

NACC envisions a justice system wherein every child has his/her voice heard with the assistance of well-trained, well-resourced independent lawyers resulting in the child's rights being protected and needs being met.

STATE COURTS WEIGH IN ON THE ISSUE:

Morbid Childhood Obesity Grounds for Neglect?

By Elizabeth Thatcher, NACC Legal Fellow

Chips or apple slices? The latest video game or a baseball? Place these options in front of an eight-year-old, and it is not difficult to predict where his little hands will gravitate. Parents and guardians, the adults who do the grocery shopping, drive the car to get fast food, and supervise their children's daily activities, have the responsibility of ensuring that their children receive the proper nutrition and exercise necessary for healthy growth. In November of 2011, Cuyahoga County Children and Family Services found that an Ohio mother was not meeting this responsibility.

Third-grader Andyⁱ was an honor roll student who loved to participate in extracurricular activities. Andy also loved food. At only eight years old, Andy weighed 218 pounds, more than 150 pounds heavier than an average, healthy-weight third grade boy. When Andy was in first grade, his mother took him to the hospital because he was having trouble breathing. During Andy's visit, the staff alerted the County to his health issues. Concerned county

service workers collaborated with the family for months in an attempt to control Andy's weight, but the numbers on Andy's scale continued to rise. Andy's weight gain resulted in the development of sleep apnea. He could no longer sleep safely at night without the help of a machine. Andy also experienced trouble breathing while performing normal activities during the day and he was at risk for developing diabetes and high blood pressure.

Convinced that Andy's health would continue to deteriorate in his mother's house, the County charged Andy's mother with medical neglect and removed Andy from his family. A juvenile judge placed Andy in a foster home and Andy's mother was given once-a-week, supervised visitation with her son. After two months and few results, Andy was transferred from foster care to his uncle's home, where Andy's mother was allowed to visit more frequently with her son. After being away from home for six months, a judge returned a 167 pound Andy back into his mother's care.

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i. Not actual name of child.



Cases

NEW YORK'S HIGHEST COURT MAKES VIEWING CHILD PORNOGRAPHY ON THE INTERNET LEGAL

People v. Kent, decided recently by the New York Court of Appeals, squarely addresses the issue of whether knowingly viewing pornographic images of children on the internet constitutes a criminal offense.¹ As of May 7, 2012, it does not in New York. Two issues arose in this case: whether viewing alone constitutes a crime and whether cached images from previously viewed websites constitute dispositive evidence of such a crime.² The Court first decided that simply accessing and displaying such content on a computer screen does not constitute the illegal acts of promoting or procuring child porn as prohibited by Penal Law §236.15.³ The Court next determined that if the State cannot prove that the viewer knew the images would be cached in accessible storage, such cached images would not prove a defendant had done more than simply viewed them.⁴ In such a case, charges premised on the illegal promotion or procurement of child porn would be dismissed.⁵

1. *People v. Kent*, 2012, NY 70U, http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/120508_NY_ChildPorn_Ruling.pdf.

2. *Id.* at 1-2.

3. *Id.* at 10-12.

4. *Id.* at 13-14.

5. *Id.* at 13.

In summary, the majority opinion articulated a distinction between knowingly viewing but not saving, downloading, or printing such websites or their contents and knowingly viewing them with the intent to possess them in tangible form.⁶ This led the Court to affirm the conviction of a college professor charged with promoting and possessing child porn only for those images and materials which he had saved and catalogued but not for the same or similar which he had only viewed via the internet.⁷

However, the majority opinion passes over the question of whether this reading of the New York statute enhances the specificity of a specific intent crime and thereby, oversteps the court's role of only interpreting the laws as opposed to making them.⁸ The concurring opinion of Judge Graffeo picks up on the majority's odd determination. As long as the People cannot prove the defendant knew computers cache images and material from previously visited websites and the defendant also did not convert them into a tangible form, pedophiles can legally view as much pornographic content as the internet makes available to them.⁹

Judge Graffeo's opinion outlines the consequences of this for victimized children. The internet creates an easily accessible forum and convenient vehicle for the dissemination of child porn; as a result, the internet makes images of these children available to would-have-been defendants well beyond the actual perpetration of the crime.¹⁰ Every time someone views a pornographic image of a child that

6. *Id.* at 14-15.

7. *Id.* at 17.

8. See *id.* at 1, 6 (Graffeo, J., concurring).

9. *Id.* at 5.

10. *Id.* at 2, 11.

child is victimized.¹¹ The ruling also has the potential to expand the market for child pornography, as illustrated by Judge Graffeo's opinion, by validating the temptation of those previously deterred by the threat of criminal conviction.¹²

TEXAS UPHOLDS TERMINATION ON MOTHER'S FAILURE TO PAY CHILD SUPPORT

In *In re D.M.D.*, the Court of Appeals of Texas upheld a trial court's decision to terminate a mother's parental rights after the mother failed to pay monthly child support to the Texas Department of Family and Protective Services, despite having the ability to do so.¹ The Department removed the mother's children in 2004 after receiving a report of abuse and neglect.² The trial court appointed the Department as the permanent managing conservator of the children and ordered the mother to pay child support in the amount of \$282.00 per month.³ The Department subsequently moved to terminate the mother's parental rights and the trial court granted the motion to terminate in 2011.⁴ The mother appealed the decision, citing two major issues of error. First, the mother claimed that the evidence is legally and factually insufficient to support the trial court's finding that the mother failed to support the children in accordance with her ability to pay child support.⁵ Second, the mother challenged the trial court's determination that termination was in the best interest of the children.⁶

11. *Id.* at 2.

12. *Id.* at 11, 12.

1. *In re D.M.D.*, 363 S.W.3d 916 (Tx. App. 2012).

2. *Id.* at 918.

3. *Id.*

4. *Id.* at 919.

5. *Id.* at 920.

6. *Id.* at 922.

On review, the Texas Court of Appeal noted that “A trial court may terminate parental rights only upon proof by clear and convincing evidence that the parent has committed an act set forth in section 161.001(1) and termination is in the best interest of the child.”⁷ The Court of Appeals defined the standard of review when reviewing the sufficiency of facts supporting the termination as whether “a factfinder could reasonably form a firm belief or conviction about the State’s allegations.”⁸

Addressing the mother’s first challenge, the Court noted the Department’s complaint that the mother did not make a single payment of the ordered \$282.00 per month.⁹ Although the mother was unemployed from 2008 to the time of the trial, the mother received \$674.00 per month in social security benefits after being diagnosed with depression, food stamps, and lived in an apartment that required her to pay only \$79.00 per month.¹⁰ The mother claimed that instead of paying the monthly dollar amount, she would bring her children clothing and gifts during visits, as a substitute.¹¹ The Court of Appeals, in agreement with the trial court, found that the mother’s supplying of clothing and gifts to the children did not relieve the mother of her responsibility to pay the court-ordered support amount.¹² The fact that the mother had the resources to provide at least some support but chose not to do so is clear and convincing evidence supporting the Department’s motion to terminate.

7. *Id.*, Tex. Fam. Code Ann. § 161.001(1), (2).
8. *Id.*
9. *Id.* at 921.
10. *Id.*
11. *Id.*
12. *Id.* at 922.

In response to the mother’s challenge that the trial court erroneously determined that termination was in the best interest of the children, the Court of Appeals reviewed the evidence before the trial court: the desire of three of the children to be adopted by their foster parent with whom they had lived for two years, the close bond between the foster mother and the children, the close bond between the siblings, the foster mother’s willingness to adopt the children, the troubling reports from the mother’s court-ordered therapy, the mother’s denials and contradictions regarding past events, the mother’s refusal to pay support, the mother’s inability to find suitable housing, the children’s special needs, and the mother’s lack of cooperation in working with services, such as her failure to take a substance abuse evaluation.¹³ The Court of Appeals held that the evidence supports the trial court’s determination that the Department proved by clear and convincing evidence that termination of the mother’s parental rights was in the best interest of the children.¹⁴

NOTICE TO READERS : Decisions reported herein may not be final. Case history should always be checked before relying on a case. Cases and other material reported are intended for educational purposes and should not be considered legal advice. Featured cases are identified by NACC staff and our members. We encourage all readers to submit cases. If you are unable to obtain the full text of a case, please contact the NACC and we will be happy to furnish NACC members with a copy at no charge.

13. *Id.* at 924–926.
14. *Id.* at 926.

Although Andy may have been the first child in Ohio to be removed from his home solely because of his weight, this is not a unique issue in the United States. Across the country, states are addressing this growing dilemma. Courts in Iowa, Indiana, New Mexico, New York, Pennsylvania, and Texas have held that life-threatening morbid childhood obesity is included within the state neglect statutes.ⁱⁱ Cases have involved a 290-pound ten-year-old, a 111-pound four-year-old, a 131-pound three-year-old, a 260-pound nine-year-old, a 451-pound sixteen-year-old, and a 136-pound four-year-old.ⁱⁱⁱ Importantly, these children were not simply categorized as morbidly obese; all of these children presented with comorbidities that threatened their health. Likewise, in all of these cases, the parents were charged with neglect, and had repeatedly failed to successfully comply with diet and exercise changes recommended by doctors and/or local services. These courts varied in determining the proper response to morbid childhood obesity: one court terminated the parental rights, another court convicted the parents of criminal charges, several states sent homemaker services to teach the parents how to cook healthy meals, and one state ordered the parents to purchase a gym membership for their daughter.^{iv}

In 1998, the California Superior Court addressed a tragic result of morbid childhood obesity, the death of a 680-pound thirteen-year-old girl named Christina. The California Superior Court

[See Obesity, page 4 »](#)

ii. Mitgang, Melissa. “Childhood Obesity and State Intervention: An Examination of the Health Risks of Pediatric Obesity and When They Justify State Involvement.” 44 Colum. J.L. & Soc. Probs. 553, 559 (2011).
iii. Darwin, Abigail. “Childhood Obesity: Is It Abuse?” Child Welfare League of America. 2008. <http://www.cwla.org/voice/0807obesity.htm>
iv. *Id.*



Amicus

In re WLH

NACC ARGUES THE CHILD'S RIGHT TO APPEAL IN GEORGIA CASE

The NACC recently joined a Georgia Association of Counsel for Children amicus brief in support for a petition for certiorari in *In re WLH*. This case involves the alleged deprivation of a child by his current caregivers, a cousin, and her husband. The juvenile court appointed a lay CASA to make monthly reports and an attorney to serve as the child's legal counsel. Throughout the adjudication, the child's counsel, without objection, took positions contrary to the recommendations of the child's CASA worker. The trial court found the child deprived and placed him in the custody of the Division of Family and Children Services. The child appealed this placement, but his CASA worker, through her own counsel, filed a brief opposing the child's appeal. The Court of Appeals held that the child had no standing to appeal the placement over the objection of his CASA worker.

The amicus brief makes several arguments as to why the Court of Appeals finding is problematic. First, this finding violates not only the parent's but also the child's fundamental liberty interest in his or her relationship with their family. A deprivation case can result in the state ultimately severing the relationship between a parent and child forever. Therefore, it is hard to imagine a legal outcome more injurious to a family than an erroneous decision to remove a child from his home. However, the Court of Appeals decision in this case greatly limits the ability of the child to seek redress from such an error.

Second, the Court of Appeals decision imposes duties on CASA workers that may alter their role as defined by statute. State law defines a CASA worker's role in a deprivation proceeding as a witness to the Court with respect to the best interests of the child. State law does not refer to a CASA worker as a party to the proceedings, nor does the statute grant CASA workers authority over the child's attorney. However, the Court of Appeals interpreted the CASA worker's duties to be those of a traditional guardian ad litem, who is appointed by the court to take legal action on behalf of the child or incompetent party, when the Court held that a child may not appeal over the objection of the CASA. This ruling may also interfere with the ability of the child's attorney to meet her ethical responsibilities to her client, the child. If the attorney's advocacy is governed by the recommendations of the CASA, the attorney cannot meet her duty to defer to her client's direction regarding the objectives of the litigation. A child's ability to appeal their removal and placement by the Division of Family and Child Services should not be limited by the objection of a CASA worker because the CASA's statutory role is to serve as a witness with respect to the child's best interest, not as counsel for the child.

UPDATE : The Georgia Supreme Court granted certiorari and oral argument will take place this Fall.

To view briefs or submit a request for the NACC to participate as Amicus Curiae in a case, visit the [Amicus Curiae page on the NACC website.](#)

» Obesity from page 3

convicted Christina's mother of misdemeanor child abuse through inaction because she refused to address her daughter's dangerous, excessive weight.^v

With one in three American children overweight or obese and more than an estimated 2 million children who are severely obese, the weight of America's youth is a serious matter.^{vi} The Centers for Disease Control and Prevention state that immediate effects of childhood obesity include risk factors for cardiovascular disease (such as high cholesterol or high blood pressure), prediabetes, bone and joint problems, and sleep apnea, in addition to the social and psychological effects that often accompany childhood obesity.^{vii} Obese children are also subject to a host of long-term health effects, such as an increased risk for diabetes, type 2 diabetes, stroke, osteoarthritis, and several types of cancer.^{viii}

While factors such as genetics, lack of money, lack of information, unhealthy school meals, unsafe neighborhoods, and hectic schedules undoubtedly make it difficult for many parents to perfectly control their children's food intake and physical activity, it is important for all parents to make the best possible choices for their children with the options available to them and to set a healthy example for their children. As morbid childhood obesity continues to rise, it is safe to assume that more courts will be presented with the issue of how to handle cases of life-threatening morbid childhood obesity.

v. Sciarani, Stephanie. "Morbid Childhood Obesity: The Pressing Need to Ex-pand Statutory Definitions of Child Neglect." 32 T. Jefferson L. Rev. 313 (2010).

vi. The Centers for Disease Control, Childhood Obesity Facts, <http://www.cdc.gov/healthyyouth/obesity/facts.htm>.

vii. *Id.*

viii. *Id.*



Policy & News

Bill Would Curb Foster Care Entries Linked to Immigration, Deportation

A bill was introduced that aims to curb the number of children placed in foster care because of immigration enforcement, and end the termination of parental rights brought on because of deportation proceedings.

› [Learn more](#)

The Lasting Effects of Neglect: Altered Brain Structure in Children

Children who are neglected, growing up without normal emotional and social interaction, have measurably different brain structure from other children, according to a new study from researchers at Boston Children's Hospital.

› [Learn more](#)

Foster Care Population Drops for 6th Straight Year

The number of U.S. children in foster care has dropped for the sixth straight year. The drop results primarily from a shift in the policies and practices of state and county child welfare agencies. Many have

shortened stays in foster care, expedited adoptions and expanded preventive support for troubled families so more children avoid being removed from home in the first place.

› [CBS News](#)

› [New data from Administration for Children and Families](#)

Foster Care for Meth Exposed Kids

A recent study reported spikes in foster care admissions due to methamphetamine abuse in the U.S. Researchers recommend a tailored plan for handling kids that have been removed from situations due to methamphetamine use in the home.

› [Read Study](#)

Casey Foundation Ends Foster Care Program After 36 Years

The Baltimore-based foundation will close its Casey Family Services, a 36-year-old program that oversees the care of 400 foster children in seven states.

› [Baltimore Sun](#)

Certification Update

Become a Child Welfare Law Specialist

The NACC is pleased to announce several new changes to make the Certification Application and Exam process more convenient for you.

- **The Certification Application is now available in electronic form.** [Request an application via our web site.](#)
- **NACC has launched a computer-based Certification Exam offered at ACT Centers nationwide.** With locations in every state the ACT Center network delivers computer-based testing at hundreds of sites across the country. Approximately 85% of the U.S. population lives less than an hour from an ACT Center.

These changes will permit the NACC to accept applications year-round. Once your application is approved, you will be able to schedule your own exam at a local ACT testing center.

QIC Application Fee Waivers — 2012

The U.S. Children's Bureau is funding an additional 200 slots for certification. This means applicants can have their fees paid by the U.S. Government. To apply, visit the [Certification page](#) on the NACC website.



2013 Target States

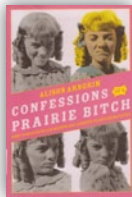
The NACC is applying to open certification in Alabama, Arizona, and Minnesota. We anticipate accepting applications as early as January 2013.



Professional Resources

PUBLICATIONS

You now have the opportunity to purchase publications from the NACC Official Bookseller: Bookworks. Available publications include:



Confessions of a Prairie Bitch: How I Survived Nellie Oleson and Learned to Love Being Hated

By Alison Arngrim

Paperback \$14.99

ISBN-13: 9780061962158

Availability: In Stock at Warehouse; Usually Ships in 1-5 Days

Published: It Books, 06/2011

Other editions of this title



Child Protection in America: Past, Present, and Future

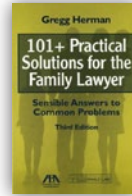
By John E. B. Myers

Google EBook \$39.95

ISBN-13: 9780195169355

Availability: In Stock at Warehouse; Usually Ships in 1-5 Days

Published: Oxford University Press, 07/2006



101+ Practical Solutions for the Family Lawyer: Sensible Answers to Common Problems

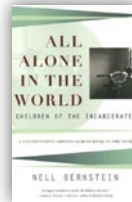
By Gregg Herman

Paperback \$139.95 (includes CD-ROM)

ISBN-13: 9781604425079

Availability: Special Order; Price and Availability May Change

Published: American Bar Association, 05/2011



All Alone in the World: Children of the Incarcerated

By Nell Bernstein

Paperback \$16.95

ISBN-13: 9781595581853

Availability: In Stock at Warehouse; Usually Ships in 1-5 Days

Published: New Press, 08/2007



The APSAC Handbook on Child Maltreatment

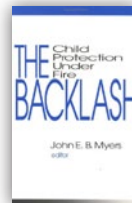
By John E. B. Myers, John E. B. Myers, APSAC (American Professional Society on the Abuse of Children)

Paperback \$120.90

ISBN-13: 9781412966818

Availability: In Stock at Warehouse; Usually Ships in 1-5 Days

Published: Sage Publications (CA), 06/2010



The Backlash: Child Protection Under Fire

By John E. B. Myers

Paperback \$65.00

ISBN-13: 9780803954045

Availability: In Stock at Warehouse; Usually Ships in 1-5 Days

Published: Sage Publications (CA), 07/1994



Child Maltreatment: A Collection of Readings

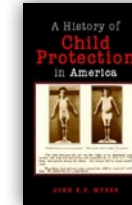
By John E. B. Myers

Paperback \$46.80

ISBN-13: 9781412995061

Availability: Special Order; Price and Availability May Change

Published: Sage Publications (CA), 05/2011



A History of Child Protection in America

By John E. B. Myers

Paperback \$24.99

ISBN-13: 9781413423013

Availability: In Stock at Warehouse; Usually Ships in 1-5 Days

Published: Xlibris Corporation, 05/2004



Legal Issues in Child Abuse and Neglect Practice

By John E. B. Myers

Paperback \$128.75

ISBN-13: 9780761916666

Availability: In Stock at Warehouse; Usually Ships in 1-5 Days

Published: Sage Publications (CA), 07/1998

Other Editions of this title



TRAINING CALENDAR

Wednesday, September 19, 2012

› **National Center for Victims of Crime 2012 National Conference**

New Orleans, LA



Thank you to everyone who made the 2012 Conference a success!

A special thanks to the NACC Board of Directors for their assistance and support of the NACC!

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[› Learn more about this exciting member benefit](#)



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