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National Association of Counsel for Children
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# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>POVERTY AND CHILD WELFARE</td>
<td>1</td>
</tr>
<tr>
<td>by Maureen Farrell-Stevenson, JD, NACC President / CEO</td>
<td></td>
</tr>
<tr>
<td>CASES</td>
<td>3</td>
</tr>
<tr>
<td>DELINQUENCY / RIGHT TO JURY TRIAL (Colorado)</td>
<td>3</td>
</tr>
<tr>
<td>DEPENDENCY / CHILD SUPPORT OBLIGATION</td>
<td>3</td>
</tr>
<tr>
<td>POST TERMINATION (Maine)</td>
<td>3</td>
</tr>
<tr>
<td>DELINQUENCY / TRYING JUVENILE AS ADULT (Connecticut)</td>
<td>4</td>
</tr>
<tr>
<td>DEPENDENCY / REUNIFICATION (California)</td>
<td>5</td>
</tr>
<tr>
<td>DELINQUENCY / SENTENCING DUE PROCESS (Ohio)</td>
<td>7</td>
</tr>
<tr>
<td>FAMILY LAW / NONPARENT CUSTODY (New York)</td>
<td>7</td>
</tr>
<tr>
<td>DELINQUENCY / ORDERS AGAINST PARENTS (Utah)</td>
<td>8</td>
</tr>
<tr>
<td><strong>AMICUS CURIAE UPDATE</strong></td>
<td>9</td>
</tr>
<tr>
<td>PEOPLE V. GABRIESHEFSKI (Colorado)</td>
<td></td>
</tr>
<tr>
<td><strong>NACC PUBLICATIONS ORDER FORM</strong></td>
<td>10</td>
</tr>
<tr>
<td><strong>CHILD WELFARE LAW SPECIALIST – CERTIFICATION YEAR END SUMMARY</strong></td>
<td>11</td>
</tr>
<tr>
<td><strong>FEDERAL POLICY UPDATE</strong></td>
<td>12</td>
</tr>
<tr>
<td>by Miriam Rollin, JD</td>
<td></td>
</tr>
<tr>
<td><strong>ROCKY MOUNTAIN CHILD ADVOCACY TRAINING INSTITUTE</strong></td>
<td>13</td>
</tr>
<tr>
<td><strong>CHILDREN’S LAW NEWS</strong></td>
<td>14</td>
</tr>
<tr>
<td>News, Conferences &amp; Trainings, Publications, and Career Center</td>
<td></td>
</tr>
<tr>
<td><strong>AFFILIATE NEWS</strong></td>
<td>16</td>
</tr>
<tr>
<td><strong>NACC CONTRIBUTORS</strong></td>
<td>17</td>
</tr>
<tr>
<td><strong>NACC MEMBERSHIP APPLICATION</strong></td>
<td></td>
</tr>
<tr>
<td>BACK PAGE</td>
<td></td>
</tr>
</tbody>
</table>
Over 13.2% of the U.S. population or 13.9 million people had income below the official poverty level (FPL) in 2008 according to the American Community Survey. These statistics reflect an increase of 1.1 million people since 2007. As the FPL, by most economists’ standards, is not an accurate measurement of poverty, we must take into account that many other families, even working families, cannot make ends meet or are struggling to do so. Given the link that exists between poverty and neglect, such families are at a higher risk of becoming involved in the child welfare system.

Our current economic recession is contributing to the overall rise in poverty. High unemployment plays a significant role in the rise. Many families are unable to maintain or obtain decent affordable housing; thus, homelessness for children and families is rising. Energy prices have risen and as a result many cannot afford to pay for their utilities and so do without. Job opportunities and access to affordable educational opportunities are less and less available or affordable at a time when many workers need to be trained or retrained. Access to medical and mental health care is limited or non-existent for many families, including working families. To make matters worse, government resources are shrinking as states face their own financial woes. While states are now able to obtain help from the federal government, that help is temporary. Since states must balance their budgets, hard economic times typically result in state budget cuts to discretionary programs, many of which serve low-income children and families. Ironically, at the time families need the most help, resources, including benefits and services, become scarce.

Needless to say, low-income families live with constant financial stress and that stress increases in a struggling economy. While many low-income families manage to provide a safe and loving home for their children despite this ongoing stress, others have a harder time coping. An inability to cope can lead to child abuse or neglect. Numerous studies have documented the link between poverty and the increased risk of child neglect. Some studies have found that a poor child is 22 times more likely to be abused or neglected. We know that there are more cases of neglect than abuse – over 60% of child maltreatment cases are child neglect cases. While the reasons for neglect are varied, some parents who face allegations of neglect may not have faced such allegations had they timely received appropriate benefits and services.

What does this mean for those of us involved in representing or working with families in the child welfare system? Since poverty is on the rise, particularly child poverty, it is important to remind ourselves that the lives of those individuals involved in the child welfare system are significantly and particularly impacted. Further, we must remind ourselves that we must address the impact of poverty to the best of our abilities. We tend to focus on the immediate tasks before us, often out of necessity, thereby failing to consider the larger context in which these families live.

The NACC Recommendations for Representation of Children in Abuse and Neglect Cases and the ABA Standards for Respondent Parents provide guidance on how to address this larger context in which families live. For example, the NACC Standards highlight the responsibility of a child’s attorney to ensure that the child’s basic needs are met. Further, the Standards indicate that “competent representation includes the knowledge...of placements and services available for the child and services available to the family.” 1 Similarly, respondent parents’ attorneys must do the same for their clients. Agency attorneys should assist with access to such benefits and services and should be asked to do so if they are not.

It is critical for those representing or working with families in the child welfare system to assess the impact that poverty has in the lives of those families. In a medical neglect case, for example, it is critical to explore

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whether the child’s failure to receive needed medical treatment is a result of her parents inability to pay for treatment. Similarly, in a case alleging neglect for failure to protect, it is imperative to question whether the family is homeless because they cannot afford to pay rent or whether the family is without utilities because they are unable to pay the utilities bill. Such questions are critical to understanding “who” families are and what they need to succeed.

When we ask exploratory questions and obtain critical information, we can better advocate for those services and benefits that will help families succeed. Perhaps that advocacy involves helping them obtain emergency or transitional housing, childcare, health care, cash assistance, disability benefits, educational supports or child support, to name only a few.

In addition to state and federal benefits and services, local non-profits and church based groups may also be able to provide supports to these families. It is important not to rely solely upon the child welfare system and what may be available through it especially in tough economic times.

It is important to note that while poverty is one area that we must deal with if we are to ensure good outcomes for families in child welfare matters, there are others that are critically important to explore as well. They include but are not limited to religion, language, mental health, physical health, learning and other disabilities, gender, age, gender identity, sexual orientation, and literacy. Magistrate Judge Karen A. Howze, Superior Court of the District of Columbia, suggests a simple yet profound approach. She urges us to explore these areas through “methodical questioning” and “listening” to families. Through this process we will determine “who” families are and what they need. Most child welfare professionals are trained to ask questions and investigate. It is imperative, however, that we consciously and regularly remind ourselves to explore the areas that impact the families we work with and to explore how their lives are impacted on a day to day basis. We must not impose our values and experiences on these families. Rather we must begin to see the world through their eyes and their experiences. As a result we will better serve families and help to ensure better outcomes.

For a more detailed discussion of these issues I urge you to read or re-read Magistrate Judge Howze’s chapter in Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect and Dependency Cases (The Red Book). I also urge you to read Opening Doors for LGBTQ Youth In Foster Care: A Guide for Lawyers and Judges, written by Mimi Laver and Andrea Khoury with the ABA Center on Children and the Law. It is available online at http://www.abanet.org/child/lgbtq.shtml.

In addition to these resources, I want to share some words of wisdom from Marian Wright Edelman:

Child poverty and neglect, racial disparities in systems that serve children, and the Cradle to Prison Pipeline are not acts of God. They are America’s immoral political and economic choices that can and must be changed with strong political, corporate, and community leadership.

Source: The Sea is so Wide and my Boat is so Small — Charting a Course for the Next Generation

We all have a responsibility to help make the “CHANGE” she describes wherever we find ourselves day to day.

At the preliminary hearing, A.B.-B. was not entitled to a jury trial A.B.-B.'s request for a jury trial. When A.B.-B. was 13 years old, the Juvenile Not Entitled to Jury Trial Delinquency Petition Does Not Include Explicit Violence Charge. Revised Statute 18-3-405(1) (Colo. Ct. App. 2009). When Delinquency Petition Does Not Include Explicit Violence Charge. People ex rel. A.B.-B., 215 P.3d 1205 (Colo. Ct. App. 2009). Ultimately, the State decided not to pursue those charges and opposed A.B.-B.'s request for a jury trial. According to the court, the underlying theme of a delinquency proceeding is to provide guidance and rehabilitation for the child and protection for society, rather than fixing criminal responsibility on guilt and punishment. As such, the structure of a criminal proceeding and a delinquency proceeding are fundamentally different, and this allows the courts to allow a jury trial in one but not the other. Based on the statute, the only way for A.B.-B. to empanel a jury would be for him to have committed a crime of violence. In this case, A.B.-B. did not commit a violent crime that would afford him such a jury right. Although sexual assault on a child is a crime that receives sentencing enhancements for adults, it is only considered a permissible crime of violence in Colorado when the assault is part of a pattern of abuse. Thus, unless A.B.-B. exhibited a pattern of sexual abuse on a child, or unless he was charged with causing bodily injury to the victim (and/or utilized threats, intimidation, or force with the victim), the court maintained discretion to deny him a jury trial. In addition, the legislative history in Colorado demonstrates that there has been a significant curtailing in the right of a juvenile to empanel a jury. Beginning in 1983, the state legislature began removing instances where a juvenile could demand a jury trial. Today, juveniles are only entitled to a jury trial in a delinquency proceeding if charged as an aggravated offender or if charged with an offense that would be a crime of violence for an adult, as defined in Colorado Revised Statute 18-1.3-406. Because the charges at issue did not constitute a violent crime under the statute, the trial judge did not abuse its discretion in ordering a bench trial. Accordingly, the Colorado Court of Appeals affirmed the judgment of the lower court.

Delinquency / Right to Jury Trial

Colorado Court of Appeals Holds Juvenile Not Entitled to Jury Trial When Delinquency Petition Does Not Include Explicit Violence Charge. The charges consisted of acts that, if committed by an adult, would constitute one count of sexual assault on a child that warrant the right to a jury trial. A.B.-B. contended that his constitutional right to a jury trial was unlawfully denied because he faced the same charges as an adult, but could not empanel a jury as an adult could. Reviewing the case de novo, the Colorado Third Division Court of Appeals disagreed with A.B.-B. First, the court noted that the constitutional guarantee to a jury trial has always applied to adults, but not always to juveniles. Colorado Revised Statutes § 19-2-107(1) does not always to juveniles. According to the court, the underlying theme of a delinquency proceeding is to provide guidance and rehabilitation for the child and protection for society, rather than fixing criminal responsibility on guilt and punishment. As such, the structure of a criminal proceeding and a delinquency proceeding are fundamentally different, and this allows the courts to allow a jury trial in one but not the other. Based on the statute, the only way for A.B.-B. to empanel a jury would be for him to have committed a crime of violence. In this case, A.B.-B. did not commit a violent crime that would afford him such a jury right. Although sexual assault on a child is a crime that receives sentencing enhancements for adults, it is only considered a permissible crime of violence in Colorado when the assault is part of a pattern of abuse. Thus, unless A.B.-B. exhibited a pattern of sexual abuse on a child, or unless he was charged with causing bodily injury to the victim (and/or utilized threats, intimidation, or force with the victim), the court maintained discretion to deny him a jury trial. The court adjudicated A.B.-B. delinquent and, he subsequently appealed. The juvenile court determined that A.B.-B. was not entitled to a jury trial by statute and chose not to exercise its discretion to grant him one. It then held a bench trial for the matter and found that the state proved its two counts beyond a reasonable doubt. The court adjudicated A.B.-B. delinquent, and he subsequently appealed. On appeal, A.B.-B. argued that the juvenile court erroneously denied his request for a jury trial. According to him, the adjudication was based on a finding that he committed acts that, if committed by an adult, would constitute two counts of sexual assault on a child that warrant the right to a jury trial. A.B.-B. contended that his constitutional right to a jury trial was unlawfully denied because he faced the same charges as an adult, but could not empanel a jury as an adult could. Reviewing the case de novo, the Colorado Third Division Court of Appeals disagreed with A.B.-B. First, the court noted that the constitutional guarantee to a jury trial has always applied to adults, but not always to juveniles. Colorado Revised Statutes § 19-2-107(1) does not allow a juvenile to empanel a jury in a delinquency proceeding, but only if the charge includes a crime of violence. According to the court, the

Cases

Dependency / Child Support Obligation Post Termination


Thereafter, a probate court entered an order appointing the child's paternal grandparents as his co-guardians. In conjunction with the guardianship order, the probate court entered a child support order, which required the mother to pay ongoing child support to the co-guardians, maintain health insurance for the child, cover a portion of the child's uninsured medical and dental bills, and make payments toward arrearsages from the district court's child support order. Two years after the probate orders were entered, the Department of Health and Human Services (the Department) brought a motion for relief from the child support order. The Department asserted
that its motion was prompted by the co-guardians’ request that the Department enforce the child support order. The probate court denied the Department’s motion for relief in part based on its belief that the termination of parental rights did not survive the subsequent dismissal of the child protection proceeding, and that therefore the mother has a continuing duty to pay child support. The Department appealed to the Supreme Judicial Court of Maine.

The termination of the mother’s parental rights formed one of the bases for the Department’s motion, in which it requested a finding that the circumstances of jeopardy had been ameliorated. The court found that the district court’s order dismissing the child protection proceeding contained a finding that the circumstances of jeopardy were ameliorated, but it did not refer specifically to the prior parental rights termination order.

The Supreme Judicial Court found that there is no time limit on a motion for relief from a judgment that is void; the motion was therefore properly before the probate court.

The effect of an order terminating parental rights is provided by statute. Because the issue involved statutory interpretation, the Supreme Judicial Court reviewed the order de novo. The relevant Maine statute states, “An order terminating parental rights divests the parent and child of all legal rights, powers, privileges, immunities, duties and obligations to each other as parent and child, except the inheritance rights between the child and his parent.” The court noted the plain language of the statute mandates that a termination order sever the relationship between parent and child. In re Melanie S., 1998 ME 132, P6, 712 A.2d 1036, 1037. A person whose parental rights have been terminated is no longer a legal parent to the child and has no duty to provide ongoing support for the child. The court found that the mother was relieved of her obligation to pay ongoing child support after her parental rights were terminated.

The court vacated the probate court’s judgment because the child support order was void and remanded for the probate court to grant the Department’s motion for relief.

Delinquency / Trying Juvenile as Adult

Connecticut Supreme Court Upholds Adult Trials and Adult Sentences Against Juvenile Offenders. State v. Carrasquillo, 962 A.2d 772 (Conn. 2009)

In July 2003, 15-year-old P.C. was arrested and charged with the murder of a 17 year-old. In the state of Connecticut, murder is a class A felony. Connecticut General Statute
§ 46b-127(a) provides that a child of 14 or 15 years of age charged with a class A felony “shall be tried and sentenced as an adult.” Based on P.C.’s age and this statutory mandate, the trial court transferred P.C.’s case from a juvenile to an adult criminal docket.

Prior to trial, P.C. filed a motion to dismiss, or, in the alternative, to transfer his case back to the juvenile docket. He maintained that his automatic transfer to the adult criminal docket pursuant to § 46b-127(a), and his exposure to the same 25 year mandatory minimum sentence applicable to persons 16 years or older under Connecticut General Statute § 53a-35a(2), constituted cruel and unusual punishment in violation of the Eighth Amendment.

P.C. relied on the United States Supreme Court’s holding in Roper v. Simmons, 543 U.S. 551 (2005), that outlawed imposition of the death penalty against minors under the Eighth Amendment. P.C. analogized the three Roper characteristics that “distinguish juvenile offenders from adult offenders.” (1) immaturity and an underdeveloped sense of responsibility; (2) susceptibility to peer pressure and negative influences; and (3) transitory personality traits. He maintained that the Roper characteristics applied in his case and, accordingly, that he could not be tried or sentenced as an adult under this standard. P.C. thus filed a motion to dismiss the case.

The trial court denied his motion to dismiss, explaining that Roper only applied to the imposition of the death penalty. Following a trial on the matter, a jury found P.C. guilty of murder. P.C. then filed a motion for reconsideration of the court’s denial of his motion to dismiss. The trial court granted the motion, and he again presented his arguments under Roper. The trial court again rejected his claims, upheld the jury verdict, and imposed a 35 year sentence on him. In its ruling, the court reasoned that, under Roper, if a sentence of life imprisonment without the possibility of release for a juvenile defendant does not violate the Eighth Amendment, then the defendant’s exposure to a mandatory minimum sentence of 25 years’ imprisonment cannot be unconstitutional.

On appeal to the Connecticut Supreme Court, P.C. maintained his previous claims under Roper, that the Eighth Amendment prohibits imposition of adult trials and adult sentences on youth offenders. The court rejected his arguments, upholding the trial court’s interpretation that Roper only applies to imposition of the death penalty against juvenile offenders. The Roper ban does not apply to all adult trials or adult sentences imposed on a juvenile. Because of the nature of his offense, and based on the State’s statutory scheme, the trial court properly transferred P.C.’s case to the criminal docket.

In addition, as noted by the trial court, the Supreme Court in Roper upheld a life sentence without possibility of release against the juvenile in place of the death penalty. Thus, according to the Connecticut Supreme Court, if a juvenile can be lawfully imprisoned for a life term, then he can be imprisoned for a 35-year term. In addition, the court noted that the trial court mitigated P.C.’s sentence based on his age and other factors presented by his counsel. Instead of receiving a 50-year sentence, he only received 35 years.

Accordingly, the Connecticut Supreme Court affirmed the decision of the trial court.

Dependency / Reunification


When K.W. gave birth to N.W. both the mother and child tested positive for amphetamines. K.W. admitted that she had used drugs and alcohol while pregnant and that she needed treatment. N.W. was removed from her care and placed in the care of an aunt. K.W. agreed to participate in a reunification plan that included participation in the Substance Abuse Recovery Management System (SARMS).

SARMS requires that parents attend aggressive substance abuse treatment that includes counseling, therapy, education, support groups, and random drugs testing. Every 30 days, the court holds a review hearing to assess the parent’s compliance with the program. Parents who fail to comply with SARMS as part of their reunification plan are not only denied reunification, but also face contempt charges and a fine or up to five days in jail. K.W. was informed of the program requirements and the possibility of facing contempt and jail time if she did not complete the program.

When K.W. entered SARMS in July, she tested positive for methamphetamines and was directed to attend outpatient counseling five times each week. However, she frequently missed appointments, did not stay in contact with SARMS, and refused drug tests. The juvenile court issued a warrant when she failed to appear at her first review hearing and three months later, K.W. was removed from the SARMS program.

In December, K.W. attended a hearing on a petition to change her son’s placement. She admitted to violating the terms of her SARMS program and the court thereby found her in contempt on 60 counts of noncompliance with SARMS. The court then ordered her to five days in jail for each violation, totaling 300 days. The court agreed to stay the judgment on the condition that K.W. enter and complete a residential treatment program. However, she failed to enter a program and also failed to appear at a six-month review hearing. As a result, the court issued an arrest warrant for her failure to appear.

Two weeks after her arrest, K.W. appeared in court. Because she had failed to keep her promise to enter treatment, the court lifted the stay and sentenced K.W. to 300 days in jail. The court was persuaded to release K.W. after only 32 days when all counsel, including counsel for the Agency and for the child, argued that incarceration was meaningless because her parental rights had already been terminated.

The court of appeal heard her appeal and found that the juvenile court does indeed have the authority to order parents to participate in substance abuse treatment. Dependency proceedings aim to protect the child. The law has a strong preference for maintaining family relationships when possible, and does so through the reunification process. As part of reunification, the child and parents
receive child welfare services. When drug or alcohol abuse led to the child's removal from the home, participation in substance abuse treatment services are a reasonable condition to reunification.

However, the court of appeals found that the juvenile court cannot punish a parent for contempt solely because that parent failed to comply with the treatment. Not every violation of a court order constitutes contempt. Contempt only extends to those violations that impair the dignity or functioning of the court. Reunification orders are not limited to controlling an individual's conduct in court. Unlike probationers under the supervision of a criminal court, parents have not committed a crime. The court intervenes to protect the child, not to punish the parent. Parents voluntarily agree to a reunification plan in order to avoid losing their children. The court held that the consequence of parental failure in the dependency system is loss of parental rights, not jail.

The court can intrude on individual liberty by putting conditions on the ability to reunite with the child. However, the court cannot force the parent to participate in services. Parents can choose to forgo reunification and give up parental rights entirely. Although the law and the courts may prefer reunification of the family, the child's interest is not served by forcing parents to take on parental responsibilities that they cannot or do not want to accept.

Nothing in the California dependency statutes imposes a duty upon parents to participate in services. To the contrary, the statutes repeatedly make clear that the punishment for failure to comply with a reunification plan is the loss of parental rights. On the other hand, violations such as taking the child without permission or placing the child in danger during visitation can constitute contempt because those actions interfere with

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the court’s authority over the child and the child’s safety.

**Delinquency / Sentencing Due Process**


In December 2004, 15 year-old D.H. was arrested for firing a gun multiple times into a crowd, killing one person and injuring several others. Afterwards, D.H. was indicted for murder with a firearm, attempted murder with a firearm, and felonious assault with a firearm.

Due to his age, D.H. was subject to a discretionary adult sentence pursuant to Ohio R.C. 2152.11 and 2152.13. A serious-youthful-offender disposition consists of a “blended” sentence: a traditional juvenile disposition and a stayed adult sentence. Under this statutory framework, the court may enforce the adult portion of the sentence at a later time if the juvenile commits certain acts indicating that the juvenile disposition has been unsuccessful in rehabilitating him.

D.H. elected to have a jury trial under the serious-youthful-offender statute, and the jury ultimately adjudicated him delinquent for committing reckless homicide and for possessing and/or using a firearm in the commission of the offense. In February 2006, the juvenile court held a sentencing hearing to determine whether to impose a blended sentence. The judge decided to impose such a sentence, but explicitly stayed the adult portion of the sentence pending successful rehabilitation under the juvenile portion. The judge noted that having the adult sentence hanging over his head may serve as a deterrent to potential future crime involvement.

D.H. appealed to the Franklin County Court of Appeals, arguing that the trial court erred when it imposed an adult sentence upon him by making predicate findings that were constitutionally improper for the court to make under State v. Foster, 845 N.E.2d 470 (Ohio 2006). D.H. argued that only a jury can make the factual determinations required to impose a discretionary adult sentence.

The Court of Appeals affirmed, holding that the juvenile court did not make its findings in violation of either the Sixth Amendment to the United States Constitution or Blakely v. Washington, 542 U.S. 296 (2004). In addition, the court rejected D.H.’s assertion that the juvenile court overstepped its constitutional bounds by imposing more than the minimum sentence of the adult portion of the sentence.

On appeal to the Ohio Supreme Court, the certified question for review was whether constitutional jury trial rights, as articulated under the Sixth Amendment and in Foster and Blakely, also apply to a juvenile court’s imposition of the adult portion of a blended juvenile/adult sentence under Ohio’s serious youthful offender statute.

The Ohio Supreme Court rejected D.H.’s claim, holding that the right to a jury trial does not apply in a pre-Foster sentencing, even though the sentence imposed was a blended one. Although the juvenile court made findings under the Ohio adult felony sentencing statute, the juvenile’s right to a jury was satisfied when he had the jury trial. As such, the act of removing the jury from the disposition sentencing process did not violate D.H.’s due process rights.

In addition, the court held that leaving the determination of how the juvenile fit within the system, and whether the system was actually equipped to deal with him, did not offend any fundamental fairness guarantees. The juvenile system’s overall goal is to rehabilitate youth offenders, not to simply punish them. As such, fairness must be measured against this overarching goal. Because the adult portion of D.H.’s sentence may never be enforced, the juvenile court did not violate any Sixth Amendment rights by imposing this sentence.

The Ohio Supreme Court affirmed the juvenile court’s determination.

**Family Law / Nonparent Custody**


Mother voluntarily left her two year old daughter in the care and custody of the child’s maternal grandfather. Meanwhile, Mother lived at various other locations while keeping custody of, and caring for, her son. When the daughter was six years old, the child’s aunt began to reside with the grandfather and helped care for the child. When the child was 12 years old, an order was entered with the mother’s consent granting her and the aunt joint custody and physical custody with the aunt. Three years later, when the daughter was 15 years old, the mother sought to modify the prior custody order by petitioning for sole custody.

Although the family court found that the child had been in the custody of nonparents for 12 or 13 years and the child clearly expressed a wish to remain with her aunt, the family court concluded that the extraordinary circumstances needed for a nonparent to prevail in a custody dispute did not exist such that consideration of the child’s best interests was not warranted. As a result, the family court granted the mother’s petition to modify the prior custody order. Aunt appealed.

A biological parent’s superior right to the custody of his/her child may be overcome by proof of, among other things, an “extended period of the nonparental custody, the attachment of the child to the custodian, and the child’s imminent attainment of majority” Matter of Bennett v Jeffreys, 387 N.Y.S.2d 821 (1976). Relevant “factors to be considered include the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the biological parent allowed such custody to continue without trying to assume the primary parental role.” Matter of Bevins v Witherbee, 798 N.Y.S.2d 245 (2005).

In addition to a prior consent order granting custody to the aunt, the court found evidence establishing that the mother surrendered custody of her child to others for the majority
whether the child’s interests would
Because of the extraordinary circum-
the court found that these factors
equently demonstrate an extraordi-
Because of the extraordinary circum-
stance, the court found that the
lower court should have determined
whether the child’s interests would
best be served by continuing custody
with the aunt or changing custody to
the mother. Thus, the court reversed
the order and remitted the matter to
the family court to determine the best
interests of the child while continuing
physical custody of the child with the
aunt pending the further proceedings.

Delinquency / Orders Against Parents
Utah Supreme Court Holds Ordering
C.M., the daughter of Mr. Moreno, was
adjudicated delinquent for possession of marijuana and attempted possession of methamphetamine. The juvenile court adjudicating her
case later sent C.M. to detention for violating her probation when she
tested positive for marijuana. As part of her delinquency adjudication, the
court ordered that her father complete a urinalysis and hair test for illicit
Drugs that same day.
The juvenile court justified its order
for a drug test with four findings.
First, Mr. Moreno was considered a
threat to law enforcement. Second,
Mr. Moreno’s parents considered him
an alcoholic. Third, domestic distur-
bances had reportedly occurred in

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other advocacy efforts. The award is presented annually at
the NACC National Juvenile and Family Law Conference.

To nominate an outstanding legal advocate,
please submit the following documents:

• Completed Nomination Form
• Nomination Letter, which highlights:
  » the nominee’s activities on behalf of children that
  have significantly promoted the protection and welfare
  of children,
  » the history of the nominee’s involvement in
  child advocacy work,
  » the nominee’s affiliation with children and youth
  service organizations, and
  » other relevant information.
• Nominee’s Curriculum Vitae / Resume
• A list of nominee’s affiliations with other children and
  youth service organizations
• Any supporting materials, such as: letters of support,
  photographs, newspaper clippings, narratives, or other
  items describing the candidate’s efforts

Nominations must be received by August 1, 2010.
Send Nominations via email to Kellogg.Anne@tchden.org,
fax to 303-864-5351, or mail to NACC, 13123 E. 16th
Ave., B390, Aurora CO 80045
their home. Lastly, police records indicated that Mr. Moreno evaded the police on one occasion, although he never received charges for it.

Mr. Moreno failed to appear for his drug testing as ordered by the juvenile court, so he was placed under contempt of court under Utah Code section 78A-6-1101. At a hearing on the charge, Mr. Moreno pled guilty, and the court stayed his $300 fine and thirty days in jail on the condition that he submit to all future random drug tests. Mr. Moreno then completed, and passed, a drug test. After this, the court attempted to force Mr. Moreno to undergo another drug test, but he refused. Thus, the court placed him under contempt again, but Mr. Moreno failed to attend his contempt hearing. Accordingly, the juvenile court issued a warrant for Mr. Moreno’s arrest and reinstated the 30 day jail term.

Mr. Moreno subsequently filed a motion to dismiss the second contempt charge, and at the same time moved to vacate his guilty plea to the first charge. He maintained that the juvenile court exceeded its jurisdiction over a minor’s parents by forcing him to submit to drug testing. He argued that under Utah Code section 78A-6-108(6), a juvenile court may only require a parent to undergo physical testing, and only in cases concerning child custody and child welfare. In the alternative, Mr. Moreno argued that forced submission to drug testing was not a “reasonable condition” the juvenile court could impose under Utah Code section 78A-6-117(2)(p)(i) since the court had no reason to suspect Mr. Moreno of using drugs. Finally, Mr. Moreno argued that drug testing violated his Fourth and Fifth Amendment rights.

The juvenile court denied both motions to dismiss, and Mr. Moreno appealed to the Utah Supreme Court. In framing the issue before it, the court concluded that, under statute, a juvenile court retains subject matter jurisdiction over a minor’s parents, and that it may impose conditions on those parents under the statutes set forth by Mr. Moreno. The question, however, is whether the conditions in this case were reasonable.

The Utah Supreme Court noted that the stated purpose of the juvenile court and its authority over parents is to further the best interests of the child at issue. Therefore, juvenile court orders may not be aimed at punishing the parent, and there must be some nexus between the actions of the parent that are to be constrained by the court’s conditions, the behavior of the minor which created the need for adjudication, and the court order.

In considering the reasonableness of the juvenile court order and the nexus between the parent, the child, and the order, the Utah Supreme Court evaluated the meaning of punishment, the constitutional rights invoked, and considered examples of this required connection in other delinquency matters.

The court concluded that the juvenile court had subject matter jurisdiction over Mr. Moreno, but that the order to undergo drug testing was not reasonable. Absent probable cause to believe Mr. Moreno was actually using drugs, the court’s order conflicted with his established rights under the Fourth Amendment. In this case, the juvenile court did not have probable cause to this effect, so the order could not be considered a reasonable condition under Utah Code sections 78A-6-117(2)(p)(i) and (t).

Accordingly, the Utah Supreme Court reversed the decision of the juvenile court.

**Amicus Curiae Update**

**People v. Gabriesheski, 2009 Colo. LEXIS 417 (Colo. Apr. 27, 2009).**

The National Association of Counsel for Children, and signatories Rocky Mountain Children’s Law Center and the University of Colorado Law School’s Juvenile and Family Law Program, filed an amicus curiae brief in *People v. Gabriesheski* before the Colorado Supreme Court. The issue before the court is whether the Colorado Court of Appeals erred in concluding that conversations between a child and her guardian ad litem in a dependency and neglect case are confidential communications protected by attorney-client privilege. The brief supports the Colorado Court of Appeals opinion, which held that the child is a client of the Guardian ad Litem (“GAL”) and that professional and ethical duties of confidentiality and privilege apply. The trial court and the court of appeals held that in representing a child, a GAL also represents the child’s best interests.

Further, the brief argues that a GAL acts as both advocate and guardian, employing all her legal skill to advance the child’s interests zealously and expeditiously while exercising a higher degree of objectivity than in a traditional client-directed relationship.

The court of appeals’ holding gave full effect to the public policy in Colorado of providing high quality legal representation to children involved in dependency and neglect proceedings. Along with competency, confidentiality and privilege are cornerstones of high quality legal representation. Confidentiality and privilege enrich the GAL-child relationship by providing children a unique and open line of communication that encourages them to speak freely and frankly. Confidentiality likewise aids and guides the GAL in fulfilling her duty to investigate and develop the case fully. The brief asserts that this is all the more significant in dependency cases where the compelling interests of the state, children, and parents are uniquely complex, at times divergent, and always at stake.

**Amicus curiae** brief available at: www.NACCChildlaw.org.
# NACC – Publications Order Form

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Fall 2009
2009 was a busy and productive year for the Child Welfare Law Attorney Specialty Certification Program. The following are highlights of the year:


- The NACC certified 93 attorneys as Child Welfare Law Specialists, for a total of 234 CWLS in California, Connecticut, Iowa, Michigan, New Mexico, North Carolina, Tennessee, and Washington D.C. Please click here to see a list of all 234 CWLS: www.naccchildlaw.org/?page=Certification.

- The NACC received a total of 174 new applications in 2009, up from 132 applications in 2008 and 80 applications in 2007. Eligible applicants will take the Certification Exam in the Spring 2010.

- The NACC offered the Red Book Training at the NACC Annual Conference in Brooklyn, NY, and three times in Texas as part of the NACC Texas Training Series. The Red Book Training is a one-day Child Welfare Law and Practice survey course. The course follows Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect and Dependency Cases covering the major competency areas of dependency practice. The Training prepares attorneys for the NACC Child Welfare Attorney Certification Exam.

If you are an attorney in one of the fourteen open jurisdictions, the application deadline to be considered for the Spring 2011 exam is May 31, 2010. Please visit the NACC website to download the NACC Child Welfare Law Program Summary and request an application.

For more information about the NACC Child Welfare Law Certification Program, please visit the NACC website: www.NACCchildlaw.org.
Since the previous Guardian update, Congress advanced health care reform legislation (including home visiting provisions) and early learning legislation.

Health Reform Bills/ Voluntary Home Visiting Legislation

President Obama included in his FY 2010 Budget proposal a new (capped entitlement) federal formula grant to states of $8.6 billion over 10 years, for evidence-based voluntary home visitation.

Two provisions that support evidence-based voluntary home visiting were included as a part of health care reform legislation (H.R. 3962) passed by the U.S. House of Representatives on November 7: an early childhood home visitation grant program through the Administration on Children and Families in the federal Department of Health and Human Services with a capped entitlement funding level of $750 million over 5 years, as well as a state option for nurse home visitation in the Medicaid program.

In mid-October, the Senate Finance Committee completed its consideration of health reform legislation, which included an early childhood, voluntary home visitation grant program through the Maternal and Child Health Bureau in HHS with a capped entitlement funding level of $1.5 billion over 5 years. In late November, Senate Majority Leader Reid unveiled the health reform legislation for Senate floor debate (the Senate version of H.R. 3590), which included the early childhood home visitation language.

The House-passed and Senate (pending) health care reform bills would obviously also have significant impacts on children's physical and mental health coverage. The precise nature and extent of those impacts are dependent upon the provisions of the bill as enacted. The complexity of those issues preclude meaningful presentation in this brief update, but interested individuals may want to see a recent fact sheet on children's coverage in House and Senate health reform bills, from the Georgetown University “Center for Children and Families”: http://ccf.georgetown.edu/index/children-in-health-care-reform. [The Senate floor debate on health care reform legislation is in progress as this column is being written.]

Fiscal Year 2010 Budget and Appropriations

In late February, President Obama submitted his first budget outline (for FY 2010) to Congress; a more detailed budget was submitted in early May. The budget included continued funding for most current programs that benefit court-involved children and families, as well as new initiatives in education (including early learning, see below), health care and home visitation (see above). The House and Senate passed the final Congressional Budget Resolution for FY 2010 (S. Con. Res. 13) on April 29, largely following the contours of the President's budget outline. The full House and the Senate Appropriations Committee completed action on the two FY10 appropriations bills that include most of the programs that directly affect court-involved children and families: the Labor/Health and Human Services/Education bill in July and Commerce/Justice/Science bill in June, largely following the President's proposed budget. The Senate then passed the Commerce/Justice/Science appropriations bill on November 5, without significant changes. Senate floor action on the Labor/HHS/Education appropriations bill has not yet been scheduled.

Early Learning Challenge Fund Legislation

H.R. 3221, a higher education bill that includes provisions to implement a new early learning challenge fund initiative of President Obama, was introduced in mid-July, and marked up and reported out by the House Education and Labor Committee in late July. The full House of Representatives passed H.R. 3221 in mid-September. The bill would provide one billion dollars per year over eight years to provide state challenge grants to improve the quality of early learning programs around the country, with a focus on ensuring that more low-income children, birth to age five, are in higher quality early learning programs. Senate action in the Health, Education, Labor and Pensions Committee (now chaired by Senator Harkin of Iowa) is expected after Senate floor action on health reform is completed.

Child Safety in Boot Camps and other Private Residential Programs

H.R. 911, the Stop Child Abuse in Residential Programs for Teens Act of 2009, was voted out of House Education and Labor Committee on 2/11/09, and was adopted (under suspension of the rules) by the full House of Representatives by a vote of 295-102 on 2/23/09; a similar bill had passed in the House Appropriations Committee on 1/22/09; and was adopted (under suspension of the rules) by the full Senate. The legislation sets minimum standards for boot camps and other private residential programs as well as civil penalties for violation of those standards, and provides for federal oversight of such programs, including mandates that complaints of child abuse/neglect in the programs be investigated. No Senate action has been scheduled.
Gangs Legislation
On 1/6/09, Senators Feinstein and Hatch reintroduced the latest version of their “gangs bill” as S. 132. This bill includes mandatory minimums and other enhanced penalties, and increased federalization of gang crime, although the bill now also includes some prevention resources, and no longer has the previously-included section providing for expanded prosecution of juveniles as adults in federal court. Companion legislation in the House, H.R. 1022, was introduced on 2/2/09 by Reps. Schiff and Bono Mack. No House or Senate Judiciary Committee markup of any of these bills has been scheduled.

On 2/13/09, the Chairman of the House Judiciary Subcommittee on Crime, Rep. Bobby Scott, introduced the Youth PROMISE Act, H.R. 1064, along with Rep. Castle and several other cosponsors; the bill now has over 230 House cosponsors. The bill would support a variety of proven-effective prevention and intervention approaches to reduce youth involvement in gangs and violent crime. The Senate companion legislation, S. 435, was introduced on 2/13/09 by Senators Casey and Snowe. A House hearing on the Youth PROMISE Act was held in the House Judiciary Subcommittee on Crime on July 15th. House markup of H.R. 1064 was held in the full Judiciary Committee on December 2. No date for House floor consideration has been set.

Juvenile Justice Reauthorization Bills
On 3/24/2009, S. 678, a bill to reauthorize and improve the Juvenile Justice and Delinquency Prevention Act, was introduced by Senators Patrick Leahy, Herb Kohl, and Arlen Specter. The Senate Judiciary Committee is expected to consider the bill on December 10, but no House companion bill has been introduced yet. On 3/16/2009, Rep. Bobby Scott (Chairman of the House Judiciary Subcommittee on Crime) introduced a simple reauthorization bill (H.R. 1514) for the Juvenile Accountability Block Grants (JABG) program; no markup has been scheduled yet, and no Senate companion bill has been introduced at this time.

For further information on any federal legislation (including copies of bills, copies of committee reports, floor votes, etc.), visit www.Thomas.loc.gov

The Fifteenth Annual Rocky Mountain Child Advocacy Training Institute 2010
Persuasive Advocacy in Cases Involving Children
May 17–21, 2010 NITA National Education Center • Louisville, Colorado

The Rocky Mountain Child Advocacy Training Institute is a unique hands-on, learn-by-doing trial skills training. You will learn through lecture, demonstration, discussion, and participatory workshops. The combination of formats helps to ensure the most effective learning for each of the variety of trial skills presented over the course of five days. The majority of workshops place you in a simulated courtroom setting where you will perform as a trial lawyer. You will receive feedback from instructors with significant courtroom and teaching experiences. Expert regional and national teachers, judges and trial lawyers serve as faculty for this special advocacy training program.

Specific workshops include:
• Questioning techniques for direct and cross examination
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• Using exhibits in direct and cross examination
• How to control difficult witnesses
• Ethics and professionalism

Space is limited. For more information, call toll free 1-888-828-NACC or visit www.NACCchildlaw.org.

NACC members receive a 20% registration discount.

Presented by:
• The National Association of Counsel for Children
• The National Institute for Trial Advocacy
• The Rocky Mountain Children’s Law Center
The Guardian is Going Green!

Beginning in 2010, The Guardian will be available electronically only. We appreciate any suggestions you have regarding how the new electronic version may best serve you. We encourage feedback regarding both substance and structure/format. Please submit comments to advocate@NACCchildlaw.org.

NACC Call for Abstracts. The NACC is soliciting abstracts for presentations at its 33rd National Juvenile and Family Law Conference, October 20-23, 2010, in Austin, TX. For more information, please visit: www.NACCchildlaw.org. Submissions must be submitted online, and received by April 1, 2010.

NACC 2010 Outstanding Legal Advocacy Award. Nominations for the 2010 Outstanding Legal Advocacy 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: advocate@NACCchildlaw.org, or NACC Awards, 13123 E. 16th Ave., B390, Aurora, CO 80045. The deadline is August 1, 2010.

NACC 2010 Law Student Essay Competition. The NACC is accepting essays for the 2010 Law Student Essay Competition. The winning essay will be published in the 2010 Children’s Law Manual, and the winner will be given $1,000, a one-year NACC membership, and a scholarship to the 2010 conference in Austin, TX! Essays will be evaluated on the importance of the topic to advancing the legal interests of children, persuasiveness, and quality of research and writing. Essays should be submitted electronically to Kellogg.Anette@tchden.org. The deadline is July 1, 2010.

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 on a variety of children's law issues. To join, send an email to: advocate@NACCchildlaw.org, and request to be added.

NACC Child Welfare Law Attorney Certification is now open in the following 14 jurisdictions: California, Colorado, Connecticut, District of Columbia, Georgia, Iowa, Michigan, New Hampshire, New Mexico, New York, North Carolina, Tennessee, Texas, and Utah. For more information on applying in one of these states, contact the NACC or visit: www.NACCchildlaw.org.

The Detroit Center for Family Advocacy (CFA): CFA, which opened in July 2009, provides legal advocacy and social work services to low-income families to prevent the unnecessary placement and prolonged stay of children in foster care. By doing so, the CFA aims to keep children safe with their families, minimize the emotional trauma caused by removal, and allow the foster care system to focus its resources on children who need its protection. More information is available at: www.law.umich.edu/centrandsprograms/ccl/cfa/Pages/default.aspx.

May 17–21, 2010, Louisville, CO: NACC 15th Annual Rocky Mountain Child Advocacy Training Institute. Presented by the NACC, the National Institute for Trial Advocacy, and the Rocky Mountain Children’s Law Center. This is a five-day intensive professional trial skills training program for lawyers who practice child welfare law. Participants learn a variety of trial skills through lecture, demonstration, discussion, and participatory workshops. The majority of the training takes place in a simulated courtroom setting, where participants perform as trial lawyers. NACC Members receive a 20% discount on tuition. For more information, please visit www.NACCchildlaw.org.


October 20–23, 2010, Austin, TX: NACC 33rd National Juvenile and Family Law Conference, Austin,
TX. For more information, visit: www.NACCchildlaw.org.

Publications

Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect and Dependency Cases (The Red Book). Please see the ad in this issue or contact Bradford Publishing at: 800.446.2831, or www.bradfordpublishing.com. NACC members receive a 20% discount.

Standing at the Forefront: Effective Advocacy in Today’s World, the 2009 edition of the NACC Children's Law Manual Series. The 2009 Children’s Law Manual is a compilation of articles authored by presenters and produced in conjunction with the National Juvenile and Family Law Conference. To order, call 888.828.NACC, use the Publications Order Form in this issue, or order online at: www.NACCchildlaw.org.

NACC Children’s Law Manual Series, past editions available. To order, call 888.828.NACC, use the Publications Order Form in this issue, or order online at: www.NACCchildlaw.org.


The Dependency Quick Guide (Dogbook). The California Administrative Office of the Courts Center for Families, Children, and the Courts has recently developed a new reference manual for attorneys representing parents and children in juvenile dependency proceedings. The guide is divided into three major parts: Hearings, Fact Sheets, and Summaries of Seminal Cases. It is designed to provide guidance and short answers to common problems that attorneys face. Available at: www.courtinfo.ca.gov.

NACC Child Welfare Law Office Guidebook: Best Practice Guidelines for Organizational Legal Representation of Children in Abuse, Neglect, and Dependency Cases (The Blue Book). Created as part of the NACC Children’s Law Office Project (CLOP), the Blue Book is a collection of 33 best practice guidelines intended to move child welfare law offices toward model practice. It is organized by three areas of operation: administration, development, and program. Within these categories are guidelines and commentary developed by the CLOP staff and advisory board to promote best practices in the delivery of legal services to children. Limited numbers of hard copies are available for $20 each by contacting the NACC. The searchable electronic version is available at no charge at: www.NACCchildlaw.org.

Where Are All the Children? Increasing Youth Participation in Dependency Proceedings, by Erik Pitchal. This article considers the absence of foster children from juvenile court cases that decide their future and present a framework for thinking about how to increase their engagement. This article is available at: http://epitchal.googlepages.com/prof.eriks.pitchal.


Publication – Review

Book Review, by Robert Lowenbach, Senior Judge in Residence, Colorado Court Improvement Program:

Three Little Words is a must read for anyone associated with the child welfare system. As professionals we sometimes become insulated from the lives of the children who we seek to protect. The author, who was in the state’s care from the age of 4 until she was adopted at age 13, gives us insight into the realities children face while living in foster care and the struggles they experience in finding their place in their new forever homes (should they be fortunate enough to find one).

During her years in foster care Ashley experienced some good and empathic caretakers, some who were quirky as well as one foster mother who was as wicked as a fairy tale witch. She experienced a judicial and child welfare system that was overworked, and in her view incompetent and uncaring. More than anything, what comes through in her account is her sense of powerlessness to protect herself and her younger brother when the state should have been doing that job.

There is one hero in her life as a foster child — her CASA. She fought for Ashley and her brother to extricate them from a system from which Ashley thought she could never escape.

Ashley’s three little words are not what you think. When Ashley was 13 she attended her adoption hearing and since she was of the age where her consent to the adoption was necessary, the judge said to her, “Ashley, would you like to sign the papers so that we can make this official?” Her reply was to shrug her shoulders and say, “I guess so.” In three little words it was done.

Career Center

NACC members have access to our online Career Center. Non-members may post openings, but only members may post their resumes and receive alerts regarding new job postings. Access the Career Center at: www.NACCchildlaw.org/networking/

NACC Law Student Internship Program: NACC is hiring interns for 2010. Unpaid / school credit only. NACC interns are responsible for: Assisting with substantive legal matters in conjunction with the Staff Attorney and President/CEO, including conducting research and providing referrals for the National Children’s Law and Advocacy Resource Center, assisting in
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Robin Nash Fellowship Program:
The Barton Child Law and Policy Clinic at Emory University School of Law has a one year post graduate fellowship for recent law school graduates to work with the clinic on issues of child neglect and abuse. More information is available at: www.naccchildlaw.org/networking/opening.asp?id=72082.

Please send children’s law news and job openings to: The Guardian, 13123 East 16th Avenue, B390, Aurora, CO 80045
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New York Association of Counsel for Children (NYACC)

New York Association of Counsel for Children (NYACC)

At the NACC annual board meeting in August, the NACC Board of Directors approved New York’s charter! To join or for more information, please contact Tamara Steckler at tasteckler@legal-aid.org.

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NACC member dues cover only a fraction of operating expenses and we must continually seek support to bring you the high quality programs and services you currently enjoy. Your generous contributions support not only our publications and infrastructure, but also provide training scholarships to new children’s law attorneys, and staff our resource center to respond to crisis calls from children and families.

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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 NACC and we will put you in touch with an affiliate in your area or work with you to form one. Affiliate development materials and a current list of affiliates with contact information are available on our website at www.naccchildlaw.org/about/affiliates.html.

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