

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

# Reunification – the Preferred Outcome in Child Welfare Cases

By Sara R Brennan, NACC Fellow

June is **National Reunification Month**. During this month we celebrate the preferred outcome in child removal cases – reunification. The Administration for Children and Families reports that as of September 30, 2010, 408,425 children were in foster care in the US, and 51% of those children were reunited with their families.<sup>1</sup> These statistics provide us with reason to celebrate. Amie S. Gladfelter, a caseworker with the York County Office of Children, Youth and Families in Pennsylvania, noted that “Reunification is most important since the cost of separation is quite damaging both on emotional and financial levels.”<sup>2</sup>

**Casey Family Programs**, an organization whose major focus is foster care reform, developed a *2020 Strategy for America's Children*. This Strategy is a plan that promotes safely reducing the number of children in foster care and improving the lives of those who remain in care.<sup>3</sup> Their plan contains seven “values” which are all helpful to keep in mind when trying to achieve reunification. Those values are as follows:

- Permanence is a right for all adolescents and young adults in foster care, regardless of age, mental health, or behavior challenges.
- Permanency planning must be inclusive. Family engagement and family-centered practice are critical and must include meaningful participation by the youth, and frequent visitation between youth, parents and siblings. Collaborative service planning and delivery is also imperative.
- Permanency planning should start early. But, at the same time, it is never too late to engage birth parents, relatives, or other kin to help youth in foster care achieve permanency. Family circumstances change and as a result family connections should be continuously revisited even if previous engagements have not met with success. New permanency options might exist.
- Provide families with needed emotional and financial support as they prepare for and experience reunification.

See [Reunification](#), page 3 »

## In This Issue

Reunification – the Preferred Outcome in Child Welfare Cases .....	1
Cases .....	2
Juvenile Transfer to Criminal Court .....	2
Competency of Juvenile Victims of Abuse ...	2
Amicus .....	4
Certification Update .....	5
Policy & News .....	6
Professional Resources .....	7
Training Calendar .....	7
REGISTER NOW for the 35th National Child Welfare, Juvenile, and Family Law Conference .....	7
Thank You to our Lifetime Members! .....	8
NACC Mission .....	8

### NACC Executive Committee 2012–2014

President .....	Jan Sherwood
Vice President .....	Gerry Glynn
Treasurer .....	H.D. Kirkpatrick
Secretary .....	Erik Pitchal
Past Chair .....	Bob Fellmeth



## Cases

### **State v. Drane** **2012-Ohio-1978**

#### **JUVENILE TRANSFER TO CRIMINAL COURT**

The Court of Appeals for Montgomery County Ohio reviewed, on appeal, the juvenile court's transfer of Drane to criminal court.

In June of 2009, Drane acted as an accomplice to an armed man during a robbery. After being apprehended and arrested a hearing was set to determine if Drane should be tried as a juvenile or an adult. The juvenile court judge listened to testimony and weighed the factors set forth in R.C. 2152.12 (D) and (E), and determined that Drane should be transferred to the General Division of the Montgomery County Court of Common Pleas. There Drane was convicted and sentenced for one count of aggravated robbery with a deadly weapon (firearm), in violation of R.C. 2913.01(K), a felony of the first degree. After a series of appeals, the Court of Appeals found because they had allowed the previous appeal to be reopened on meritable arguments, this demonstrated an implicit finding that Drane was denied effective assistance of appellate counsel at the time of the original appeal. Therefore the Court of Appeals allowed Drane to

go forward with his current appeal. In this appeal Drane cited six assignments of the error. The first three are similar and the most relevant.

In his first assignment of error, Drane contends that the trial court erred when it transferred him from juvenile court to adult criminal court. Specifically, Drane argues that ample evidence was adduced which established that he was amenable to rehabilitation in the juvenile system. In his second assignment, Drane argues that the juvenile court improperly relied on "unproven allegations of previous misconduct" when it found that Drane was not amenable to juvenile rehabilitation. Thus, Drane asserts that his due process rights were violated when the juvenile court transferred him to adult criminal court.

The juvenile court's decision to transfer the case to criminal court is within the court's sole discretion. The abuse of discretion standard is defined as "an appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence." *State v. Boles*, 2d Dist. Montgomery No. 23037, 2010-Ohio-278. Revised Code Section 2952.12(D) sets forth eight factors to consider in favor of transfer of a juvenile to the General Division, while R.C. 2952.12(E) sets forth eight factors to consider as relevant against transfer. *State v. Grimes*, 2d Dist. Greene No. 2009-CA-30, 2010-Ohio-5385. The Court of Appeals found on further review that the juvenile court did not abuse its discretion to transfer Drane to criminal court. The Court of Appeals based their decision on the record, which established that Drane had been adjudicated delinquent prior to the instant offense and that he had been under community control sanctions and proba-

tion for earlier misdemeanor offenses. The juvenile court also found that Drane's criminal activities were escalating and that prior attempts at his rehabilitation in the juvenile court had failed. Since the Court of Appeals found no error in the transfer, the juvenile court did not abuse its discretion in deciding Drane's constitutional rights were not violated.

Drane's final three assignments of error dealt with the timing of assigning court costs, the juvenile court prospectively denying him access to transitional control, and an assertion of ineffective assistance of counsel. Drane's fourth and fifth assignments of error were sustained and remanded but his final error was dismissed.

[› Read entire opinion](#)

### **In Re J.M.** **2012-Ohio-1467**

#### **COMPETENCY OF JUVENILE VICTIMS OF ABUSE**

The Ohio Supreme Court considered whether a ten-year-old victim of abuse is competent to testify.

J.M., a fourteen-year-old boy was adjudicated as a delinquent child for having committed the offense of rape against his ten-year-old step sister. The juvenile court then transferred the case to Putnam County Juvenile Court for disposition. The court committed J.M. to the Department of Youth Services for three years, with the commitment suspended on the condition J.M. complete the Juvenile Residential Center Program. He was also placed on probation, ordered to attend counseling, prohibited from having unsupervised contact with any juveniles, with the exception of his sister. Additionally, he was not permitted to have unsupervised access to the internet.

J.M. went on to appeal his case and cited five different points of error. He first claimed the court erred in allowing the 10 year old victim to testify because she was not competent. J.M. asserts that the trial court erred when it failed to conduct an examination to determine whether the 10-year old victim was competent to testify, even though J.M.'s counsel had filed a motion requesting such a determination. J.M. asserted the victim was mentally "slow." Ohio Evid.R. 601(A) provides that every person is competent to be a witness except: (A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truthfully. The Ohio Supreme Court has ruled in the case *State v. Clark*, 71 Ohio St.3d 466, 469, 1994-Ohio-43, "A plain reading of Evid.R. 601(A) leads to the conclusion that the competency of individuals ten years or older is presumed, while the competency of those under ten must be established." Prior to the trial, the court denied defense counsel's motion to conduct a competency hearing on the child, stating that "the child is over the age of ten and is presumed competent. There is nothing before the Court which would suggest that she is not competent." Furthermore, even though there was a presumption that the 10-year-old victim was competent to testify, the trial judge did in fact question her as to her understanding of her obligation to tell the truth. The record showed the 10-year-old victim answered all of the questions during her testimony consistently and appropriately, and the record did not reflect any problems or issues that would have indicated she was not competent.

J.M.'s third point of error alleges that J.M.'s statements to the police should have been suppressed

because he was not allowed to speak to his parents before waiving his Miranda rights. The Supreme Court of Ohio affirmed their previous ruling which declined to establish a more rigorous standard with respect to juvenile defendants who are subjected to custodial interrogation.

In sum, the Supreme Court of Ohio found the lower court committed no errors in the J.M. case and affirmed the lower court's ruling.

» [Full opinion](#)

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

» [Reunification from page 1](#)

- Permanency planning and reintegration is a continuous process and takes a significant amount of time before, during, and after returning the child to the home. Without this time, reintegration is not as likely to be successful.
- Cultural sensitivity and competency are essential for success. Agencies must consistently develop services that are responsive to the cultural, racial, ethnic, linguistic, sexual orientation, gender identity, and religious/spiritual backgrounds of young people and their families.<sup>4</sup>

Reunification takes time, commitment, and significant community services and support, but in the end all the hard work truly benefits the families involved in the process. At the 2011 congressional briefing to celebrate National Reunification Days, Benjamin Muhammad, a former New York foster care child, stressed the significance of reunification saying, "Reunification is so important because although parents might not have the best history, they love their children. Love is the missing component in foster care."<sup>5</sup>

1 Administration for Children and Families, Preliminary 2010 Report, [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report18.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report18.htm)

2 Enhancing and Celebrating Family Reunification from Foster Care, American Bar Association News Service, <http://www.abanow.org/2011/06/enhancing-and-celebrating-family-reunifications-from-foster-care/>

3 <http://www.casey.org/AboutUs/>

4 Casey Family Programs' 2020 Strategy and the Importance of Permanency, [http://www.casey.org/Resources/Publications/pdf/AustinReintegration\\_FacilitatorGuide.pdf](http://www.casey.org/Resources/Publications/pdf/AustinReintegration_FacilitatorGuide.pdf)

5 Enhancing and Celebrating Family Reunification from Foster Care, American Bar Association News Service, <http://www.abanow.org/2011/06/enhancing-and-celebrating-family-reunifications-from-foster-care/>



# Amicus

## M.D. v Perry

*The NACC and others filed an Amicus Brief in the Perry case due to their shared interest in protecting the proper standard that has historically and consistently allowed for Rule 23(b)(2) class actions to be brought in cases seeking injunctive and declaratory relief to remedy violations of civil rights including actions on behalf of children in foster care and in other state custody arrangements.*

The Fifth Circuit Court of Appeals considered whether the District Court was correct in granting class certification to approximately 12,000 children, who are in Texas Permanent Managing Conservatorship ("PMC"), or long term foster care.

Nine children currently in Texas PMC care filed suit under 42 USC § 1983 against three Texas officials, in their official capacity, seeking to represent all children who are currently in PMC care, or may be in PMC care in the future. The suit sought declaratory and injunctive relief to re-dress class wide injuries caused by systematic deficiencies in Texas's administration of the PMC. The named plaintiffs claim the actions and inactions of Texas Officials violated the purported class members': (1) substantive due process rights to be free from harm while in state custody under the Fourteenth amendments; (2) liberty interests, privacy interests, and associational rights not to be deprived of a child-sibling or a child-parent family relationship where safe and appropriate, under the First, Ninth, and Fourteenth Amendments; and (3) procedural due process rights under the Fourteenth Amendment by depriving them of alleged state law entitlements, relating to monitoring by DFPS of contracted substitute care,

TEX. FAM. CODE § 264.106(b); TEX HUM. RES. CODE § 45.002(c), and the right to have placement decisions made using "clinical protocols to match a child to the most appropriate placement resource." TEX. FAM. CODE § 264.107(e).

In order to receive class certification, the party seeking the class certification bears the burden of proof to affirmatively demonstrate that both Rule 23(a)'s four threshold requirements are met as well as the requirements of Rule 23(b)(1), (2), or (3). The four requirements of Rule 23(a) are: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. The named plaintiffs only sought certification under Rule 23(b)(2), meaning it also had to establish that the party opposing the class has acted or has refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. The Fifth Circuit Court of Appeals is reviewing the district court's granting of the class certification, in order to ensure the district court complied with the rigorous analysis of the Rule 23 prerequisites.

On appeal Texas made three primary arguments: (1) the district court abused its discretion by certifying the purported class because the named plaintiffs failed to establish there were any questions of law or facts common to the class; (2) the district court failed to conduct the rigorous analysis required by Rule 23, in particular, the court failed to define with any specificity the class claims, class issues, or defenses, nor describe how those claims would be tried on behalf of over 12,000 PMC children; and (3) the proposed

class did not satisfy the cohesiveness requirement of Rule 23(b)(2), in that the class members have not been harmed in essentially the same way, nor could a single injunction or declaratory judgment provide relief to each member of the class.

In applying the Supreme Court's recently announced standards in *Wal-Mart Stores, Inc v. Dukes*, for establishing commonality under Rule 23(a)(2), the Fifth Circuit Court of Appeals found the district court failed to conduct the rigorous analysis required by Rule 23. Specifically, the Fifth Circuit Court of Appeals found that the district court abused its discretion by certifying a class that lacked cohesiveness under Rule 23(b)(2).

First on the issue of commonality to satisfy rigorous analysis under Rule 23(a)(2), the district court reasoned that although each member experienced the alleged shortcomings in the State's administration of its PMC in a different way, the class still satisfied commonality because all class members are within the same system and subject to the alleged deficiencies in that system. The Court of Appeals found that although the district court's conclusions regarding commonality would have been sufficient pre-*Wal-Mart* precedent, the *Wal-Mart* decision has heightened the standards for establishing commonality under Rule 23(a)(2), rendering the district court's analysis insufficient. The Supreme Court expanded the meaning of commonality to now require the class members have all suffered the same injury. Every member's claim must depend upon a common contention of such a nature that it is capable of class-wide resolution, meaning the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. That is, the district court did not indicate how the resolution of the alleged common question of fact would decide an issue

that is central to the substantive due process claims, family association claims, or procedural due process claims of every class member at the same time. The formulation of these common questions of law is too general to allow for effective appellate review because the broad scope of the complaint and the diverse array of claims asserted therein lacks the specificity required to determine there is a common question of law which satisfies Rule 23(a)(2).

The Court of Appeals also found the district court failed to look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination. Specifically, the district court conducted no analysis of the elements and defenses for establishing any of the proposed class claims, nor did it adequately explain how those claims depend on a common legal contention whose resolution would resolve an issue that is central to the validity of each of the individual's claim. Ultimately, the Court of Appeals concluded that, given the amorphousness of the proposed class's proffered common issues of fact and law, the district court needs to be more precise when explaining how the resolution of the claims will resolve an issue that is central to the validity of each of the individual class member's claims at once, in order to satisfy the rigorous analysis requirement in Rule 23(a)(2).

Finally, the Court of Appeals found the district court's denial of Texas's motion to stay proceedings in the lower court pending the resolution of this interlocutory appeal is sound as long as the conclusion is supported by reasoning based on the elements for establishing the proposed class's various constitutional claims on a class-wise basis.

The Court of Appeals also found the district court abused its discretion by certifying a class that lacked cohesiveness under Rule 23(b)(2). Rule 23(b)(2) cre-

ated two relevant requirements when a proposed class seeks class-wise injunctive relief: (1) the class members must have been harmed in essentially the same way; and (2) the injunctive relief sought must be specific. Specifically, Rule 23(b)(2) does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. The Court of Appeals found that although some of the proposed class's sub-claims could potentially be certified under Rule 23(b)(2), its super-claim cannot be certified under that subsection because it includes requests for individualized relief on behalf of individual children within several subclasses of the class. For example, by requesting a special expert panel to review the cases of individual class members and then implement appropriate remedial steps to remedy their individual injuries, the Named Plaintiffs undermine their position that their claim is to seek remedy for the group as opposed to individual injuries. The Court of Appeals held that the Named Plaintiffs must demonstrate that the class members have been harmed in essentially the same way. Additionally, the Named Plaintiffs must make an effort to demonstrate what is required to provide adequate or appropriate levels of services in order to craft a final injunctive relief which reasonably details the acts required.

The Court of Appeals concluded by noting that if the district court decides on remand to certify the class, it should (1) perform a rigorous analysis regarding whether the class claims of each of the subclasses meets the requirements of Rule 23, and (2) comply with the instructions for certifying subclasses contained in *Marisol A. v. Giuliani*, 126 F.3d 372, 278 (2d Cir. 1997).

To view briefs or submit a request for the NACC to participate as Amicus Curiae in a case, visit [www.NACCchildlaw.org](http://www.NACCchildlaw.org).

# Certification Update

## Become a Child Welfare Law Specialist

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

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

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

## QIC Application Fee Waivers — 2012

We are pleased to announce that the QIC Child-Rep from Children's Bureau is funding an additional 200 certification applications in 2012. [Applications are being accepted now.](#)



## 2013 Target States

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



# Policy & News

## **Families for Foster Youth Postage Stamp Act**

NACC signed onto the Families for Foster Youth Postage Stamp Act in May. The bill would create a semipostal stamp to raise funds to improve outcomes for foster youth. Half of the funds will specifically support programs focused on improving permanency outcomes for older youth through adoption, kinship care, or guardianship. The other half will support the State Court Improvement Program to improve the ability of the courts to serve children in the child welfare system. NACC encourages you to show your support for this Act by contacting [Megan Thompson](#) at the Office of Senator John F. Kerry.

## **State Secrecy and Child Deaths in the U.S. 2nd Edition**

The Children's Advocacy Institute and First Star released a report, "State Secrecy and Child Deaths in the U.S. 2nd Edition, An Evaluation of Public Disclosure Practices About Child Abuse and Neglect Fatalities and Near-Fatalities, with State Rankings."

[› Download report](#)

## **Helping Foster Kids Transition to Adulthood**

With the support of the Edna McConnell Clark Foundation and the Bill & Melinda Gates Foundation, MDRC is working with University of Chicago researcher Mark Courtney to evaluate transitional living programs launched by Youth Villages, a nonprofit established in 1986 that currently serves 18,000 kids and young adults in 11 states.

[› Learn more](#)

## **New Research Expands Understanding of Psychoactive Medication Use Among Children in Foster Care**

Following the federal Government Accountability Office report issued on the use of psychoactive drugs by children in foster care in five states, a national study from [PolicyLab](#) at [The Children's Hospital of Philadelphia](#) describes prescription patterns over time in 48 states.

[› Learn more](#)

[› Original GAO report](#)

## **Children's Well-being Central to Courts' Mission, Expert Panel Says**

Youth Today has published an article detailing how the nation's juvenile and family courts need to cooperate and share data.

[› Read article](#)

## **States Have Second Thoughts About Juveniles in Adult Court**

Based on public concern and media attention to the rise in youth violence that peaked in 1994, every state created youth transfer policies to send more

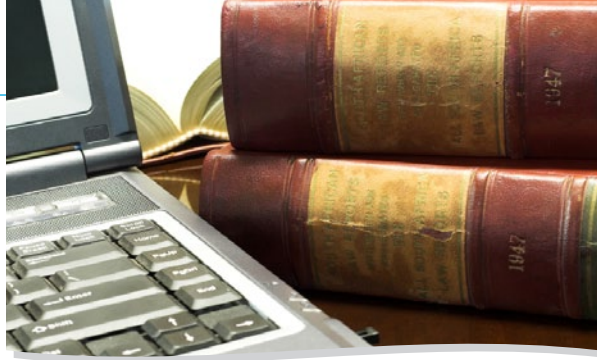
teen-agers to adult court and extend sentences for most crimes. In 2000, 15 states had prosecutorial discretion laws. Now a number of them are being reconsidered.

[› Learn more](#)

## **Help Get the Story Out — Lawyers for Kids Make a Difference!**

The National Right to Counsel Strategy Group is launching its second stage of national work to promote the importance of lawyers for children in dependency cases. They are seeking compelling case examples of when and how a lawyer made a difference in the life of a child or youth. These stories will be used in legislative reform efforts across the nation, for media engagement, and in legal briefs. In addition, the stories will be used to develop training materials which identify both routine as well as innovative legal strategies to advocate for children in these cases. We all know the importance of storytelling whether in our individual cases, in our public speaking, and in simple gatherings with friends. Storytelling is similarly important in our efforts to bring about reform, and in conveying the critical role of lawyers for abused and neglected children.

[› Learn more, or share your story](#)



# Professional Resources

## PUBLICATIONS

### **How to Work with Your Court: A Guide for Child Welfare Agency Administrators, 2nd Ed**

Hardin, Rauber

This book for child welfare administrators explains how to establish effective and efficient relationships between their agencies and the courts.

› [Get your free copy](#)

### **Standby Guardianship**

*Child Welfare Information Gateway*

Examines state standby guardianship laws in which a parent may transfer guardianship of his or her child to a specific person under certain conditions. Many states developed these laws specifically to address the needs of parents living with HIV/AIDS, other disabling conditions, or terminal illnesses who want to plan a legally secure future for their children. A standby guardianship differs from traditional guardianships in that the parent retains much of his or her authority over the child. This publica-

tion covers the establishment of standby guardianship, the noncustodial parents, parental authority, and withdrawal of guardianship.

› [View publication](#)

## ARTICLES

### **Where We've Been, Where We're Going: A Look at the Status of the Civil Right to Counsel, and Current Efforts**

John Pollock, Coordinator, NCCRC

### **Right to Counsel and Legal Services: From Fear and Loathing to Love and Support**

Cathy Carr, Executive Director, Community Legal Services of Philadelphia

*These two articles are from last December's National Coalition for a Civil Right to Counsel's full-day conference.*

› [View both articles](#)

## TRAINING CALENDAR

**Wednesday, June 13, 2012**

› [Juvenile Justice Reform Webinar](#)

On-line

**Wed, June 27 – Sat, June 30, 2012**

› [American Professional Society on the Abuse of Children's 20th Annual Colloquium](#)

Chicago, IL

**Tuesday, August 28, 2012**

› [13th National Conference on Child Sexual Abuse and Exploitation Prevention](#)

New Orleans, LA

**Wednesday, September 19, 2012**

› [National Center for Victims of Crime 2012 National Conference](#)

New Orleans, LA

## REGISTER NOW!

› [35th National Child Welfare, Juvenile, and Family Law Conference](#)

**Tuesday, Aug 14 – Thursday, Aug 16, 2012**

Pre-Conference: Monday, Aug 13

Historic Palmer House Hilton

Downtown Chicago, IL



## Thank You to our Lifetime Members!

Do you want to join the elite club of lifetime members?  
Email [advocate@naccchildlaw.org](mailto:advocate@naccchildlaw.org) for more details.

Candace Barr

Charles Masner

Donald Bross

Kathleen McCaffrey

Donna Furth

John Stuemky

Gerard Glynn

Smith Williams

### And a big thank you to Southwest, the preferred airline of NACC!

Through the generosity of Southwest Airlines, NACC has been able to develop a Member Emergency Assistance Program (MEAP). A limited number of travel vouchers are available to current NACC members for work-related travel.

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



## NACC Mission

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

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