IN THIS ISSUE

PRACTICE TIPS ............................................. 1
COUNSEL FOR CHILD VICTIMS OR WITNESSES IN CRIMINAL PROSECUTIONS
by John E.B. Myers

CASE LAW.................................................... 4
COLORADO COURT OF APPEALS LIMITS EXPERT TESTIMONY IN SHAKEN BABY CASES

FEDERAL POLICY UPDATE. ............................ 9
CHILD WELFARE AND JUVENILE JUSTICE FUNDING AND REAUTHORIZATION LEGISLATION

SEVENTH ANNUAL ROCKY MOUNTAIN CHILD ADVOCACY TRAINING INSTITUTE ....... 11
MAY 14–18, 2002 – DENVER, CO

CHILDREN’S LAW NEWS............................... 11
LEGAL ADVOCACY AWARD NOMINATIONS OPEN
JOB OPENINGS AT THE NACC

AFFILIATE NEWS ........................................ 15

NACC 25th National Children’s Law Conference
Sheraton World Resort – Orlando, Florida
September 26 – 29, 2002
# Table of Contents

## NACC PRACTICE TIPS
- Counsel for Child Victims or Witnesses in Criminal Prosecutions ............. 1

## CASES
- Foster Children / Class Action (10th Circuit) ........................................ 2
- Dependency / Concurrent Planning (North Dakota) .................................... 2
- Dependency / Emotional Harm (1st Circuit) ............................................. 3
- Adoption (Mississippi) ............................................................... 3
- Criminal Prosecution / Experts (Colorado) ............................................ 4
- Dependency / Sex Offender Registration (New Jersey) ............................ 5
- Mandatory Reporting (Ohio) .............................................................. 5
- Guardian Ad Litem / Bias (Montana) ..................................................... 6
- Ineffective Assistance of Counsel (Michigan) .......................................... 7

## FEDERAL POLICY UPDATE
- Child Welfare and Juvenile Justice Funding and Reauthorization Legislation ............................ 9

## POLICY NETWORK ................................................................. 10

## SEVENTH ANNUAL ROCKY MOUNTAIN CHILD ADVOCACY TRAINING INSTITUTE ......................................................... 11

## CHILDREN’S LAW NEWS .......................................................... 11
- Legal Advocacy Award Nominations Open ............................................. 12
- NACC Staff Job Openings ................................................................. 14

## AFFILIATE NEWS ............................................................... 15
- Current Listing of NACC Affiliates .......................................................... 15

## NACC MEMBERSHIP APPLICATION .......................................... 16

## NACC DEVELOPMENT FUND .................................................. 16

## NACC CONTRIBUTORS ............................................................. 17

## PUBLICATIONS ................................................................. Back Cover

## REFERRAL NETWORK ............................................................ Back Cover

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The Guardian is published quarterly by the National Association of Counsel for Children, Imhoff Pavilion, 1825 Marion Street, Suite 340 Denver, Colorado 80218
303-864-5320 • FAX: 303-864-5351
E-Mail: advocate@NACCchildlaw.org
Web Site: http://www.NACCchildlaw.org
Editor: Marvin Ventrell
Case Editor: Laoise King
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Subscription Price: The Guardian is sent to all members of the National Association of Counsel for Children. Membership in the organization is $75 annually. To join, send application on page 16 to National Association of Counsel for Children.

The Guardian is printed on recycled paper.

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Volume 24 • Number 1 • Winter 2002
Attorneys who represent children in juvenile and family court are accustomed to playing a pivotal role. The child’s attorney investigates the case, interviews the child and others, examines and cross-examines witnesses, and, in some jurisdictions, submits written recommendations to the court. In the relatively rare case where an attorney is retained or appointed to represent a child victim or witness in a criminal prosecution, however, the attorney’s role is dramatically different. Among the few cases to address the issue, the Utah Supreme Court’s decision in State v. Harrison, 24 P.3d 936 (Utah 2001) is among the most instructive. The Court reversed the defendant’s rape conviction because the minor victim’s appointed counsel took an active role in the trial. The Court stated that “[t]he role of the guardian ad litem in the criminal context involving a child victim is as limited as that enjoyed by the child’s parent or other legal guardian.” Id. at 945-946. The court wrote:

“[B]ecause the victim was not an interested party, her court-appointed representative, the guardian ad litem, should not have been permitted to sit at counsel table, either with the State or with defendant. It was error to allow it. Permitting the guardian ad litem to question witnesses and make objections was also error. Because a guardian ad litem does not represent an interested party in a criminal trial, the guardian ad litem is not permitted to further the interests of either the State or the defendant in a criminal case…. [T]he guardian ad litem’s participation may not include objecting to questions and questioning witnesses in a criminal trial…. “” Id. at 945.

The Court went on to hold that the child’s guardian ad litem may not make an opening statement or a closing argument. What then is the role of a child victim’s court-appointed guardian ad litem in a criminal case? The Harrison Court wrote that a guardian ad litem’s role “would be peripheral, and strictly limited to matters relating specifically to the treatment of the child victim, such as assuring that the victim received notice and opportunity to be present and heard as mandated by the victims’ rights statutes.” Id.

Another instructive case is People v. Pitts, 223 Cal. App. 3d 606, 273 Cal. Rptr. 757 (1990). The Pitts Court concluded that “upon a proper showing and with proper limitations, a trial court may permissibly appoint counsel for alleged child victim…..” 273 Cal. Rptr: at 907. Although the Court declined to articulate the necessary showing, it ruled that a hearing was necessary to address whether counsel should be appointed for a child victim or witness. If the hearing resulted in appointment of counsel, “the attorney’s role should be carefully spelled out…..” Id. at 909. The child’s attorney would not have the same “ability to control the proceedings, as the prosecutor or defense counsel.” Regarding pretrial matters, the Court wrote that a trial court:

“[C]annot appoint counsel for the minors who will in essence act as the prosecution’s agent, interfering arbitrarily with defense access to those children. While counsel will have ethical obligations toward the children as clients, counsel’s role under the statute will be more advisory in nature: for example, he or she may coordinate prosecution and defense contact with the children; advise the children and their guardians on whether they are required to submit to physical examinations, interviews, etc., and the consequences at trial (such as impeachment) that are likely to occur if they do not transmit their wishes to the court in appropriate circumstances, for example, in determining whether to order the children to submit to physical examinations, the trial court may properly consider the potential for psychological harm to the victim [citation omitted]; and be present, upon the children’s/guardians’ request, during any interviews of the children to ensure that neither party becomes abusive or overbearing toward the children. The attorney could also have input in fashioning any of the court’s orders, regarding discovery and other such matters, so as to minimize harm to the children. Depending on the circumstances of the case, counsel might also properly be involved in other aspects. He or she could not, however have the power to veto defense access to the children, requests for discovery, or the like, except as that power is vested in the children/their guardians and conveyed to the court through the attorney.” Id. at 909.

North Dakota law allows appointment of a guardian ad litem for a child who is a material or prosecuting witness in a sex offense prosecution. North Dakota Century Code § 12.1-20-16 (1997). “The guardian ad litem must receive notice of and may attend all depositions, hearings, and trial proceedings to support the minor…and advocate for the protection of the minor…but may not separately introduce evidence or directly examine or cross-examine witnesses.” Id. See also Florida Statutes Annotated § 914.17 (2002).

The role of a child victim’s counsel is dramatically different in criminal than in civil litigation. Yet, the much-diminished role of the child’s attorney in criminal cases is understandable.

Although crime victims are important, they simply are not parties. A criminal prosecution is and should be about the defendant, whose reputation and freedom are at stake. Moreover, courts are concerned that the child’s attorney will align with the prosecution, essentially ganging up on the defendant. That is what happened in the Harrison case.

Many communities have excellent victim/witness advocacy programs employing trained professionals to help crime victims through the twists and turns of the criminal justice system.
FOSTER CHILDREN / CLASS ACTION


In an opinion filed August 22, 2001, the Tenth Circuit Court of Appeals ruled that the Eleventh Amendment and the Younger abstention doctrine precluded foster children from pursuing claims against the New Mexico Children, Youth and Families Department. The foster children filed a petition for a rehearing, which was granted in part. On rehearing, the Tenth Circuit found that the Eleventh Amendment does not bar the claims of the foster children, but that the Younger abstention doctrine does bar some of the claims. The court remanded the case, ordering the district court to determine which claims pose problems under the Younger abstention doctrine.

DEPENDENCY / CONCURRENT PLANNING


In September of 2000, after a seven-year history with social services, a North Dakota trial court terminated the parental rights of S.D. (Mother) and R.H. (Father) to their two children. Mother appealed claiming, among other things, that the concurrent planning procedure used by the Cass County Department of Social Services (Department) was unconstitutional because it violated her right to procedural and substantive due process. Mother argued that reasonable efforts to reunify the child with the parents are unrealistic when the department is concurrently planning for permanent placement of the children with someone other than the parents.

Mother based her claim on a statement of a Department social worker who testified that once the permanency plan recommends termination of parental rights and adoption, termination becomes the agency’s top priority. The social worker also testified that reasonable efforts to reunify the children with their parents continue at the same time, because state law requires concurrent planning.

Mother contended that this practice deprived her of due process because the same social worker, whose duty it is to make a reasonable effort to reunify the family, was also working to terminate the parental rights. Therefore, Mother maintained that the Department did not make reasonable efforts to reunify her with her children once the decision was made to pursue termination of parental rights.

The court rejected Mother’s argument. The court stated that reasonable efforts require the Department to exercise due diligence to use appropriate and available services to meet the needs of the child and the family, and that in doing so, the child’s health and safety must be of paramount concern. The court also noted that the natural rights of parents to their children are fundamental and are constitutionally protected, however, these rights are not absolute or unconditional. The court stated that due process provides certain procedural protections before the parent-child relationship may be terminated.

The court held that the Department continued to make reasonable efforts to reunify the family, concurrent with proceeding in a timely manner to finalize the permanent placement of the child. Recognizing that the child’s health and safety are the paramount concern, the court held that Mother failed to establish how concurrent planning as applied by the Department violated her due process rights. The court, therefore, affirmed the lower court’s termination of parental rights.
DEPENDENCY / EMOTIONAL HARM


On March 29, 1999, the state of Illinois took 11 year-old L.G. into protective custody after allegations of abuse and neglect were made against her mother, Leslie G. (Mother). The state found L.G. and her three siblings (N.G., B.G. and A.G.) had been struck by their mother resulting in various welts, cuts and bruises on the children. Facts also supported allegations of excessive corporal punishment and substantial risk of physical injury to the children that was likely to cause death, disfigurement, emotional impairment or loss of bodily function. After a hearing the trial court ordered the children into protective custody.

The petitions were amended to add torture as a basis for a finding of abuse. At trial, evidence was presented that on February 23, 1999, Mother forced A.G., L.G., and B.G. to restrain the oldest child, N.G., while Mother beat N.G. into unconsciousness. N.G. was unconscious for more than an hour. The petition further alleged that Mother threatened the children with physical harm if they did not assist in restraining their siblings during beatings. A Catholic Charities supervisor who interviewed the children testified that the children admitted they were fearful the same thing would happen to them if they did not help Mother during the incident.

The trial court issued a finding of abuse and neglect on the basis of an injurious environment, physical abuse, substantial risk for injury and excessive corporal punishment. The trial court also found that the children had been made to witness the beating of N.G. by holding her down, but that N.G. was the only child who was tortured. Mother’s parental rights to all four children were later terminated.

On December 22, 1999, L.G., A.G. and B.G. filed a notice of appeal on the lack of a finding that they too had been tortured. Mother filed a brief arguing that the appeal was moot because her parental rights to the children had been terminated. The children argued that the adjudicatory findings were important because they are guideposts for provision of services to children.

The Court of Appeals agreed, stating it could decide the issue because it fit the public interest exception to the mootness doctrine. The court stated that the exception applies when 1.) the issue is of a public nature, 2.) if there is a desirability of an authoritative determination for public officers, and 3.) if there is a great likelihood the issue will reoccur. Finding that these factors had been met, the court proceeded.

Absent case law defining “torture” in Illinois, and no clear definition as to the scope of “torture” in the Illinois Juvenile Court Act of 1987, the appeals court turned to dictionary definitions of “torture” for guidance. The court cited two such definitions in their opinion. Random House College Dictionary Revised Edition 1387 (1988) defines “torture” as “1. The act of inflicting excruciating pain, especially as a means of punishment or coercion…4. Extreme anguish of the body or mind.” American Heritage Dictionary Second College edition 1280 (1985) also includes in its definition ”(to) afflict great physical or mental pain.” The appeals court found that it is reasonable to conclude the legislature would have anticipated the duality of this term, and intended to include both physical and emotional harm in its definition.

Finding that the trial court did not consider emotional anguish in its interpretation of torture, the appeals court remanded the case for trial on the issue of mental torture as an additional finding of abuse.

ADOPTION

Supreme Court Of Mississippi Upholds Lower Court’s Entry Of An Adoption Decree Granting Adoption To Two Opposing And Non-Related Parties. Adoption of P.B.H., 787 So.2d 1268, 2001 Miss. LEXIS 161 (2001). 6 Pages.

In September of 1992, S.M. (Mother) gave birth to P.B.H. (Child). During her pregnancy, Mother stated that she was unsure whether J.H. (Jeff) or J.P. (Jason) was the father. A few months after giving birth, Mother and Jeff moved in together and began raising Child. During this time, Jeff had a paternity test performed. The test revealed that Jason was Child’s father; however, Mother altered the results to read that Jeff was Child’s father. The couple raised Child together until they separated in July of 1995.

In November of 1995, Jeff filed for custody of Child. He and Mother subsequently entered into an agreed temporary order for joint legal and physical custody with equal periods of physical custody every forty-eight hours. Shortly after that order was entered, Mother was killed in an automobile accident.

After Mother’s death, Child’s maternal grandmother (Lori) and her husband filed a notice of intervention in Jeff’s custody action alleging that Jeff was not the biological father of Child.

In June of 1996, Jeff filed a petition for termination of the parental rights of the biological father, and for the adoption of Child. Jeff attached a consent and relinquishment of rights signed by Jason, the now uncontested biological father. Lori and her husband filed a notice of intervention and cross petition for termination of parental rights and for adoption.

After a hearing, the lower court ruled that it was in the best interests of the child to terminate Jason’s rights, and grant both Jeff and Lori’s adoption petitions, giving primary physical custody to Lori and visitation rights to Jeff.

Lori appealed claiming, among other things, that the lower court erred in granting the petitions of both parties. The Supreme Court disagreed. The court stated that it is undisputed that all parties seeking to adopt Child qualify under the technical aspects of the state’s principal adoption code and thus the primary focus of the proceeding would be the evaluation of the best interests of the child. The court reviewed the lower court’s findings regarding the child’s best interests.

The court stated that in determining what would be in the best interests of
Martinez (Martinez) was baby-sitting his girlfriend's four-month-old daughter. Martinez reported to a 911 operator that the child had begun choking after he fed her and that the child was pale and cold. Paramedics arrived and took the child to the hospital, where she died later that day.

When police arrived on the scene, they noticed that the baby's crib sheet was missing. Martinez told the officers that he had put the sheet in the washing machine because it was stained with the baby's blood. The police took statements from both Martinez and his girlfriend. Martinez repeated the statement he made to the 911 operator.

Later, in a videotaped interview, Martinez stated that the baby's death may have been due to an incident that had occurred two and a half weeks earlier, in which he had tripped while feeding the baby and caused her to incur a minor head wound. The investigating officer told Martinez that the doctors said the baby's injury occurred that day, and encouraged Martinez to confess. Martinez then stated that he had gotten frustrated with the baby's crying and shook her; and while he was shaking her her head accidentally hit the crib. Martinez stated, "I shook her hard" and also provided a demonstration of his actions that day. Martinez was charged with first degree murder.

At trial, the coroner testified that the child had suffered a skull fracture, localized subdural and subarachnoid hemorrhages, optical nerve and retinal hemorrhages, a "reported history of acceleration/deceleration" and scalp bruises.

The primary issue at trial was Martinez's mental state when the incident occurred. Martinez argued that he did not mean to fatally injure the child, but that he wanted the child to stop crying. He argued that he shook the baby with minimal force, and that he accidentally hit her head on the crib. The prosecution presented evidence that Martinez acted "knowingly" by presenting expert testimony that the injuries sustained by the child resulted from a force so great that the defendant had to know his actions were practically certain to cause death. Specifically, the prosecutor attempted to elicit testimony from physicians that a subdural hematoma can be caused by the forces present when a child is involved in a high-speed automobile accident or a fall from a multistory building.

At trial, two physicians testified that it would take considerable force to cause the child's injuries. The coroner was permitted to demonstrate, using a doll, the level of violence necessary to cause the injury, and both physicians testified that the necessary force was considerably in excess of that testified to by Martinez and demonstrated by him on his videotaped interview. One physician testified that doctors do not know exactly how much force is necessary to inflict a subdural hematoma, but that they see this type of injury in infants involved in high-speed automobile accidents or falls from multistory buildings. Martinez was convicted of first degree murder and appealed. On appeal, Martinez argued that the lower court erred by allowing testimony equating the child's injuries with injuries sustained by children involved in high-speed automobile accidents and long falls. The court agreed.

The court stated that the purported purpose of the expert testimony was to establish that the force necessary to cause a subdural hematoma was such that Martinez acted "knowingly" rather than "negligently" or "recklessly" but that the testimony failed to achieve that purpose. The court reasoned that as presented and argued, the evidence was not probative of the force necessary to cause a subdural hematoma. The court stated that to determine how much force Martinez must have inflicted on the child, it is the minimum force, necessary to inflict a subdural hematoma that is relevant, not the maximum force, and that the evidence presented confused this fact.

The court illustrated the error in the prosecution's logic with the following analysis:

Some children who have been subjected to trauma or force such as that sustained by a fall from a multistory building or being unrestrained in a high-speed automobile accident suffer subdural hematomas.
This child suffered a subdural hematoma. Therefore, this child was subjected to trauma or force equal to or exceeding that caused by a fall from a multistory building or being unrestrained in a high-speed automobile accident.

The court stated that the reasoning is flawed in that it applies the conclusion to all members of a class when it is premised on limited members of that class. Thus, the court concluded that the testimony was unfairly prejudicial and remanded the case for a new trial.

**DEPENDENCY / SEX OFFENDER REGISTRATION**

Supreme Court Of New Jersey Rules That The Lifetime Sex Offender Registration Requirement Of Megan's Law Should Not Apply To Offenders Under The Age Of 14.


In October 1995, ten year old J.G. was charged with two counts of juvenile delinquency. The charges were equivalent to first-degree aggravated sexual assault, had he been an adult, based on alleged acts of sexual penetration with victims under the age of thirteen. The alleged victims were J.G.'s eight-year-old cousin, P.D., and J.G.'s five-year-old sister, B.G.

In May 1996, under a plea bargain arrangement, charges involving J.G.'s sister were dismissed, and the charge involving J.G.'s cousin was amended to allege conduct that, if committed by an adult, would constitute second-degree sexual assault. Under New Jersey law (N.J.S.A 2C:14-2a (1)), second-degree assault is defined as “an act of sexual penetration with another person…using physical force or coercion, but the victim does not sustain severe personal injury.” As part of this agreement, J.G. admitted in court that he had willfully penetrated P.D. in a sexual manner; he knew what he was doing and that his actions were wrong. J.G. was ordered to complete two years probation, provided he comply with the treatment program he was attending, as well as any recommendations made by the program, J.G. was also to avoid any unnecessary contact with the victims and not be alone with any young children.

Approximately 16 months after his sentencing, a Mercer County Prosecutor served J.G. with notice that, pursuant to Megan's Law, he was classified as Tier Two Moderate risk offender with a Registrant Risk Assessment Scale (RRAS) score of 55. The Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws categorizes offenders in risk categories based on RRAS scores. A score of 0 to 36 denotes a low risk of re-offense and is categorized as a Tier 1 offender; a score of 37 to 73 denotes a moderate risk offender and classifies a Tier 2 offender; a score of 74 or higher denotes a high risk. Tier 3 offender. These scores determine at what depth public notification is required of the Registrant's whereabouts. Based on his score of 55, prosecutors sought to notify local police departments, several schools, preschools and childcare programs in the area of J.G.'s residence. J.G. requested a Megan's Law hearing to challenge the validity of his score and to contest the lifetime registration required by Megan's Law.

Ultimately, the Appellate court found that actual penetration could not be determined by J.G.'s testimony. J.G. was undergoing therapy at the time the plea was entered into, but the therapist was not called to testify. The therapist had determined at the time of the plea that J.G., because Spanish was his primary language, had no capacity to understand the meaning of the word “Penetration,” and believed that actual penetration did not occur. Pursuant to the court's finding, J.G.'s RRAS score was recalculated to show a score of 27, a low-risk Tier I offender. Notification was limited to the school in which J.G. was or would be attending.

The court next turned to the lifetime registration requirement under Megan's Law which applies to all convicted sexual offenders. Under this provision J.G. would be required to register as an offender with the local police department for the rest of his life, only to release from this obligation when he could provide clear and convincing evidence that he had not re-offended for fifteen years following conviction, or release from prison, which ever occurs later.

Lacking case law in this specific instance, the Appellate court compared the lifetime registration requirement provided for in Megan's Law with New Jersey's Juvenile code. Under New Jersey Law, persons under the age of 14 are deemed too immature to be treated as adults who commit the same offense. The court stated that young children who display sexually inappropriate behavior are often reflecting lack of adult supervision, immaturity, inappropriate media exposure or a prior history of emotional abuse- not displaying inclinations toward becoming a sexual predator. The court also expressed concern that the Attorney General Guidelines and the RRAS do not adequately distinguish adult and juvenile offenders. For example, in the RRAS scale, a score is substantially increased if the victim is under the age of 13. However, if the victim is a ten-year old offender, like J.G., this increased penalty would be universally applied because it would be highly unlikely that young offenders would pursue victims significantly older than themselves. The court found that this oversight unjustly inflated J.G.'s RRAS score. The court reasoned that imposing the lifetime registration requirement to children in this category would be unreasonable.

The court thus ruled that juveniles under the age of 14 should be released from the potential lifetime registration requirements of Megan's law, and that registration orders should terminate after the registrant reaches the age of 18 and a hearing concludes the offender is unlikely to offend again.

**MANDATORY REPORTING**

Supreme Court Of Ohio Holds That Sovereign Immunity Does Not Shield Superintendent, Board Of Education And Teacher / Peer Mediation Counselor From Liability For Failing To Perform Their Duty To Report Known Or Suspected Child Abuse. Campbell v Burton, 92 Ohio St. 3d 336, 750 N.E.2d 539, 2001 Ohio LEXIS 1890 (2001), 7 Pages

During the 1995–1996 school year, Amber Campbell was an eighth-grade student at Baker Junior High in the Fairborn City School District (Fairborn). During the same time period, Fairborn
conducted a peer mediation program which involved students as mediators and was designed to resolve disputes between students. A teacher from the school, Debra Mallonee (Mallonee) was the peer mediation coordinator.

In March of 1996, Amber participated in two mediations as a disputant with another student regarding a disagreement over a male classmate. During the mediation sessions, Mallonee claimed she told Mallonee that a male friend of her family, David Burton, often tried to touch and kiss her and that this made her uncomfortable. At the close of the mediation, Mallonee told Amber to tell her mother about Burton and to stay away from him if he made her uncomfortable. Mallonee did not report Amber's disclosure to anyone. Amber alleged that Burton continued to touch and kiss her after she had her conversation with Mallonee.

In March of 1997, Amber filed an action against the Superintendent, Board of Education, Mallonee and Burton. Amber claimed that the defendants failed to report the alleged abuse pursuant to the state mandatory reporting statute. Amber's complaint alleged that as a result of Mallonee's failure to report Amber's disclosure, Amber suffered from psychological and other permanent injury.

In January of 1999, a trial court granted summary judgment in favor of the Superintendent, Mallonee and the Board of Education holding that they were immune from liability under the doctrine of sovereign immunity. Amber appealed. The Court of Appeals affirmed. Amber moved the Court of Appeals to certify the question of whether the defendants were entitled to immunity under state law to the Ohio Supreme Court.

The Ohio Supreme Court looked to the question of whether the Board of Education, the Superintendent and Mallonee were entitled to immunity. The defendants argued that they were entitled to sovereign immunity under the Political Subdivision Tort Liability Act (PSTLA) which provides that a political subdivision (and its employees) are entitled to immunity unless liability is expressly imposed upon it by another section of the Revised Code. Therefore, the court turned to the code section which mandates reporting of child abuse to determine whether it expressly imposes liability within the meaning of the PSTLA. The mandatory reporting statute states:

"No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows or suspects that a child has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion to the public children services agency or a municipal or county peace officer...." Section (A)(1)(b) lists “school teacher; school employee; school authority” and other professionals as persons required to report any known or suspected abuse or neglect. The penalty provision of the statute states: "Whoever violates [the mandatory reporting statute]... is guilty of a misdemeanor of the fourth degree."

The defendants argued that this section of the code did not expressly impose liability because a criminal sanction should not be interpreted as an express imposition of liability within the meaning of the PSTLA. The court turned to the dictionary definition of “liability” for clarification. The court noted that Black's Law Dictionary defines “liability” as: “the quality or state of being legally obligated or accountable; legal responsibility to another or to society; enforceable by civil remedy or criminal punishment.” The court pointed out that the PSTLA does not modify the term liability with the words “civil” or “criminal.” The court also noted that other code sections do modify by expressly stating “civil liability” or “criminal liability.” Therefore, the court found that since the legislature chose not to specify whether the statute applied only to civil liability or only to criminal liability the court must find that the legislature intended for the exception to apply to both types of liability. Therefore the court found that the exception to immunity under the PSTLA was satisfied. The Court reversed the Court of Appeals decision upholding summary judgment and remanded the case to the trial court.

The defendants argued that they were entitled to sovereign immunity as a political subdivision under the Revised Code. Therefore, they were not entitled to immunity unless liability was expressly imposed upon them by another section of the Revised Code. Therefore, the court found that the legislature intended for the exception to apply to both types of liability. Therefore the court found that the exception to immunity under the PSTLA was satisfied. The Court reversed the Court of Appeals decision upholding summary judgment and remanded the case to the trial court.

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Discontinue Life Support Was Laden With COUNSEL INEFFECTIVE ASSISTANCE OF COUNSEL


AMB (Allison) was born on February 9, 1999. Allison was conceived after JB raped his mentally disabled 17-year-old daughter KB. Allison was born five weeks prematurely and was severely ill, with a poor prognosis for long-term survival. After her birth, she was immediately transferred to the neonatal intensive care unit and placed on ventilator support. Local authorities instituted criminal proceedings against JB and also instituted a protective proceeding against JB to terminate his parental rights to KB and her younger brother.

On February 11, 1999, the Family Independent Agency (FIA), the local social service agency, filed a petition requesting that the family court take temporary custody of Allison, based on KB's inability to care for Allison and the sexual abuse that had occurred in JB's home.

The family court held a hearing on the petition the same day. Neither KB nor JB attended the hearing and neither was represented by counsel. No one, including the caseworker, testified under oath. The attorney for the FIA asked the referee to authorize the petition and a placement order and to "authorize all necessary medical treatment for the child." Without hearing any additional argument, the referee found probable cause to authorize the petition. After a discussion off the record, Allison's attorney, William Ladd, objected to an order authorizing anything other than routine medical care, arguing that a blanket order would impermissibly give the FIA and the hospital the discretion to determine what defines necessary medical care. The court ordered the child to receive all necessary medical treatment and any and all necessary medical treatment to sustain her life.

On Monday, February 15, the social worker filed an amended petition alleging that Allison was being kept alive on life support and had no hope of surviving independent of life support. The petition alleged that doctors had advised the social worker that it was not in the infant's best interests to be maintained on life support. The petition further alleged that KB was not capable of making an informed decision on the matter, and that because Allison was a pending ward of the court, that the court render a decision regarding Allison's best interests.

A referee held a hearing regarding the amended petition on Wednesday, February 17. Neither KB nor JB appeared at the second hearing, and neither was represented by counsel. Ladd did not appear at the second hearing because he had not been notified that it was scheduled. In his stead, the court appointed “emergency house counsel” to represent Allison.

The emergency house counsel did not indicate what, if any steps she had taken to prepare to represent Allison. The referee did not ask whether KB or JB received notice of the hearing. Neither the FIA attorney nor emergency house counsel indicated whether KB or JB were aware that the second hearing was scheduled. The referee did not inquire whether Allison or KB had a guardian ad litem. At the hearing, Allison's neonatologist testified under oath by telephone and recommended that Allison be removed from life support. The social worker testified under oath by telephone and explained that she had not had contact with KB despite her representation at the first hearing that she had had the opportunity to inform the mother of the proceedings. The social worker testified that she filed the amended petition because she talked to KB's teacher and learned that KB was mentally impaired. KB's teacher neither testified nor furnished any evidence concerning KB. Emergency house counsel did not cross-examine the social worker.

At the conclusion of the social worker's testimony, the attorney for FIA requested that the court allow the hospital to make the appropriate decision based on Allison's best interests. Emergency house counsel concurred. The referee entered an order authorizing the hospital to remove Allison from life support, effective seven days after the hearing date unless a petition for review was filed. The order was stamped with a family court judge's signature.

For reasons that are unclear, the hospital staff did not wait seven days for the order to become effective or for a party to request judicial review. Rather, on February 19, 1999, hospital staff removed the life support and Allison died.

On February 25, Ladd filed a petition for judicial review of the referee's findings and recommendation. In pertinent
part, the petition stated that review was critical because the emergency house counsel had represented Allison at the second hearing and was not given an opportunity to observe the child or consult with caretakers and expert witnesses. Ladd also argued that he was not apprised of the early hearing date, nor was any attorney from his office asked to be present. He also argued that the decision was erroneous because neither parent was notified or served. The family court reviewed his petition and upheld the referee’s finding. The court then dismissed the review petition as moot.

In April of 1999, another attorney, joined by Ladd, appealed to the Michigan Court of Appeals on behalf of Allison. The Court of Appeals dismissed the appeal finding that the attorney lacked authority to file the appeal on behalf of Allison's estate. Having failed to obtain substantive review at the Court of Appeals, Ladd applied for leave to appeal to the Michigan Supreme Court. In lieu of granting leave, the Supreme Court reversed the Court of Appeals order dismissing the appeal and remanded the case to the Court of Appeals for consideration on the merits of the issues raised by Ladd.

On review the Court of Appeals appeared dismayed at the number and seriousness of the errors perpetrated by the lower court. Thus the court reversed the lower court’s decision to discontinue life support.

The court first noted that the lower court’s decision to withdraw life support was made without holding an adjudicatory hearing, by proceeding straight from the preliminary hearing to a dispositional hearing. The court held that failing to conduct an adjudicatory hearing was erroneous.

The court next addressed the fact that the lower court did not appoint a GAL to represent Allison’s best interests at the hearing. The court noted that although a family court in Michigan is not required to appoint a GAL to represent an incompetent child in cases involving medical decisions, the need to appoint a GAL becomes urgent when the medical decision is serious and there is little time to make the decision. The court noted that in this case, it was unclear whether the attorney appointed to represent Allison was expected to function as both a lawyer and GAL. Additionally, the court stated that inconsistencies and lack of continuity in Allison’s representation prevented the attorney from effectively representing the baby’s interests. Therefore, the court held that the lower court’s failure to appoint a GAL to protect Allison’s interests was an error.

The court next turned to the fact that Allison’s parents had not participated in the hearing. The court stated that denying a parent the right to make a major medical decision, including the decision to end a child’s life, requires clear and convincing evidence of incompetence. The court stated that allegations that the parents are mentally incompetent of making this decision is not enough. The court noted that no evidence of mother’s alleged incompetence were made on the record, no one who participated in the proceedings had ever personally met the mother and the mother herself was not present at the hearings. The court found that this error alone was sufficient to warrant reversal. Additionally, the mother and putative father were denied procedural due process since neither was notified of or given a chance to be heard at the hearing that decided their child’s fate. The court held that denying the parents their due process rights based on mother’s alleged incompetence and father’s criminal involvement was an unconstitutional denial of due process.

The court next reviewed the evidentiary standard employed by the lower court. The court held that the proper standard for best interests determinations to withdraw life support is clear and convincing evidence. The court reviewed the lower court record and noted that the family court referee’s decision to withdraw life support was based on the testimony of one physician. No second opinion was sought and the court did not have a copy of Allison’s medical records. Therefore, the court found that failure to apply a clear and convincing standard to a life-ending decision was a clear error.

The court also found that a family court referee does not have authority to enter a life-ending order. The court stated that while a referee may recommend actions for a judge to take, the judge must make the ultimate decision and that this duty may not be delegated to a referee. The court held that a literal rubber stamp by a judge was insufficient.

Finally, the court reviewed Ladd’s arguments that Allison’s representation was inadequate. Ladd argued that he was not notified of the second hearing, and that although emergency counsel appeared in his place, this representation was inadequate because the substitute attorney had not had time to prepare. Ladd also argued that the substitute counsel was improper without a determination on the record that there was good cause for the substitution. Ladd argued that his appearance at the preliminary hearing constituted an “appearance” that entitled him to notice of other proceedings. The court agreed. The court observed that the referee presiding over the best interests hearing should have asked about the attorney’s whereabouts and made sure the circumstances warranted his absence. The court held that while consistent legal representation of children in child protections proceedings is desirable, attorney substitutions are permitted when good cause exists. However, the court stated that when substitutions occur, the attorney substitute must become familiar with the case by reviewing relevant documents and speaking with relevant parties and witnesses before proceeding. To enforce this requirement, the court found that courts must make findings on the record regarding the attorney’s preparation. In this case the referee did not inquire and the substitute counsel did not offer any information on her preparation for the case. The court found this oversight denied a key protection to the child and required reversal. Further, the court found that the substitute attorney’s representation at the best interests hearing was ineffective. She did not challenge the request to withdraw the baby’s life support and agreed to the decision without convincing evidence. She also failed to question the case-worker involved in the case, investigate the reliability of the doctor’s testimony, or try to secure a second opinion. The court held that these actions denied Allison her right to competent legal representation. Reversing the decision of the lower court, the court of appeals stated:
FUNDING FOR CHILD WELFARE AND JUVENILE JUSTICE PROGRAMS

President Bush released his proposed FY2003 federal budget (for the coming fiscal year, which begins on October 1, 2002) on February 4. The budget proposed continued funding at current levels for most federal child welfare and juvenile justice programs. There were two significant exceptions:

1. The President proposed fully funding the newly-reauthorized Promoting Safe and Stable Families child welfare program (formerly known as “Family Preservation and Support”) at $505 million in FY03 (the FY02 funding level was $375 million), and also proposed fully funding the newly-authorized program of education vouchers for youth aging out of foster care ($60 million in FY03) (the justification provided for the cut was that the Administration was cutting funds that had been earmarked by Congress in FY02; while earmarks are not desirable Congressional policy, that doesn’t mean that the funds are not needed!).

ACTION NEEDED: Calls to your Representative and Senators, urging them to ensure full funding of Promoting Safe and Stable Families and education vouchers for foster kids (as proposed by the President), and to ensure no cuts in funding for the Juvenile Justice and Delinquency Prevention Act programs, including Part C research, evaluation, and demonstration grants (despite the President’s proposed cut).

NOTE: On Friday, February 8, 2002, Senators Lieberman, Santorum and a widely-diverse, bi-partisan group of cosponsors (Bayh, Brownback, Nelson, Cochran, Carnahan, Lugar, Clinton and Hatch) introduced S. 1924, a bill to implement the President’s faith-based initiative (with language that is much less controversial than the House-passed faith-based initiative bill). Among its provisions is a section which increases mandatory funding for the Social Services Block Grant (Title XX) from $1.7 billion in FY02 to $1.975 billion in FY03, and $2.8 billion in FY04. The SSBG program supports a significant proportion of child welfare services around the country; the SSBG has been decreased substantially over the past few years. S. 1924 would also ensure the continued flexibility for states to transfer up to 10% of their TANF funding to SSBG. S. 1924 has been endorsed by the White House.

CHILD WELFARE REAUTHORIZATION LEGISLATION

The Child Abuse Prevention and Treatment Act (CAPTA) programs were due to have been reauthorized by October 1, 2001, when their prior reauthorization expired. While both House and Senate Committee staff have done some preliminary work on reauthorization, no legislation has been introduced or marked-up in Committee (the Senate committee with jurisdiction is the Health, Education, Labor and Pensions Committee; the House...
committee with jurisdiction is the Education and Workforce Committee).

The Promoting Safe and Stable Families program (originally called the Family Preservation and Support program) was reauthorized through Public Law #107-133 on 1/17/02, which included continued mandatory funding of PSSF (at $305 million per year), as well as discretionary authorizations for:

1. A $200 million per year increase in the Promoting Safe and Stable Families (PSSF) program (from $305 million to $505 million); and

2. A $60 million per year increase in the Chafee Independent Living program to support educational vouchers for youth aging out of foster care.

While the President had originally proposed that the increases be “mandatory funding” (not subject to annual appropriations decisions), the final bill included only discretionary authorization increases.

**JUVENILE JUSTICE REAUTHORIZATION LEGISLATION**

H.R. 1900, legislation to reauthorize the Juvenile Justice and Delinquency Prevention Act (JJDPA), passed the House in September 2001. The bill is a vast improvement over prior years’ JJDPA reauthorization bills:

- it has a requirement that juveniles be separated from adult inmates when they are in adult jails, although the requirement is somewhat weaker than the current law “sight and sound separation” standard;
- the bill also has a requirement that juveniles be removed from adult jails, although it changes the current 24-hour allowance to a 48-hour allowance, and includes a narrow parental consent exception.
- The requirement for states to address racial disparities in the juvenile justice system is actually improved slightly from current law – it encompasses disproportionality throughout the system, not only disproportionate minority confinement.
- The current law requirement for deinstitutionalization of status offenders is maintained with very minor modification.
- The prevention block grant in H.R. 1900 replaces the Title V prevention program and several smaller programs, although the prevention block grant mixes a number of intervention uses of funds with prevention (causing concern re: prevention getting the funding).

The Senate Judiciary Committee has not yet marked-up JJDPA legislation, although there is a bill to simply extend current law for a few more years (S. 1174), that was introduced by both Senators Leahy and Hatch (the Chair and Ranking Minority Member of the Committee). That bill also, for the first time, provides funding to improve the conditions of confinement of juveniles tried as adults (current JJDPA protections only apply to juveniles tried as juveniles). Legislation similar to H.R. 1900 (except with an improved Prevention Grant) and H.R. 863 (see below) was introduced by Sen. Biden et al. as S. 1165.

H.R. 863 to authorize (for the first time) and improve the Juvenile Accountability Block Grant program – which has been funded for several years – was passed on the floor of the House in October 2001; no action has occurred in the Senate.

**OTHER RELEVANT LEGISLATION**

Several other relevant bills have been introduced (addressing unaccompanied alien children, Indian and Alaska Native foster care and adoption services, Indian Child Welfare Act amendments, promoting partnerships between child welfare agencies and drug and alcohol abuse prevention and treatment agencies, providing funding for youth development activities, etc.) – see Spring and Summer 2001 issues of The Guardian. None of these has moved forward in Congress.

Don’t Forget: You can access all bills (including the text of legislation and public laws), committee reports, and budget/appropriations funding charts via the Internet at thomas.loc.gov.

* Miriam Rollin is the NACC Policy Representative in Washington D.C.

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**NACC – Federal Policy Network**

Become a part of the NACC Federal Policy Network (FPN). You will receive periodic updates and information with which to contact your representatives / senators when action is needed to protect children.

☐ YES, I would like to be part of the NACC Federal Policy Network.

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The Rocky Mountain Child Advocacy Training Institute is a unique, hands-on, learn-by-doing trial skills training. It is intended for both new and experienced attorneys who work in dependency, delinquency, family and criminal courts. Through the collaboration of the Institute sponsors, the traditional, time honored trial skills training methodology of the National Institute of Trial Advocacy is merged with a children’s law case. The case file is used as a source of facts and law for the training. Following lecture, discussion and demonstration, you will learn primarily through participatory exercises. Following your performances, you will be evaluated by experienced instructors. Some performances will also be videotaped and you will receive an additional one-on-one video performance review.

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- The Rocky Mountain Children’s Law Center

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2002 Outstanding Legal Advocacy Award

NOMINATION APPLICATION

PURPOSE: The NACC is looking for people who have tipped the scales in favor of children. Many children cannot rise above their circumstances without the help of real-life heroes. Our nation’s courts, clinics, schools, homes, law enforcement agencies and social service organizations are filled with people who have made a difference. The NACC created the Outstanding Legal Advocacy Award to honor excellence in the field of children’s law, advocacy, and protection. The NACC presents its Outstanding Legal Advocacy Award annually to individuals and organizations making significant contributions to the well being of children through legal representation and other advocacy efforts. Nominees’ accomplishments may include work in child welfare, juvenile justice, private custody and adoption and policy advocacy. All child advocates are eligible.

The Nomination Letter should highlight:

• 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.
• Any other relevant personal background information.

Nominations Must Include:

• The nomination letter
• A completed application form
• Nominee’s Curriculum Vitæ / Resume
• A list of nominee’s affiliations with other children and youth service organizations

Nominations May Also Include:

• Supporting materials such as: Letters of Support, Photographs, Newspaper clippings, narratives, or other items describing the candidate’s efforts.

Nominations Must Be Received By July 15, 2002.

Send Nominations to:

Awards Committee
National Association of Counsel for Children
1825 Marion Street, Suite 340
Denver, Colorado 80218

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**PUBLICATIONS**

**NEW** Moving from Sympathy to Empathy, the 2001 Edition of the NACC Children's Law Manual Series. The manual is 435 pages and includes 30 articles covering a wide range of children's legal issues including Attachment, Bonding and Reciprocal Connectedness; Limitations of Attachment Theory in the Juvenile and Family Court by Arredondo and Edwards; ASFA's Compelling Reasons Requirement by Cecilia Fiermonte; NACC Recommendations for Representation of Children in Abuse and Neglect Cases; Powerhouse: Empowering Young Adults as they Transition from Foster Care by O'Dell, Alba, Lehman, Mayer, and Hein; Helping Separating and Divorcing Parents Remain Child Focused by Eugene White; and The Status of Sibling Rights: A View into the New Millennium by William Patton. Copies may be ordered from the NACC by calling toll free 1-888-828-NACC or using the Publications Order Form on page 18 of this issue.

*The Children’s Legal Rights Journal* Is Published In Association With The NACC And Available To NACC Members At A Discount. *Children’s Legal Rights Journal (CLRJ)* is a quarterly professional practice journal for child welfare, juvenile justice, and family law professionals. Now in its 20th year, CLRJ is published by William S. Hein & Co., Inc., under the editorial direction of the ABA Center on Children and the Law, the CIVITAS Child Law Center at Loyola University of Chicago School of Law and now, the National Association of Counsel for Children. CLRJ is indexed in the Current Law Index and Index to Legal Periodicals and runs approximately 60 pages per issue. The annual subscription rate is $67 but is available to NACC members at a 30% discount of $47 annually. To subscribe, contact Hein toll free at 800-828-7571, ISSN 0278-7210 or contact the NACC for more information.


**NEWS**

Law Student Scholars. The NACC is pleased to announce the selection of two law student Fellows for summer 2002. Jacob Smiles is a Webster Society Scholar at Washington University School of Law. Jessi Tamayo is a Stein Scholar at Washington University School of Law and now, the National Association of Counsel for Children. CLRJ is indexed in the Current Law Index and Index to Legal Periodicals and runs approximately 60 pages per issue. The annual subscription rate is $67 but is available to NACC members at a 30% discount of $47 annually. To subscribe, contact Hein toll free at 800-828-7571, ISSN 0278-7210 or contact the NACC for more information.

NACC Launches New Web Site. Visit the NACC’s new and improved web site at www.NACCchildlaw.org.

The new site is comprised of four sections: About the NACC; Technical Assistance and Training; Children and the Law; and Policy Advocacy. The site includes members only sections which allow you special access to resources including the online membership directory. Passwords have been mailed to all NACC members.

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

The NACC 2002 Outstanding Legal Advocacy Award. Nominations for the 2002 award are being accepted now. Please see the award notice on page 12 and send nomination letter and supporting documentation to NACC Awards, 1825 Marion Street, Suite 340, Denver, CO 80218. Contact the NACC for more information. The deadline is July 15, 2002.

NACC 2002 Law Student Essay Competition. The NACC is accepting essays for the 2002 Law Student Essay Competition. The winning essay will be published in the 2002 Children’s Law Manual, and the winner will be given $100, a one-year NACC membership and a scholarship to the 2002 conference in Orlando. Essays will be evaluated on the importance of the topic to advancing the legal interests of children, persuasiveness and quality of research and writing. Mail essays with contact information and a $10 application fee to: NACC Student Essay Competition, 1825 Marion Street, Suite 340, Denver, CO 80218 by July 15, 2002. Essays should be submitted on disk together with a hard copy, not to exceed 15 pages single-spaced. For more information, please call the NACC toll free at 1-888-828-NACC.

2002 NACC Outstanding Affiliate Award. Nominations are being accepted for the NACC 2002 Outstanding Affiliate Award. The award will be presented to the affiliate that best...
fulfills the mission of the NACC on the local level. The mission of the NACC is to achieve the well being of children by promoting multidisciplinary excellence in children’s law, establishing the legal interests of children and enhancing children’s legal remedies. Affiliates should submit an application in letter form together with supporting documentation to NACC Affiliate Award, 1825 Marion St., Suite 340, Denver, CO 80218. Submission Deadline is July 15, 2002.

NACC Members Get Members Program. Earn “NACC Bucks” by nominating your colleagues for membership. Participate in the NACC “Members Get Members” program and earn valuable NACC Bucks redeemable on your NACC member dues, publications, and conferences. For every prospect who becomes an NACC member, you will receive 20 NACC Bucks. Save 100 NACC Bucks and receive a complimentary ticket to the NACC Annual National Children’s Law Conference (a $300 value).

To request NACC amicus participation, there is no new amicus curiae activity. To request NACC amicus participation, contact the NACC or go to www.NACCchildlaw.org/training/amicus.html.

Parties interested in NACC Amicus Curiae participation in a case should contact the NACC Executive Director.

JOBS

NACC Staff Job Openings. The NACC is accepting applications for the following positions:

- **NACC Staff Attorney.** Serves as legal consultant to NACC members. Manages the NACC National Child Advocacy Resource Center and Amicus Curiae Programs. Serves as an NACC trial skills and conference trainer. Works on NACC policy and legislative matters. Must be a licensed attorney with at least 2 years experience in children's law. Salary and benefits are competitive, commensurate with expertise and experience.

- **NACC Administrator / Meeting Planner.** Responsible for the day to day management of the NACC office. Primary tasks include conference and meeting planning, bookkeeping, budgeting, and management of member services. BA or BS required. Salary and benefits are competitive, commensurate with expertise and experience.

- **NACC Assistant Director for Association Development.** Responsible for overall development of the association including membership, visibility, and fundraising. Experience in association development and knowledge base in child welfare and juvenile justice preferred. BA or BS required. Salary and benefits are competitive, commensurate with expertise and experience.

For all positions, send cover letter, resume/cv, writing sample, and references to Marvin Ventrell, NACC Director; 1825 Marion St., Suite 340, Denver, CO 80218; Fax 303-864-5351; e-mail ventrell.marvin@tchden.org. For more information on these NACC positions, visit the NACC jobs website at www.NACCchildlaw.org/childrenlaw/jobs.html, or contact the NACC Executive Director:

**Executive Director, Juvenile Rights Project, Inc., Portland, OR.** JRP is accepting applications for its ED position. $50,000-$60,000 plus excellent benefits. BA required, JD, MPA, MSW or equivalent preferred. Contact JRP at 503-232-2540, tessa@jrplaw.org.

**Executive Director, Children’s Law Center, Charlotte, NC.** Competitive salary and benefits commensurate with experience. Fax resume to Ashley Smith at 704-343-0211 or e-mail to asmith@carolinalegal.com.

Visit the NACC Child Law and Advocacy National Job Web Site. You can access the information on line at www.NACCchildlaw.org/childrenlaw/jobs.html, or contact the NACC at 1-888-828-NACC.

Please Send (mail/email/fax) Children’s Law and Advocacy Job Openings to the NACC.

If you have “Children’s Law News,” please send it to: The Guardian, 1825 Marion Street, Suite 340, Denver, CO 80218
You can e-mail information to advocate@NACCchildlaw.org.

NACC – Members Get Members Program!

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Participate in the NACC “Members Get Members” program and earn valuable NACC Bucks redeemable on your NACC member dues, publications and conferences. For every prospect who becomes an NACC member, you will receive 20 NACC Bucks. Save 100 NACC Bucks and receive a complimentary registration to the NACC Annual National Children’s Law Conference (a $300 value).

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Mail to: NACC Membership, 1825 Marion Street, Suite 340, Denver, CO 80218
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 organization in your area. If there is no affiliate in your area and you would be interested in forming one, please let us know. The formation of an NACC affiliate is simple, and we can provide you with an affiliate development packet to get you started, affiliate development materials are available on our website at www.naccchildlaw.org/about/affiliates.html.

THE 2002 NACC OUTSTANDING AFFILIATE AWARD

The NACC is accepting nominations for the 2002 NACC Outstanding Affiliate Award which will be presented to the affiliate that best fulfills the mission of the NACC on the local level. The mission of the NACC is to achieve the well being of children by promoting multidisciplinary excellence in children’s law, establishing the legal interests of children and enhancing children’s legal remedies. Affiliates should submit an application in letter form together with supporting documentation to NACC Affiliate Award, 1825 Marion St., Suite 340, Denver, CO 80218. Submission Deadline is July 15, 2002.
NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

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  Student $35  Sustaining $150*  *Includes special thank you listing in The Guardian
  ☐ I would like $10 of my membership dues to support my local NACC affiliate.

☐ GROUP MEMBERSHIPS:
  Agency 1 $375 = 10 individual memberships (50% savings)
  Agency 2 $750 = 20 individual memberships (50% savings)

☐ Please send additional information on the NACC.

☐ Please send information on establishing an affiliate.

Make Check Payable to: NACC
Mail to: National Association of Counsel for Children
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