

In This Issue

| | |
|---|----|
| Calm in the Face of the Storm: Including the Child's Voice in Custody and Visitation Cases | 1 |
| NACC Organization Spotlight: Child Advocates, Inc. | 3 |
| Planning to Attend the 37th National Child Welfare, Juvenile, and Family Law Conference? | 4 |
| Conference Sponsorship Opportunity | 4 |
| Gault Revived for Youth in Colorado | 5 |
| NACC Welcomes: Brooke Silverthorn, JD, CWLS Carolyn Moershel | 8 |
| Practice Tips for Contempt | 9 |
| Amicus Curiae | 10 |
| Pierre v. Holder | 10 |
| In re Sanders, No. 146680, slip op. at 2 (Mich. June 2, 2014) | 11 |
| Case: United States v. Under Seal, 709 F.3d 257 (4th Cir. 2013) | 13 |
| Child Welfare Law Certification | 15 |
| Executive Director's Message: Twenty Minutes Now Saves You Hundreds of Dollars Later (and Puts You on Track to be a CWLS) | 15 |
| A First: Washington Appellate Court Finds Denial of Counsel Violated Foster Child's Rights | 16 |
| National Association of Counsel for Children | 18 |

The NACC envisions a justice system that protects the rights of children by ensuring their voices are heard through the assistance of well-trained, well-resourced, independent lawyers.



Calm in the Face of the Storm:

Including the Child's Voice in Custody and Visitation Cases

by Dawn J. Post, Esq.

Dawn is Co-Borough Director at [The Children's Law Center New York](#). She is an expert in children's rights, advocacy and litigation, and the central theme of her work is that children and adolescents are entitled to have a voice and representation in legal proceedings that have a significant impact on their lives. To that end, she promotes cultural competence to address the underlying issues of poverty and social exclusion based upon race and socio-economic status in the legal and foster care systems in the United States.

Recent articles have described the use of child-focused and inclusive mediation in divorce negotiations as much less common in New York and the United States than in other countries. The authors report that the voice of the child is most commonly heard in foster care mediations which are professionally led in order for the parties to engage in a constructive, facilitated process which includes either the advocacy of the attorney for the child or the child's direct participation.

However, in New York City the voice of the child is heard in family court custody and visitation negotiations albeit not in the formal setting of a mediator's office. The Children's Law Center of New York ([CLCNY](#)) is unique in that it is one of the few organizations in the country that specializes in providing representation and an effective voice to children in custody/visitation, guardianship, domestic violence and related child protective cases in New York City Family Courts and Integrated Domestic Violence Parts in Supreme Courts. CLCNY delivers high quality representation providing children with respectful, supportive, informed and passionate advocates who give a voice to their unique needs not only in the courtroom but through mediation and negotiation.

Advocates active in the litigation assuming the role of mediator and negotiator? This may seem outlandish to those who believe in a win or

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lose mentality and that trial with competing adversaries before a judge is the best method to reach a resolution in a case. However, it is critical for Attorneys for Children (AFCs) in custody and visitation cases to be the voice of reason and to convey their client's feelings and preferences to the parents, the very people who should readily hear them before settling into a protracted legal battle designed to maximize the pain they can cause one another. Research has shown that children "want to be consulted and informed, and the inclusion of the child's voice in the negotiations about rearrangement of the family structure correlates positively with that child's ability to adapt to the rearranged family situation."¹ Children are very aware of the conflict and generally express considerable sadness over it. When asked specifically, how it made her feel, one 5-year-old client simply and profoundly responded: "I feel like a mood ring—all blue and grey." It is not uncommon for children to express during interviews:

"I just want to be normal"

"I love them both and just want them to get along"

"I don't want to be a part of this"

"I don't want to have to choose"

"Just make this go away"

As AFCs in family court, it is our role and responsibility to effectively represent the child not only

1. Jill Goldson, *Hello, I'm a Voice, Let Me Talk* Child-Inclusive Mediation In Family Separation, Centre for Child and Family Policy Research Auckland University, p. 6 December 2006.

in the courtroom, but also to employ strategies to defuse the conflict and reach a resolution which provides children conflict-free time and affection that they generally crave from both of their parents. This is not as simple as it sounds. Law school does not train attorneys to address the medical, social, child development, and psychological issues that often occur in families. Attorneys are taught to think analytically and not how to be sensitive to the emotions and interpersonal issues of families. Yet, AFCs must assess and address these issues every day working in a specialty which means delving into the innermost aspects of families and their relationships, and participating in legal proceedings that impacts the most intimate aspects of an individual's life. Not surprisingly, many are reluctant to share their thoughts and feelings, especially when they know that these thoughts and feelings may be used against them when stuck in a litigation posture.

At CLCNY, the use of a holistic team led by the attorney is critical to help resolve cases without going to trial. Certainly, some cases cannot be resolved and they are generally identifiable early on in the case. These are cases in which the parties lack insight and are locked into their own belief systems, frequently due to a personality disorders, and are immune to therapy, education, or persuasion—disagreeing with any contrary conclusions of an assessor or therapist. These parents are self-absorbed and view their own actions as being in the child's best interests and cannot accept any other perspective. They will rarely acknowledge or accept responsibility for their actions or change, and are blind to the effects of acrimonious litigation on the child, the

other parent, and extended family. Cases that go to trial generally share certain common parental characteristics that include irrational behavior, dysfunctional relationships, mental disorders, and alleged or actual engagement in potentially criminal conduct, drug abuse, domestic violence, or child abuse or neglect.²

But what about the other cases that cannot be resolved? These are generally situations in which there has been a traumatic separation and the parents are not prepared, skilled or knowledgeable enough to handle a child's feelings towards the other parent while at the same time dealing with their own emotional trauma when they initially go to court. However, these parents ultimately will be open to education, behavioral transformation for the benefit of the child, engaging in therapy, and in the end, resolving the case.

Some of the most complex cases that CLCNY's holistic teams worked on have involved the death of one parent allegedly at the hands of the other parent, frequently in front of the children. In such cases, the maternal and paternal families quickly square off staking their claim on the child. Often, the child's relationship with the other family is minimized and the children's feelings, during a time when they should have the love and support from everyone, are lost or ignored. In such traumatic cases, children's overriding desire is generally for a stable home and to maintain relationships with all members of the maternal and paternal families. However,

2. Child Custody Proceedings Reform, High-Conflict Custody Cases: Reforming the System for Children Conference Report and Action Plan. Conference sponsored by the American Bar Association Family Law Section and The Johnson Foundation Wingspread Conference Center, Racine, Wisconsin, September 8-10, 2000.

» **Calm in the Face of the Storm**
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a decision often needs to be made quickly about where and who the child should live with during the pendency of the litigation. In such cases, the role of the CLCNY team in gathering a comprehensive perspective on the needs and wants of the child as well as how each family can and are willing to meet those needs is crucial. Using mediation and negotiation is central in order to preserve and encourage relationships while focusing on the needs and the best interest of the children such as in the high profile family court case following the death of the mother, Nazish Noorani, in a shooting outside her sister's house in Boonton, N.J., that authorities said was arranged by her husband, Kashif Parvaiz, and a female associate of his from Boston. As a result of CNCNY's efforts an interim agreement³ and ultimately a final settlement⁴ were reached.

Representing children in custody and visitation cases can be significantly different than representing children in child welfare proceedings. It has been stated that child protective cases are tragedies while custody/visitation cases are dramas. Yet, even in the drama of custody and visitation litigation, a child's voice still needs to be heard and their story told. It is up to the child's attorney to be the calm in the face of the storm and provide that voice. As a result, cases in family court are often resolved through mediation and negotiation without going to trial. ■

3. Liz Robbins, Custody Deal for 2 Families After Killing, NY Times October 24, 2011 http://www.nytimes.com/2011/10/25/nyregion/after-wife-killing-charge-2-families-share-custody.html?_r=0.
4. Kate Kowsh, Murdered New Jersey mother's kin win kids from 'killer' dad, August 17, 2012, <http://nypost.com/2012/08/17/murdered-new-jersey-mothers-kin-win-kids-from-killer-dad/>.

NACC Organization Spotlight



www.childadvocates.net

Child Advocates, Inc., is the GAL/CASA program in Indianapolis, Indiana and is one of the oldest and strongest GAL/CASA programs in the country. As long time members of NACC, Child Advocates' attorneys and staff have always valued our connection to NACC. The resources and national conference have informed and improved our practice as attorneys in the child welfare system.

At any given time, Child Advocates provides best interest advocacy to approximately 2500 children and advocates for 4500–5000 children each year. Child Advocates is a leader in the Indianapolis child welfare system, always seeking to improve our advocacy on behalf of our clients with projects such as our Educational Advocacy Project and our Undoing Racism Initiative. The Initiative has provided 25 Undoing Racism workshops for child welfare system stakeholders and the community, and is a part of the community's Anti-Racist Collaborative.

In recognizing the different ways that states handle child representation, Child Advocates began a pilot project approximately two years ago to provide direct attorney representation to a group of children in our child welfare system. Child Advocates recognized that a child may need his own attorney to represent his direct interest, and fortunately, the statutes in Indiana allow for the discretionary appointment of counsel to children in child welfare cases. We are pleased to be able to continue the direct representation project for children in Indianapolis. The project has also strengthened the belief in our Indianapolis child welfare system that *all* children need the best interest representation provided by a GAL/CASA and introduced the practice that there are circumstances that require a child to have direct representation.

*Is your organization a member of the NACC?
Would you like to see it showcased in the eGuardian?*

We'd love to hear from you!

Would you like more information on Group Memberships?

We'd love to hear from you too!

Contact us at Membership@NACCchildlaw.org

PLANNING TO ATTEND THE 37TH NATIONAL CHILD WELFARE, JUVENILE, AND FAMILY LAW CONFERENCE?

IF SO, JOIN US FOR ONE OF THESE TWO EVENING ACTIVITIES
TUESDAY, AUGUST 19, 2014!

BASEBALL : COLORADO ROCKIES VS. LA DODGERS

Tickets \$25 • Registration Required

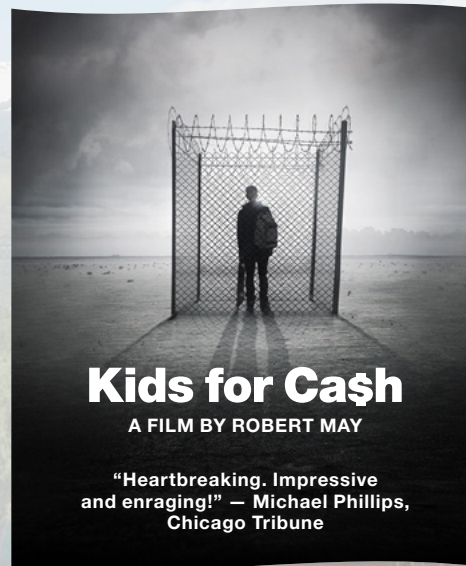


Flickr: Geoff Livingston



MOVIE NIGHT : KIDS FOR CASH

No Charge • Registration Required



**REGISTER NOW FOR THE CONFERENCE OR CONTACT US
TO ADD ON TO YOUR EXISTING REGISTRATION.**

Conference Sponsorship Opportunity

Reach More Than 600 Juvenile and Family Law Professionals Working in the US Legal System

Sponsoring the conference provides an opportunity to put your brand in front of a targeted audience in a credible environment—reaching hundreds of attorneys, judges, physicians, social workers and other stakeholders interested in organizations, products, and services related to the field!

As a sponsor you would receive thank you signage at the door, option to provide material to be distributed at the session, thank you slide on the screen, recognition from the podium and in the conference program.

Details available by emailing
Conference@NACCchildlaw.org

Gault Revived for Youth in Colorado

by Kim Dvorchak, Executive Director, Colorado Juvenile Defender Coalition

Picture yourself the parent of a child in trouble. A summons to appear arrives by mail informing that your child has been accused of a crime and has a court date scheduled in just over a week, which you also required to attend. Not sure what to expect you take the day off from work and excuse your child from school. You get to the courthouse and take a seat in the courtroom alongside the twenty to thirty or so other youth and their parents. A gentleman approaches; he tells you he is the district attorney and is offering you a deal that can take care of the case today. Your choice is to take the deal or request a lawyer and come back on another court date. The pattern repeats until all families have been contacted and handed a waiver of rights and plea bargain to consider. Then the judge comes in, gives a mass advisement to everyone in the courtroom, and starts calling cases. And the waivers of counsel begin.

In 1967, the United States Supreme Court held the 14th Amendment Due Process Clause guarantees the right to defense counsel for children accused of crimes:

The juvenile needs the assistance of counsel to cope with problems of the law, to make skilled inquiry into the facts, to insist upon regularity in the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him.¹

1. *In re Gault*, 387 U.S. 1, 36 (1967).

So how is that that on the 47th Anniversary of the *Gault* decision, nearly half of all juvenile delinquency proceedings in Colorado take place without a defense attorney? 45% of all juvenile delinquency cases proceed without defense counsel, and in five counties the statistic is over 60%.² This number would be even higher if it included the cases with late appointment of counsel, while the parent or guardian goes through the hurdle of applying for a public defender or trying to hire an affordable private attorney. Or, even worse, the shackled unrepresented child at a detention hearing, whose parent is told how to apply for the public defender but won't actually see one until her next court date. There are an estimated 2000 children are unrepresented by counsel at detention hearings statewide in Colorado.³

As the *Kids for Cash*, Luzerne County, Pennsylvania scandal informs, leaving children and families to fend for themselves opens opportunities for abusive court practices to persist for years.⁴ While access to counsel and quality of representation for children in juvenile delinquency court is not a new concern for youth advocates and attorneys, many of us may not be aware of how pervasive the problem is in our own courts. How many of you are

2. Colorado Judicial Branch, Division of Planning and Analysis, Data received by CJDC, February 20, 2013.

3. Testimony of Francis S. Brown, Chief Deputy Colorado State Public Defender, in support of H.B. 1032, Senate Judiciary Committee Hearing, April 23, 2013.

4. See, *Kids for Cash*, now a major motion picture, www.kidsforcashthemovie.com; See also, *Juvenile Law Center*, <http://www.jlc.org/current-initiatives/promoting-fairness-courts/luzerne-kids-cash-scandal>.



Kim Dvorchak is the Executive Director of the Colorado Juvenile Defender Coalition, a nonprofit organization dedicated to ensuring excellence in juvenile defense and advocacy and justice for all children and youth in Colorado. **Learn more at www.cjdc.org.**

tracking the timeliness of access to juvenile defense counsel and the rate of waivers of counsel in your state? Until just last year, Colorado had no idea.

The wake-up call for our state came when the National Juvenile Defender Center (NJDC) released *Colorado: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings*.⁵ The Colorado Juvenile Defender Coalition was a collaborating author on the report, and had sought the presence of NJDC in our state since the founding of our organization in 2010. We knew about the lack of detention hearing representation and lack of specialization in our public defender system, but we needed a thorough examination of juvenile defense law and practice in our courts in order to chart the course for reform.

The National Juvenile Defender Center conducts state-based assessments in a nationwide effort to improve juvenile defense. The assessments provide comprehensive examinations of the systemic and institutional barriers that prevent lawyers from providing adequate legal services

5. *Colorado: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings*, National Juvenile Defender Center & Colorado Juvenile Defender Coalition (2012)(hereinafter as *Colorado Assessment*), at <http://www.njdc.info/colorado.php>.

» Gault Revived for Youth in Colorado by Kim Dvorchak

to indigent children. In addition to gathering general data and information about the structure of the juvenile indigent defense system, assessments examine issues related to the timing of appointment of counsel, the frequency with which children waive their right to counsel and under what conditions they do so, resource allocation, attorney compensation, supervision and training, and access to investigators, experts, social workers and support staff.⁶

The *Colorado Assessment* described a juvenile defense system suffering from “benign neglect.”⁷ It wasn’t as if anyone was willfully working against it, there simply was not a concerted effort working for it.⁸ NJDC investigators found that despite the deep care, concern, and professionalism observed in courts across Colorado, there were widespread disparities in accessibility of counsel and the quality of the representation provided.⁹ Colorado was defaulting to a pre-*Gault* system that focused on the perceived best interests of the child without adequate regard for the due process protections the U.S. Supreme Court requires.¹⁰

The findings in the *Colorado Assessment* were compounded by judicial data reported for the first time showing 45% of all delinquency cases statewide have no defense attorney present at any stage in the case.¹¹ To better understand the factors contributing to high rates of unrepresented kids,

6. National Juvenile Defender Center, Assessments, <http://www.njdc.info/assessments.php>.

7. *Colorado Assessment*, p.7.

8. *Id.*

9. *Id.*

10. *Id.*

11. See, FN 3.

CJDC staff and volunteers engaged in a court-watching program targeting first appearances and detention hearings. The results of this project were detailed in CJDC’s Report, *Kids Without Counsel: Colorado’s Failure to Safeguard Due Process for Children in Juvenile Delinquency Court*.¹² We observed four factors contributing to the lack of access to counsel at the earliest stages in the case: (1) the presence, or lack thereof, of a public defender in the courtroom; (2) the cumbersome process to apply for a public defender; (3) the fact that waiver of counsel took place in the context of a guilty plea; and (4) some courts were appointed Guardian ad Litem but no defense attorney in juvenile delinquency cases.

Now Colorado fancies itself a fairly progressive state when it comes to juvenile justice. We were one of the first states to create a specialized juvenile court at the turn of the century;¹³ we established a cap on the number of youth in detention in 1991;¹⁴ and we’ve rolled back the prosecution and jailing of youth as adults to record-low numbers.¹⁵ But the NJDC *Colorado Assessment* and *Kids Without Counsel* shed light on an area long overlooked, and—with a little prodding from CJDC and the National Campaign to Reform State Juvenile Justice Systems’ lobbyist—prompted action at the state capitol and in our indigent defense systems.

12. *Kids Without Counsel: Colorado’s Failure to Safeguard Due Process for Children in Juvenile Delinquency Court*, Colorado Juvenile Defender Coalition (2013), available at <http://cjdc.org/wp/juvenile-defense-center/njdc-colorado-assessment/>.

13. *Colorado Juvenile Court History: The First Hundred Years*, 32-APR Colo. Law. 63, Laoise King (2003).

14. Senate Bill 91-94.

15. See, *A Bid to Keep Youth out of Adult Prisons*, New York Times, John Schwartz, October 28, 2013; See also, 2012 Legislative Accomplishments, Colorado Juvenile Defender Coalition at <http://cjdc.org/wp/juvenile-justice-policy/legislative-achievements/>.

Last summer the Colorado General Assembly convened a Juvenile Defense Interim Committee.¹⁶ The Committee consisted of ten legislators and ten non-legislative members, including myself and representatives from the public defender’s office, the district attorneys council, judges, guardians ad litem, parents, and citizens. Over the course of six all-day hearings in five months, the Committee studied when defense counsel is appointed, indigence determinations, waivers of counsel, the role of the juvenile defender, and the structure of our current indigent juvenile defense delivery systems.

As the interim committee hearings began, the Colorado Office of the Public Defender announced changes it was making to support juvenile defense by: (1) establishing juvenile summit meetings for attorneys to brainstorm and collaborate on juvenile justice issues; (2) eliminating forced rotation, and allowing public defenders to remain in juvenile court assignments; (3) establishing a new performance pay system to reduce salary disparities for attorneys who chose to remain in juvenile defense; and (4) increasing training for attorneys in juvenile defense. A proposal to create a Division of Juvenile Defense within our statewide public defender system was set aside based upon assurances the office made regarding its systemic improvements and commitments to juvenile representation.¹⁷

16. All interim committee research, hearing summaries, and reports are available at <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=CGA-LegislativeCouncil%2FCLCLLayout&cid=1251653169460&pagename=CLCWrapper>.

17. See, Juvenile Defense Interim Committee Hearing, October 28, 2013, available at <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=CGA-LegislativeCouncil%2FCLCLLayout&cid=1251653169460&pagename=CLCWrapper>.

» Gault Revived for Youth in Colorado by Kim Dvorchak

The Committee recommended three pieces of legislation for the 2014 General Assembly.¹⁸ The original recommendations lay the framework for full-representation of children in Colorado: automatic appointment of the public defender at detention hearings and first appearances for all children, indigence determined by the assets of the child not the parent, and bans on waivers of counsel in certain cases. But then there is the sausage-making that takes place in a legislative session that occurs during an election year. Stakeholders, advocates, defenders, and lawmakers met numerous times to work out an agreement that would obtain bi-partisan support and continue a meaningful course of reform to protect the due process rights of kids.

CJDC and our coalition partners brought together advocates, legal organizations, and youth serving organizations for Citizen Advocacy Days at the state capitol. Participants wore white T-shirts that said "45% without counsel" on the front, and "Why Don't Kids Have Lawyers?" on the back that created a buzz as they walked about the capitol. The National Campaign to Reform State Juvenile Justice Systems supported the production a video called *Why Don't Kids Have Lawyers*,¹⁹ that helped spread the message across our state and across the country. We even created a hash-tag, **#shouldahadalawyer**, to use social media to educate the public and gain allies at the capitol.

Last month, Governor John W. Hickenlooper signed into law two bills from the Juvenile

18. See, Juvenile Defense Counsel Interim Committee Final Report. All interim committee reports are also available at <http://cjdc.org/wp/juvenile-defense-center/interim-juvenile-defense-committee/>.

19. Available at www.cjdc.org.

Defense Interim Committee. The first bill, House Bill 1032, will help ensure and encourage early appointment of counsel. The first part of the bill amends our detention hearing statute to require that every child be represented by the public defender at their initial detention hearing, and the public defender will remain on the case even if the child is released.²⁰ In order to facilitate meaningful representation, detention or holding facilities must notify the local public defender's office when a child is admitted, agencies must provide any pre-trial reports, assessments, and police reports to counsel in a timely manner, and counsel must have an opportunity for confidential consultations with their clients.²¹

The second aspect of the bill focuses on first appearances for youth not in custody. Summons and promises to appear will now explicitly state the child has the right to counsel, include the contact information for the local public defender office, and encourage parents to make early application for court appointed counsel five days before their first court date.²² The public defender's office will put more information on their website to make it easier for parents and guardians to figure out how to apply for counsel. Indigence determinations will still be based upon parent income, but there are now specific exceptions that allow the court to appoint counsel to a child who may not otherwise qualify as indigent: if the parent refuses to hire counsel for the child, if the child is in the temporary or permanent custody of human services, or if

20. H.B. 14-1032, p. 3-4, amending C.R.S. §19-2-508.

21. *Id.*

22. Application after the five day period is not considered a waiver of counsel, but if the parent applies five days in advance, it is guaranteed the public defender will be present at first appearances. H.B. 14-1032, p.6-7, amending C.R.S. §19-2-706.

the court finds it is in the best interests of the child to appoint defense counsel. The bill also states that a court may not appoint a Guardian ad Litem as a substitute for defense counsel.²³

A third area of the bill codifies a waiver colloquy juvenile judges must use when a child or parent is seeking to plead guilty without counsel. The statute includes procedures from our court rule, but adds an additional provision: the trial court must ensure "the juvenile understands the possible consequences that may result from an adjudication or conviction of the offense with which the juvenile is charged, which consequences may occur in addition to the actual adjudication or conviction itself."²⁴ Increasing collateral consequences in education, housing, employment, student loans, and more are driving the urgency for early access to counsel before children take deals without knowing the long term effects of a juvenile adjudication.

The last but not least important part of H.B. 1032 pertains to data collection and reporting. For the first time in our state, the statewide public defender, conflict counsel, and judicial branch shall make specific reports on juvenile cases annually to the judiciary committees of the state House and Senate. The public defenders' office is required to report statistical information, the process of selecting, training, and supporting attorneys assigned to juvenile court, the average length of time attorneys are assigned to juvenile court, and the outcome of efforts to reduce juvenile court rotations and increase opportunities for promotional advancement in salaries for attorneys in juvenile

23. H.B. 14-1032, p.9, amending C.R.S. §19-1-111.

24. H.B. 14-1032, p.8-9, amending C.R.S. §19-2-706.

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court.²⁵ The judicial branch is required to report the number of delinquency cases that involved appointment of counsel, the number of cases where there was a waiver of counsel, the number of juvenile cases with a detention hearing and the number of youth released at the detention hearing, and the status of recommended reviews to juvenile court forms, rules, and Chief Justice Directives.²⁶

The second interim committee bill, House Bill 1023, will fund new social workers for the public defender system, specifically for juvenile clients, recognizing that interdisciplinary practice is best for children whose lives intersect with so many other systems. Lastly, the House and Senate voted in support of a resolution to our state Supreme Court, requesting the Court re-examine the juvenile rules of procedure, court policies and forms, and the Chief Justice Directive pertaining to the appointment of counsel. CJDC and other advocates look forward to this ongoing work as a means to continue our advocacy. Work remains to be done, particularly when it comes to indigence determinations, and the low federal poverty guidelines that exclude so many families from public defender eligibility.

The Juvenile Defense Interim Committee now has its place in the archives of our state capitol, for all to use in their own advocacy work to support access to counsel. All materials, fact-sheets, and reports the committee considered are available online.²⁷ We are grateful for the National Juvenile Defender Center for all of their work on the

25. H.B. 14-1032, p.11, amending C.R.S. §21-1-104.

26. H.B. 14-1032, p.12, amending C.R.S. §13-1-137.

27. <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=CGA-LegislativeCouncil%2FCLCLLayout&cid=1251653169460&pagename=CLCWwrapper>.

Colorado Assessment, research, advocacy, and support through this multi-year process. CJDC looks forward to seeing the Juvenile Defense Interim Committee bills take effect on November 1, 2014 and will remain constant in monitoring the implementation of these new laws and practices. There is a collective spirit of reform

among advocacy organizations and indigent juvenile defense providers we hope will continue to elevate the practice of juvenile defense and improve the quality of representation once access to counsel is established. As we near the 50th Anniversary of *In re Gault*, ask yourself—do we need to revive due process for youth in our state? ■

NACC Welcomes:



Brooke Silverthorn, JD, CWLS, a Child Welfare Law Specialist, comes to the NACC from Atlanta, Georgia where she served as a Special Assistant Attorney General, representing the Gwinnett County Department of Family and Children Services for the past 8 years. She also served as a Supreme Court of Georgia Cold Case Fellow, reviewing cases of children in foster care with no identifiable progress toward permanency, and making recommendations to facilitate permanency. She is a holistic practitioner and has enjoyed engaging both parent and child attorneys to reunify families.

Brooke received her BA in Sociology from Michigan State University and her JD from Georgia State University College of Law. Brooke is honored to join the NACC as a staff attorney and hopes to play a key role in child welfare policy and advocacy initiatives nationally. Brooke is excited to bring her experience in the courtroom to enhance the legal training program at the NACC.

Brooke grew up in Michigan and loves her home state, particularly her Michigan State Spartans. She is an animal lover and has both dogs and cats of her own. In her spare time, she loves to be outdoors, playing with her dogs, hiking, running and enjoying the fresh air.



Carolyn Moershel is the new Program Administrator at NACC, working with the certification program and office management. A long-time resident of Colorado, she has had a long career in development and marketing in private education, the arts, and community mental health. She holds a Bachelor's Degree in Political Science from Brown University. Carolyn is a violist, played with the Colorado Springs Symphony for 23 years, and now plays with the Littleton Symphony and Parker Symphony. She spends much of her time with her children and grandchildren.

Practice Tips for Contempt

by Gerard F. Glynn, JD, MA, LLM

Experienced attorneys who are new to juvenile court are shocked by how disrespectful people are to the power of juvenile court. In juvenile court, people wear inappropriate clothing (even some lawyers), talk and walk around during proceedings and laugh inappropriately at serious matters. The ultimate disrespect comes from party's non-compliance with court orders.¹ Caseworkers and parents are equally guilty of this non-compliance. If we want children to reach permanency in a timely manner, elevate the quality of practice, and respect the court's jurisdiction, everyone must comply with court orders in a timely manner. All parties should use the court's ultimate power of contempt to ensure compliance.

Here's how:

» Get specific, clear orders detailing the responsibilities of the parties.

- The Court can only hold someone in contempt if the non-compliant party is given notice of their obligations.
 - An order for "reasonable visitation" is not enforceable.

1. I do not support using contempt against children in child welfare proceedings. As the victims in these cases, I think it is inappropriate to threaten the children with contempt. Unfortunately, they are often the focus of contempt proceedings.



Gerry Glynn is President of the Board of NACC. He has represented children and families for 23 years and is now Chief Legal Officer for Community Based Care of Central Florida, a non-profit serving Orlando area children and families. He is founder of Glynn Consulting (www.glynnconsulting.org) – providing training, assessments and strategic planning for non-profit child welfare agencies.

- This order is enforceable against the caseworker and the parent: "The case worker will transport the child for a supervised visitation with the parent every Monday and Thursday between 4 and 6 p.m. The parent is obligated to be at an agreed upon location for these visits."
- Remember case plans become orders and should be equally specific.
- Due to the obligation to provide notice of the orders, orders should obligate the parties to take action.
 - If the order involves a non-party, make it a party's obligation to have others comply.
 - Or, if a non-party is needed, subpoena the non-party to the hearing and have them agree to the order in open court, thus allowing compliance.
- » **Once you have a clear order, monitor compliance.**
 - Don't wait for six month review hearings.
 - Create internal tickler system to monitor.
- » **Do not be afraid to file motions to show cause.**
 - Motion the court to issue an order to show cause. You're an attorney, and attorneys file motions. Never feel bad about zealously advocating for your client.
- Upon motion, the court will issue an order to the party to explain in a hearing why they have not complied.
- The action of filing the motion or the court granting the motion and ordering the party to show cause as to why they shouldn't be held in contempt often leads to action.
- » **After the show cause hearing, there will be a contempt hearing.**
- » **If pursuing contempt, one must consider whether they are seeking criminal or civil contempt.**
 - Criminal contempt seeks punishment and implicates criminal due process.
 - Civil contempt seeks compliance and leads to an imposition of an ongoing sanction until the compliance is obtained.
- » **Once you have filed one or two motions to show cause, the other parties will take their obligations more seriously which will lead to better results for children and families. ■**



Amicus Curiae



PIERRE V. HOLDER

by Kelsey Till,
NACC Legal Intern;
SUNY Buffalo Law School,
JD Candidate 2016

The National Association
of Counsel for Children,

the Children's Advocacy Institute, and Human Impact Partners filed an *amicus curiae* brief before the Supreme Court of the United States in *Pierre v. Holder*, on petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.¹

The Court is considering whether the Second Circuit's decision to uphold 8 U.S.C. § 1432(a) violated the Equal Protection Clause of the Fourteenth Amendment.² 8 U.S.C. § 1432(a) is an absolute bar that precludes children from deriving automatic citizenship from their unwed fathers, but not from their unwed mothers.³ The brief supports the opinion that this statute violates the Equal Protection Clause.⁴ The parent-child relationship

1. Brief for the National Association of Counsel for Children, et al. as Amicus Curiae Supporting Petitioner, *Pierre v. Holder* (2014) (No. 10-2131-ag).
2. *Id.* at 7.
3. *Id.*
4. *Id.* at pp. 9-10.

is constitutionally protected and unequal treatment of all unwed fathers without considering the current relationship between father and child conflicts with the Court's goals to protect parent-child relationships.⁵

The brief argues that the Second Circuit's application of *Nguyen v. INS* is a perpetuation of stereotypes that place legal significance on a mother's capacity to give birth.⁶ These stereotypes disregard the fact that parental responsibilities have changed and many fathers raise their children and care for their well-being.⁷ The brief cites social science research finding that a stable family unit in any form, including the many non-traditional structures that exist today, is in the child's best interest.⁸ The stability of a family depends on the practices of the caregivers, rather than the family's form.⁹ Family stability, in a variety of parental environments, increases the likelihood that a child will "fare better across a range of criteria, including physical and psychological health, social and behavioral development, and academic success."¹⁰ The *Pierre* decision, however, disrupts those stable structures "for no reason other than an outdated, discriminatory law," 8 U.S.C. § 1432(a)(3).¹¹

The brief emphasizes that when children are separated from their families, the vital benefits derived from family stability can be jettisoned, and "the mere threat of forced separation can inflict on children many of the same harms that an actual

5. *Id.*
6. *Id.* at 12-13.
7. Brief for the Petitioner, *Pierre v. Holder* (2014) (No. 10-2131-ag), at 12-13.
8. *Id.* at 15-17.
9. *Id.* at 17.
10. *Id.*
11. *Id.*

separation causes[.]"¹² Children constantly fear that their families will be torn apart, and the ambiguity and insecurity that stems from that fear is frightening to them.¹³ Poor physical and mental health, delayed social and cognitive development, and poor school readiness and social adjustment are all early setbacks that can have a negative effect on these children's entire lives.¹⁴ These setbacks make it more difficult for many "to learn to read, find a job, and maintain relationships, and increas[es] the likelihood of mental health problems and antisocial behavior."¹⁵ Additionally, if children are actually deported to their countries of origin, they likely face unique harms and difficult obstacles due to stigma, feeling like exiles, and language difficulties.¹⁶

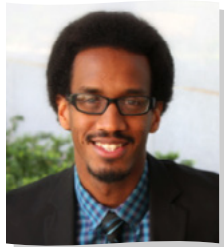
The NACC, the CAI, and HIP conclude that the Second Circuit's decision thwarts the unity of non-traditional families, violates the Equal Protection Clause, and has far-ranging implications for children's well-being. The decision creates a tenuous legal status for these children. A ruling adopting NACC's position would establish the stability and certainty that cultivate children's positive development and futures. It would also protect the sanctity of the parent-child relationship and promote the well-being and care of our nation's children.

The brief was submitted to court on May 27, 2014 by counsel of Cleary Gottlieb Steen & Hamilton LLP, on behalf of the NACC and its signatories.

The case is pending.

Amicus curiae brief available at NACCchildlaw.org.

12. *Id.* at 26-27.
13. Brief for the Petitioner, *Pierre v. Holder* (2014) (No. 10-2131-ag), at 34-35.
14. *Id.* at 30-31.
15. *Id.*
16. *Id.* at 31-32.



IN RE SANDERS, NO. 146680, SLIP OP. AT 2 (MICH. JUNE 2, 2014)

by William Cory Ford,
NACC Legal Intern;
Valparaiso University School
of Law, JD Candidate 2016

The NACC recently joined with advocates and advocacy organizations throughout the state of Michigan and signed onto an amicus curiae brief filed before the Michigan Supreme Court in the case of *In re Sanders*.¹ The brief supports the Appellant, arguing that the application of the one-parent doctrine impermissibly infringes on the rights of unadjudicated parents under the Due Process Clause of the Fourteenth Amendment.² On June 2, 2014, the Michigan Supreme Court agreed with the Amici and held Michigan’s one-parent doctrine unconstitutional.³

The one-parent doctrine permits family courts of Michigan to obtain jurisdiction over a non-offending parent without a finding of unfitness solely on the basis of the other offending parent’s adjudication.⁴ The doctrine eliminates the obligations to prove that an unadjudicated parent is unfit before the parent may be subjected to the authority of the court in the disposition of the children involved.⁵

The Amici argued that the one-parent doctrine interfered with parents fundamental rights to

1. *Brief for National Association of Counsel for Children, et al., as Amici Curiae Supporting Appellant, In re Sanders*, Michigan Supreme Court, No. 146680; Appeal from the Michigan Court of Appeals, No. 313385, March 6, 2013.
2. *In re Sanders*, No. 146680, slip op. at 2 (Mich. June 2, 2014).
3. *Id.* at 23.
4. *In re Sanders*, slip op. at 9 -10. See *In re CR*, 259 Mich. App. 185, 205; 646 N.W. 2d. 506 (2001).
5. *Id.*

direct the care, custody, and control of children by allowing courts to enter dispositional orders without finding both parents unfit.⁶ The parties of the amicus curiae purposed that in any child protective proceeding, the trial court should hold an adjudication trial for *both* parents before the state may interfere with a parent’s constitutionally protected parent-child relationship.⁷

Lance Liard, the Appellant in *In re Sanders*, is the father of two boys, C. Sanders, born in 2011, and P. Sanders, born in 2010.⁸ Tammy Sanders is the mother of the two boys, but has never been married to Appellant.⁹ Four days after being born drug positive, the Jackson Circuit Court removed C. Sanders from the custody of Tammy and placed him with the Appellant, who already had custody of P. Sanders.¹⁰

Several weeks later, Tammy admitted to “getting high” with the Appellant, and that she had disobeyed court orders of having unsupervised contact with the children when she spent the night with the Appellant.¹¹ DHS then filed an amended petition alleging that the Appellant tested positive for cocaine.¹² At the November 16, 2011 preliminary hearing, the court removed both children from the custody of the Appellant.¹³ At that time the Appellant contested the allegations made in the amended petition and requested an adjudication hearing to determine his fitness as a parent.¹⁴

6. *Brief of Amici Curiae*, at 6-10.
7. *Id.* at v.
8. *In re Sanders*, at 2.
9. *Id.* at 3.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

On February 17, 2012, Tammy pleaded no contest to the allegations of neglect and abuse, but Appellant declined to enter a plea and instead renewed his demand for a hearing.¹⁵ Appellant also moved for a change of temporary custody to the children’s paternal grandmother, with whom he resided at the time.¹⁶

At the placement hearing, Appellant testified that he allowed Tammy to stay over one night, but did not allow the children to come into contact with her.¹⁷ Appellant also testified that he was currently on probation after a conviction of domestic violence.¹⁸ The court then ordered to maintain placement of the children with their aunt pending Appellant’s adjudication.¹⁹

On April 18, 2012, DHS dismissed the allegations against Appellant, and the adjudication hearing was cancelled.²⁰ Without adjudicating him unfit, the court ordered Appellant to participate in parenting classes, substance abuse assessments and random drug screenings, attend counseling, undergo a psychological evaluation, and obtain housing and employment.²¹ The court denied Appellant’s request for the children’s temporary placement with the paternal grandmother and ordered conditional supervised parenting time.²²

On August 22, 2012, Appellant argued that without proper due process to adjudicate him unfit, the court had no legal authority to order compliance

15. *Id.*
16. *Id.*
17. *In re Sanders*, slip op. at 3.
18. *Id.*
19. *Id.* at 4.
20. *Id.*
21. *Id.*
22. *Id.*

to a costly service plan.²³ Appellant moved for the immediate placement of the children with him.²⁴ The court denied his motion, relying on *In re C.R.* and the one-parent doctrine.²⁵

The Court of Appeals denied Appellant's application for interlocutory leave for lack of merit.²⁶ The Michigan Supreme Court then granted leave to address the issue of the one-parent doctrine's constitutionality.²⁷

In the brief, Amici first argued that a court's reliance of *In re C.R.* and the one-parent doctrine negatively impacts Michigan families, generally, and specifically, low-income families.²⁸ Because trial courts are legally required to take jurisdiction of a non-offending parent once the other offending parent is adjudicated, the non-offending parents become victimized by a court's premature intervention.²⁹ Non-offending parents who are forced to comply with costly service plans become more susceptible to disposition of their parental rights.³⁰ Their already minimal time and financial resources are hindered in order to meet the burdensome requirements.³¹

Furthermore, the one-parent doctrine creates additional harm to victims of domestic violence, as it may allow one parent to continue to exercise control of the other parent solely by a plea to create court intervention against the other parent.³² The non-offending parents are not

23. *In re Sanders*, slip op. at 4.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Brief of Amici Curiae*, at 4-6.

29. *Id.*

30. *Id.* at 4-5.

31. *Id.*

32. *Id.* at 6.

the only victims, but also the children, who require the non-offending parent's resources and time.³³ The children are further victimized as the parents' care and attention are redirected to comply with the unwarranted plans.³⁴

The Amici then asked the court to protect the substantive due process rights of parents in Michigan by finding the one-parent doctrine unconstitutional.³⁵ The "mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness," and there cannot be a presumption of unfitness.³⁶ In the past the state has used the one-parent doctrine to presume unfitness of the other non-offending parent "because it was more convenient [for the court] to presume than prove."³⁷ But such a presumption is unconstitutional.³⁸

The one-parent doctrine was considered necessary to protect the best interest of the child involved in this case and similar cases across Michigan.³⁹ But when a state requires a breakup of a natural family, would it not be in the best interest of the child to first consider the fitness of both parents to prevent further harm to that child? Therefore, the Amici asked that the court require substantive due process to both parents in Michigan, not only to protect the constitutional rights of parents to direct care, custody, and control of their children, but to also protect the children involved.⁴⁰

33. *Id.*

34. *Id.*

35. *Brief of Amici Curiae*, at 6.

36. *Id.* at 7 (quoting *In re Clausen*, 442 Mich. 648, 687; 502 N.W.2d 649 (1993)).

37. *Id.* (quoting *In re Stanley*, 405 U.S. 645, 657-58 (1972)).

38. *Id.*

39. *Id.* at 9.

40. *Id.* at 10.

"In protecting the health and safety of minor children, that interest must be balanced, against the fundamental rights of parents to parent their children."⁴¹ If there is concern that both parents should not be "entrusted with the care and custody of their children, the state has the authority and the responsibility to protect the children's safety and well-being by seeking an adjudication against both parents."⁴² The Michigan Supreme Court overruled *In re C.R.* on June 2, 2014, and held that the one-parent doctrine was an unconstitutional violation of the Due Process Clause of the Fourteenth Amendment.⁴³ ■

41. *In re Sanders*, slip op. at 23.

42. *Id.*

43. *Id.*



Case

UNITED STATES V. UNDER SEAL, 709 F.3D 257 (4TH CIR. 2013)

by William Cory Ford,
NACC Legal Intern;
Valparaiso University School of Law,
JD Candidate 2016

The United States Court of Appeals for the Fourth Circuit considered two issues: (1) whether the requirement to register under the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16091 *et seq.*, is a direct contradiction of the confidentiality provisions of the Federal Juvenile Delinquency Act ("FJDA"), 18 U.S.C. § 5031 *et seq.*; and (2) whether the requirement to register an adjudicated juvenile violates the Eighth Amendment's prohibition on cruel and unusual punishment.¹ The Fourth Circuit held that SORNA did not contravene the FJDA requirements and SORNA superseded the provisions that were provided by FJDA.² The court also held SORNA's registration requirement, as applied to the juvenile, did not violate the Eighth Amendment.³

1. *United States v. Under Seal*, 709 F.3d 257, 261 (4th Cir., Feb. 26, 2013).

2. *Id.* at 257, 263.

3. *Id.* at 257, 266.

In 2007, the juvenile appellant resided in Japan on a United States Naval base with his mother, his stepfather, and two half-sisters, ages ten and six.⁴ In February of 2008, Appellant's mother filed a report with the Navy Criminal Investigation Service ("NCIS") alleging her son subjected his two half-sisters to inappropriate sexual contact.⁵ The investigation by NCIS confirmed that Appellant anally penetrated both girls and vaginally penetrated the youngest girl.⁶

The District Court of South Carolina charged Appellant under a federal statute as a juvenile delinquent with aggravated sexual abuse.⁷ Appellant admitted to all allegations.⁸ On October 8, 2009, the district court adjudicated Appellant delinquent.⁹ Appellant was sentenced to incarceration until July 1, 2010, placed on a term of juvenile delinquent supervision, and ordered to comply with SORNA reporting requirements in addition to the supervision requirement.¹⁰

On December 7, 2011, the district court overruled Appellant's objections regarding registration requirements under SORNA.¹¹ Appellant's appealed the ruling, contending that SORNA's registration requirements were a direct contradiction of the confidentiality provisions of the FJDA which prohibits the disclosure of juvenile delinquency proceedings records.¹² Appellant also raised the issue of whether the courts requirement was a

4. *Id.* at 259.

5. *Id.*

6. *Under Seal*, 709 F.3d at 259.

7. *Id.* at 260 (the charges were filed pursuant to 18 U.S.C. §§ 5032 and 3261(a)).

8. *Id.* at 260.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Under Seal*, 709 F.3d at 261.

violation of the Eighth Amendment's prohibition on cruel and unusual punishment.¹³

The circuit court first considered whether the district court's imposition of the appellant's requirement under SORNA contravenes the confidentiality provisions of FJDA.¹⁴ The purpose of the FJDA is to encourage treatment and rehabilitation of juveniles by eliminating the ordinary criminal process, which in many cases creates a barrier in the juvenile's future.¹⁵ The FJDA specifies that the identity of a juvenile offender including the name, picture, or image may not be disclosed to the public, even where the proceedings are open or documents have been released.¹⁶ The FJDA further provides that information regarding the juvenile records may not be released upon request related to an application of employment, license, bonding, or any civil right or privilege.¹⁷ Under the requirements of SORNA, sex offenders are required to release their name, address, physical description, criminal history including status of parole, probation or supervision status, a current photograph, and any other additional identifying information through the registry.¹⁸ The information must further be made available on the Internet for public access.¹⁹ The circuit court agreed that the two statutes conflicted, but affirmed the district courts ruling, holding that SORNA did not contravene the confidentiality provisions of FJDA.²⁰

In the determination of a controlling statute between two which are conflicting, the "specific

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* (citing 18 U.S.C. § 5038(e)).

17. *Id.* (citing 18 U.S.C. § 5038(a)).

18. *Under Seal*, 709 F.3d at 262 (citing 42 U.S.C. § 16914)).

19. *Id.* (citing 42 U.S.C. § 16914(a)).

20. *Id.*

statute closely applicable to the substance of the controversy at hand controls over a more generalized provision.²¹ SORNA specifically limits registry of juvenile offenders over the age of fourteen who are convicted of aggravated sex crimes to disclose their status by registering.²² Therefore SORNA is the more specific statute as applied to the appellant in this case.²³ The court concluded that the rights of the community and possible victims must outweigh the rights to protect the identity of juvenile sex offenders.²⁴ Therefore the district court did not err in the applying SORNA requirements to Appellant.²⁵

The circuit court then considered whether the requirement of a juvenile offender to register under SORNA violates the Eighth Amendment's prohibition on cruel and unusual punishment.²⁶ The Eighth Amendment prohibits sentences that are disproportionate to the crime committed and further discourages vicious punishments against an offender.²⁷ The appellant must present to the court the "clearest proof" to establish that the legislative intention of a civil remedy should be designated as a criminal punishment.²⁸ In the determination of SORNA's constitutional validity and Appellants proof, the circuit court first applied the two-part test established in *Smith v. Doe*.²⁹ The test first analyzes whether the legislature's intention of SORNA was to inflict punishment against the offender.³⁰ If it is

21. *Id.* at 262 (citing *Farmer v. Emp't Sec Comm'n of N.C.*, 4 F.3d 1274, 1284 (4th Cir. 1993)).

22. *Under Seal*, 709 F.3d at 262.

23. *Id.*

24. *Id.*

25. *Id.* at 263.

26. *Id.* at 263.

27. *Id.*

28. *Id.* at 263-64.

29. *Id.* (citing *Smith v. Doe*, 538 U.S. 84, 92 (2003)).

30. *Id.*

found the intention was not for imposing punishment, but to enact a civil and non-punitive scheme, the court must then determine if the action is one that rises to a level of a punitive purpose.³¹

The court considered the seven factors punitive effect test enumerated by *Kennedy v. Mendoza-Martinez*: (1) whether the statute inflicts restraints; (2) whether it is historically considered a physical punishment; (3) whether it applies after the determination of a scienter; (4) whether it seeks retribution and deterrence of offenders; (5) whether the behavior to which it applies is already a crime; (6) whether there is an alternative purpose by the its requirement; and (7) whether it should be considered excessive compared to the alternative purpose.³²

The circuit court held that SORNA is a non-punitive and civil regulatory scheme, both by its intended purpose and the effect on the appellant.³³ The appellant failed to provide the clearest proof to establish SORNA as a punitive remedy as opposed to the stated intension by Congress of a civil remedy to protect the public from the sex offenders in their community.³⁴ The circuit court concluded it's *Mendoza-Martinez* analysis and determined SORNA did not subject the appellant to restraints, the requirements do not have a history regarded as a punishment, it does not aim to act as retribution or a deterrent, and it has a stated non-punitive purpose for the safety of the public.³⁵ The circuit court held that SORNA's non-punitive purpose was not excessive because Congress intentionally classified only the juvenile offenders over the age

31. *Id.*

32. *Id.* at 263 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

33. *Under Seal*, 709 F.3d at 263.

34. *Id.*

35. *Id.* at 265.

of fourteen and only those offenders who have committed particularly serious sexually assaultive crimes were required to register.³⁶ Appellant failed to present the "clearest proof" to show the punitive nature of SORNA that would repudiate its stated civil intent.³⁷ Therefore the court held that SORNA requirements did not violate Appellant's Eighth Amendment right.³⁸ ■

36. *Id.* at 266 (citing National Guidelines for Sex Offenders Registration and Notification, 73 Fed.Reg. 38030-01, at 38050 (July 2, 2008)).

37. *Id.* at 266.

38. *Id.*

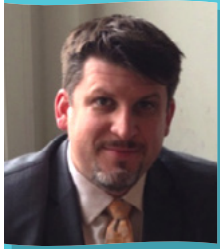
Do you know of an important case which you feel NACC members should be made aware of?



If so, please let us know. Email: advocate@NACCchildlaw.org.

Child Welfare Law Certification

Massachusetts' First CWLS: Thomas J. Roy



Thomas Roy has practiced in Western Massachusetts Probate and Juvenile Courts for approximately eight years. He spent four years in private practice and as a solo practitioner, and has for the last three years worked as a trial

attorney with the Massachusetts Committee for Public Counsel Services Children and Family Law Division representing both children and parents in Child welfare proceedings. In his current practice Tom litigates termination of parental rights cases, guardianship cases and petitions for children requiring assistance. He is a National Institute for Trial Advocacy trained child welfare litigator, a CornerHouse trained forensic interviewer and takes a particular interest in cases involving allegations of Abusive Head Trauma. He lives with his lovely wife and three children in Western Massachusetts.

Iowa

Iowa Children's Justice will award up to 20 scholarships to cover the \$350 exam fee. If you wish to apply for a scholarship for the exam, please send an email to IowaChildrensJustice@iowacourts.gov. This is in addition to \$300 QIC Application Fee Waivers that run until used or September 2014. *Iowa attorneys and judges apply now while it is fully paid!*

Next Steps

NACC is in the process of applying to **Minnesota** and **Pennsylvania**.

CWLS & CWLS Applicant Reception in Denver

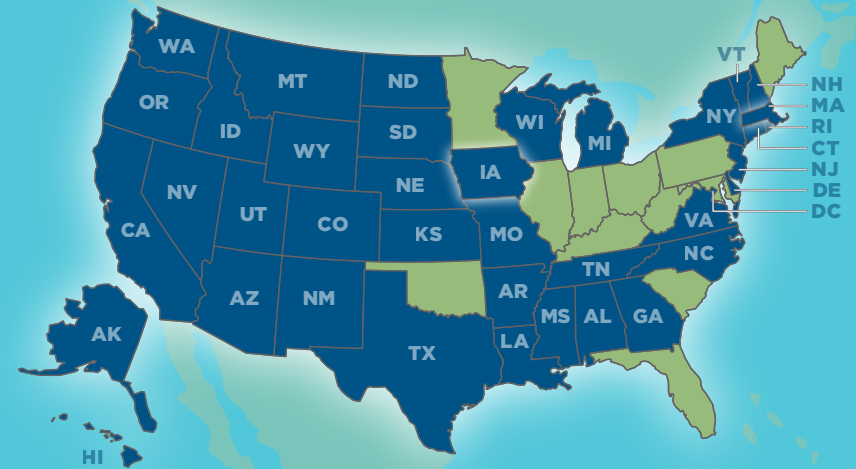
Our Child Welfare Law Specialists will have a special reception on Sunday, August 17th from 5:00pm to 6:30pm, preceding the 37th National Juvenile and Family Law Conference at the Hyatt Regency Denver. This year, CWLS applicants who are attending the Red Book Training and Conference are invited join us. Come meet your fellow specialists and soon-to-be specialists from all over the country!

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A First: Washington Appellate Court Finds Denial of Counsel Violated Foster Child's Rights

For the first time in Washington State's history, an appellate court has ruled that failure to appoint counsel to a foster youth violated the youth's legal rights. In the case, *In re the Dependency of J.A.*, the appellate court found that the Pierce County juvenile court misapplied due process law by understating the youth's interests in his case as well as incorrectly analyzing the risk of error in the case. The appellate court also held that the government's financial interests did not outweigh the interests of J.A. in having legal counsel.

State law makes appointment of counsel completely discretionary for the vast majority of children and youth. Some counties appoint to all children, some only to adolescents, and some rarely, if ever. In 2012, the Washington Supreme Court held that, while there was no universal right to counsel for foster children in termination proceedings, that some children did, in fact, have a constitutional right to counsel. *In re*

Dependency of M.S.R., 174 Wn.2d 1, 22 n. 13, 271 P.3d 234 (2012). To determine which children, the Court suggested a case-by-case analysis using the *Mathews v. Eldridge* due process factors. 424 U.S. 319 (1976). While the Court made significant pronouncements about children in dependency actions, it limited its holding to children in termination trials. It also reserved the issue of whether those children had a state constitutional right to counsel in dependency or termination proceedings. No Washington appellate court had ever found a right to counsel for any dependent child.

JA is a 15-year-old foster youth living in Pierce County, a county which has decided not to appoint counsel to the vast majority of children and youth in care.¹ J.A. has developmental delays and functions at a seven-year-old level. J.A.'s mother allegedly has developmental delays, and

1. J.A. was 14 at the time of the initial motion to appoint counsel.



Casey Trupin is the Coordinating Attorney for the *Children and Youth Project at Columbia Legal Services in Seattle*, where he advocates for at-risk, homeless and foster children and youth. Trupin has served as counsel to thousands of foster youth and homeless adults in litigation and worked on state and federal legislation designed to improve services to low-income children, youth and adults in Washington State and nationwide.

» Certification, from previous page

and over 560 of your colleagues across the country are now a "CWLS" with over another 300 current applicants, making this currently the fastest-growing legal specialty in the country. Subject to availability, the Children's Bureau's Quality Improvement Center on Child Representation will subsidize your \$300 application fee and additional support for the exam fee is available in some jurisdictions. All you need to do is to fill out and submit the application as soon as possible, and no later than this September 30. Everything else, including the exam, can be scheduled at a later time, when it's convenient for you, as you'll then have two years to complete the process.

So click on this link to request and download the application. NACC staff are available to answer questions and help you through the process. Child Welfare Law Specialist certification tells the world that you have mastered your field and dedicated your career to advocating for children and families. You deserve that recognition. Request an application and complete it soon, and together we'll get this done.

Kendall Marlowe
Executive Director

due to neglect, lost custody of J.A. to his father. J.A.'s was later removed from his father's custody, due to numerous factors, including physical abuse and failure to protect J.A.. J.A.'s father later ended up in prison. While in care, J.A. was prescribed psychotropic medications, put in inpatient treatment, arrested, and separated from his sibling. He wanted to return to his mother's care, but his requests were denied.

With the assistance of the University of Washington Child and Youth Advocacy Clinic, J.A., filed a motion to appoint counsel at public expense, arguing it was required under the federal and state constitutions, as well as under state law. RCW 13.34.100. The Pierce County Juvenile Court denied the motion and, even after the foster mom indicated she was no longer interested in adopting J.A., denied a subsequent motion for reconsideration. The motions were largely unopposed, though the GAL wrote and submitted a letter arguing that J.A. did not need an attorney.

J.A. appealed and the Department responded to the appeal, arguing that the juvenile court properly exercised discretion. Six groups of *amici* filed briefs supporting J.A., including the National Association of Counsel for Children. Neither the GAL nor J.A.'s parents weighed in on the appeal. The Department's position was that the motion was not appealable, that the trial court had acted properly, and rejected J.A.'s argument that all children in dependencies had a state or federal constitutional right to counsel.

In the appellate court's opinion, issued June 11, it held that the trial court had misapplied all three *Mathews* factors. The Court made five notable points in its decision.

First, the court held that a "child's fundamental liberty interests are at stake, not only in the initial hearing, but also in the series of hearings and reviews that occur as part of a dependency proceeding once a child comes into state custody." In other words, children's important due process rights do not come into play during the dependency and termination trials but in all judicial hearings in their case. The State had argued that the court should not review the case as an interlocutory appeal.

Second, the appellate court held that children's fundamental liberty interests and rights include the right to the "affection and care of his parents," "freedom of personal choice in matters of family life[,] and reiterated that a foster "child has a strong liberty interest in the parent-child relationship that is equal to or greater than that of parents." (Citations omitted). The State had defended the trial court's finding that J.A.'s interests in his case were "not that great."

Third, the appellate court held that "[b]ecause a case-by-case analysis allows wide room for judicial discretion, subjective determinations can magnify the risk of erroneous fact-findings." The trial court had argued that its team (social worker, GAL, assistant attorney general and parents' attorneys) would adequately protect J.A., at the same time acknowledging they had failed to keep him out of detention after a recent "meltdown."

Fourth, in a footnote, the appellate court noted that lawyers are "especially important [...] to a child with a disability." The Department and the trial court argued that his disabilities would limit an attorney's role and thus diminished the need for him to have one.

Finally, the appellate court rejected the argument that Pierce County's limited resources to pay an attorney outweighed the other factors.

Curiously, the appellate court indicated that its holding was limited to J.A.'s right to counsel under a discretionary statute, not under either constitution. This holding was despite the court's use of the *Mathews* due process test that the *MSR* court indicated was necessary to determine whether a child had a constitutional right to counsel. The statute provides no criteria for a court to follow in deciding whether to appoint, and thus, one could argue that there is no difference between when a denial of counsel violates the statute and the constitution.

The ruling comes on the heels of the Washington's first major legislative expansion of the right to counsel for foster children. Under Senate Bill 6126 (2013), which went into effect this month, all children who have been legally free for six months will get counsel. The law also allows any individual to now refer dependent children to attorneys, and all children, parties and caregivers will be able to ask the court to appoint counsel. The new rights will likely greatly expand the number of motions to appoint counsel. The decision in *In re Dependency of J.A.* is timely and will hopefully assist trial courts avoid the mistakes that the Pierce County trial court made, or, in the best case scenario, help lead to all children having counsel.

The [decision](#) is currently unpublished, and thus cannot be cited for authority, but parties are moving to have it published. ■

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NACC Mission

As a multidisciplinary membership organization, we work to strengthen legal advocacy for children and families by:

- Ensuring that children and families are provided with well resourced, high quality legal advocates when their rights are at stake
- Implementing best practices by providing certification, training, education, and technical assistance to promote specialized high quality legal advocacy
- Advancing systemic improvement in child-serving agencies, institutions and court systems
- Promoting a safe and nurturing childhood through legal and policy advocacy for the rights and interests of children and families



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