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"There are over 3,000 people on Oregon's sex offender registry for offenses committed as juveniles."

Learn How You Can Support the CLiF Project on Page 8.

Impact of the New Supreme Court ICWA Case

On Child Welfare Cases

By Leslie J. Harris, Dorothy Kliks Fones Professor, University of Oregon School of Law

Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013), the Indian Child Welfare Act, 25 U. S. C. §§1901–1963 (ICWA) case decided by the Supreme Court this summer, did not change the test for whether ICWA applies to a case. If the proceeding is a "child custody proceeding" involving an "Indian child" as those terms are defined in ICWA,[1] ICWA applies. The Court in *Adoptive Couple* took this as a given.[2] The case also did not change ICWA's jurisdictional rules, including the provision granting exclusive jurisdiction to a tribal court if the child resides or is domiciled on the reservation.[3] The case did not change the rights of the child's tribe to notice of foster care or termination of parental rights proceedings involving the child[4] or the right of the tribe to intervene in such proceedings.[5] Instead, the case limited the application of ICWA provisions that protect the parental rights of Indian children in "child custody proceedings." Specifically, it held that a parent who does not have legal or physical custody is not protected by the requirement that active efforts to preserve the family

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be made before the parent's rights are terminated[6] or by the requirement that evidence, including qualified expert testimony, support a finding beyond a reasonable doubt 'that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" before parental rights are terminated. [7] 133 S.Ct. at 2556.

Adoptive Couple is only the second case about ICWA that the Supreme Court has decided, and it, like the first case, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U. S. 30 (1989), concerns a private adoption, rather than a juvenile court dependency or termination of parental rights proceeding. This contributes greatly to the differing opinions about the scope of *Adoptive Couple* and whether it is a good or bad decision. Those who view the case as fundamentally an adoption case tend to think that the Supreme Court correctly interpreted ICWA as applying primarily when a public or private agency removes an Indian child from the parents or caregivers. From this perspective, the opinion protects unmarried mothers who seek to place their children for adoption from being thwarted by uninvolved fathers who haven't taken any personal responsibility for the children.[8] In contrast, those who view the case as being primarily about the scope of ICWA regard the opinion as significantly undermining the statute's goal of preserving the relationship between Indian children and their tribes.[9] The majority opinion in *Adoptive Couple* treats the case as being primarily about private adoptions,[10] and it is, therefore, not clear how it will apply in dependency and termination of parental rights cases in juvenile court.

The Facts[11]

Baby Girl was born to an unmarried mother in Oklahoma. During the pregnancy, the relationship between the mother and the father, a member of the Cherokee nation, fell apart. While pregnant, the mother sent a message to the father, asking if he would rather pay child support or surrender his parental rights, and he replied that he would relinquish his rights. He later said that he didn't understand this to mean that he was consenting to adoption, but rather thought the mother would raise the child without him.

The mother, who had two other children and was struggling financially, decided to place the baby for adoption. Working with a private agency in Oklahoma, she chose a couple in South Carolina as the adoptive parents. The mother told the agency that the father was Native American, and her attorney sent a letter to the Cherokee Nation asking whether he was an enrolled member. Because his name was misspelled and his birthday was incorrect, the Nation responded that he was not on the rolls. In preparation for transporting the baby to South Carolina, the mother signed Interstate Compact documents which did not identify the child as Native American.

Adoption papers were filed in South Carolina soon after the baby's birth, but the father was not served or notified of the action until she was about four months old. The father signed the relinquishment papers, believing the mother would raise the child without him. When he realized that the mother had relinquished her rights to the adoptive parents, the

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father tried unsuccessfully to retrieve the papers from the process server. He promptly contacted a lawyer, who filed to stay the adoption proceedings and initiated a paternity suit in Oklahoma. The mother and the adoptive parents moved successfully to have the Oklahoma action dismissed for lack of jurisdiction. In the meantime, the Cherokee Nation had identified the father as a registered member and the baby as an Indian child under ICWA. It filed to intervene in the South Carolina adoption action.

The South Carolina Proceedings

The South Carolina trial court ordered genetic testing, which established the father's biological paternity. After a hearing on the merits of the father's objection to the adoption, the trial court concluded that ICWA applied, that the father had not voluntarily consented to relinquish his parental rights, and that the adoptive parents had not proven by clear and convincing evidence that his parental rights should be terminated or that granting him custody would result in serious emotional or physical damage to the baby. The court, therefore, ordered transfer of custody to the father. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 556 (S.C. 2012).

The South Carolina Supreme Court affirmed. It first rejected the "existing Indian family" exception to ICWA, which interprets ICWA as not applying to a child who has never been a member of an Indian home. 731 S.E.2d at 558. The court then ruled that the father was a "parent" for purposes of ICWA,[12] and that two provisions of ICWA that are prerequisites to the involuntary termination of parental rights had not been satisfied. These are the requirements that active efforts to "prevent the breakup of the Indian family" have been tried unsuccessfully, 25 U.S.C. § 1912(d), and that evidence, including qualified expert testimony, support a finding beyond a reasonable doubt 'that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," 25 U.S.C. § 1912(f). The court, therefore, upheld the order to place the child with her father.

The Supreme Court Reverses

In a 5-4 opinion authored by Justice Alito, the majority of the Supreme Court reversed. It held that the provisions of ICWA imposing the active efforts requirement and precluding involuntary termination of parental rights absent proof beyond a reasonable doubt that the child would suffer serious damage if placed in the father's custody did not apply. The Court concluded, based on language in the statutory provisions creating these requirements, that Congress intended them to apply only if the child had been removed from the (physical or legal) custody of the parent claiming their protection. Since Baby Girl had never been in her biological father's legal or physical custody, these rules did not apply to the termination of his rights, the Court held. 133 S.Ct. at 2556.

The opinion bolstered this interpretation by arguing that the problem Congress was addressing in ICWA was the practice of public and private child welfare and adoption agencies taking children from Indian homes. The Court wrote, "[W]hen, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA's primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated." 133 S.Ct. at 2561. The Court continued,

> Section 1912(d) [the active efforts requirement] is a sensible requirement when applied to

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"Justice will not be served until those who are unaffected are as outraged as those who are."

– *Benjamin Franklin*

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state social workers who might otherwise be too quick to remove Indian children from their Indian families. It would, however, be unusual to apply § 1912(d) in the context of an Indian parent who abandoned a child prior to birth and who never had custody of the child. The decision below illustrates this point. The South Carolina Supreme Court held that § 1912(d) mandated measures such as "attempting to stimulate [Biological] Father's desire to be a parent." 398 S.C., at 647, 731 S.E.2d, at 562. But if prospective adoptive parents were required to engage in the bizarre undertaking of "stimulat[ing]" a biological father's "desire to be a parent," it would surely dissuade some of them from seeking to adopt Indian children. And this would, in turn, unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home, even in cases where neither an Indian parent nor the relevant tribe objects to the adoption.

133 S.Ct. at 2563-2564. In a footnote the Court added, "Biological Father and the Solicitor General argue that a tribe or state agency *could* provide the requisite remedial services under § 1912(d). Brief for Respondent Birth Father 43; Brief for United States as *Amicus Curiae* 22. But what if they don't? And if they don't, would the adoptive parents have to undertake the task?" 133 S.Ct. at 2564, n. 9.

The final paragraph of the opinion makes clear that the majority viewed this case primarily as a private adoption case and as raising issues similar to earlier decisions about the rights of unmarried biological fathers. It says:

> The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context.

133 S.Ct. at 2565. This passage has echoes of language in *Lehr v. Robertson*, 463 U.S. 248 (1983) and *Quilloin v. Walcott*, 434 U.S. 246 (1978), earlier Supreme Court decisions upholding against due process

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challenges state laws that denied uninvolved biological fathers the rights to notice of adoption proceedings and to prevent an adoption by withholding consent.[13]

The Impact of the Case on Private Adoptions

The clearest effect of *Adoptive Couple* is on private adoptions with fact patterns similar to those in the case itself. If one of a child's parents (typically a father) does not have physical or legal custody, the custodial parent (typically the mother) and would-be adoptive parents do not have to comply with the ICWA requirements of active efforts and proof beyond a reasonable doubt that placement with the noncustodial parent would damage the child. However, the Supreme Court opinion indicates that other provisions of ICWA would apply. The most obvious evidence of this view, ironically, is the Court's statement that the ICWA placement preferences[14] do not apply "in cases where no alternative party has formally sought to adopt the child." It characterized *Adoptive Couple* as such a case. 133 S.Ct. at 2564. The application of this interpretation to the facts of the case is dubious, at best, since there was no occasion for anyone who might have a preference to seek to adopt, given that the father and the Cherokee Nation were arguing for the preservation of his rights. But it is quite important that the Court assumed that the placement preference statute still governed and might limit the baby's placement with the would-be adoptive parents. In addition, as mentioned above, the Court says that it is undisputed that Baby Girl is an "Indian child" and that the adoption proceeding was a "child custody proceeding," as those terms are defined in ICWA. 133 S.Ct. at 2557, n.1. Similarly, later in the opinion the majority argues that the dissent undercut its argument "when it states that 'numerous' ICWA provisions not at issue here afford 'meaningful' protections to biological fathers regardless of whether they ever had custody," 133 S.Ct. at 2561, n. 6, a point with which it does not disagree. In other words, the Court did not adopt the "existing Indian family" exception to ICWA.[15] If it had, none of the provisions of ICWA would have applied.

Employing the Court's analysis, the following provisions of ICWA, in addition to the placement preferences, would apply to a private adoption even if one parent did not have custody because none of them includes language about breaking up an Indian family or continuing custody in the parent:

-- 25 U.S.C. § 1911, governing when a tribal court would have exclusive jurisdiction and when a state court could assert jurisdiction, subject to a petition to remove the action to state court, as well as the obligation of states to give full faith and credit to judgments of tribal courts;

-- 25 U.S.C. § 1911(c), granting the child's tribe the right to intervene in a state court proceeding for foster care placement or termination of parental rights;

-- 25 U.S.C. § 1912(a), in an involuntary foster care or termination of parent rights case, obliging the state court to notify the child's parent and tribe, to appoint counsel for the parent, and to allow parties to examine all reports and documents;

-- 25 U.S.C. 1913(a), allowing a parent who voluntarily consents to a foster care placement or to termination of parental rights to withdraw that consent and, after a final decree of adoption, to collaterally attack the decree for fraud or duress.

Indeed, the only other provisions of ICWA that include the language about removing a child or continuing custody and which would not protect a parent who did not have custody, in addition to those discussed in *Adoptive Couple*, are these:

-- 25 U.S.C. § 1912(e), before an involuntary foster care placement can be ordered, requiring clear and convincing evidence including testimony of a qualified expert that continued custody by the parent is likely to result in serious emotional or physical damage to the child;

-- 25 U.S.C.§ 1914, allowing a child, a parent from whose custody the child was removed and the tribe to petition to invalidate an action taken in violation of §§ 1911, 1912 or 1913; and

-- 25 U.S.C. § 1916, allowing a biological parent or prior Indian custodian to petition for return of

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custody whenever a final decree of adoption has been vacated or set aside and requiring the court to grant the petition unless it is not in child's best interests.

The Impact of the Case on Child Welfare Proceedings

In a termination of parental rights action in juvenile court involving an Indian child who was never in the legal or physical custody of the parent whose rights are at stake, the *Adoptive Couple* Court's statutory analysis relying on the words "breakup of the Indian family" or "continued custody" point in a different direction than does its policy analysis. If the child had not been in the parent's custody, the same statutory construction arguments used in *Adoptive Couple* could be deployed in the juvenile court action. On the other hand, the Court also recognized that

> the primary mischief the ICWA was designed to counteract was the unwarranted *removal* of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts. The statutory text expressly highlights the primary problem that the statute was intended to solve: "an alarmingly high percentage of Indian families [were being] broken up by the *removal*, often unwarranted, of their children from them by nontribal public and private agencies." § 1901(4) (emphasis added); see also § 1902 (explaining that the ICWA establishes "minimum Federal standards for the *removal* of Indian children from their families" (emphasis added)); *Holyfield*, 490 U.S., at 32–34, 109 S.Ct. 1597.

133 S.Ct. at 2561. This concern might be said to exist any time a child welfare agency is initiating an action to terminate the parental rights of an Indian child's parent, which would suggest that all the provisions of ICWA should apply in such a proceeding.

The application of *Adoptive Couple* to foster care proceedings is even more uncertain because of how ICWA defines "foster care placement." The statute defines "foster care placement" as "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand." 25 U.S.C. § 1903(1)(i). If the mode of analysis of *Adoptive Couple* is applied to this language, it means that ICWA does not protect the noncustodial parent of an Indian child who is being placed in foster care, a result that would be sharply at odds with the policy and purpose of the Act.

Even if an agency invoked the *Adoptive Couple* analysis in a foster care or termination of parental rights proceedings case, state law and practice would still provide significant protection to the noncustodial parent (usually a father). The most important statutory section is ORS 419A.004(16), which defines "parent" to mean "the biological or adoptive mother and the legal father of the child, ward, youth or youth offender." It further defines "legal father" in cases to which ICWA applies as "a man who is a father under applicable tribal law."[16] Thus, if under tribal law a man is recognized as a child's father, he is the child's legal

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father entitled to full rights in juvenile court proceedings, even though under state law he might be only a putative father, i.e., a man alleged to be a father whose paternity has not been established, who gets only provisional rights.[17]

In addition, the Oregon Administrative Rules governing child abuse investigations require workers to make "diligent efforts to identify the child's legal parents and any putative fathers after a child is taken into protective custody." OAR 413-015-0455(1)(e). Ordinarily, if a putative father is identified, the agency attempts to clarify whether he is the biological father and, if his biological paternity is established, he becomes a legal father entitled to full rights.[18] Thus, a father who had never had custody of his child but whose paternity was legally established would have full rights under the juvenile code. While this would not mean that he automatically was a legal custodian of the child clearly entitled to the full protections of ICWA, if the child were ever temporarily placed with him, he would become entitled to those protections, even under a restrictive reading of *Adoptive Couple*. ●

[1] ICWA defines "child custody proceeding" as including proceedings to establish a foster care placement, to terminate parental rights, to establish a preadoptive placement, and to establish an adoption. 25 U.S.C. § 1903(1). An "Indian child" "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

[2] 133 S.Ct. at 2557, n.1.

[3] 25 U.S.C. § 1911(a) and (b).

[4] 25 U.S.C. § 1912(a).

[5] 25 U.S.C. § 1911(c).

[6] 25 U.S.C. § 1912(d).

[7] 25 U.S.C. § 1912(f).

[8] *See, e.g.,* Brief of Amici Curiae National Council for Adoption in Support of Petitioners (Feb. 26, 2013), available 2013 WL 749938.

[9] *See, e.g.,* Brief of Casey Family Programs, Child Welfare League of America, Children's Defense Fund, Donaldson Adoption Institute, North American Council on Adoptable Children, Voice for Adoption, and Twelve Other National Child Welfare Organizations as Amici Curiae in Support of Respondent Birth Father (Mar. 28, 2013), available at 2013 WL 1279468.

[10] *See* text accompanying notes ___ *infra*.

[11] These facts are taken from the Supreme Court opinion.

[12] This issue was not resolved by the Supreme Court. 133 S.Ct. at 2559-2560. The question is the interpretation of 25 U.S.C. § 1903(9), which provides:

> "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *It does not include the unwed father where paternity has not been acknowledged or established*;

Some courts, such as the trial court in *Adoptive Couple*, have interpreted the italicized language as being satisfied if the father takes any informal action acknowledging paternity or if biological paternity is established at some point during the proceedings. Other courts defer to state laws which require more formal actions. See, e.g., Matter of Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988); Yavapai–Apache Tribe v. Mejia 906 S.W.2d 152, 171–173 (Tex. App. 1995); In re Daniel M., 1 Cal.Rptr.3d 897 (Cal. App. 2003).

[13] *See, e.g., Lehr*, 463 U.S. at 261:

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban [v. Mohammed]*, 441 U.S., at 392, 99 S.Ct., at 1768, his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he "act[s] as a father toward his children." *Id.*, at 389, n. 7, 99 S.Ct., at 1766, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children as well as from the fact of blood relationship." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844, 97 S.Ct. 2094, 2109-2110, 53 L.Ed.2d 14 (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-1542, 32 L.Ed.2d 15 (1972)).

[14] 25 U.S.C. § 1915(a) provides that in a state court adoption proceeding, "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."

[15] Courts that have adopted the existing Indian family exception cite the same statutory language that the Supreme Court cited in *Adoptive Couple*, but they reach the broader conclusion that Congress did not intend for any of the provisions of ICWA to apply if the child was never in the physical custody of an Indian parent. *See, e.g.*, In re Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982), overruled In re A.J.S., 204 P.3d 543 (Kan. 2009); In re Adoption of Baby Boy D., 742 P.2d 1059, 1064 (Okla. 1985), overruled In the Matter of Baby Boy L., 103 P.3d 1099 (Okla. 2004).

[16] In addition, ORS 419B.100(5)(b) authorizes the "parent," not just the "legal parent," of an Indian child not domiciled on the reservation to petition to have a foster care or termination of parental rights proceeding transferred to a tribal court.

[17] ORS 419B. 875, defining parties to proceedings in dependency and termination cases and their rights, provides in subsection (1)(a)(C) that "A putative father of the child or ward who has demonstrated a direct and significant commitment to the child or ward by assuming, or attempting to assume, responsibilities normally associated with parenthood, including but not limited to: (i) Residing with the child or ward; (ii) Contributing to the financial support of the child or ward; or (iii) Establishing psychological ties with the child or ward" is a party, and subsection (3) provides that "A putative father who satisfies the criteria set out in subsection (1)(a)(C) of this section shall be treated as a parent, as that term is used in this chapter and ORS chapters 419A and 419C, until the court confirms his paternity or finds that he is not the legal or biological father of the child or ward."

[18] See ORS 109.070(

The CLiF Project Needs You!

By Gwendolyn Griffith and Vicki Ballou, Tonkon Torp LLP

The CLiF Project collaborates with YRJ to provide pro bono legal assistance for people adjudicated for sex offenses as juveniles who are now, as adults, seeking relief from sex offender registration.

Oregon is one of just a few states that require every juvenile adjudicated for a sex offense to register on its sex offender registry *for life*. The negative impact on juveniles is well known—they cannot obtain housing, find jobs, join the military, or sometimes even attend college classes. Recent research confirms the extremely low recidivism rate for juvenile offenders, so it is difficult to see how keeping them on the registry enhances public safety.

Fortunately, Oregon law allows a person adjudicated as a juvenile to petition the juvenile court for relief from registration. Yet the process is complicated for a lay person, and few of the many registrants eligible for relief have the resources to navigate it. In an innovative collaboration between Youth, Rights & Justice and lawyers in private practice, the CLiF Project provides pro bono legal assistance to low income individuals in seeking relief. While it was started by lawyers at Tonkon Torp, LLP, lawyers from a variety of backgrounds participate in this program.

The Basics of Relief from Registration for Juvenile Adjudications

ORS 181.823 provides the basic process for seeking relief from registration. Two years after release from supervision for A and B felonies, or within 30 days before the end of supervision for Class C felonies, a person adjudicated as a juvenile for a sex offense may petition the court for relief from the duty to report. A hearing is held within 90-150 days after the petition is filed. If the court grants relief, the petitioner sends a copy of the order to the Oregon State Police, the state agency in charge of the sex offender registry. When the OSP receives the court's order granting relief, the OSP removes the person from the registry.

In order to be entitled to relief, a petitioner must prove, by clear and convincing evidence, that he or she is "rehabilitated" and "does not pose a threat to the safety of the public." ORS 181.823(9)(a). The statute offers no fewer than 19 factors that a court may consider to determine if the petitioner has met this burden, including the nature of the underlying case, the petitioner's completion of treatment, his or her taking of personal responsibility for the act, the perspective of the victim, the petitioner's other criminal history, and a final catch-all: "any other relevant factors." ORS 181.823(4)(a) – (s).

The Court of Appeals, in *Patterson v. Foote* 226 Or. App 104, 204 P.3d 97 (2009), defined this same standard in a case involving the adult relief statute. In that case, the trial court refused to grant relief even though the petitioner completed the required sex offender treatment and the petitioner's expert testified that "his chance of recidivism is virtually nil, being less than one percent." *Id* at 108. The State contended that the statute requires that a petitioner must prove an absolute absence of any possibility that he or she will reoffend. According to the state, any risk, "regardless of how small," precluded granting relief under the statute.

The Court of Appeals disagreed with the State, stating that:

> "[C]onsistently with the applicable standard of proof and the plain meaning of the terms "rehabilitated" and "threat" to public safety, we understand ORS 181.820 to require a petitioner for relief from the sex offender reporting requirement to demonstrate by clear and convincing evidence that he or she has successfully completed programs or services designed to ameliorate his or her previous behavioral and psychological patterns and to prevent a recurrence of

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> unlawful conduct, and that, as a result, the petitioner does not present a threat, that is, he or she is not likely to reoffend." *Id* at 114-115.

Thus, after *Patterson v. Foote*, it appears that most cases for relief should be successful if the petitioner can show that he or she successfully completed treatment. As discussed below, however, most attorneys for petitioners introduce other kinds of evidence of rehabilitation and lack of danger of recidivism to bolster a case.

A similar relief process is available for people now living in Oregon who were adjudicated as juveniles in other states. The same standard applies, but additional requirements must be met. See ORS 181.826. For example, if the offense would have been a Measure 11 offense, relief can only be granted if the court finds that it is in the "interest of public safety." ORS 181.826(6). If a juvenile comes from a state that requires registration "for life," relief is not available. ORS 181.826(7).

The CLiF Project

The CLiF Project (which stands for **C**hanging **L**ives **F**orever), provides volunteer attorneys around the state to assist low-income registrants with relief from registration. Most case referrals come from Youth, Rights & Justice, but treatment providers, probation officers, juvenile court counselors, and even the State Police also refer cases to the Project.

With over 30 cases completed or in process, CLiF Project volunteer lawyers never have to invent any wheels. The CLiF Project provides the required forms, and CLiF volunteer lawyers provide regular consultation and assistance to one another. Experts at YRJ are available to consult on procedural and other issues that arise from time to time.

The typical CLiF client is a male, in his mid-twenties, who committed a sex offense when he was just 13 years old. He successfully completed treatment and has been a model citizen since release from supervision. Yet every CLiF case is different. A number of potential CLiF clients have convictions from failure to register. Others have had drug or alcohol problems in the past. However, the client must be committed to the process, must be able to pay at least a portion of the costs ($500) and must be willing to take a polygraph examination as evidence that the client has met the statutory conditions for relief from registration.

The CLiF Project process begins with a telephone interview with a CliF Project leader. If she believes this is a case that is consistent with the Project guidelines, she will seek a CLiF Volunteer lawyer that she thinks is a good fit with the client and the facts of that client's case. That lawyer will interview the client in person. If the lawyer doesn't want to take the case (perhaps the lawyer just doesn't like the client, or facts come to light that show that this is not a case that is winnable), the client will not become a CLiF client. If the lawyer accepts the case, the typical case has three stages.

Stage One: Information Gathering

In this stage, the attorney seeks records from the county of adjudication, from the OYA, from treatment providers, from prior legal counsel, and from any other government agency involved in the case. In every case, the DA will seek to contact

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the victim, so the attorney for the petitioner also tries to interview the victim and obtain his or her support for relief. It usually takes about 30-45 days to collect all of the documents. Obtaining the records is relatively straightforward but can be particularly challenging for older relief clients whose records may have disappeared.

The most important records are those that show successful completion of sex offender treatment. Other records help develop the story of the client's maturation into a responsible young adult and identify people willing to support the client's petition for relief.

At this stage, the attorney must also consider what kind of evidence to present at the hearing. Some of the treatment documents will evolve into documentary evidence. Attorneys representing paying clients often submit a full psycho-sexual evaluation of the client and produce expert witnesses. No CLiF client can afford this. Fortunately, courts have been willing to accept a less expensive alternative: a recent maintenance polygraph that shows no inappropriate contact with children since the last polygraph, which is usually just prior to the end of supervision.

Stage Two: Filing a Petition and Trial Memorandum

The petition for relief is a straightforward pleading of the jurisdiction and facts, and a prayer for relief from registration. This is filed with the juvenile court and served on the DA's office and the juvenile department. Most attorneys will also file a trial memorandum, including exhibits that support rehabilitation and absence of threat to public safety. That memorandum also gives the attorney the chance to educate the court about recidivism rates for juvenile sex offenders, which are extremely low. At this stage, most CLiF attorneys touch base with the DA to seek his or her perspective on the case.

Stage Three: The Hearing

A relief hearing can take as little as 20 minutes or as long as two hours. The petitioner's attorney presents the evidence of rehabilitation, perhaps calling the juvenile court counselor, the probation officer, or others who support the relief petition. Counties vary widely in the way the DA approaches the case. Typically, the DAs resist relief, with varying degrees of energy. The juvenile department may be involved in the proceeding, depending on the county. The only rule of evidence is relevance ORS 181.823(5), so it is possible to use declarations and affidavits in lieu of live witnesses.

The lawyer for the petitioner places on the record the evidence of successful completion of treatment, and evidence of no further inappropriate sexual activities. Appropriately, most courts seem to be interested in "who the client is today," as evidenced by his or her employment, support system, and community activities and other pro-social pursuits. The DA's office is in the unenviable position of basing its position against relief on *old facts*, i.e., those of the underlying offense and the client's experience on probation or parole. For a typical relief case, many years have elapsed since the end of supervision, so these facts typically have little probative value.

Many judges rule from the bench in favor of the petitioner, and some judges offer some inspiring words to the petitioner, recognizing his or her efforts and maturation. Other judges take the matter under advisement and issue a written ruling after having time to consider the facts and law. Still others send the client back for some additional proof, continuing the case until that can be accomplished.

Once a judge orders relief, the CLiF attorney submits the order to the State Police, which removes the person from the registry. This takes about a month. If a judge were to deny relief, the client is no worse off, and in fact is better off: the denial is an opportunity to discover what kinds of evidence a court would consider sufficient to grant relief—the next time around. There is no statutory prohibition on applying more than once for this relief.

The CLiF Project Needs You!

There are about 3,000 people on Oregon's sex offender registry for offenses committed as juveniles. There are more CLiF cases than the current lawyers can handle. Please consider becoming a volunteer CLiF lawyer and collaborating with the many

Continued on next page »

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volunteer lawyers who are already handling cases. Call or email Gwen Griffith at 503-802-2102 or gwen.griffith@tonkon.com. ●

Ten Important Things I've Learned

On Child Welfare Cases

By Linda J. Guss, Retired
Civil Enforcement Division, Oregon Department of Justice

Most of us rarely take time to reflect on our professional and personal lives, assess where we've been, consider what we've accomplished and recall lessons learned. Closing one chapter in your life and looking forward to beginning another is a natural opportunity to take stock and set new goals. And so retirement has given me such an opportunity. As part of this reflection process a "lessons learned" list started to take shape. But I would never have thought to put pen to paper (remember when we used pen and paper to compose?) until asked to write this piece. These are just random lessons, not in any particular order, that I learned during the last 38 years of my professional career as an attorney, juvenile court counselor, secure detention worker and Dairy Queen supervisor. Over the years co-workers have probably tired of me "sharing" some of these ideas. Many of you have learned similar lessons. You will see that some are simple and obvious; most are practical, while others are more philosophical. I have many more lessons to learn but here are a few that I thought were worth sharing.

1. Most people are doing the best they can given their personal history and current circumstances. This goes for family, friends, co-workers, clients, opposing counsel, adverse parties, court staff, judges, other professionals and even the grocery clerk, barista and dry clearer. You never know what kind of day they've had before you interact with them. Maybe they just had a fight with their significant other or perhaps their 1 year old threw up on them as they were going out the door. The way they treat you probably has nothing to do with you. Many of the parents, children and family members we deal with in the juvenile court system have had extraordinarily difficult lives – lives we read about but often can't begin to understand. Abuse, neglect, drug addiction, alcoholism, domestic violence, mental illness, family disruptions, tragedy. And they are facing some of the worst times they will ever experience. Be sensitive and respectful, no matter what. This does not mean we excuse behavior, minimize conduct or not hold people responsible. But do so without blaming, demeaning or condemning. Have some empathy and compassion. You may voice the only kind word someone hears on what they believe is the worst day of their life. Give them a break; assume they are doing the best they can.

2. Talk to people instead of communicating exclusively by email. Email can be a quick, convenient and efficient way to communicate. But email does not always "communicate" what we intend to "communicate." A rashly composed email can create conflict, heighten tensions and get in the way of resolving disagreements. There is a time and place for email. But when you are frustrated and struggling to compose a response, pick up the phone. Have a real conversation. Nothing can replace a personal connection.

3. Don't be so sure of yourself that you reject new ways of interpreting and applying the law. Look forward to law clerks and new lawyers questioning how you read

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"This cannot stand: 'America' and 'poverty' are words that should not appear in the same sentence. We are the wealthiest country in the world. That we should have poverty at all is oxymoronic, and that we have the highest child poverty rate in the industralized world is downright shameful.."

– Peter Edelman

« Ten Things continued from previous

statutes and interpret cases. Mentor and guide these new members of our profession but welcome any challenges to conventional thinking they bring to the workplace.

4. Admit when you are wrong and apologize. I wish I had done this more often. It is not a sign of weakness to admit a mistake and make amends. Practice this often but learn from your mistakes and try hard not to repeat them.

5. Make friends with court staff. I learned this lesson early in my career when practicing in eastern Oregon. I was not only new to the practice of law but also the "outsider." I was told by a co-worker to get to know court staff and do everything I could to make their jobs easier. What great advice.

6. Being a good writer will make you a more effective advocate. Work on your writing. I am not the best writer but I try! Be clear and concise. Use short words and short sentences. Learn how to correctly use "that" and "which." I'm not going to explain it so get a grammar book, read the Texas Law Review Manual on Style and Usage or ask someone who knows. Why would anyone believe you can correctly analyze and apply the law if you don't know how to use commas, misuse "advise" and "advice" or use "their," "there," and "they're" incorrectly? Don't let your message get lost in poor writing. How you write can be as import as what you write.

7. Work hard but make time for family, friends and yourself. You will be a better person and better lawyer if you are happy, healthy and emotionally fulfilled. Unplug, decompress and relax. At the end of the day we probably will not regret that we didn't spend more time at work.

8. Say "please" and "thank you." Isn't this something we should have learned in kindergarten? And it seems so obvious. But all too often people make demands and take for granted the work of others. It is surprising how simply being polite can significantly improve working and personal relationships. And people feel better when they know they are appreciated. It doesn't cost a thing, takes no time at all and can mean so much.

9. Avoid "multitasking," unless absolutely necessary. You may think you are being efficient and productive by constantly checking and responding to email while sitting in a meeting. But you are simply doing multiple tasks poorly. A quick internet search reveals dozens of studies and articles decrying the "myth of multitasking." Studies have shown that multitasking reduces productivity, interferes with your ability to learn, wastes time, impairs concentration and stifles creativity. There are times when you have to multitask. But constantly reading and responding to emails and texts while attending a meeting or training is inconsiderate to presenters, irritating to other attendees and usually unnecessary. And you are missing out on what is happening right in front of you.

10. Stay focused on promoting child safety and wellbeing. This is not so much a "lesson learned" as it has been a guiding principle. Asking myself "What will keep children safe?" brought me back to what was important. In answering that question I did my best to always respect the rights of parents to raise their children and the rights of children to live with their families. The goal is not "winning" or punishing parents or saving children. Don't lose track of what is important: keeping children safe while at the same time protecting their rights and the rights of their parents and families. ●

Case Summaries

By Shannon Story, OPDS Senior Deputy Defender and Arianna DeStefano, YRJ Law Clerk

***Dept. of Human Services v. M. K.,* 257 Or App 409 (2013)**

The juvenile court asserted jurisdiction over the father's child, as to the father, because the father was unable to maintain a relationship with the child, the father was a "convicted untreated sex offender," and the father was incarcerated and unavailable to parent. Thereafter, the department's caseworker determined that the department would require father to submit to a psychosexual evaluation before it would consider allowing and arranging for visits between the father and his child. The caseworker spoke with one evaluator who stated that he would charge $5,000 to evaluate the father while the father was in prison. The caseworker did not schedule an evaluation. At the subsequent permanency hearing, the department moved the court to rule that its efforts toward reunification had been reasonable. Reasoning that the "State should not be required to expend the funds" to pay for an in-custody evaluation, the juvenile court ruled, *inter alia*, that the department's efforts had been reasonable.

The father appealed, arguing that the department's failure to schedule the psychosexual evaluation—a service that the department's caseworker deemed the "key element" for reunification—rendered its efforts unreasonable as matter of law. Reasoning that the juvenile court had failed to engage in the proper analysis of weighing the cost of the evaluation to the department against the potential benefit to the father and that the agency had failed to present evidence that the evaluation would not benefit father, the Court of Appeals reversed:

"Given the importance of the psychosexual evaluation to the reunification plan, the juvenile court should have considered the extent to which the family might benefit if father received a psychosexual evaluation promptly, instead of waiting a year to be evaluated after his release. In other words, the court should have considered the totality of the circumstances related to the reasonableness of DHS's reunification efforts, including the potential benefits of providing services and the burden of associated costs. The record does not reflect such an analysis. Moreover, the parties did not proffer any evidence regarding the potential benefits (or lack thereof) of promptly providing father with a psychosexual evaluation that would support a determination, properly based on the totality of the circumstances, that DHS had made 'reasonable efforts' to make it possible for [the child] to return home. Accordingly, we reverse."

***Dept. of Human Services v. T. A. H.,* 257 Or App 526 (2013)**

The department petitioned the juvenile court to assert jurisdiction over the mother's children because the mother had left her infant, T, with "unsafe caregivers" and failed to protect her from abuse, T had suffered severe injuries, the mother had not adequately supervised the children, the mother lacked basic parenting skills, and the mother was unable to protect the children from domestic violence. To meets its burden, the department presented evidence that mother had left T in the care of a friend, and, while in the friend's care, T suffered a skull fracture, broken arm and ribs, and a liver laceration. The juvenile court asserted jurisdiction, and the mother appealed, arguing that the court's jurisdiction was not warranted because her friend's abuse of T was "unforeseeable." In a per curiam opinion, the Court of

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Appeals disagreed with the mother and affirmed the court's assertion of jurisdiction.

Dept. of Human Services v. R. D., 257 Or App 427 (2013)

The department removed the parents' child from their care at birth. Eleven months later, the court asserted jurisdiction over the child because each parent was an untreated sex offender, the mother suffered from various mental health and cognitive infirmities, and both parents had "substance abuse issues." Eighteen months later, the department moved the court to change the child's permanency plan from reunification to adoption. The parents defended on the theory that the department's efforts to assist the parents to achieve reunification had not been reasonable because the department had failed to arrange for sex offender treatment for the mother who required treatment tailored to her cognitive disabilities. The juvenile court agreed with the parents and denied the department's motion. Further, the juvenile court ruled that "further efforts can and will make it possible for child to return home." The child appealed, arguing that, as (in her view) the evidence was unequivocal that the mother would never be able to parent, the department's failure to provide timely and necessary sex offender treatment to the mother was immaterial, and, thus, the juvenile court erred in refusing to change the permanency plan. Reasoning that the department's failure to timely provide the mother with cognitively appropriate sex offender treatment was dispositive, the Court of Appeals affirmed:

> "First, in a permanency hearing, DHS has the burden of proving that (1) DHS made reasonable efforts to make it possible for the child to return home safely and (2) the parent has not made sufficient progress for that to occur. * * * If DHS fails to prove both, the court will not change the plan from reunification to adoption. Here, the juvenile court implicitly concluded that DHS's reasonable efforts must include sex offender treatment, and there is evidence in the record to support the court's finding that, because of DHS's failure to secure a provider, mother received no sex offender treatment for 16 months after jurisdiction was established. That finding supports the court's legal conclusion that DHS failed to make reasonable efforts to provide services to mother. Second, in this case, the court did not determine that parents had not made sufficient progress for child to safely return home. The juvenile court did not conclude, as child asserts, that mother could never be an adequate parent. On the contrary, the court explicitly stated that 'further efforts can and will make it possible for the child to safely return home within a reasonable period of time,' and child does not challenge that determination. Accordingly, we conclude that the juvenile court did not err in continuing the plan of reunification."

Department f Human Services v. C. F., 257 Or App 50 (2013)

The department petitioned the juvenile court to assert jurisdiction over the father's children because of, *inter alia*, the father's history of

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committing acts of domestic violence against the mother. The department presented evidence that, historically, the mother had obtained restraining orders against the father, the mother was afraid of the father, the mother had told the department's investigator that she was not able to leave the house to attend necessary appointments, and the mother's behavior "demonstrated a pattern that is common in domestic violence." The father defended on the theory that he no longer subjected the mother to violence (*i.e.*, the condition did not warrant jurisdiction because the condition was not current), and, in accordance with that theory, he testified that he had last abused the mother 18 months earlier. The juvenile court asserted jurisdiction, and the father appealed. Reasoning that the department's evidence was "legally sufficient to permit the court's ruling that there was a current threat of serious loss or injury to the children," the Court of Appeals affirmed.

Dept. of Human Services v. C. J. T., 258 Or App 57 (2013)

The department petitioned the court to assert jurisdiction over the mother's three children because of the mother's violent behavior, her neglect of her children, her use of alcohol "and/or" marijuana, and the children's respective fathers' inability to protect them. To meet its burden to prove that jurisdiction was warranted, the department presented evidence that the mother's two older children had seen the mother use marijuana, and one of the children's fathers testified that he had last smelled marijuana in the mother's home three months prior to the jurisdictional hearing. The juvenile court asserted jurisdiction on the basis of the mother's alcohol "and/or" marijuana use, and the mother appealed. Reasoning that the department had failed to prove that mother was using marijuana or alcohol at the time of the hearing—much less that her use of either substance exposed the children to a threat of serious loss or injury—the Court of Appeals reversed.

Dept. of Human Services v. D. A. N., 258 Or App 64 (2013)

The juvenile court asserted jurisdiction over the child and thereafter changed the child's permanency plan from reunification to adoption. Three months later, the father established his paternity. The father admitted that he suffered from a substance abuse problem, that he was incarcerated, and that, because of that status, he was presently unable to care for his child. The court asserted jurisdiction over the child, as to the father, based upon those facts. Shortly thereafter and in light of father's new appearance as a party to the case, the department moved the court to again change the child's permanency plan from reunification to adoption. To meet its burden, the department presented evidence that the father had been disciplined six times while in prison, that he had failed to enroll in parenting classes or drug treatment programs, and that he would be unable to do so during the remaining four months of his incarceration. Reasoning that the department's evidence established that reunification could not occur until, at the earliest, nine months after the permanency hearing (because of the father's need to be released from prison and to meaningfully engage in services thereafter), the juvenile court again changed the child's permanency plan away from reunification.

The father appealed, arguing that the juvenile court erred in ruling that his progress was insufficient to allow for reunification within a reasonable period of time and, so, erred in changing the permanency plan. The department responded that, under *Dept. of Human Services v. D. L. H.*, 251 Or App 787, 284 P3d 1233, *adh'd to as modified on recons*, 253 Or App 600, 292 P3d 565 (2012), the juvenile

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court was not required to determine whether the child could be returned to the father *within a reasonable period of time*. Reasoning that the father's failure to participate in services was, at least in part, attributable to his poor disciplinary record while incarcerated and that the juvenile court had implicitly ruled that nine months was not a reasonable period of time for the father's child to wait to achieve reunification, the Court of Appeals affirmed.

Dept. of Human Services v. M. H., 258 Or App 83 (2013)

The juvenile court asserted jurisdiction over the parents' child A and changed A's permanency plan from reunification to adoption. Thereafter, the mother gave birth to V, and the juvenile court asserted jurisdiction over V because of the mother's history with the department and the father's status as untreated sex offender. At the subsequent consolidated permanency hearing, the department moved the court to continue A's permanency plan of adoption and to change V's plan from reunification to adoption. To meet its burden, the department presented evidence that it had assisted the parents to attend visitation and had offered other services but that the parents had failed to participate in any services. The juvenile court continued adoption as the permanency plan for A and continued V's permanency plan as reunification. With regard to A, the court failed to determine whether there existed a compelling reason to defer filing a petition to terminate the parents' parental rights and failed to include that determination on the face of the judgment as required by ORS 419B.476(5)(d). The parents appealed.

As to A, the parents argued, *inter alia*, that the juvenile court's failure to include the required judicial determination on the face of the judgment constituted reversible error. Reasoning that it was well settled that the juvenile court's "failure to make determinations required by ORS 419B.476(5) is reversible error," the Court of Appeals reversed the judgment as to A.

As to V, the parents argued that the juvenile court erred in concluding that the department's efforts had been reasonable because the department had moved V to another county, rendering it difficult for parents to visit, and because the department had failed to timely refer the father for a psychosexual evaluation. The Court of Appeals disagreed. The father had repeatedly refused to engage in services. And, the department's conduct of moving V was reasonable because it moved V to the home of a relative with whom V's sibling lived and who the department had identified as a potential adoptive placement for V.

Dept. of Human Services v. J. L. H., 258 Or App 92 (2013)

The mother appealed a judgment terminating her parental rights to her two-year-old child, KM. As KM was a member of the Alaska Native Village of St. Michael, the case was subject to the Indian Child Welfare Act (ICWA). As such, the department was required to prove the factual bases for terminating the mother's parental rights beyond a reasonable doubt.

To meet its burden, the department presented the following evidence: The mother was 22 years old at the time of the termination trial and had previously relinquished her parental rights to two other children. Throughout the course of her pregnancies the mother had used prescription medications and had abused narcotics and marijuana. The department removed KM from mother's custody at birth after he tested positive for marijuana. Further, the department's experts had diagnosed the mother with depression and anxiety. In addition to her drug abuse and mental health

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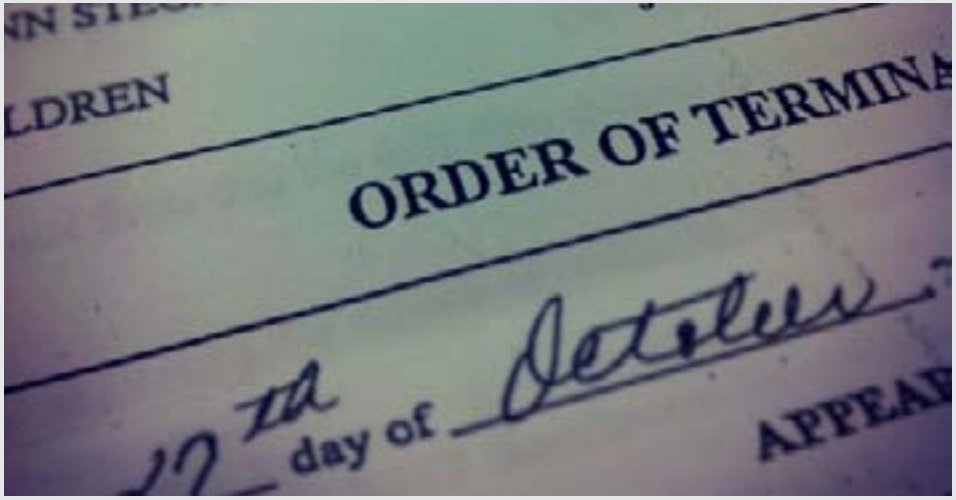
struggles, mother had a history of "residential instability" and "unhealthy" relationships with men, including KM's father, whose parental rights had already been terminated. After KM's removal, the department provided the mother with a variety of services for her mental health and drug abuse. While the mother was engaged in multiple treatment programs, she had poor attendance, demonstrated inconsistent progress, and failed to complete the programs' requirements. Further, the mother lied to treatment providers and to the department on a number of occasions regarding her relationships with men.

At the termination trial, the tribal expert testified that termination of the mother's parental rights was warranted. The juvenile court agreed and terminated the mother's rights.

The mother appealed, arguing, *inter alia*, that the department had failed to prove, beyond a reasonable doubt, that mother was unfit or that termination of her parental rights was in KM's best interest. Additionally, the mother advanced an alternative argument that reversal was required because the juvenile court relied on factual circumstances that the department had failed to allege in the termination petition, and, under the court's reasoning in *Dept. of Human Services v. N. T.*, 247 Or App 706, 271 P3d 143 (2012), and *Dept. of Human Services v. N. M. S.*, 246 Or App 284, 266 P3d 107 (2011), it was error for the juvenile court to have done so. Concluding that the juvenile court relied primarily on the mother's mental health in ruling to terminate her parental rights and that the department had alleged mental health as a basis for termination, the Court of Appeals affirmed.



Dept. of Human Services v. J. G., 258 Or App 118 (2013)

The mother and the father were married, and together had one child, A. The mother also had four children from a previous relationship—H, D, M, and C (collectively referred to as "stepchildren"). The department removed all five children from the mother and the father's care and, as to A, alleged that the juvenile court's jurisdiction was warranted on the basis of the following facts:

> "Father to A has physically and emotionally abused the children, H, D, M, and C, in the form of shooting the children with a BB gun, slamming their heads into the wall, and aiming a shotgun at H's chest then shooting the gun when she ran away from him. Father also threatened the children if they made disclosures of the abuse."

At the subsequent hearing on the petition, the department offered the stepchildren's out-of-court statements recounting the abuse through the in-court testimony of the CARES doctor who had evaluated the children and the CARES evaluations. The court admitted the statements and asserted jurisdiction over the children. The father appealed, arguing, *inter alia*, that the juvenile court erred when it did so.

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Reasoning that the stepchildren's out-of-court statements about the father's abuse were admissible under OEC 803(4) as statements made for the purposes of medical diagnosis or treatment, the Court of Appeals affirmed.

Dept. of Human Services v. D. W. C., 258 Or App 163 (2013)

After the department removed the father's daughter, A, from her mother's care, the father met five-year-old A for the first time. The juvenile court asserted jurisdiction over A, as to the father, because of the father's "limited contact with [A] for an extended period of time."

At the subsequent permanency hearing two years later, the department moved the court to change A's permanency plan from reunification to guardianship. To meet its burden, the department presented evidence that the father had failed to comply with the court's order to submit to a psychological evaluation, that he had continued to live out of state, that he had visited A for a few days and called her sporadically, and that, ultimately, he had failed to contact A for the eight-month period immediately preceding the beginning of the permanency hearing. The department also presented evidence that A's special needs required constant care and line-of-sight-supervision (she had exhibited sexually aggressive and physically violent behaviors toward other children and small animals) and that, by the father's own admission, if the court were to place A in his care, he would be unable to provide "line-of-sight" supervision. Based upon that evidence, the juvenile court ruled, *inter alia*, that the father's progress had been insufficient and granted the department's motion to change her permanency plan. The father appealed, arguing that the juvenile court had erred in ruling that his progress toward establishing a relationship with A was insufficient. And, citing ORS 419B.090(4), *Dept. of Human Services v. J. R. F.*, 351 Or 570, 273 P3d 87 (2012), and *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000), the father argued that reversal was required because, in ruling that this progress was insufficient and changing A's permanency plan, the juvenile court failed to afford him the presumption "that his decision to have [A] in his care and custody was in her best interest." Reasoning that the department's evidence was sufficient and that the father's due process argument was foreclosed by *Dept. of Human Services v. S. M.*, 256 Or App 15, 300 P3d 1254, *rev allowed*, 353 Or 867 (2013), the Court of Appeals affirmed:

> "Implicit in the juvenile court's conclusion that father had made insufficient progress is a conclusion that the danger that existed to the child when dependency jurisdiction was established in 2010 still existed at the time of the permanency hearing.
>
> "Finally, we briefly address father's additional assertion that is based, in part, on his first argument. Father asserts that DHS was required to prove that 'father's limited relationship with [A] rendered him unfit, *i.e.*, exposed [A] to a current and ongoing safety threat,' and that it did not do so. Thus, father's contends, 'he was entitled to the presumption that his decision to

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Juvenile Law Resource Center

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have [A] in his care and custody was in her best interest.' * * *

"Father's constitutional assertion is foreclosed by our resolution of father's first argument and by this court's rejection of a similar argument in *Dept. of Human Services v. S. M.*, 256 Or App 15, 24-29, 300 P3d 1254, *rev allowed*, 353 Or 867 (2013).

"In *S.M.*, we reviewed *State ex rel Juv. Dept. v. Smith*, 205 Or App 152, 166, 133 P3d 924 (2006), and *O'Donnell-Lamont and Lamont*, 337 Or 86, 91 P3d 721 (2004), which applied the United States Supreme Court decision in *Troxel* and noted that, although a parent has a right to make decisions related to his or her child, that right is not absolute, but instead is a basis for a presumption that a 'fit' parent acts in best interest of his or her child. *S. M.*, 256 Or App at 26-27.

"* * * * *

"* * * We have already determined that the trial court did not err in concluding that the jurisdictional basis persists and thus father made insufficient progress toward reunification. Therefore, we reject father's argument that he was entitled to the presumption threat his decision to have A in his care and custody was in her best interest."

Dept. of Human Services v. B.G., 258 Or App ___ (2013)

The father appealed from the juvenile court's assertion of jurisdiction over his children, arguing that the department had failed to prove its allegations by a preponderance of competent evidence as required by ORS 419B. 310. The department conceded the errors, and, in a per curiam opinion, the Court of Appeals reversed. ●

Attorney General Eric Holder on Indigent Defense

In a speech at the annual meeting of the American Bar Association's House of Delegates in San Francisco on August 12, Attorney General Eric Holder addressed the need to expand indigent defense and provide counsel for juveniles.

"Through the Department's Access to Justice Initiative, the Civil Rights Division, and a range of grant programs, this Administration is bringing stakeholders together – and providing direct support – to address the inequalities that unfold every day in America's courtrooms, and to fulfill the Supreme Court's historic decision in *Gideon v. Wainwright*. Fifty years ago last March, this landmark ruling affirmed that every defendant charged with a serious crime has the right to an attorney, even if he or she

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cannot afford one. Yet America's indigent defense systems continue to exist in a state of crisis, and the promise of *Gideon* is not being met. To address this crisis, Congress must not only end the forced budget cuts that have decimated public defenders nationwide – they must expand existing indigent defense programs, provide access to counsel for more juvenile defendants, and increase funding for federal public defender offices. And every legal professional, every member of this audience, must answer the ABA's call to contribute to this cause through pro bono service – and help realize the promise of equal justice for all."

Read Holder's speech in its entirety here: http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html ●

OPDS Update

By Nancy Cozine, OPDS Executive Director

On July 8, 2013, the Oregon State Legislature passed the final budget bills and adjourned Sine Die. We knew going into this session that the economic environment would allow only very limited opportunity for growth. Given that backdrop, the PDSC did well, and enjoyed support from system partners and legislators on both sides of the isle, from all around the state.

The PDSC budget, as amended by House Bill 5008, included funding to support current services levels, which means that OPDS should be able to continue current contract rates, with a very slight increase for cost of living and inflation. However, the Legislature also imposed a

- $855,200 reduction to the PDSC's General Fund appropriation based upon projected savings as a result of passage of Senate Bill 40, which reduces the crime classification for the unlawful manufacture and delivery of marijuana;
- 5% reduction to services and supplies (this is a $1,731,434 reduction to the Professional Services Account); and a
- 2% holdback (which is a further reduction of $4,617,158 to the Professional Services Account).

State agencies have been told that the 2% holdback amount could be restored during the 2014 legislative session depending upon statewide economic conditions.

The Legislature partially funded PDSC Policy Option Package requests, providing $3 million to increase compensation for public defenders, hourly attorneys, and hourly investigators, and $2.4 million for the purpose of reducing dependency caseloads. The dependency caseload reductions may be implemented as

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part of a pilot program; Providers receiving these funds must adhere to best practices, and OPDS must evaluate the impact of reduced caseloads.

As always, thank you to those who spoke with legislators and others about the important role of public defense within our criminal and juvenile justice systems, and to all of you for ensuring that your clients receive excellent representation.

Upcoming PDSC meeting dates are listed below; changes are posted online at: www.oregon.gov/OPDS

- October 25
- December 12 ●

Save the Date

Juvenile Law Training Academy

Nuts & Bolts + Experience = Better Outcomes for Oregon Families

October 21-22, 2013

Eugene Hilton

http://www.ocdla.org/seminars/shop-seminar-2013-juvenile-law-training-academy-seminar.shtml

Public Defense Management

Building for the Next Decade

October 24-25, 2013

Salishan, Gleneden Beach

http://www.ocdla.org/seminars/shop-seminar-2013-public-defense-management-seminar.shtml ●

Wineries & Chocolatiers

Arrowhead Chocolates • Batch PDX • Bliss Bake Shop • Cheesecake Factory • Cupcake Jones • Fort George Brewery • Helen Bernhard Bakery • Holm Made Hazelnut Toffee • Kyra's • Missionary Chocolates • Pearl Chocolate • Pheasant Valley Vineyard & Winery • REX HILL • Rose's Restaurant & Bakery • Sineann Winery • UU Yogurt • Voodoo Doughnut • Wallowa Lake Fudge Company • Watermill Winery *and more!*

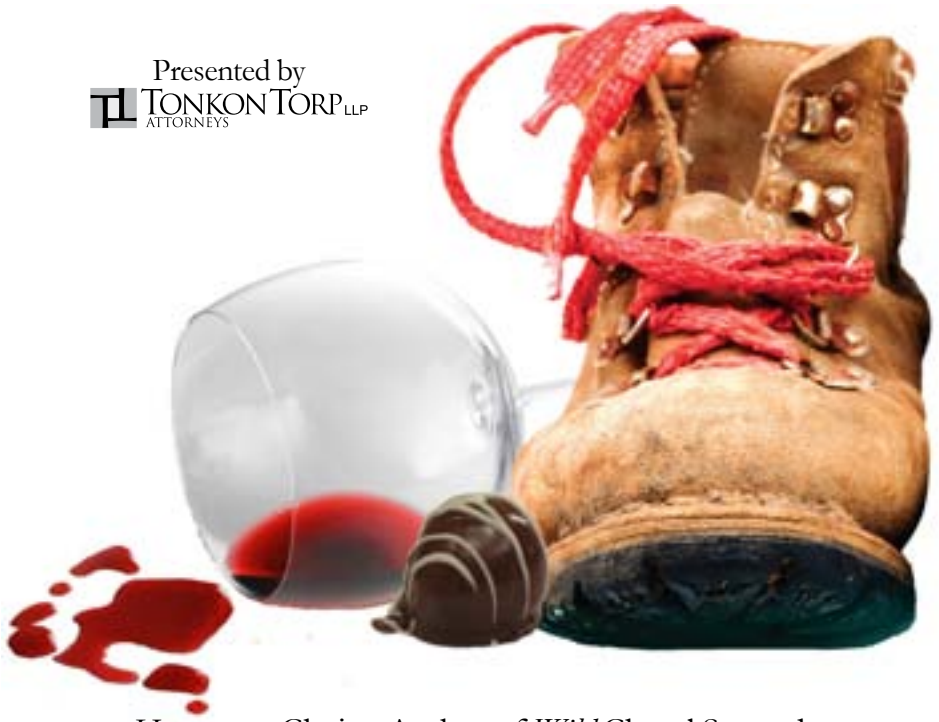
Wine & Chocolate Extravaganza

The **wild** Edition

November 16, 2013

Oregon Convention Center

Presented by Tonkon Torp LLP Attorneys



Honorary Chairs: Author of *Wild* Cheryl Strayed & Filmmaker Brian Lindstrom

Individual Tickets	$150 ($85 *tax deductible*)
Friends of Youth Sponsor	$500 ($370 *tax deductible*)
Includes 2 Guest Tickets, plus recognition	

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