

**NATIONAL COUNCIL OF JUVENILE &
FAMILY COURT JUDGES**

70TH ANNUAL CONFERENCE

CASE LAW UPDATE

OTHER CASES OF INTEREST

***PRESENTED BY:
Hon. Stephen M. Rubin
Pima County Juvenile Court
Tucson, Arizona***

DEPENDENCY

(To be reported at: 140 P.3d 205)
2006 WL 1224935 (Colo.App.)

TOPICAL HIGHLIGHTS

Family Law
May 19, 2006

Child Protection: Court of Appeals could review constitutionality of Supreme Court rules for expedited appeals in child neglect cases.

In a case of first impression, the Court of Appeals held that it had jurisdiction to address the constitutionality of the new Supreme Court rules expediting appeals in dependency and neglect proceedings and making significant changes in the way such appeals proceed in the Court of Appeals.

This decision may not yet be released for publication.

People ex rel. T.D.

(To be reported at: 821 N.Y.S.2d 741)
13 Misc.3d 894, 2006 WL 2706187 (N.Y.Fam.Ct.), 2006 N.Y. Slip Op. 26369

TOPICAL HIGHLIGHTS

Family Law
September 25, 2006

Child Protection: Mother's paramour could not be adjudicated as having severely abused child.

A mother's paramour could not be adjudicated as having severely abused the mother's child. The child was not the paramour's biological or adoptive child. The paramour was not the lawful custodian of the child. There was no allegation or evidence that he had natural children or that there were issues with respect to the potential termination of his parental rights thereto. The Family Court noted that this issue has rarely been reported on at the trial level and as of yet apparently has been unaddressed by any appellate court.

In re Meredith DD

(To be reported at: 142 P.3d 110)
207 Or.App. 414, 2006 WL 2423553 (Or.App.)

TOPICAL HIGHLIGHTS
Family Law
September 07, 2006

Child Protection: Father in juvenile court dependency proceedings was not entitled to court-appointed counsel.

A father in juvenile court dependency proceedings was not entitled to court-appointed counsel for the purpose of attending review hearings. Although the father had a statutory right to attend and participate in the review hearings, he had no right to appointed counsel, inasmuch as the record failed to suggest that the upcoming proceedings could result in interference with his relationship with his children, would involve complex issues and evidence, would involve allegations or evidence that the father would wish to contest, or would have any effect on other proceedings.

State ex rel. Juvenile Dept. of Multnomah County v. Jackson

(To be reported at: 909 A.2d 498)
2006 WL 3289078 (R.I.)

TOPICAL HIGHLIGHTS
Family Law
November 15, 2006

Child Protection: Evidence supported finding that father's extended incarceration made him an unfit parent.

Evidence was sufficient to support the trial court's finding that a father was an unfit parent due to his extended incarceration that made it improbable he could care for his daughter for an extended period of time. Father had been incarcerated since his daughter was only three days old, and five and one-half years remained on his sentence.

In re Alvia K.

TOPICAL HIGHLIGHTS
Family Law
November 30, 2006

Child Protection: Standard for emergency removal of child from home-Certiorari Denied.

Certiorari has been denied from a decision in which the Tenth Circuit, following what it characterized as the majority approach, held that state officials may remove a child from the home without prior notice and a hearing, consistent with the requirements of the due process clause, when the officials have reasonable suspicion of an immediate threat to the safety of the child if he or she is allowed to remain there. Even in those instances in which emergency removal is justified, the state must afford the parents a prompt post-removal hearing, the Court of Appeals found.

The parents of a child who was removed from her home without prior notice observed in their petition for a writ of certiorari that the circuits disagree as to whether a social worker must have a reasonable suspicion or probable cause that an emergency exists prior to seizing a child from her parents without notice and hearing. The petitioners argued that probable cause was the better standard, noting that the "result of the decision in the Tenth Circuit is that a state officer may seize a child on the basis of reasonable suspicion, but must have probable cause to seize the child's bicycle, as required by the Fourth Amendment." (Case below: Gomes v. Wood, 451 F.3d 1122 (C.A.10-Utah 2006).)

Gomes v. Wood

(To be reported at: 125 P.3d 220)
130 Wash.App. 862, 2005 WL 3473318 (Wash.App. Div. 3)

TOPICAL HIGHLIGHTS
Family Law
January 03, 2006

Child Protection: Dependent juvenile was not afforded sufficient criminal due process protections during hearing on contempt petition.

The Washington Court of Appeals held that a dependent juvenile, who had previously been found in contempt of court several times for running away from court-ordered placement, was not afforded sufficient criminal due process protections during the hearing on a petition to subject the juvenile to detention exceeding the statutory seven-day contempt remedy under the juvenile court's inherent contempt power. The juvenile's stipulation to the fact of running away, which supported the contempt adjudication, was made without advisement of her due process rights, in particular her rights to a trial with witnesses and proof beyond a reasonable doubt.

(To be reported at: 903 A.2d 333)

2006 WL 1586318 (Me.), 2006 ME 67

TOPICAL HIGHLIGHTS

Family Law

August 21, 2006

Child Protection: State lacked statutory authority to approve DNR order for child in its custody without notice to parents and opportunity for hearing.

A statute providing that when the custody of a child is placed with the Department of Health and Human Services or other custodian under a preliminary or final protection order, the custodian has full custody of child, did not authorize the Department to unilaterally approve a Do Not Resuscitate (DNR) order with respect to a child adjudicated in jeopardy and who was in the Department's custody, without notice to the child's parents and opportunity for the parents to be heard. The DNR could have the effect of terminating the parents' parental rights, which had to be supported by clear and convincing evidence, after notice and hearing.

In re Matthew W.

(To be reported at: 36 Cal.Rptr.3d 411)

134 Cal.App.4th 822, 2005 WL 3114229 (Cal.App. 4 Dist.), 05 Cal. Daily Op. Serv. 10,298, 2005 Daily Journal D.A.R. 14,011

TOPICAL HIGHLIGHTS

Family Law

December 08, 2005

Child Protection: Juvenile court's assertion of jurisdiction over dependent children on ground of risk of harm was not supported by evidence.

The California Court of Appeal held that the juvenile court's assertion of jurisdiction over two children alleged to be dependent on grounds of a substantial risk of serious physical harm to the children, as the result of the parents' current neglect and previous neglect of an older sibling, was not supported by substantial evidence. The evidence of the mother's substance abuse problems and both parent's mental illness was never tied to any substantial risk of serious harm to the children. Although the mother tested positive for marijuana metabolites at the time of the birth of one of the children, that child tested negative for any and all drugs at birth. Further, the evidence was uncontradicted that both children were healthy, well cared for in a clean home, and loved by both parents, and the record of the parents' past neglect of another sibling was insufficient to support the declaration of dependency, absent more current evidence of neglect.

In re David M.

(To be reported at: 130 P.3d 245)

~~2006 WL 163880 (Okla.), 2006 OK 5~~

TOPICAL HIGHLIGHTS

Family Law

January 26, 2006

Evidence: Child's statements to therapist came within hearsay exception for statements made for purpose of medical treatment.

A child's statements to his therapist that his mother's boyfriend, who had been court ordered to leave home, was at the home when the child came home from school, and that the mother locked the child out of the house when he went to the neighbor's to call the police, came within the exception to the rule against hearsay for statements made for the purpose of medical diagnosis or treatment, in proceedings on the State's petition to adjudicate the children as deprived. Although the therapist was not a medical doctor, she had an ongoing therapeutic relationship with the child as he re-integrated with family. The therapist's role was to help the child manage anger and react appropriately, which could reasonably entail identifying the causes of the child's anger and frustration.

This decision may not yet be released for publication.

In re J.D.H.

(To be reported at: 889 A.2d 1153)

382 N.J.Super. 582, 2005 WL 3527274 (N.J.Super.Ch.)

TOPICAL HIGHLIGHTS

Family Law

December 29, 2005

Child Protection: HIV-positive mother's refusal to take medication during pregnancy to reduce risk of transferring virus to unborn child was not act of abuse or neglect.

The refusal by a mother who tested positive for HIV to take recommended medication in order to reduce the risk of transferring the virus to her unborn child did not constitute an act of abuse or neglect within the meaning of the Abandonment, Abuse, Cruelty, and Neglect Act. The mother had a constitutional right to refuse medical treatment and to decide what medications to take during her pregnancy, even if such a decision created a risk of harm to the fetus. Furthermore, there was no evidence that the child tested positive for HIV after her birth, that she suffered from any HIV-related condition, or that the child would not have been born HIV-positive if the mother took the medication. Moreover, even if child initially tested positive for the virus, the evidence established that the virus could disappear as the child developed.

~~2006 WL 2501507 (Cal. App. 4 Dist.), 06 Cal. Daily Op. Serv. 8564, 2006 Daily
Journal D.A.R. 12,271
Not Officially Published
(Cal. Rules of Court, Rules 976, 977)~~

TOPICAL HIGHLIGHTS
Family Law
September 14, 2006

Child Protection: Criminal liability principles apply to denial of reunification services to parent who causes another child's death.

The California Court of Appeal held, as an issue of first impression, that the Legislature intended that the phrase "causing death of another child [by] neglect" in child dependency statutes be governed by principles of criminal liability. Accordingly, the court held that a parent is subject to the denial of reunification services in a dependency proceeding based on that parent's causing the death of another child by neglect if a reasonable person in the parent's position would have appreciated the risk his or her neglectful conduct posed to human life, and if the parent's neglectful acts were a substantial factor in bringing about another child's death. Applying those principles to the case before it, the court held that there was insufficient evidence that the mother of two children who were the subject of the proceeding caused the death of her niece, who died as the result of injuries inflicted by the mother's live-in boyfriend. Although the mother had been aware of her boyfriend's pattern of abusing her niece, the mother had intervened to protect her niece from the abuse, and thus her neglect could not have been regarded as a substantial factor in bringing about her niece's death.

Jorgelina E. v. Superior Court

(To be reported at: 140 P.3d 231)
2006 WL 871174 (Colo.App.)

TOPICAL HIGHLIGHTS
Family Law
April 10, 2006

Child Protection: Mother was not entitled to have her expert witness testify in child dependency proceedings.

A mother was not entitled, during the adjudicatory trial in which her child was found to be dependent or neglected, to have her expert witness testify concerning Battered Women's Syndrome. The issue before the jury was whether the child was dependent or neglected, and although the mother's relationship with the father was relevant to these issues, testimony as to the reasons why she may have continued the relationship after he had severely injured another child would not have helped resolve them.

This decision may not yet be released for publication.

People ex rel. M.W.

(To be reported at: 723 N.W.2d 363)
15 Neb.App. 148, 2006 WL 3069118 (Neb.App.)

TOPICAL HIGHLIGHTS
Family Law
November 07, 2006

Child Protection: Evidence established that reasonable efforts to reunify child with father were in child's best interests.

The evidence established that reasonable efforts to reunify a child with his father were in the child's best interests. The father complied with all the tasks required by the case plan and all recommendations made to him by the caseworker. He attended parenting classes, completed a psychological evaluation, participated in therapy sessions, and attended all visitations with his child. The visitation reports showed that the father and son had a positive relationship and that all visits ended in hugs and kisses. The child's therapist testified that the child wanted to go back home with the father, and the father's therapist testified that he was amazed by the father's ability to handle stress in an appropriate manner, and he could not identify anything where the father needed improvement.

In re Ethan M.

(To be reported at: 37 Cal.Rptr.3d 579)
135 Cal.App.4th 555, 2005 WL 3416287 (Cal.App. 4 Dist.), 06 Cal. Daily Op. Serv. 251, 2006 Daily Journal D.A.R. 267

TOPICAL HIGHLIGHTS
Family Law
January 11, 2006

Child Protection: One parent's reunification services in dependency proceeding could be terminated, while other's were extended.

The California Court of Appeal held, as a matter of first impression, that the juvenile court had discretion to terminate the father's reunification services at the 12-month-review hearing in a dependency proceeding, despite the facts that no permanency planning hearing was set and the mother's reunification services were extended to the 18-month review date. The father's performance during the period when services were provided did not merit continued services and, if not for the mother's determined efforts to reunify with the child, the father would not have been eligible for services beyond the 12-month date. The court further held that the termination of the father's services was supported by a rational basis, and thus did not violate his right to substantive due process. During the 12 months of services, the father's compliance was at first marginal, then nonexistent.

In re Alanna A.

TOPICAL HIGHLIGHTS

Family Law

February 01, 2006

Child Protection: Return of custody of child to parents, whose other child had allegedly suffered from shaken baby impact syndrome (SBIS), was appropriate.

The Supreme Court of Appeals of West Virginia has held that there was no clear and convincing evidence that a father had abused his child's sibling, and, thus, no basis to find that the child was abused on the basis that the child had lived in the same residence as another abused child. While there was medical evidence that the child's sibling had suffered from shaken baby impact syndrome (SBIS), there was also medical evidence that the sibling had suffered a head injury that was about 15 days old, and that his death had been caused by a re-bleed of the injured area. Further, the timing of the sibling's old injury correlated with his fall from a bed onto carpet while visiting at his grandparents' home. Finally, the fact that the sibling suffered from a coagulation disorder contributed to the likelihood of a slight fall causing a subdural hematoma.

State ex rel. West Virginia Dept. of Health and Human Resources v. Fox
(To be reported at: 50 Cal.Rptr.3d 208)
144 Cal.App.4th 92, 2006 WL 3020261 (Cal.App. 4 Dist.), 06 Cal. Daily Op.
Serv. 9983

TOPICAL HIGHLIGHTS

Family Law

October 30, 2006

Child Protection: Juvenile court had statutory and constitutional authority to sua sponte change prior order in child dependency proceeding.

The California Court of Appeal held that the juvenile court had statutory authority, and inherent authority under the state constitution in a child dependency proceeding to sua sponte change, modify, or set aside any previous order when necessary to prevent a miscarriage of justice, after providing the parties with notice and opportunity to be heard. The court further held that the juvenile court's authority in this regard was not contingent on a party filing a modification petition. In the case before it, the appellate court held that the juvenile court improperly utilized the procedural mechanism of a modification petition at the 12-month hearing, which petition it solicited from the county agency and the mother, to modify its prior order at the disposition hearing so as to terminate previously ordered family reunification services to the father. The appellate court reasoned that the determination whether the provision of services to father posed detriment to children should properly have been made at that earlier hearing, given the evidence before the juvenile court at that time that the father was serving a prison sentence for child abuse, involving the infliction of great bodily injury, of the half-brother of the children whose dependency was at issue. However, the appellate court finally concluded that denial of services to father, although procedurally flawed, did not result in a miscarriage of justice, and thus was harmless error.

Nickolas F. v. Superior Court

TERMINATION OF PARENTAL RIGHTS

TOPICAL HIGHLIGHTS
Family Law
October 05, 2006

Child Protection: Use of res judicata in proceedings to terminate parental rights-
Certiorari Denied.

Denying certiorari, the United States Supreme Court has let stand an Arkansas appellate court decision affirming a circuit court's determination that principles of res judicata and collateral estoppel precluded parents in a proceeding to terminate their parental rights from presenting their defense, namely, the exculpatory expert testimony of a pediatrician who opined in an offer of proof that the fractures suffered by their child were caused by natural causes and not by abuse. Although the parents had appealed the circuit court's order granting the state agency's petition for a "no reunification" order, they had failed to appeal from the circuit court's initial finding of dependency/neglect, and the appellate court found that this failure deprived the court of jurisdiction to consider the issues raised in the dependency/neglect order. It did not matter that, in the dependency-neglect action, the statutory standard was preponderance of the evidence, while both the petition for a "no reunification" order and the petition to terminate parental rights were decided under the clear and convincing standard. The parents argued in their petition for a writ of certiorari that the Fourteenth Amendment is violated when a state invokes res judicata, collateral estoppel, and procedural default grounds to prevent parents from presenting their defense in no-reunification and termination of parental rights proceedings, particularly when the earlier finding of abuse was made under a lesser standard of proof than that applicable in a no-reunification or termination case. (Case below: Neves de Rocha v. Arkansas Dept. of Human Services, 2005 WL 3307078 (Ark.App. 2005).)

Neves Da Rocha v. Arkansas Dept. of Health and Human Services

(To be reported at: 129 P.3d 243)
204 Or.App. 198, 2006 WL 289144 (Or.App.)

TOPICAL HIGHLIGHTS
Family Law
February 15, 2006

Child Protection: Father's unfitness by reason of conduct or condition seriously detrimental to child supported termination of parental rights.

The Court of Appeals held that clear and convincing evidence established a father's unfitness by reason of conduct or a condition seriously detrimental to the child, supporting termination of his parental rights. Although there was insufficient evidence of the father's abuse of alcohol or controlled substances to support an unfitness finding, a combination of other facts, taken together, established that it was highly probable that the father was not presently able, and would not be able within a reasonable time, to meet the child's physical and emotional needs. At the time of the child's birth, her 16-year-old father was under the supervision of the juvenile department for alcohol-related offenses. The child was first taken into custody by the state Department of Human Services (DHS) when she was two months old and her father brought her to the hospital with a serious and unexplained injury, a transverse leg fracture, which she suffered while she was in his care. The father's dishonesty with regard to that injury and his diagnosed conduct disorder necessitated his participation in counseling before the child could safely be returned to his care. However, he failed to engage in the requisite counseling and continued to express his belief, even throughout the appeal, that he was not in need of counseling. Finally, the fact that the child was thriving in foster care evidenced that termination was in her best interests.

In re Rodgers

(To be reported at: 908 A.2d 297)
2006 WL 2589795 (Pa.Super.), 2006 PA Super 248

TOPICAL HIGHLIGHTS
Family Law
September 20, 2006

Child Protection: Evidence did not establish that termination of mother's parental rights served needs and welfare of children.

The evidence did not establish that termination of a mother's parental rights served the needs and welfare of the children. Although the evidence supported termination of the mother's parental rights, no adoptive placement had been identified, and it was unlikely that an adoptive family would be found at such a late stage in the children's lives. A termination could create the false hope that the children would be adopted. And it would not benefit the children to separate them if one was willing to consent to an adoption and other would not. There was a very strong bond between the children, and it was very important that the children remained together. Neither child expressed commitment to a cessation of contact with the mother, nor would anything prevent it. Furthermore, the children could reunite with the mother in the not too distant future when they were 18 and out of the system.

(To be reported at: 636 S.E.2d 316)

2006 WL 3196497 (N.C.App.)

TOPICAL HIGHLIGHTS

Family Law

November 13, 2006

Child Protection: Evidence supported determination that father failed to make progress toward correcting condition that led to child's removal.

The trial court's determination that the father willfully failed to make reasonable progress toward correcting the conditions that led to his daughter's removal was supported by clear, cogent, and convincing evidence, as would support termination of the father's parental rights. The child was removed from the parents' custody because she tested positive for marijuana at birth. The father was told that if he continued to reside with someone with an untreated substance abuse problem, his home would not be considered appropriate. The father chose to live with the mother despite her refusal to obtain substance abuse treatment or even acknowledge the need for such treatment. Thus, although the father may have made some progress toward his case plan, he did nothing to remedy the fact that he was maintaining a home with the child's mother that rendered him ineligible to receive custody.

In re S.N.

(To be reported at: 130 P.3d 1132)

142 Idaho 594, 2006 WL 454371 (Idaho)

TOPICAL HIGHLIGHTS

Family Law

March 06, 2006

Child Protection: Evidence was insufficient to find that termination of mother's parental rights was in best interests of child.

The evidence presented was insufficient to find that the termination of a mother's parental rights was in the best interests of the child. The Department of Health and Welfare's only witness, a licensed social worker and employee, testified that it was not in the best interests of the mother or the child to terminate the relationship, and the testimony was neither impeached nor inherently improbable. And evidence indicated that the child and the termination action were a motivating factor in the mother's decision to straighten out her life. The mother and the child had a strong emotional bond, interactions between them were both positive and healthy, the mother could adequately care for the child, and the mother went above and beyond the case plan in order to provide appropriate parenting.

This decision may not yet be released for publication.

In re Doe

(To be reported at: 182 S.W.3d 838)

2005 WL 2051286 (Tenn.Ct.App.)

TOPICAL HIGHLIGHTS

Family Law

February 10, 2006

Child Protection: Termination of parental rights for persistence of conditions required judicial finding of dependency, neglect, or abuse.

In affirming a trial court order terminating a mother's parental rights, an intermediate appellate court has held, as a matter of apparent first impression, that "persistence of conditions" applies as a ground for the termination of parental rights only where the prior court order removing the child from the parent's home was based on a judicial finding of dependency, neglect, or abuse. The various orders entered against the mother in the case before the court were held not to establish a proper predicate for termination on the basis of persistence of conditions. However, other grounds for termination found by the trial court, including the mother's prolonged incarceration following her convictions of especially aggravated kidnapping and aggravated robbery, were affirmed on appeal.

This decision may not yet be released for publication.

In re Audrey S.

(To be reported at: 127 P.3d 652)

203 Or.App. 677, 2006 WL 121572 (Or.App.)

TOPICAL HIGHLIGHTS

Family Law

January 19, 2006

Child Protection: Termination of mother's parental rights was affirmed on appeal after mother failed to challenge all grounds of termination.

Termination of a mother's parental rights based on alleged unfitness and neglect was affirmed on appeal, where the mother challenged only the unfitness on appeal, and failed to challenge the alleged neglect. The Court of Appeals had to affirm the termination since the finding of neglect that the mother failed to challenge was an independent and sufficient ground for termination.

In re Thompson

ADOPTION

TOPICAL HIGHLIGHTS
Family Law
November 03, 2006

Child Protection: Standard for liability under § 1983 in child abuse cases--
Certiorari Denied.

The United States Supreme Court has refused to grant certiorari in a case in which the Eleventh Circuit Court of Appeals held that an adoptee failed to establish that Florida Department of Children and Families (DCF) personnel knew of a risk of serious harm to the adoptee from his adoptive mother, as required for the personnel to be liable to the adoptee under 42 U.S.C.A. § 1983 for deliberate indifference to abuse he suffered at the hands of his adoptive mother. Although prior to adoption the adoptee had some documented illnesses and displayed evidence of psychological problems, and his doctor discovered loop marks on his body, there was no evidence that any treating physician suspected the adoptee was being abused, or that DCF personnel drew the inference that the adoptee was being abused by his prospective adoptive mother.

The petition for certiorari asked the United States Supreme Court to accept the case to resolve a conflict between the circuits and several of the states' highest courts as to the standard for imposing liability under § 1983 in child abuse cases. The petition favored the more protective "professional judgment" standard, rather than the "deliberate indifference" standard used for prisoner cases. The petition argued further that, even if the deliberate indifference standard applied, the Eleventh Circuit's application of a purely subjective intent test for meeting the deliberate indifference threshold was erroneous as a matter of law. (Case below: Omar v. Babcock, 177 Fed.Appx. 59 (C.A.11-Fla. 2006).)

Omar v. Babcock

TOPICAL HIGHLIGHTS
Family Law
August 02, 2006

Adoption: Trial court had to resolve unmarried biological father's paternity action before finding that he was not parent whose consent was required for adoption.

In the context of an action brought by an adoption agency to terminate parental rights pending adoption, the trial court lacked the statutory authority to terminate the parental rights of an unmarried biological father without a preliminary determination as to whether he was a parent whose consent to the adoption was required. The District Court of Appeal held that, under the statutory framework, the biological father was not a parent whose consent was required for the adoption, because the father had not registered with the putative father registry prior to the mother consenting to the adoption and the initiation of the termination proceedings. However, the unusual circumstances of the instant case required the trial court to resolve the father's paternity action before making the determination that he was not a parent whose consent to the adoption was required, under the adoption statute providing that a petition to terminate parental rights pending adoption could be granted only after written consent or notice to a father under circumstances where the minor has been established by court proceeding to be his child.

This decision may not yet be released for publication.

In re Adoption of Baby A.

(To be reported at: 845 N.E.2d 229)
2006 WL 947745 (Ind.App.)

TOPICAL HIGHLIGHTS
Family Law
April 14, 2006

Adoption: Adoption Act did not prohibit same-sex couple from filing joint petition to adopt child.

The Court of Appeals of Indiana has held that the Indiana Adoption Act did not prohibit a same-sex couple from filing a joint petition to adopt a child. The Act provided that "a resident" could file an adoption petition, by which the legislature intended "a resident" to include the plural. Also,, the purpose of the Act in setting forth rules regarding adoption by married couples, including that married persons file a joint adoption petition, was to guarantee harmony on the part of adoptive parents upon the question of adoption, and to assure a welcome and affectionate reception of the child into the adoptive home. However, it did not follow that, in placing this requirement on a married couple, the legislature was denying unmarried couples the right to petition jointly to adopt a child.

In re Infant Girl W.

