

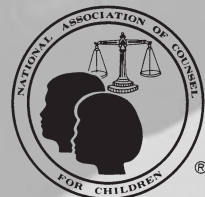
# THE GUARDIAN

NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

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# THE GUARDIAN

NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN



## Guest Column

### CRIME AND PUNISHMENT

by Shay Bilchik, President/CEO, Child Welfare League of America

When the Supreme Court agreed to hear the case of *Roper v. Simmons*<sup>1</sup> this summer, the Court took up a cause begun in the nineteenth century, but one that is still being fought to ensure justice for children today. In 1899, authorities in Cook County, Illinois, established a juvenile justice system separate from the adult criminal justice system to divert young offenders from the destructive punishments of criminal courts and encourage rehabilitation based on the individual's needs. Now, more than 100 years later, children as young as 16 or 17, like Christopher Simmons, find themselves on death row for quite serious crimes, leaving all of us to debate whether children and adults should be treated in exactly the same way.

As many of you already know, in the waning years of the last century, 49 states and the District of Columbia passed laws making it easier for juveniles to be tried as adults through statutory exclusion, mandatory waiver, direct file by prosecutors, or presumptive waiver legislation. Twenty-three states now permit capital punishment for juveniles. These changes came about as lawmakers increasingly focused on the seriousness of crimes, without meaningful examination of the perpetrator's age as a mitigating factor; lawmakers who stood in the way were labeled soft on crime.

The ethical and moral implications surrounding *Roper v. Simmons* are compelling, and the arguments cover a lot of territory: The United States is one of only a handful of nations that continue to execute minors in violation of several international human rights agreements. Moreover, the deterrence effect of the death penalty is unproven and even less likely to motivate teens, who often consider themselves immortal. But one of the most important arguments against executing minors has come from the halls of science, not a law library.

Psychologists have long recognized that children differ from adults in terms of cognitive development, impulse and emotional control, and judgment capability. It's why our nation doesn't allow those under 18 to vote, enter into contracts, drink alcohol, or serve in the military. But research conducted in the last few years reveals specific chemical and biological differences between the cognition of a teen and that of an adult. Doctors at UCLA, for example, have shown that the frontal lobe of the brain—which allows us to prioritize thoughts, anticipate consequences, and control impulses—is the last part of the brain to fully develop, and undergoes the greatest change during adolescence. Researchers at Harvard have even shown that underdevelopment of this region makes teens more prone to react using another part of the brain, the amygdala, which is

much more instinctual. This research has led many to conclude that brain development is not complete until the early 20s, meaning the biological age of maturity should be older than 18, and a far cry from 16 or 17, the age at which youth in many states have been subject to the death penalty.

Fortunately, in recent years, some of the justices have spoken out against execution of minors, labeling it a “shameful practice” and a “relic of the past ... inconsistent with evolving standards of decency in a civilized society.” In June 2002, when the Supreme Court handed down a decision on *Atkins v. Virginia* prohibiting the execution of mentally retarded criminals as cruel and unusual punishment, some thought the justices might also reconsider the treatment of juveniles. Justice Stevens, writing the majority opinion for *Atkins*, noted that although mentally retarded people frequently understand the difference between right and wrong and are competent to stand trial, their intellectual impairments leave them with a decreased capacity to process information, to communicate, to learn from mistakes, to logically reason, to control impulses, and to understand others' reactions. Sound familiar? Much of the new biological evidence confirms that teenagers' brains are still developing the capacity to make precisely these distinctions.

Christopher Simmons, who was just 17 years old at the time of his offense, had been both physically and mentally abused by his stepfather, a chronic alcoholic. A psychologist also noted that Simmons had a “longstanding history of abusing alcohol and marijuana, beginning at age 13... and suffered from a schizotypal personality disorder.” And his circumstances aren't unique among youth on death row. Add these complications to the host of typical developmental issues, and the odds are clearly stacked against many of these teens, paving the way for an injustice.

There's no question that Christopher Simmons committed a very serious crime when he killed a woman in St. Louis County, Missouri. His victim and her family and friends have every right to demand a severe punishment for the young man who took her life. And his background does not excuse his actions—many teens with tragic upbringings find a way out of their circumstances and turn away from a life of crime and violence. But in many ways, Christopher Simmons is a victim as well. Let us hope that the Supreme Court Justices understand that taking the life of a young man or woman in this circumstance is far from a just solution—in fact, it takes us one step farther away from the civilized society we all want for all our children. ■

Shay Bilchik, President and CEO of CWLA, also serves on the National Advisory Board of the NACC. CWLA is the nation's oldest and largest association of agencies that directly help abused, neglected, abandoned and otherwise vulnerable children and their families. CWLA has nearly 1,200 member agencies nationwide. The Washington, DC-based organization has offices in Baltimore, Boston, Chicago, Denver, Los Angeles, and Reston, VA. For more information, visit [www.cwla.org](http://www.cwla.org)

<sup>1</sup> *Roper v. Simmons*, Pending Before The Supreme Court of the United States, No. 03-633. The NACC filed an *Amicus Curiae* Brief together with the Juvenile Law Center (JLC) and other child advocacy groups on July 19, 2004. The brief can be viewed at: <http://www.jlc.org/Resources/pdfs/Simmons.pdf>. The JLC news release is available at: <http://www.jlc.org/home/mediacenter/pressreleases/simmons.htm>, and all the amicus briefs are available at: <http://www.abanet.org/crimjust/uvjus/simmons/simmonsamicus>.



## Cases

### Juvenile Miranda Warnings

*U.S. Supreme Court Reverses 9th Circuit And Holds That It Is Not Necessary To Consider Juvenile's Age When Deciding Whether To Issue Miranda Warnings.* Yarborough v. Alvarado, 124 S. Ct. 2140; 2004 U.S. LEXIS 3843 (June 1, 2004).

The United States Supreme Court granted certiorari on a case from the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the state court's denial of a petition for writ of habeas corpus holding that the state courts erred by not considering the youth's age and inexperience when evaluating whether a reasonable person would have felt free to leave the interrogation as part of the *Miranda* custody test. The U.S. Supreme Court reversed the Ninth Circuit's decision in a five to four decision and held that the court of appeals applied the proper test.

When Michael Alvarado was seventeen years old he agreed to help Paul Soto steal a truck in a mall parking lot. Soto approached the driver with a gun and demanded the keys, Alvarado waited near the passenger side door. Soto shot and killed the driver, and Alvarado helped hide Soto's gun. An investigator contacted Alvarado's mother and indicated that she would like to speak with him. Alvarado's parents took him to the police station for an interview.

Alvarado was interviewed for two hours in a small room at the police station. His parents asked to be with him during the interview, but were not allowed. Alvarado was not given *Miranda* warnings. Eventually, Alvarado admitted that he agreed to help Soto steal the truck and that he hid the gun after the murder. Alvarado stated that he thought Soto was only going to scare the man. During the interview, Alvarado was offered two

breaks, which he declined. After the interview his parents drove him home. Subsequently, Alvarado was charged and convicted of first first-degree murder and attempted robbery. The trial judge reduced the conviction to second-degree murder and sentenced him to fifteen years to life in prison.

The trial court rejected Alvarado's request to suppress his statement to the police on *Miranda* grounds. The District Court of Appeals agreed with the trial court and ruled that a *Miranda* warning was not necessary because he was not in custody during the interview. The Federal District Court affirmed the state court on habeas corpus review. The Ninth Circuit, however, reversed and held that the state courts erred by not considering Alvarado's age and inexperience when determining whether a youth is in custody for *Miranda* purposes. The U.S. Supreme Court rejected the Ninth Circuit's reasoning.

The Court stated that the *Miranda* custody test is objective. Courts must first look at the circumstances surrounding the interrogation and then consider, given those circumstances, whether a reasonable person would have felt free to terminate the interrogation and leave. The Court noted that the circumstances of each case influence the custody determination, but reemphasized that the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement to the same degree associated with a formal arrest.

In order for the Court to grant a writ of habeas corpus the state court adjudication must have involved an unreasonable application of the law. In the present case the Court concluded that the application was reasonable. It relied on the facts that the police did not bring Alvarado to the station or require him to appear at a cer-

tain time; they did not place him under arrest or threaten to place him under arrest; Alvarado's parents remained in the lobby; the investigator offered him two breaks; and at the end of the interview they let him go home. The Court concluded that the state courts considered the proper facts and reached a reasonable decision. The Court noted it had not stated that a suspect's age or experience was relevant to the *Miranda* custody analysis, and counsel for Alvarado did not raise either issue in the direct appeal or habeas proceedings.

The dissent stated that Alvarado did not come to the station on his own free will; he was brought there by his parents. It noted that the proper question for *Miranda* custody analysis should be how a reasonable person would feel during the interview. The fact that Alvarado went home after the interview was irrelevant. Furthermore, by declining to take breaks during the interview Alvarado demonstrated he already felt as though he was not free to leave the interrogation. Therefore, he was in custody and should have received *Miranda* warnings.

### Custody / Relocation

*Texas Supreme Court Rules That Trial Court Retained Exclusive Continuing Jurisdiction Over Modification Proceedings.* In re Ann M. Forlenza, 140 S.W.3d 373; 2004 Tex. LEXIS 656 (2004).

Ann and Robert Forlenza divorced in Texas in March 1996. In July 1997, the trial court granted Mr. Florenza primary custody of the two children and the exclusive right to establish their primary physical residence. Over the next five years, Mr. Forlenza and the children moved to four different states. When Mr. Forlenza made plans to move to Taiwan with the children, Ms. Forlenza filed suit to modify the parenting plan and asked



the court to prohibit him from moving the children outside of the United States. Mr. Florenza filed a motion to dismiss. He argued that the Texas court should decline jurisdiction in favor of Virginia where the children were living. The Texas trial court concluded that it had exclusive continuing jurisdiction and denied Mr. Forlenza's motion to dismiss. He appealed the decision. The Texas Court of Appeals determined that the trial court abused its discretion; the children had not lived in Texas in over five years and they had numerous visits with their mother outside of Texas. It ordered the trial court to vacate its order and dismiss the case. Ms. Forlenza petitioned the Texas Supreme Court to determine whether the Texas trial court retained exclusive continuing jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA).

In September of 1991 Texas adopted the UCCJEA designed to clarify and unify the standards for courts continuing and modification jurisdiction in interstate child-custody matters. The statute specifically provides that a court retains exclusive continuing jurisdiction until it determines that the 'significant connection' and 'substantial evidence' requirements are no longer met. Mr. Forlenza contended that the children no longer had a significant connection to Texas because they had not lived there in a number of years and they only had five visits with their mother in Texas. He argued that the mother's residence in Texas was not sufficient. In fact, the children had six visits with their mother in Texas, four of which were one month stays during the summer. Additionally, numerous relatives from both the father's and the mother's families lived in Texas and maintained relationships with the children. The evidence also indicated that the mother maintained a significant relationship with her children. As a result, the Texas Supreme Court concluded that the court of appeals erred. The court held that the children had a significant connection with Texas to support the trial court's exclusive continuing jurisdiction over the modification proceedings.

## **Custody / Relocation**

*California Supreme Court Holds That Change In Custody Should Be Considered If Noncustodial Parent Shows Relocating Children Would Be Detrimental To Children And Noncustodial Parent's Relationship With Children. In re the Marriage of LaMusga*, 32 Cal. 4th 1072; 2004 Cal. LEXIS 3658 (2004).

Mr. LaMusga and Ms. Navarro divorced in 1996. The parents were awarded joint legal custody of their two sons, and Ms. Navarro was granted primary physical custody. Both parents remarried. In 2001, Ms. Navarro asked the court to modify the visitation order to allow her and the children to move to Ohio. Ms. Navarro's extended family lived in Ohio and her husband received a job offer there. Mr. LaMusga objected to the children moving to Ohio and asked the court to transfer primary custody to him. He argued that moving his sons to Ohio would damage his relationship with them. He also alleged that the children's mother attempted to alienate him from their sons. The court ordered a custody evaluation to determine whether moving the children was in their best interests.

The custody evaluation reported Mr. LaMusga's concern that his relationship with his sons would deteriorate if they moved, which would be a significant loss for the children. The report also noted, however, that the boys would suffer the loss of their mother if she moved without them. Additionally, the boys wanted to move with their mother and they had close relationships with their mother's husband and their half-sister. Ultimately, the custody evaluation concluded that there was no good solution to the issue.

A hearing was held on the issue of moving the children to Ohio. The court noted that it would not determine which parent was competent and qualified to be the custodial parent, but whether the children's interests would be best served by moving to Ohio or granting their father physical custody. It acknowledged Ms. Navarro was not purposely trying to alienate the children from their father, and that the pending move was not in

bad faith. The court concluded that moving would be detrimental to the children's welfare. It denied the mother's request to relocate the children. The court ruled that if Ms. Navarro chose to move, the children's father would be awarded primary physical custody (at least during the school year). Ms. Navarro appealed the superior court's order.

The court of appeals concluded that the lower court improperly placed emphasis on the impact moving would have on the children's relationship with their father. It reversed the superior court's decision. The court stated that if a custodial parent has a good faith reason to move with the children, he or she cannot be prevented from doing so unless the noncustodial parent makes a 'substantial showing' that a change in custody is 'essential' to prevent detriment to the children. Mr. LaMusga appealed the appellate court's order. The California Supreme Court granted review to consider whether the appellate court misapplied the relevant case law.

The California Supreme Court rejected the appellate court's holding and concluded that the superior court did not abuse its discretion. The court did not find a statutory basis for imposing a specific additional burden of persuasion on either parent to justify a choice of residence as a condition of custody. The court concluded that when requiring a reconsideration of custody a noncustodial parent has the initial burden of showing that a move would be detrimental to the children. The court found that the impact of moving on a parent's relationship with his or her children is a relevant factor and may be sufficient to justify a change in custody. The court reversed the appellate court's order and affirmed the lower court's order transferring custody of the children to their father if their mother moved to Ohio.

## **Third Party Custody**

*New Jersey Supreme Court Grants Neighbor Custody As Psychological Parent. P.B. v. T.H.*, 179 N.J. 311; 2004 N.J. Super LEXIS 254 (July 8, 2004).

The New Jersey Superior Court considered the standing of a third party non-relative to seek custody of a child. This case involved a custody dispute between a neighbor and the child's biological aunt. The trial court had previously granted custody to the neighbor. The New Jersey Superior Court remanded the decisions and asked the trial court to decide whether a third party had standing to seek custody as a 'psychological' parent. The trial court ruled in favor of the neighbor for a third time, and the New Jersey Superior Court affirmed the trial court's decision.

In 1996 V.H., an infant, and her brother were removed from their mother's care because of substance abuse and placed with their maternal aunt T.H. T.H. struggled to care for the two children in addition to her own six year-old child and infant son. She was unemployed from 1996 until 1998 when she obtained part-time employment. At that time P.B., a neighbor, offered to care for V.H. and the other children to help T.H. According to P.B. she began taking care of V.H. full-time in 1998 when the child moved into her home. P.B. contended that her home was the only home V.H. knew, and that she provided for V.H. "emotionally, materially, and intellectually." (at 255).

T.H., V.H.'s aunt, disputed P.B.'s claim that she cared for V.H. full-time. T.H. argued that she and several other friends all cared for the child. Additionally, she contended that she never consented to her neighbor's relationship with her niece. T.H. conceded, however, that in 1999 V.H. spent equal amounts of time with each household, and in 2000 V.H. relocated with P.B. and her family when they moved to a different home. In the summer of 2000, T.H. decided to return V.H. and her brother to their biological mother. When P.B. informed T.H. she would oppose the custody change, T.H. took custody of V.H., removed P.B.'s name from the list of people authorized to pick V.H. up from school, and obtained a temporary restraining order against P.B. This order was eventually dissolved.

V.H.'s mother filed for a transfer of custody to the New York court, in which T.H. joined. P.B. filed a complaint and order to show cause in the New Jersey family court, requesting an immediate return of

V.H. The judge in New York concluded that New Jersey was the child's home state. A trial in New Jersey then proceeded. Previously, in *V.C. v. M.J.B.*, 163 N.J. 200 (2000), the New Jersey Supreme Court created a four-prong test to determine whether a parent's former domestic partner was the children's psychological parent. The trial court opted not to apply the state's four-prong test. It viewed the *V.C.* holding as limited to custody disputes involving a biological parent and a non-family member who entered into a familial like relationship with the biological parent. None the less, the court concluded that P.B. did have standing to seek custody of V.H. The court admitted a bonding evaluation and testimony of a doctor that P.B. was V.H.'s psychological parent. It concluded that returning to P.B.'s home was in V.H.'s best interest. At that time V.H. returned to P.B.'s care, where she has remained.

T.H. appealed the trial court's order and challenged P.B.'s standing to seek custody of V.H. The New Jersey Supreme Court determined that the trial court erred by not applying the *V.C.* test and by relying on the doctor's report and testimony to determine whether P.B. was V.H.'s psychological parent. The court remanded the case and noted that the determination of who is a psychological parent is a legal one to be decided by the *V.C.* test. Additionally, the court stated that the *V.C.* test applied to all custody circumstances where a third party is seeking standing.

The *V.C.* test requires the petitioner to demonstrate the existence of four factors: 1) the biological or adoptive parent consented to, and fostered, the petitioner's parent-like relationship with the child; 2) the child and the petitioner lived together in the same household; 3) the petitioner assumed parent-like responsibilities without the expectation of financial support, and 4) the petitioner had been in a parental role for a length of time sufficient to establish a bonded, dependent, parent-like relationship with the child. (*V.C.* at 223). On remand, the trial court concluded that P.B.'s relationship with V.H. satisfied the *V.C.* test, and affirmed its decision granting custody of V.H. to P.B.

T.H. appealed the trial court's order. On review, the New Jersey Supreme Court concluded that the trial court, which heard eight days of testimony, had applied the correct legal principles and established that P.B. was V.H.'s psychological parent. The Court found that the trial testimony and evidence satisfied the *V.C.* test and affirmed the lower court's order granting custody to P.B.

## Dependency Court TPR

*Florida Supreme Court Clarifies Statutory Grounds For Termination Based On Involuntary Termination Of Other Child.* Dep't of Children and Families v. F.L., 29 Fla. L. Weekly S 351; 2004 Fla. LEXIS 984 (July 2004).

This case came before the Florida Supreme Court to determine the constitutionality of Florida statute section 39.806(1)(i) as grounds for termination of parental rights. The trial court terminated F.L.'s parental rights to C.N. Jr., her seventh child. The Florida Department of Children and Families (DCF) alleged two statutory grounds for termination. First DCF alleged, under section 39.806(1)(c), that there was a substantial risk of harm to C.N. Jr. based on his mother's failure to care for her other children, failure to comply with prior treatment plans, and her history of domestic violence and substance abuse. The second ground for termination was section 39.806(1)(i), which provides for termination of parental rights based on prior involuntary termination of a child's sibling. F.L.'s parental rights to her sixth child were involuntarily terminated, she voluntarily relinquished her rights to her five other children. The trial court noted that DCF referred F.L. to numerous services but she failed to comply with her treatment plan. The court concluded that DCF satisfied both statutory grounds for termination. It found that F.L. made minimal effort and failed to present evidence that the conduct that led to the involuntary termination of her sixth child had changed. The court concluded that F.L. demonstrated an unwillingness and inability to care for C.N. Jr., and that it was in his best interest to terminate her parental rights. F.L. appealed the termination order.

The Fourth District Court of Appeals reversed the trial court's order and held that DCF failed to prove the statutory requirements in either sections 39.806(1)(c) or 39.806(1)(i) to terminate F.L's parental rights. The court also declared that section 39.806(1)(i) was facially unconstitutional because it shifted the burden to the parent to show that her past conduct does not place her child at risk. DCF, joined by C.N. Jr.'s guardian ad litem, appealed the decision to the Florida Supreme Court.

The Florida Supreme Court reviewed de novo the appellate court's declaration that the statute was unconstitutional. The court noted that parents have a fundamental interest in the care and upbringing of their children, however, the parents' interest can be superseded by the State's compelling duty to protect children. Section 39.806(1)(i) authorized termination of parental rights when the parent's rights to a sibling have been involuntarily terminated. Because the statute impedes on a parent's fundamental interest, the strict scrutiny standard applies. The statute, therefore, must serve a compelling interest through the least restrictive means. The court concluded that the statute may not constitutionally permit termination of parental rights based solely on the termination of parental rights to a child's sibling. There must be proof of substantial risk to the child. The court held that to use section 39.806(1)(i) as grounds for termination the state must prove a prior involuntary termination of parental rights to a sibling, that reunification would pose a substantial risk of significant harm to the child, and that termination is the least restrictive means of protecting the child.

Next, the court addressed the trial court's order terminating F.L.'s parental rights. The trial court placed the burden on F.L. to produce evidence that her prior conduct did not place C.N. Jr. at risk. It applied a test which required the parent whose parental rights to another child had been terminated, to rebut a presumption in favor of termination. The court rejected this test, and stated that the burden remains with DCF to demonstrate the elements required under the termination statute. It reversed the appellate court's decision and

remanded the case to the trial court to apply the constitutional interpretation of section 39.806(1)(i).

## Dependency / TPR

*Oregon Court Of Appeals Reverses Termination Of Parental Rights Holding Parent's Refusal To Admit Past Abuse Of Sibling Does Not Pose Current Threat To Child.* State ex rel Juv. Dept. v. Nguyen, 194 Ore. App. 604; 2004 Ore. App. LEXIS 1010 (Aug. 2004).

The parents, Mr. and Mrs. Nguyen, appealed a judgment terminating their parental rights to their three year old son M.N. The trial court's termination order was based in part on the previous termination of the Nguyen's parental rights to M.N.'s two sisters. As an infant M.N.'s sister suffered numerous broken bones and her parents refused to admit to the harm or provide an explanation for her injuries. The Nguyens eventually voluntarily terminated their rights to their daughters. M.N. lived with his parents under a court approved safety plan for ten months until the court entered a termination order for his sisters. The state then removed M.N. from the home and filed a petition to terminate parental rights.

The state argued that although the parents complied with the department's recommendations and treatment plan, they continued to deny harming M.N.'s sister. The state concluded, therefore, that absent an admission or acknowledgment of the harm or failure to prevent the harm, the parents could not present a sufficient safety plan to ensure M.N.'s safety if he returned to their home. The trial court agreed that because the parents had not acknowledged the abuse of their daughter, nothing had changed since the termination of their parental rights to the girls. Based on the foregoing analysis, the court concluded that the Nguyens were unfit to parent M.N. and terminated their parental rights. The Nguyens appealed the trial court's order.

On appeal, the parents argued that the state failed to prove by clear and convincing evidence that they were unfit parents, that reintegration into their home was not likely within a reasonable period of time, and that termination was

in M.N.'s best interest. They contended that the state did not satisfy its burden of proving that they were *presently* unfit parents. The appellate court noted that the state's expert witnesses were unable to make an assessment and arrived at their conclusion that M.N. should not be returned to his parents based on a very cautious approach to ensure his safety. Furthermore, the experts who worked with the Nguyens for the past three years agreed that a risk remained, but recommended that M.N. be returned to his parents. Ultimately, the appellate court concluded that the State failed to meet the standard of proof. It did not demonstrate that the parents were presently unfit or that a risk of harm to M.N. was highly probable if he was returned to their care. The appellate court, therefore, reversed the trial court's termination order.

*Thank you to NACC Member James Marsh for identifying this case.*

## Dependency / Child's Right To Counsel

*Ohio Supreme Court Rules Juvenile Who Is Part Of Termination Of Parental Rights Proceedings Is A Party And Entitled To Legal Representation.* In Re Williams, Ohio Supreme Court, 101 Ohio St. 3d 398; 2004 Ohio LEXIS 705 (2004).

This case came before the Supreme Court of Ohio to determine when a juvenile court must appoint counsel for a child who is the subject of a termination of parental rights proceeding. The children's mother, D.W., appealed the juvenile court's decision terminating her parental rights. The appellate court vacated the juvenile court's termination order finding that the court failed to consider the wishes of ten year-old M.W. The Geauga County Department of Human Services appealed the court of appeals decision to the Ohio Supreme Court, which affirmed that children who are subject to a termination of parental rights proceeding are parties to the action and must be appointed counsel.

M.W. and his brother S.W. were removed from their parents care in 2000. In 2002, the juvenile court terminated the parental rights of the boys' parents. Their mother, D.W. appealed the termination order.



On appeal, the court noted that M.W. repeatedly expressed his desire to live with his mother. Although the juvenile court appointed M.W. a guardian ad litem, the guardian ad litem's recommendations conflicted with M.W.'s wishes. Neither M.W.'s guardian ad litem nor his parents represented his interests to the juvenile court, therefore the court determined he was unrepresented in the proceedings. The court of appeals concluded that the juvenile court erred by not considering whether M.W. was entitled to representation of his interests.

Children in Ohio are appointed a guardian ad litem. If the guardian ad litem is not representing the child's wishes an attorney is also appointed. After deciding the preliminary question that children are parties to a termination of parental rights case, the children are assigned a guardian ad litem. If neither the guardian ad litem nor the child's parents represent the child's wishes, under a conflict of interest analysis, the child is appointed an attorney in addition to a guardian ad litem. In this case, the court of appeals determined that M.W. had a right to counsel, based on his status as a party to the termination of parental rights proceedings. The court emphasized that the juvenile court has a responsibility to consider a child's wishes whether expressed by the child or the guardian ad litem.

## Attorney-Client Privilege

*New York Supreme Court Appellate Division Affirms Supreme Court Decision Granting Law Guardian's Motion To Disqualify Father's Attorney And Preclude Father From Using Psychiatric Report Of Child.*

*Campolongo v. Campolongo*, 2 A.D.3d 476; 2003 N.Y. App. Div. LEXIS 13060 (NY. 2003).

The Campolongos divorced in 2001. They then entered into a custody dispute over their son and the New York court appointed a law guardian to protect his interests. In September 2002, the law guardian filed a motion requesting that the court disqualify the father's attorney and prohibit him from using a psychiatrist's report as evidence. The father's attorney allowed a psychiatrist to interview the child, who was represented by

a law guardian, without the law guardian's knowledge or consent. The New York Supreme Court (Kings County) concluded that the father's attorney's actions violated the New York Code of Professional Responsibility and granted the law guardian's motion. The father appealed the court order granting the law guardian's motion.

The appellate court noted that the father's attorney caused him to retain a psychiatrist who interviewed the child about the pending custody dispute and prepared a report on the interview. The New York Supreme Court previously appointed a psychiatrist to evaluate the child and his parents, and the father's attorney failed to seek the court's permission or notify the mother's attorney of the psychiatric evaluation. Additionally, the court noted that the child had an attorney-client relationship with his law guardian, and therefore interviewing the child in the absence of his attorney violated his due process rights. The appellate court affirmed the Supreme Court's order granting the law guardian's motion to disqualify the father's attorney and prevent him from using the psychiatrist's report and testimony as evidence.

*Thank you to NACC member Rita Swan from CHILD, Inc. for identifying this case.*

## Delinquency / TPR

*Appellate Court Of Illinois Upholds Termination Of Parental Rights Based In Part On Mother's Prior Adjudication As Delinquent. J'America B. v. Elunder D.*, 346 Ill. App.3d 1034; 2004 Ill. App. LEXIS 266 (ILL. 2004).

Respondent mother E.D. appealed a trial court order terminating her parental rights to her daughter J'America. On appeal E.D. argued that the trial court erred by denying her motion to strike a reference to the death of her seven-month old cousin in the termination petition. She also alleged the court erred by finding that she was depraved and by failing to admonish her properly. The Illinois Court of Appeals affirmed the trial court's decision.

At the age of ten E.D. was adjudicated a delinquent for committing aggravated battery, aggravated criminal sexual

assault, and involuntary manslaughter all related to the death of her seven-month old cousin. In 1998, when E.D. was 13 years old, she gave birth to J'America. Four days later the State filed a neglect petition and transferred guardianship and custody of J'America to the Department of Children and Family Services (department). J'America was later declared a ward of the court and the department filed a petition to terminate E.D.'s parental rights. The petition alleged two counts of depravity, both stemming from her juvenile delinquency adjudication; count one was based on aggravated criminal sexual assault and count two on involuntary manslaughter.

At E.D.'s fitness hearing the court took judicial notice of her delinquent adjudications and concluded that the incident involving aggravated criminal sexual assault (count one) constituted a presumption of unfitness under the Adoption Act. Therefore, the burden of proof shifted to E.D. on the issue of parental fitness with regard to count one. The trial court concluded that E.D. did not overcome the burden for count one, however, with regard to count two, the court concluded that the State did not prove that E.D. had the intent necessary to constitute depravity based on her adjudication for involuntary manslaughter. Following a best interest hearing, the court terminated her parental rights. On appeal the Illinois Appellate court vacated that order. The court found that the trial court erred when considering E.D.'s delinquency adjudication under the Adoption Act. The court concluded that the Adoption Act's statutory presumption of unfitness only applied to criminal convictions, not juvenile adjudications. The court reversed the termination order and remanded the case for further proceedings.

The State then amended its termination petitions. On second appeal, the court held that amendments to the Juvenile Court Act shifted the purpose from rehabilitation to a dual purpose of rehabilitation and protecting the community. Accordingly, using the evidence against E.D. in the termination of parental



rights proceeding, and thereby holding her accountable was consistent with public policy and changes to the Juvenile Court Act.

## Delinquency / Juvenile's Association Rights

*California Court Of Appeals Affirms Probation Condition Prohibiting Juvenile From Associating With Anyone His Parent Or Probation Officer Disapproved Of. In Re Byron B., 119 Cal. App. 4th 1013; 2004 Cal. App. LEXIS 1004 (2004).*

Byron B. was adjudicated a juvenile delinquent for participating in a theft with two accomplices. He became a ward of the state and was placed on probation. A condition of Byron's probation prohibited him from associating with anyone disapproved by his parent,

guardian, probation officer or staff. Byron appealed the juvenile court's order. He argued that the court abused its discretion and that the probation condition was unreasonable, overbroad, and vague.

The appellate court considered the purpose of placing juveniles on probation. The court noted that juvenile probation is distinct from adult probation. Although the goal of both is rehabilitation, the juvenile court has broad discretion in its role as *parens patriae*. An adult probation condition is overbroad if it unduly burdens the exercise of a constitutional right. Juvenile probations conditions, however, can infringe on a juvenile's constitutional rights if they are tailored to meet the needs of the juvenile.

The juvenile court's oral ruling stated that Byron must not have contact with

anyone disapproved by parent, guardian, probation officer or staff. In the court's minute order, however, it stated that the juvenile must not have contact with anyone *known to be* disapproved by parents, guardian, probation officer or staff. The Appellate Court concluded that the probation condition, as stated in the minute order, was not unreasonable, overbroad, or void for vagueness. The court noted that probation conditions can limit a juvenile's right to association in ways that the court could not limit an adult's. If the probation condition prohibited Byron from associating with people who were "not approved" by his parent or probation officer, it would be unconstitutionally vague and overbroad, however, since the order forbid him from associating with those he knows are disapproved the probation condition was not vague. ■

### GUARDIAN CASES — NOTICE TO READERS

Decisions reported in *The Guardian* 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.

Cases reported in *The Guardian* 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.

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# Federal Policy Update

by Miriam A. Rollin, JD  
NACC Policy Representative, Washington, DC

## FY2005 Funding News

On February 2, the President submitted his proposed FY05 budget to Congress. (See Winter 2004 *Guardian* for details.) The Senate (March 12) and House (March 25) passed somewhat different versions of the FY05 budget. House and Senate leadership were not able to craft a compromise (“Conference Report”) that could achieve Senate (and, thus, final) passage.

Although no final FY05 budget resolution was ever adopted, Congress began to move forward on FY05 appropriations legislation (which determines actual program-by-program funding levels each year, and which is supposed to fall within the broad outlines of a final budget resolution).

The Senate Appropriations Committee recently (September 15) took action (“held a mark-up”) on the two appropriations bills that most affect programs serving court-involved children and families (the “Labor/HHS/Education” bill or the “Commerce/Justice/State” bill). The Senate Labor/HHS/Education appropriations bill and the House companion bill (approved by the Appropriations Committee in mid-July and passed by the House on September 9) both include only a small fraction of the already modest increases in child abuse prevention and treatment funding (Promoting Safe and Stable Families, and the Child Abuse Prevention and Treatment Act) that were proposed by the President. [The House bill includes about \$6 million more for PSSF (rather than the \$101 million proposed), although the Senate bill includes none of the proposed increase in PSSF; and the Senate bill is more than \$15 million over current CAPTA spending, while the House bill includes about \$8 million more for CAPTA (rather than the \$44 million proposed).]

On July 8, the House passed a Commerce/Justice/State Appropriations Bill that fully rejected the President’s proposed slashing of juvenile justice funding (proposals that eliminated the Juvenile Accountability Block Grant and sliced the Title V Prevention Grants program in half, for a total juvenile justice cut of 40% below FY04 levels, and a more than 2/3 cut from FY02 levels). Thankfully, the Senate largely followed the House’s example; the Senate appropriations bill marked up on September 15 includes overall funding nearly equal to current levels (although specific accounts vary somewhat above and below current funding levels).

## Federal Child Welfare Reform Legislation

The summer of ‘04 became—for some unknown reason—the summer to introduce significant federal child welfare reform legislation... In mid-May 2004, Senator Bond (R, MO) introduced the “Education Begins at Home Act” (S. 2412), which would authorize \$500 million in new federal funding for early childhood home visiting (and some models of such parent coaching efforts have demonstrated significant impact in the prevention of child abuse and neglect).

Then, in June, Representative DeLay (R, TX) introduced H.R. 4504, the “Orderly and Timely Interstate Placement of Foster Children Act”, which would: require each state to have procedures for the timely placement of foster and adoptive children across state lines and to complete home studies for such purpose within 60 days of another state’s request; authorize incentive grants to states that complete timely interstate home studies; revise requirements for checking of child abuse registries to eliminate an opt-out provision;

and allow access to the federal parent locator service to courts in foster care or adoptive placement cases, among other provisions. A similar Senate companion bill was introduced on September 8, by Senators Domenici (R, NM) and Lincoln (D, AR).

And in July, the introduction effort was bi-cameral... Rep. Herger (R, CA), Chair of the House Ways and Means Subcommittee with jurisdiction over federal child welfare funding, introduced H.R. 4856, the Child SAFE Act, proposing some rather far-reaching changes in federal child welfare financing—some of which, though well-intentioned, could be quite harmful to abused/neglected children. The Child SAFE Act would cap Title IV-E foster care funds (now an open-ended entitlement); while the bill provides for a 4% annual increase in the cap, the bill would eliminate the current guarantee that federal foster care funds rise automatically when more eligible children are in foster care. Although states would be permitted access to some additional funds (TANF contingency funds) if foster care increases are quite substantial in a particular year, the threshold for states to reach into those funds is so high that access would be unlikely. Further, the bill would convert several current funding streams (IV-B programs, such as PSSF and Child Welfare Services, as well as IV-E administration and training) into a single “Safe Children, Strong Families Grant.” This grant would be increased by \$200 million per year, but given the substantial unmet need for services to children and families already in the child welfare system, it is likely that funds for up-front prevention would actually decrease. The legislation makes a number of other changes to federal child welfare financing—some helpful, others less so. For a good analysis of the bill, visit the

Children's Defense Fund website, <http://childrensdefense.org/childwelfare/default.asp> and look at their Summary of the Child SAFE Act (August 2004). For Rep. Herger's materials on the bill, visit the Committee's website: <http://waysandmeans.house.gov/Links.asp?section=1444>.

Meanwhile, over on the Senate side of the Capitol, Senators Clinton (D, NY), Daschle (D, SD) and Snowe (R, ME) introduced S. 2706, the "Kinship Caregiver Support Act." This bill would authorize federal financial assistance to states to develop "kinship navigator programs" (to help connect kinship caregivers to services they need to raise the children in their care), and also would establish a subsidized guardianship option for Title IV-E.

No House or Senate Committee mark-ups have been scheduled, yet.

## Offender Reentry Legislation

This summer was also when a bi-partisan group of Representatives, led by Rep. Portman (R, OH) and Rep. Davis (D, IL) introduced legislation (H.R. 4676, the "Second Chance Act") to reduce recidivism among offenders reentering society, by strengthening services (including education, employment, mental health and substance abuse treatment, and family reunification services) and reducing barriers to their successful reintegration. While early drafts of the bill

were solely focused on adult offenders, the sponsoring Representatives agreed to incorporate improvements to the bill that addressed juvenile offender post-incarceration services, as well. Although no mark-up has occurred yet, bill introduction in the Senate — by Sen. Brownback (R, KS), S. 2789 — occurred on September 10; further House movement on the bill is expected shortly...

## Unaccompanied Alien Children

A bill to provide for the protection of unaccompanied "alien" (non-citizen) children, including ensuring access to counsel (S. 1129) was reported out of the Senate Judiciary Committee in early June. (The House companion bill, H.R. 3361, has not yet moved forward.)

## No Further Action on Most Legislation Since Last *Guardian*:

- Welfare Reform (TANF)/Child Care Funding legislation (the Senate has begun consideration of H.R. 4, but there has been no final Senate passage vote, and further Senate action is unlikely). Meanwhile, Congress keeps passing temporary extensions of TANF—the latest (H.R. 4589) is set to expire on September 30.
- On May 6, 2004, the Senate passed, by unanimous consent, S. 622, the Family Opportunity Act. The bill will provide assistance for states to enable adoptive parents of special needs children

to purchase, on a sliding-fee scale, Medicaid health coverage. The House has not yet taken action on this legislation (H.R. 1811).

- Restoration of Social Services Block Grant (SSBG) funding from \$1.7 billion to \$2.8 billion, as part of the "CARE" Act, S. 476, adopted 95-5 in the Senate in April 2003, and still awaiting House/Senate Conference.
- Sen. DeWine's (R-OH) Mentally Ill Offender Treatment and Crime Reduction Act (S. 1194), passed by the Senate (by unanimous consent) in October 2003. (The House Judiciary Committee recently — September 23 — marked-up this bill, and could move it forward to the floor before the mid-October Congressional recess.)
- The Lifespan Respite Care Act, to assist families in accessing affordable respite care (S. 538), which had passed the Senate in April 2003, but has not yet moved in the House (H.R. 1083).
- The Keeping Families Together Act [S. 1704, introduced in 2003 by Sen. Collins (R-ME); and H.R. 3243, introduced by Rep. Ramstad (R-MN) and Rep. Kennedy (D-RI)], to establish a state grant program to reduce the practice of parents giving custody of their seriously emotionally disturbed children to state child welfare or juvenile justice agencies for the purpose

## NACC – Federal Policy Network

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of obtaining mental health services for those children.

- The Child Protective Services Improvement Act [H.R. 1534, introduced in 2003 by Rep. Miller (D-CA) and Rep. Cardin (D-MD), as an alternative to the Administration-proposed foster care block grant].
- Legislation to amend Title IV-E of the Social Security Act to provide equitable access to foster care and adoption services for Indian children in tribal areas (H.R. 443, S. 331).
- Indian Child Welfare Act amendments legislation (H.R. 2750).

- The Adoption Equality Act (S. 862), to promote the adoption of children with special needs by “de-linking” their eligibility from the old AFDC (the predecessor to welfare reform, or “TANF”). Note: Such “de-linking” is also included in Rep. Herger’s Child SAFE bill, with cost-neutrality (e.g., lower per-child federal rates).
- The Child Protection and Alcohol and Drug Partnership Act (S. 614).
- Bills providing for loan forgiveness for personnel in the child welfare system (for social workers: S. 409 and H.R. 734; for attorneys: S. 407; and for child

welfare workers, certain teachers, nurses, etc.: H.R. 1306).

- A bill (H.R. 2437, the Child Protective Services Workforce Improvement Act) to provide grants to state child welfare systems to improve quality standards and outcomes, etc.
- A bill (H.R. 1378) to amend Title IV-E of the Social Security Act to increase payments to states for expenditures for short-term training of child welfare agency staff.

**Don't forget:** you can download copies of any Congressional bill, Committee Report, House or Senate floor statement, and up-to-date bill status information through: [Thomas.loc.gov](http://Thomas.loc.gov). ■



## Children's Law News

### Conferences & Training

**May 16–20, 2005** NACC 10th Annual Rocky Mountain Child Advocacy Training Institute, *Presenting Evidence in Children's Cases*. A hands-on trial skills training for juvenile law attorneys produced in conjunction with NITA, University of Denver College of Law, and the Rocky Mountain Children's Law Center. Brochures will be mailed to all NACC members in early 2005. For more information, go to [NACCchildlaw.org/training/RMCATL.html](http://NACCchildlaw.org/training/RMCATL.html).

**August 25–28, 2005** NACC 28th National Children's Law Conference, Hollywood Renaissance Hotel, Los Angeles, CA. Now accepting presentation abstracts. For more information, contact the NACC or visit [NACCchildlaw.org/training/conference.html](http://NACCchildlaw.org/training/conference.html). Conference Brochures will be available in Spring 2005.

### Publications

#### NACC Publications

*Representing Children, Families, and Agencies in Child Welfare, Juvenile Justice, Custody, and Adoption Proceedings*, the 2004 Edition of the

NACC Children's Law Manual Series. The manual is 422 pages and includes 26 articles covering a wide range of children's legal issues including: Interviewing Children with Disabilities; Youth with Sexual Behavioral Problems; Educational Advocacy; The Child as a Witness; Maintaining Sibling Bonds; Creating Youth Peer Courts; Confidentiality of Juvenile Mental Health Records; Psychotropic Medication; and more. Copies may be ordered from the NACC by calling toll free 1-888-828-NACC, using the Publications Order Form on the back cover this issue, or online at [www.NACCchildlaw.org/trainings/manuals.html](http://www.NACCchildlaw.org/trainings/manuals.html).

*Legal Representation of Children: Recommendations and Standards of Practice for the Legal Representation of Children in Abuse and Neglect Cases*, by NACC. This document provides comprehensive guidance to children's attorneys including descriptions of the attorney's role and duties. The NACC encourages jurisdictions and courts to use this publication to create local guidelines that will improve the quality of legal representation in your jurisdiction.

To obtain a copy, contact the NACC or use the publication order form in this issue. The two documents contained in this publication are also available online at: [www.NACCchildlaw.org/training/standards.html](http://www.NACCchildlaw.org/training/standards.html).

#### *The Children's Legal Rights Journal (CLRJ)*

is a quarterly professional practice journal for child welfare, juvenile justice, and family law professionals. Now in its 22nd year, CLRJ is published by William S. Hein & Co., Inc., under the editorial direction of the ABA Center on Children and the Law, Loyola University of Chicago School of Law, and the National Association of Counsel for Children. CLRJ is indexed in the Current Law Index and Index to Legal Periodicals and runs approximately 60 pages per issue. The annual subscription rate is \$72 but is available to NACC members at a discounted rate of \$55 annually. To subscribe, contact Hein toll free at 1-800-828-7571, ISSN 0278-7210, or contact the NACC for more information.

*NACC's Better Public Policy for Children, Youth and Families — An Advocacy Guide*, by NACC Policy



Representative Miriam Rollin. A comprehensive guide to policy advocacy for children and families. Available online at [www.NACCchildlaw.org/policy/policy\\_guide.html](http://www.NACCchildlaw.org/policy/policy_guide.html), or call the NACC at 888-828-NACC.

### Law Review / Journal Articles

"Confidentiality of Juvenile Mental Health Records in Dependency Proceedings" by David Katner. *William and Mary Bill of Rights Journal*, Volume 12, Issue 2, February 2004.

"Filing of Amicus Curiae Briefs in State Courts of Last Resort" by Corbally, Bross, and Flango. *The Justice System Journal*, Volume 25, Number 1, 2004.

"Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision" by Austen L. Parrish. *Stanford Law and Policy Review*, Volume 15, Issue 1, 2004.

"Juvenile Competence to Stand Trial" by Lexcen, Grisso, and Steinberg. *Children's Legal Rights Journal*, Volume 24, Number 2, Summer 2004.

"Questions Every Judge and Lawyer Should Ask About Infants and Toddlers in the Child Welfare System" by Osofsky, Maze, Lederman, Grace, and Dicker. *Juvenile and Family Court Journal*, Volume 55, Number 2, Spring 2004.

### Books

*A History of Child Protection in America*, by John E.B. Myers. Copyright 2004 Xlibris Corporation. 1-888-795-4274; [www.Xlibris.com](http://www.Xlibris.com).

### Miscellaneous Publications

*Effective Representation of Children in Juvenile Delinquency Court*. Pamphlet from California Administrative Office of the Courts / Center for Families, Children, and the Courts. [www.courtinfo.ca.gov/programs/cfcc/](http://www.courtinfo.ca.gov/programs/cfcc/).

*Children Missing from Care*, by Caren Kaplan. CWLA Press 2004. Email: [books@cwla.org](mailto:books@cwla.org).

*Building a Better Court: Measuring and Improving Court Performance and Judicial Workload in Child Abuse and Neglect Cases*, ABA Center on Children and the Law, National Center for State Courts, National Council of Juvenile and Family Court Judges. 202-662-1750.

## News

### NACC 2004 Outstanding Legal Advocacy Award

**Shannan Wilber**, Legal Services for Children, Inc. (LSC) has been named the recipient of the NACC 2004 *Outstanding Legal Advocacy Award*. The NACC presents the award annually to individuals and agencies that make important contributions to the welfare of children through legal advocacy. After serving youth as a juvenile law staff attorney for most of her career, Ms. Wilber became Executive Director of Legal Services for Children (LSC) in San Francisco in 2000. LSC was founded in 1975 as one of the first juvenile law clinics in the country. Ms. Wilber has established LSC as a model full service children's law office, utilizing a multidisciplinary staff that collaborates to represent the "whole child" in cases of abuse, guardianship, mental health, immigration, and mental health cases. Ms. Wilber is also a leader in the movement to create effective child welfare systems for gay and lesbian youth and to provide fair custody opportunities to gay and lesbian parents.

Nominations for the 2005 award are now being accepted. The award is given annually to individuals and organizations making significant contributions to the well-being of children through legal representation and other advocacy efforts. Send nomination letter and supporting documentation to NACC Awards, 1825 Marion Street, Suite 242, Denver, CO 80218. Contact the NACC for more information. The deadline is July 1, 2005.

### NACC Stephen Cahn Juvenile Law Award

**Robert Schwartz** has been named the recipient of the *Stephen M. Cahn Award*, named for the Massachusetts attorney and NACC member who dedicated his career to representing youth in juvenile delinquency cases and building a national movement to recognize the practice of law for children as an important legal specialty. The award is given

periodically to attorneys in recognition of career achievements in juvenile law and the development of the practice of law for children. Mr. Schwartz co-founded the Juvenile Law Center (JLC) in Philadelphia in 1975, at a time when the dedicated practice of law for children was virtually unheard of. He has served as Executive Director of JLC since 1982. Mr. Schwartz' representation of youth, mentorship of attorneys in the field, and his academic and policy advocacy accomplishments have established him as one of our nation's most valued juvenile attorneys.

### NACC 2004 Law Student Essay Competition

The 2004 NACC Law Student Essay winners are:

"A Child's Due Process Right to Legal Counsel in Abuse, Neglect and Dependency Proceedings." **Jacob Smiles**, Washington University in St. Louis School of Law.

"Child, School, and Police: Reappraising the Special Needs Doctrine in an Era of School-Law Enforcement Entanglement." **Joshua Kagan**, New York University School of Law.

Both articles are published in the NACC 2004 *Children's Law Manual*.

The NACC is accepting essays for the 2005 Law Student Essay Competition. The winning essay will be published in the 2005 *Children's Law Manual*, and the winner will be given \$1,000, a one-year NACC membership, and a scholarship to the 2005 conference in Los Angeles. Essays will be evaluated on the importance of the topic to advancing the legal interests of children, persuasiveness, and quality of research and writing. Mail essays with contact information to NACC Student Essay Competition, 1825 Marion Street, Suite 242, Denver, CO 80218 by July 1, 2005. Essays should be submitted on disk together with a hard copy.

### Join the NACC Children's Law Listserv Information Exchange.

All NACC members are encouraged to

become part of the NACC Listserv which provides a question, answer and discussion format for a variety of children's law issues. It is an excellent way to improve your advocacy skills and share your expertise with your NACC colleagues. To join, simply send an e-mail to [advocate@NACCchildlaw.org](mailto:advocate@NACCchildlaw.org) and say "Please add me to the NACC Listserv."

**NACC Web Site / Member Directory Now Open to Public.** Visit the NACC's member services web site at [www.NACCchildlaw.org](http://www.NACCchildlaw.org). The site is comprised of four sections: About the NACC; Training & Technical Assistance; Children and the Law; and Policy Advocacy. The site includes members-only sections that allow you special access to resources. Passwords are

mailed to all NACC members with their welcome packets. Contact the NACC if you don't know your password. Additionally, the NACC online membership directory, formerly a member only section, is now open to the public. Please contact the NACC if you do not want your listing made public.

**The NACC National Child Advocacy Resource Center is available for member use.** The Resource Center provides referrals, resource information, and consultation. NACC members may access the resource center online ([www.NACCchildlaw.org](http://www.NACCchildlaw.org)), by phone (toll-free 1-888-828-NACC), fax (303-864-5351), and e-mail ([advocate@NACCchildlaw.org](mailto:advocate@NACCchildlaw.org)).

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### ***Amicus Curiae*** **Activity**

*In re Josiah Z.*, 118 Cal. App 4th 944, 2004 Cal. App. LEXIS 759 (2004), California Supreme Court. The California Supreme Court will consider

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whether appellate counsel has the authority to dismiss an appeal on behalf of her child client. Two year old Josiah and his infant brother G.Z. were removed from their parents' home when G.Z. tested positive for drugs at birth in August 2002. The children were placed in the custody of the Kern County Department of Human Services (department). In July 2003, the department terminated reunification services and set a permanency hearing. The children's guardian ad litem asked for a hearing on placement with the paternal grandparents. The court denied the request based on information from the department showing that the paternal grandparents had criminal records and neglected their own children. The guardian ad litem appealed the court's decision on behalf of the children. The court then appointed an appellate attorney through the Central California Appellate Program.

Appellate counsel requested travel funds to visit the children to determine whether an appeal was in their best interests. The court denied her request and stated that appellate counsel does not have the authority to dismiss a minor client's appeal based on her assessment of her client's best interest. Appellate counsel based the request on her duty to make an informed, independent decision when representing minor clients. The court disagreed with appellate counsel's assertion of her duty. The court noted that even if the minor's appellate counsel has a duty to make an independent informed decision, this does not mean appellate counsel has the authority to evaluate independently what is in the minor's best interest and whether to proceed with the appeal. Additionally the court pointed out that the California legislature has not clearly stated the duties of appellate counsel appointed to represent children in dependency cases.

In appellate counsel's request for funds to visit her clients she suggested that if she determined an appeal was not in the best interest of her clients, she would file a motion to dismiss supported by

her analysis. The court determined that this practice would unlawfully interject post-judgment analysis, and would cause the court to exceed its authority as a court of review. The court concluded that determining what is in the children's best interest is a question for the trier of fact, not appellate counsel, nor the court of appeals. The court noted, as a matter of legal practice, that if appellate counsel felt she could not ethically pursue an appeal, that attorney has the option of filing a letter brief explaining her position. The court denied appellate counsel's request for funds because it could not find any statutory or case law supporting appellate counsel's claim of authority. Ultimately, the court of appeals held that appellate counsel does not have authority to dismiss a child's appeal based on his or her assessment of the child's best interest. The NACC joined the Northern California Association of Counsel for Children (NCACC) in an *amicus curiae* letter to the California Supreme Court, urging the Court to consider whether appellate counsel has the authority to dismiss her child client's appeal. In August, the California Supreme Court granted review of this case. The NACC and NCACC will file an *amicus curiae* brief with the California Supreme Court.

Roper v. Simmons, 2004 U.S. LEXIS 836 (2004), United States Supreme Court. The NACC joined the Juvenile Law Center and nearly fifty other child advocacy organizations in an *amicus curiae* brief to the U.S. Supreme Court in opposition of the juvenile death penalty. The case came before the U.S. Supreme Court after the Missouri Supreme Court overruled Christopher Simmon's death sentence. Christopher Simmons committed a murder in 1993 when he was seventeen years old. At the time of trial, *Stanford v. Kentucky* controlled. In *Stanford*, the Supreme Court held there was no national consensus opposed to execution of 16 and 17 year olds. The Court had previously decided that it was cruel and unusual punishment to execute juveniles who were fifteen years

old or younger at the time of their offense. Simmons argued that his age at the time of the offense was a mitigating factor, but did not argue that it barred sentencing him to the death penalty. Simmons was convicted of first-degree murder and sentenced to death.

In 2002, the U.S. Supreme Court held that there is a national consensus against executing the mentally retarded in *Atkins v. Virginia*. On appeal, Simmons asked the Missouri Supreme Court to reconsider his sentence in light of the *Atkins* decision. The Missouri Supreme Court concluded that a national consensus against executing juvenile offenders had developed since the 1989 *Stanford* decision. The court noted that twelve states bar all executions, eighteen states bar juvenile executions, no state has lowered the age of execution below 18, and by case law or legislation five states have established 18 as the minimum age. Furthermore, the imposition of the death penalty on juveniles has become very unusual nationwide. The court adopted the U.S. Supreme Court's approach in the *Atkins* case, concluding there is now a national consensus against imposing the death penalty on defendants who were juveniles at the time of their offense.

The *amicus curiae* brief focused on scientific research indicating the developmental difference between juveniles and adults. The brief also discussed the increased likelihood of juveniles to engage in risky behavior and the emerging research on the propensity for juveniles to give false confessions. Additionally, the brief explored the vast number of state laws limiting juvenile's rights. *Amici* argued that the array of state laws limiting the rights of youth to participate in activities ranging from military service to getting a tattoo reflect societies' belief that youth do not have the same decision-making capabilities as adults.

To view the brief in its entirety please visit the American Bar Association's website at <http://www.abanet.org/crimjust/juvjus/simmons/simmonsamicus/>

## Jobs

**Children's Law Center, Washington, D.C. is seeking Fellowships, Staff Attorneys, a Supervising Attorney, and Legal Director.** CLC invites applications for several staff attorneys to begin in the Fall of 2005. The CLC is also accepting applications for Fellowships, a Supervising Attorney to start immediately, and a Legal Director. Please submit application, cover letter, resume, a legal writing sample, and references to: The Children's Law Center, 901 15th Street, NW Suite 500, Washington, DC 20005, Email: [mnatale@childrenslawcenter.org](mailto:mnatale@childrenslawcenter.org), Fax: 202-467-4949

**Policy Analyst/Legislative Assistant, Alliance for Children and Families, Office of Public Policy, Washington, D.C.** The Policy Analyst should have a B.A. degree and three years of related experience, or an advanced degree and two years of experience in related field. Applicants should have experience working in federal or state government and familiarity with the federal legislative process and governmental structures. For more information please visit [www.alliance1.org](http://www.alliance1.org). Interested individuals should e-mail a resume with a cover letter to: [policy@alliance1.org](mailto:policy@alliance1.org), Attention: Carmen Delgado Votaw, Alliance for Children and Families, 1701 K Street, NW, Suite 200, Washington, D.C. 20036-1503, tel. 202-429-0400 x15.

**Pro Bono Coordinator, Clark County Legal Services, Las Vegas, NV.** The Clark County Pro Bono Project, a division of Clark County Legal Services is seeking an attorney to assist in the development and coordination of pro bono programs for low income residents of Clark County. Candidates must possess an active/good standing bar license from any U.S. jurisdiction. Interested candidates should send a cover letter and resume to: Terry Bratton, Administrator / Clark County Legal

Services, 800 South Eighth Street, Las Vegas, Nevada 89101, Email: [cclslaw@clarkcountylegal.com](mailto:cclslaw@clarkcountylegal.com) Fax: 702-366-0569

**Staff Attorney, Children's Rights, New York, NY.** Children's Rights, the national child welfare reform organization, is seeking an attorney with a minimum of five years of active litigation experience, excellent writing skills, an outstanding record, and a demonstrated commitment to public interest. Submit a cover letter, resume, and one recent writing sample (preferably including discussion of a constitutional or federal court issue) to: Children's Rights, 404 Park Avenue South, 11th Floor, New York, N.Y. 10016 Attn: Susan Lambiase, Associate Director, Email: [Slambiase@childrensrights.org](mailto:Slambiase@childrensrights.org).

**Policy and Regulation Analyst/Writer, Children's Bureau, Washington, D.C.** Caliber Associates, Inc. has partnered with the Children's Bureau to offer program support for Child Welfare Monitoring. They are seeking a Policy and Regulation Analyst/Writer to work with the Children's Bureau. Applicants should have a Bachelor's Degree in a related subject, and 5+ years of experience in child welfare or a related field. This position will be located on-site at the Children's Bureau in Washington, D.C. If interested, please forward a cover letter with salary requirements and resume to: Caliber Associates, Inc., Attn: HR - Policy and Regulation Analyst/Writer, 10530 Rosehaven Street, Suite 400, Fairfax, VA 22030, Email: [careers@caliber.com](mailto:careers@caliber.com) Fax: 703-218-6930

**National Review Team Specialists, Washington, D.C.** Several National Review Team Specialists are needed to work with the Children's Bureau to conduct Child Welfare Monitoring. The positions are based in regional offices nationwide and at least one position will be based in Washington, D.C. The National Review Team Specialist will

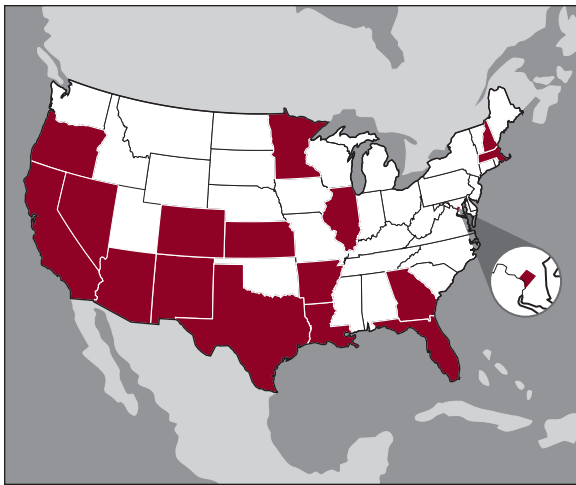
provide support to the national review team in conducting the Child and Family Service Reviews (CFSRs) in order to assure compliance with the State plan requirements in titles IV-B and IV-E of the Social Security Act. Interested applicants please contact: Caliber Associates, Inc. Attn: HR - National Review Team Specialist, 10530 Rosehaven Street, Suite 400, Fairfax, VA 22030 Email: [careers@caliber.com](mailto:careers@caliber.com) Fax: 703-218-6930

**Directing Attorney, Legal Advocates for Children & Youth, San Jose, CA.** The Directing Attorney is responsible for day-to-day operation of LACY. Please send letter describing interest and qualifications, a writing sample (limit 10 pages), resume, and contact information for three references to: Jim Bower, Executive Director, Law Foundation of Silicon Valley, 111 W. St. John Street, Suite 315, San Jose, CA 95113

**ABA-Africa Regional Anti-Trafficking Advisor for East Africa.** The American Bar Association's Africa Law Initiative (ABA-Africa) is currently seeking an attorney/advisor to be placed in Uganda to implement a two year anti-trafficking program to support enforcement, training, legal education, and resource development in Uganda, Kenya, and Tanzania. This project is intended to build on the pre-existing HIV/AIDS networks as well as ABA national and regional contacts developed during various ABA programs, including the recently completed Department of State funded East Africa Children's Rights Program. Interested applicants should forward their CV and cover letter to [abaafrika@abanet.org](mailto:abaafrika@abanet.org). No phone calls please.

**Visit the NACC Child Law and Advocacy National Job Website.** You can access additional information online at [www.NACCchildlaw.org/childrenlaw/jobs.asp](http://www.NACCchildlaw.org/childrenlaw/jobs.asp). If you wish to post a job on the website, follow the online instructions or call the NACC at 1-888-828-NACC. ■

Please send children's law news and advocacy job openings to: *The Guardian*, 1825 Marion Street, Suite 242, Denver, CO 80218  
Fax: 303-864-5351 • E-mail: [advocate@NACCchildlaw.org](mailto:advocate@NACCchildlaw.org).



## Affiliate News

NACC affiliates help fulfill the mission of the national association while providing members the opportunity to be more directly and effectively involved on the local level. If you are interested in participating in NACC activities on the local level, or simply want contact with other child advocates, please contact the affiliate in your area. If there is no affiliate in your area and you would be interested in forming one, please let us know. The formation of an NACC affiliate is simple, and we can provide you with an affiliate development packet to get you started. Affiliate development materials are available on our website at [www.naccchildlaw.org/about/affiliates.html](http://www.naccchildlaw.org/about/affiliates.html).

### Arizona

#### Arizona Association of Counsel for Children (AACC)\*

Ann M. Haralambie, President  
3499 N. Campbell, #901  
Tucson, AZ 85719

Phone: 602-327-6287  
FAX: 520-325-1374

Email: [acacnacc@aol.com](mailto:acacnacc@aol.com)

Website: [members.aol.com/naccaz](http://members.aol.com/naccaz)

### Arkansas

#### Arkansas Association of Counsel for Children (AACC)\*

Janet Bledsoe, President  
121 N. 7th St.

Rogers, AR 72756-3742

Phone: 501-631-7136

### California

#### Northern California Association of Counsel for Children (NCACC)\*

*Recipient of the NACC Outstanding Affiliate Award (2001)*

Christopher Wu, President  
AOC/ Center for Children,  
Families and the Courts  
455 Golden Gate Avenue  
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Phone: 415-865-7721

Fax: 415-865-7217

Email: [Christopher.Wu@jud.ca.gov](mailto:Christopher.Wu@jud.ca.gov)

#### Los Angeles Affiliate of the National Association of Counsel for Children (LANACC)\*

*Recipient of the NACC Outstanding Affiliate Award (2001)*

Tamatha Schreinert, President  
201 Centre Plaza Drive, Suite 8  
Monterey Park, CA 91754

Phone: 323-980-8753

FAX: 323-980-8708

Email: [schreinert@clcla.org](mailto:schreinert@clcla.org)

### Colorado

#### Colorado Association of Counsel for Children (CACC)\*

John Ciccolella, President  
405 South Cascade Avenue, Suite 205  
Colorado Springs, CO 80903

Phone: 719-636-1561

FAX: 719-444-0155

Email: [John@coloradofamilylaw.net](mailto:John@coloradofamilylaw.net)

### Florida

#### Florida Association of Counsel for Children (FACC)\*

David Bazerman, Interim President  
Legal Aid Service of  
Broward County, Inc.  
609 SW 1st Ave.

Fort Lauderdale, FL 33301

Phone: 954-765-8957

Email: [dbazerman@legalaidservice.org](mailto:dbazerman@legalaidservice.org)

### Georgia

#### Georgia Association of Counsel for Children (GACC)\*\*

Dee Simms  
Office of the Child Advocate  
3330 Northside Drive, Suite 100  
Macon, GA 31210

Phone: 478-757-2670

Fax: 478-757-2666

Email: [dsimms@gachildadvocate.org](mailto:dsimms@gachildadvocate.org)

### Illinois

#### Illinois Association of Counsel for Children (IACC)\*

Contact the NACC for information

### Kansas

#### Kansas Association of Counsel for Children (KACC)\*

Larry R. Rute, President  
212 SW 8th Avenue, Suite 102  
Topeka, KS 66603

Phone: 785-357-1800

FAX: 785-357-0002

Email: [staff@adr.kscoxmail.com](mailto:staff@adr.kscoxmail.com)

### Louisiana

#### NACC Student Chapter of Tulane Law School\*\*\*\*

David Katner, Faculty Advisor  
Tulane Law School  
7031 Freret Street  
New Orleans, LA 70118

Phone: 504-865-5153

FAX: 504-862-8753

Email: [Dkatner@clinic.law.tulane.edu](mailto:Dkatner@clinic.law.tulane.edu)

### Massachusetts

#### Central & Western Massachusetts Association of Counsel for Children (CWMACC)\*

Larri Tonelli Parker  
490 Shrewsbury St., Suite C  
Worcester, MA 01604

Phone: 508-795-0200

FAX: 508-791-0325

Email: [lamparker@aol.com](mailto:lamparker@aol.com)

### Minnesota

#### Minnesota Association of Counsel for Children\*

Contact the NACC for information.

### Nevada

#### Nevada Affiliate of the NACC (NANACC)\*\*

Stephanie Charter



Clark County Legal Services, Children's Attorney Project  
800 South Eighth Street  
Las Vegas, NV 89101-7051  
Phone: 702-386-1070  
Fax: 702-366-0569

Email: [scharter@clarkcountylegal.com](mailto:scharter@clarkcountylegal.com)

*NANACC held an organizational meeting in Las Vegas following the NACC 2004 National Conference. If you are interested in being part of the newly forming Nevada affiliate, please contact Stephanie Charter.*

## New Hampshire

**New Hampshire Chapter of the National Association of Counsel for Children (NHNACC)\***

Contact the NACC for Information.

## New Mexico

**New Mexico Association of Counsel for Children (NMACC)\***

Contact the NACC for information.

## Oregon

**Oregon Association of Counsel for Children (OACC)\***

Contact the NACC for Information

## Texas

**Central Texas Association of Counsel for Children (CTACC)\***

Bree Buchanan, President  
727 East Dean Keeton Street  
Austin, TX 78705  
Phone: 512-232-1293

Email: [Bbuchanan@mail.law.utexas.edu](mailto:Bbuchanan@mail.law.utexas.edu)

**Houston Association of Counsel for Children / Student Chapter (HACC)\*\*\*\***

Ellen Marrus, Faculty Advisor  
University of Houston Law Center  
100 Law Center  
Houston, TX 77204

Phone: 713-743-0894

Email: [Emarrus@uh.edu](mailto:Emarrus@uh.edu)

## Washington, DC

**Washington, DC Metro Chapter of NACC\***

Anne E. Schneiders, President  
2828 Wisconsin Avenue NW, #314  
Washington, DC 20007

Phone: 202-363-7916

FAX: 202-244-7693

Email: [aeschild@aol.com](mailto:aeschild@aol.com)

\* Officially Chartered NACC Affiliate \*\* Petition for Charter Pending \*\*\* Affiliate Forming \*\*\*\* Student Chapter  
NACC Affiliates are encouraged to send announcements and news of their activities and meetings to The Guardian.  
Deadlines for submission are February 1, May 1, August 1, and November 1.

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