will make special efforts to avoid having a GAL appointed for the client. The commentary to the Model Rule gives several examples of measures that an attorney might take to avoid having a GAL appointed for a client. Among those that are applicable when the attorney represents a parent in a child protective proceeding are "(1) consulting with family members, (2) using a reconsideration period to permit clarification or improvement of circumstances, … (4) consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client."

The Oregon and Model Rules provide that the attorney's usual obligation to maintain a client's confidentiality is modified when the client has diminished capacity: "When taking protective action pursuant to Rule 1.14(b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." RPC 1.14(c). The commentary to ABA Model Rule 1.14(b) gives an example of how the obligation to maintain confidentiality might be modified:

> The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under Rule 1.14(b), must to look to the client, and not family members, to make decisions on the client's behalf.

Appointment of a guardian ad litem should be the last resort when a parent facing a dependency or termination of parental rights proceeding is marginally competent. The parent's lawyer must evaluate the circumstances carefully and advocate the least restrictive action on behalf of the client.

B. The role and obligation of the parent's guardian ad litem

The statutes concerning appointment of GALs for parents in child welfare proceedings and the 2000 State Bar ethics opinion both make clear that after a GAL is appointed, the GAL "control[s] the litigation and provide[s] direction to the parent's attorney on the decisions that would ordinarily be made by the parent in the proceeding." ORS 418B.234(3)(d); OSB Formal Op. No. 2000-159 at 438. *See also State ex rel. Juv. Dept. v. Sumpter*, 201 Or App 79 (2005) (When parent has a GAL, the GAL alone is able to make a valid waiver of the parent's right to a trial on the merits, and that waiver must be knowing and intelligent. That the guardian was present and did not object does not show such a waiver. The court must ascertain on the record that the guardian understand what rights are being given up for the waiver to be valid.).

The Oregon statute gives the GAL authority to make all decisions that the parent could normally make, including deciding not to contest a case. ORS 419B.234(3)(b) explicitly allows the GAL to "admit or deny the allegations of any petition; agree to or contest jurisdiction, wardship, temporary commitment, guardianship or permanent commitment; accept or decline a conditional postponement; or agree to or contest specific services or placement." Subsection (3)(c) allows the GAL to "make decisions concerning the adoption of a child of the parent including release or surrender, certificates of irrevocability and consent to adoption under ORS 109.312 or 418.270 and agreements under ORS 109.305."

In exercising this decision-making authority, the GAL must "make the decisions consistent with what the guardian ad litem believes the parent would decide if the parent did not lack substantial capacity to either understand the nature and consequences of the proceeding or give direction or assistance to the parent's attorney on decisions the parent must make in the proceeding." ORS 419B.234(4). In other words, the GAL does not act on his or her own assessment of the client's best interests, but rather on the basis of what the GAL believes the parent would do. The GAL is required to "consult with the parent, if the parent is able, and with the parent's attorney and make any other

Continued on page 8

GAL—Continued from page 7.

inquiries as are appropriate to assist the guardian ad litem in making decisions in the juvenile court proceeding." ORS 419B.234(3)(a). Courts in some other states have held that because the central function of a GAL is to protect a parent's fundamental legal rights, a GAL may waive a parent's legal rights only in return for a legal benefit. E.g., . *In re Christina B.*, 19 Cal. App. 4th 1441 (1993).

The parent's attorney must follow the instructions of the guardian ad litem regarding decisions that are ordinarily made by the parent in the proceeding. ORS 419B.234(5). However, the attorney also continues to have an obligation to protect the parent's interest in making decisions if he or she is competent. The statute requires the parent's attorney to "inquire at every critical stage in the proceeding as to whether the parent's competence has changed and, if appropriate, [to] request removal of the guardian ad litem." *Id.*[5]

Endnotes

1. If the defendant does not regain competence within three years or the length of the maximum sentence authorized for the offense with which he or she is charged, whichever is shorter, he or she must be released from the mental health facility. ORS 161.370(6). Oregon has not enacted a statute governing competence to stand trial issues in juvenile delinquency proceedings, but the issue can be raised in them. Oregon State Bar Continuing Legal Education, Juvenile Law §§ 26.11 –26.13 (2007 rev.).

2. The GAL must be "a licensed mental health professional or attorney, … be familiar with legal standards relating to competence, … have skills and experience in representing persons with mental and physical disabilities or impairments; and may not be a member of the parent's family." ORS 419B.234(1).

3. The difficult question of the attorney's ethical duty when he or she thinks that the criminal defendant client is incompetent but the client opposes raising the issue to the court is beyond the scope of this memo. For a discussion of this issue in the context of a juvenile delinquency proceeding, *see* David R. Katner, *The Ethical Struggle of Usurping Juvenile Client Autonomy by Raising Competency in Delinquency and Criminal Cases*, 16 S. Cal. Interdis. L. J. 293 (2007).In the same vein, American Bar Association Formal Opinion 404 (1996) provides:

4. A lawyer who reasonably determines that his client has become incompetent to handle his own affairs may take protective action on behalf of his client, including petitioning for the appointment of a guardian. The protective action should be the least restrictive under the circumstances. The appointment of a guardian is a serious deprivation of the client's rights and ought not to be undertaken if other, less drastic, solutions are available. With proper disclosure to the court of the lawyer's self-interest, the lawyer may recommend or support the appointment of a guardian who the lawyer reasonably believes would be a fit guardian…"

5. The GAL also has an obligation to inform the court if the parent no longer needs a GAL. ORS 419B.234(3)(e).

COMMUNITY PARTNER TRAININGS

OREGON SAFETY MODEL TRAININGS

The Department of Human Services, Child Welfare Program is offering a series of free trainings for judicial officers and attorneys of Multnomah County on the **Oregon Safety Model.** The training is being presented in 3 modules over the lunch hour (12:15 p.m.—1:15 p.m.) on **November 18th, November 19th and December 16th**, in the large conference room at the Juvenile Justice Center. Participants are invited to bring their lunch and attend all 3 modules if they can. Module 1 will cover *Safety Threats, Safety Analysis, and Placement Matching*. Module 2 will cover the *Development of Ongoing Safety Plans through use of Child Safety Meetings, Conditions for Return, and face-to-face contact with clients*. Module 3 will cover the *Protective Capacity Assessment, Expected Outcomes, and Confirming Safe Environments*.

WRAPAROUND 101

The Wraparound Oregon Training Committee is offering free training for community partners new to the wraparound process on:

- Developing understanding of wraparound principles
- Identifying roles on wraparound teams
- Applying understanding of wraparound principles and roles for effective participation in work with child and family teams.

If you wish to attend please register online at:

Http://www/ccf.pdx.edu/forms/index.php?formTitle=form 4 or contact Karen Bard at PSU's Center for the Improvement of Child & Family Servs.:

bark@pdx.edu.

TERMINATION OF PARENTAL RIGHTS IN EXTREME CONDUCT CASES Part I

The Oregon Child Advocacy Project

Professor Leslie J. Harris and Child Advocacy Fellows Farron Lennon and David Sherbo-Huggins

Summary

ORS 419B.502 allows a court to find that a parent is unfit "by reason of a single or recurrent incident of extreme conduct toward any child" and lists seven kinds of conduct that a court must consider in making the determination. None of the listed conduct except previous involuntary termination of parental rights explicitly requires the state to prove that the parent cannot safely care for the child at the time of trial. The language of the statute and its legislative history do not resolve the ambiguity. However, courts should interpret the statute as imposing this requirement because the statute would otherwise violate parents' constitutional rights in some circumstances.

I. The ambiguous statute

ORS 419B.502 provides that a parent's rights may be terminated "if the court finds that the parent or parents are unfit by reason of a single or recurrent incident of extreme conduct toward any child. In such case, no efforts need to be made by available social agencies to help the parent adjust the conduct in order to make it possible for the child or ward to safely return home within a reasonable amount of time." The statute then lists seven kinds of conduct that the court "shall consider" in determining whether extreme conduct exists:

1) Rape, sodomy or sex abuse of any child by the parent.

(2) Intentional starvation or torture of any child by the parent.

(3) Abuse or neglect by the parent of any child resulting in death or serious physical injury.

4) Conduct by the parent to aid or abet another person who, by abuse or neglect, caused the death of any child.

(5) Conduct by the parent to attempt, solicit or conspire, as described in ORS 161.405, 161.435 or 161.450 or under comparable laws of any jurisdiction, to cause the death of any child.

(6) Previous involuntary terminations of the parent's rights to another child if the conditions giving rise to the previous action have not been ameliorated.

(7) Conduct by the parent that knowingly exposes any child of the parent to the storage or production of methamphetamines from precursors. In determining whether extreme conduct exists under this subsection, the court shall consider the extent of the child or ward's exposure and the potential harm to the physical health of the child or ward.

No Oregon case has decided whether this statute means that proof of any one of specific types of conduct listed in paragraph (1)-(5) or paragraph (7) is automatically a ground for termination or whether the state must also provide more evidence to establish that the parent is presently unfit to parent the child.

On its face, the statute could be interpreted as requiring proof only that the parent at some time in the past has committed one of the listed acts, particularly because paragraph (6), concerning prior termination of parental rights, explicitly requires proof that "the conditions giving rise to the previous action have not been ameliorated." Dictum in *State ex rel DHS v. Rardin*, 340 Or. 436, 134 P.3d 940 (2006), adopts this interpretation. In that case the Supreme Court said,

> ORS 419B.502 permits the (termination of parental rights based on a single (or recurrent) incident of "extreme conduct towards any child," and it provides a nonexclusive list of factors for the court to consider in determining extreme conduct . . . . The legislature thus provided a procedure for terminating parental rights based upon past conduct, even when the parent might be a "fit" parent at the time of the termination proceeding. 340 Or. at 448-49.

On the other hand, less than a month after *Rardin,* the Court of Appeals in *State ex rel DHS v. Keeton,* 205 Or. App. 570, 135 P.3d 378 (2006), cast doubt on this interpretation. Without deciding the issue, the court said,

> We note that, to read the statute in the manner the state suggests, would, in essence, eliminate any requirement for a finding of present unfitness--that is, that unfitness and extreme conduct would be conflated notwithstanding the "by reason of" language of ORS 419B.502. On the other hand, to read the statute as mother does--to require the state to establish by clear and convincing evidence a nexus between a parent's extreme conduct and serious detriment to the children--would render ORS 419B.502 redundant of some aspects of ORS 419B.504.
>
> 205 Or. App. at 585.

Continued on page 10.

Neither court considered a third possible interpretation of the statute: that proof of one of the listed acts could be sufficient if no other evidence about the parent's present condition was presented, but that the parent could present evidence to suggest that at the time of trial s/he was not unfit. This interpretation would mean that proof of one of the acts would satisfy the state's burden of production, but it would still have the burden to persuade the judge by clear and convincing evidence of the ultimate issue, that the parent was unfit. *Cf. Santosky v. Kramer,* 455 U.S. 745 (1982),

The legislative history of ORS 419B.502 is unclear and can support an argument for any of these interpretations, as the next section describes.

II. Legislative history of ORS 419B.502

The Oregon legislature first enacted a statute allowing termination of parental rights for "extreme conduct" in 1989. H.B. 3200 of the 1989 legislative session added the following language to ORS 419.523, which at the time was the statute that set out grounds for termination.

> (2) The rights of the parent or parents may be terminated as provided in subsection (1) of this section if the court finds that the parent or parents are unfit by reason of a single or recurrent incident of extreme conduct toward the child or another child and that continuing the parent and child relationship is likely to result in serious abuse or neglect. In such case, no efforts need to be made by available social agencies to Help the parent adjust the conduct in order to make the return of the child possible. In determining extreme conduct, the court shall consider the following:
>
> (a) Rape or sodomy of the child by the parent.
>
> (b) Intentional starvation or torture of the child by the parent.
>
> (c) Parental abuse or neglect of the child resulting in serious physical injury, as defined in ORS 161.015.
>
> (d) Parental abuse or neglect resulting in death or serious physical injury, as defined in ORS 161.015, of a sibling or another child.

HB 3200 was introduced at the request of Children's Services Division, the predecessor agency to the Children, Adults and Families Division of the Department of Human Services. Assistant Attorney General Debbie Wilson, Oregon Department of Justice, testified that the purpose of the new provision was to give CSD discretion to proceed immediately to termination of parental rights without making reasonable efforts to reunite the parent and child in cases where the parent's conduct was so egregious that it presented a great risk to the child. She said that the new language provides,

> that when there has been a "single or recurrent incident of extreme conduct" towards the child and continuing the parent child relationship help would be a risk to the child that we can, CSD can immediately file for termination of parental rights. What you need to understand, currently, under the current statute for termination of parental rights it is what we not be able to parent this child within the foreseeable future. We also have to work to reunite the parent and the child. We would suggest to this committee that there are some circumstances where there has been extreme conduct toward the child and where in fact we could prove in court that trying to reintegrate this child and parent would be a risk to the child that in fact we should be able to immediately file a termination petition without doing any more. Without trying to have visits with the parent and child without providing a lot of services. That would not stop in any way the parents ability to go out on their own and attempt to get services or attempt to show how in fact their conduct would not put this child at risk. But it would stop the agency from having to work with them usually for about one year. The type of cases we're talking about here in terms of extreme conduct are defined in the statute you can find them on page 21 . . . . Again we do not want to just automatically say that they are an unfit parent, but we want the ability to file in court and not have to work with them. If in fact they can come to court and prove for some reason that they have now been rehabilitated, that they are not a risk to their other children then they would have the opportunity to do that in court.
>
> (all emphasis added)
> (audio tape)

Continued on page 11.

EXTREME CONDUCT—Continued from page 10.

Later in the hearing, Representative Kevin Mannix asked,

> You talk about death or serious physical injury of a sibling or another child due to parental abuse or neglect. What about death or serious physical injury of the child's other parent? Why should you have to go through a year of services when the father has killed the mother for example?

Ms. Wilson replied,

> That's a good argument. One would like to say though, that what we are really out to do is protect kids. There could potentially be situations where a parent would kill another parent and he may in fact be able to parent that child. I know that sounds ridiculous, but again we are very cautious . . . . What we want to make sure is that if their action is extreme conduct toward the child and that that child would be at risk if put back in that home.

Rep. Mannix continued,

> Your own bill says "if the court finds that the parent or parents are unfit by reason of a single or recurrent incident" so don't you take care of that problem with your own bill? (emphasis in original oral testimony)Ms. Wilson answered,
>
> Ya I think we do. I think there would definitely be a safe guard there in our own bill. (audio tape)

The language enacted in 1989, now codified in ORS 419B.502, remained essentially unchanged until 1999, when the phrase, "and that relationship is likely to result in serious abuse or neglect." was deleted and additional terms were added by SB 408. As amended, the section read (italicized language deleted, words in bold added):

> The rights of the parent or parents may be terminated as provided in ORS 419B.500 if the court finds that the parent or parents are unfit by reason of a single or recurrent incident of extreme conduct toward any child and that continuing the parent child relationship is likely to result in serious abuse or neglect. In such a case no efforts need be made by available social agencies to help the parent adjust the conduct in order to make it possible for the child or ward to return safely home within a reasonable amount of time. In determining extreme conduct the court shall consider the following:
>
> (1) Rape, Sodomy or sex abuse of any child by the parent
>
> (2) Intentional starvation or torture of any child by the parent.
>
> (3) Abuse of neglect by the parent of any child resulting in death or serious physical injury.
>
> (4) Conduct by the parent to aid or abet another person who by abuse or neglect caused the death of any child.
>
> (5) Conduct by the parent to attempt, solicit, or conspire, as described in ORS 161.405, 161.435 or 162.450 or under comparable laws of any jurisdiction, to cause the death of any child.
>
> (6) Previous involuntary termination of parents rights to another child and the conditions giving rise to the previous action have not been ameliorated.

CONTINUED IN NEXT ISSUE OF JLR

RECENT CASE LAW - Continued from Page 5

Parental rights, the Court of Appeals found that father's recent progress in chemical dependency treatment was not sufficient to lead to a likelihood of reintegration within a reasonable amount of time. The Court noted that father's "past in this case, is the best predictor of father's future success". Father had an extensive history of drug addiction and inability to maintain recovery when faced with other day-to-day stressors in his life, including his employment, domestic violence treatment and parent training.

CASES OF INTEREST FROM OTHER JURISDICTIONS

Santos v. State, No. S08A1296, 2008 WL 4691705 (Ga, October 27, 2008).
http://www.gasupreme.us/pdf/s08a1296.pdf

In *Santos*, the Georgia Supreme Court held that state's sex offender registration law to be unconstitutionally vague because it fails to make provision for registration of homeless sex offenders who are required to register.

The Court found that in the absence of any language in the statute providing direction or a standard of conduct applicable to offenders who do not possess a street or route address, the statute did not provide fair warning to persons of ordinary intelligence as to what is required for compliance and therefore, the registration as applied to Santos is unconstitutionally vague under the due process clauses of the Georgia and United States Constitutions.

IN RE ALEXIS O., ___ NH ___ (October 29, 2008).

The New Hampshire Supreme Court unanimously ruled in the *Alexis O.* case that the ICPC

Continued on page 12.

CASES OF INTEREST FROM OTHER JURISDICTIONS

—Continued from page 11.

(The Interstate Compact on the Placement of Children), is not applicable to placements of children in foster care with their birth parents. The Court's decision was based primarily on statutory grounds, but the Court also discussed how the ICPC fails to afford parents any presumption of fitness as required by the fundamental liberty interest of parents in raising and caring for their children. See, Troxel v. Granville, 530 U.S. 57, 66 (2000)(plurality opinion).

The Court also find in its examination of the statute that, read as a whole, the Compact was intended only to govern placing children in substitute arrangements for parental care, and not when a child is returned by the sending state to a natural parent residing in another state.

RESOURCES

JUVENILE JUSTICE

The Future of Children, a collaboration of the Woodrow Wilson School of Public and International Affairs at Princeton University and the Brookings Institution, has released its latest publication, *Juvenile Justice*, which provides useful research on current delinquency issues. The 210 page volume examines juvenile justice policies and practices with the goal of promoting reforms that are based on solid evidence and acknowledge that adolescents differ from adults in ways that courts and practitioners ought to take into account. Addressing the "get tough" reforms of the past two decades—reforms that criminalized delinquency and ignored the developmental realities of adolescence—the volume concludes that these reforms have been both unnecessarily costly and of questionable effectiveness.

Chapters in the volume include: Adolescent Development and Regulation of Youth Crime; Improving Professional Judgments of Risk and Amenability in Juvenile Justice; Disproportionate Minority Contace; Juvenile Crime and Criminal Justice: Resolving Border Disputes; Understanding the Female Offender; Adolescent Offenders with Mental Disorders; Juvenile Justice and Substance Use; and Prevention and Intervention Programs for Juvenile Offenders.

Juvenile Justice is available online at: www.futureofchildren.org

JRP Juvenile Rights PROJECT

401 NE 19th Avenue

Suite 200

Portland, Oregon 97232