NACC
e-Guardian
Nov 2013 Vol 35 · No 09

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

What It Means To Belong

However you came to know of NACC and become a member, you are here because of your commitment to the work of serving children and their families. You devote your professional life to advocating for your clients in the individual case, but also to fighting for better law, policy and practice in all cases. You represent some of the most marginalized, stigmatized and even vilified members of society, yet have the audacity to believe that these children, youth and parents deserve the best possible legal advocacy and the full faith of the body politic. You have fought this fight your entire career, and have no intention of stopping now (in spite of the well-intentioned, repeated suggestions of your stockbroker brother-in-law.)

Now is the time for NACC to do a better job of supporting you in this essential work. We are exploring options in many directions, from professional resources to remedies for what challenges you personally. We need to know what you need, and only you can tell us. ***What can NACC do to make your work more effective for your clients and more rewarding for you?*** What can we provide that you and your local resources can't?

Helping you succeed on behalf of kids and families is my highest priority, and I am working daily with NACC Staff Attorney D. Andrew Yost to identify and build the supports you want and need. Call me at **303-864-5322**, or Andy at **303-864-5325**. Email us at Kendall.Marlowe@childrenscolorado.org or D.Andrew.Yost@childrenscolorado.org. We're now shaping our plans for the coming year, and we'd love to hear from you directly about how we can get you the practical, tangible support you need to succeed in this work and build the career you can be proud of (even in the company of that certain brother-in-law.)

What can NACC do to make your work more effective for your clients and more rewarding for you?

Belonging to a community is a two-way street, as you know, so you won't be surprised to learn that you'll receive a piece of mail from NACC as we enter the holidays, asking you to consider an end-of-year donation to support NACC as an organization. Thanks in advance for opening that envelope, and listening to the message inside. We're thankful for the support you give the organization, but just as thankful for the opportunity to support you. We're not stopping now, either, and you can tell your brother-in-law we said so. Let's keep moving forward together, because we belong together, helping each other each step of the way. What can we do for you? Andy and I look forward to your call.

Kendall Marlowe, Executive Director

In This Issue

NACC Executive Committee 2012–2014

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

Cases

Hensley v. Koller

This case involves adoption of a special needs child ("BLH") and the adoptive parents' ability to collect financial assistance from the Adoption Assistance and Child Welfare Act, 42 U.S.C. § 670(a)(3) (the "Act"). In April 1997 in South Carolina, Angela and Kenneth Hensley (collectively, the "Hensleys") provided BLH temporary foster care. The South Carolina Department of Social Services ("DSS") approved monthly foster care maintenance payments totaling to $675 per month. Subsequently, the Hensleys applied and obtained status as BLH's adoptive parents. The Hensleys then sought to convert the previous foster care payments into an adoption assistance subsidy totaling to the same amount of $675 per month. However, due to South Carolina's budget crisis, DSS reduced the amount by $20, decreasing the monthly payments to $655 per month. BLH, through the Hensleys, filed a class action under 42 U.S.C. § 1983 against then-DSS Director Elizabeth Patterson, the current DSS Director Lillian Koller, Kim Aydlette, and Kathleen Hayes, individually as former DSS Directors (collectively, the "Directors"). The Hensleys sought injunctive and declaratory relief additional to money damages.

Due to the purely legal issue of whether the Directors had qualified immunity in the present suit, the 4th Circuit Court of Appeals (the "Court") maintained jurisdiction and reviewed de novo. Addressing the qualified immunity issue, the Court applied the *Saucier* test: (i) "whether an official violated a federal right," and (ii) "whether that right was clearly established as the time the official acted."[1] Most importantly, the Court recognized that if a right was not clearly established, it only shielded the Directors from money damages; therefore, if the Court found that "no clearly established law permits an award of damages against the state officials, the case would necessarily return to the district court" to determine injunctive and declaratory relief.[2] Because of this, the Court's first inquiry was whether there was an enforceable right to parental concurrence, in which the Directors had violated.[3]

To answer this, the Court applied the *Blessing v. Freestone* three-pronged test of whether a particular statutory provision gives rise to a federal right: (i) "Congress must have intended the provision in question to benefit the plaintiff," (ii) "the plaintiff must demonstrate that the right asserted is not so vague and amorphous that its enforcement would strain judicial competence," and (iii) "the statute must unambiguously impose a binding obligation on the States."[4] Applying this, the Court first found that the Act did confer a federal right, which thereby satisfied *Blessing*'s first criteria. Second, the Court found that the Act provided that "a state may not readjust an adoption assistance payment amount with an adoptive parent's 'concurrence,' i.e., agreement or assent."[5] Last, the Court found that the Act did impose a binding obligation onto the States. Therefore, and in summation, the Act did give rise to a limited privately enforceable federal right.

The next inquiry was whether the Directors actually *violated* that right. Focusing on the language of the Act, the Court recognized that the Act "prohibits adoption assistance subsidies that exceed foster care maintenance programs."[6] The Act then "establishe[d] a right to parental concurrence in subsidy readjustment determination except when the subsidy must be reduced due to reduction in foster care maintenance payments."[7] Applied to the current case, the Court recognized that the reduction of the foster care maintenance precisely mirrored the reduction of the adoption assistance subsidy. South Carolina made this reduction against *all* foster care maintenance payments and failure to reduce BLH's adoption assistance payment would have been a federal violation.[8] Therefore, the Hensleys could not maintain that the Directors violated their asserted right.

The Court reversed and remanded.[9]

Devon Bell, *NACC Fellow*

See Cases, next page »

1. Hensley v. Koller, 722 F.3d 177, 181 (4th Cir. 2013) (citing Saucier v. Katz, 533 U.S. 194 (2001)).
2. *Id.*
3. *Id.*
4. *Id.* (citing Blessing v. Freestone, 520 U.S. 329, 340-41 (1997)).
5. *Id.* at 182.
6. *Id.* at 183.
7. *Id.*
8. *Id.*
9. *Id.* at 184.

» Cases, from previous page

Wright v. O'Day

This case involved a determination of standing for a thirteen-year-old boy ("DW") and whether his claim was ripe for adjudication. DW's mother, as next friend, brought the 42 U.S.C. § 1983 claim against the Governor of Tennessee and the Commissioner of the Tennessee of Children's Services. In it, the claim alleged "that the defendants violated [DW's] procedural due process rights by listing him on the state's child abuse registry without providing him with an administrative hearing to challenge the listing."[1] Also explained in the claim, a Children's Service case manager interviewed DW and his mother investigating a sexual abuse incident involving DW and another minor, LM. The mother denied the allegations, but was later notified that Children's Services indicated DW as a perpetrator of child abuse. After never being told the evidence against him, the Children's Services upheld DW's classification. DW claimed that being listed as a perpetrator of child sexual abuse "deprived him of his liberty interest in pursuing the common occupations of life."[2] DW sought injunctive and declaratory relief.

The Commissioner filed a motion to dismiss arguing that the listing's effects did not create a live justiciable case or controversy because DW's claims were speculative; the motion also argued that DW was not deprived of liberty because "reputation damage alone is insufficient to state a claim under the Due Process Clause."[3] The district court granted the motion alleging that DW's injuries were speculative. The court dismissed DW's claim and DW subsequently appealed.

1. Wright v. O'Day, 706 F.3d 769, 771 (6th Cir. 2013).
2. *Id.*
3. *Id.*

Applying *Lujan v. Defenders of Wildlife*, the 6th Circuit Court of Appeals (the "Court") recognized that a litigant could suffer an injury from the denial of procedural issues.[4] Because DW sought procedures to protect his interest of not being listed as a child sexual perpetrator, the Court found it was an injury that was sufficiently imminent and concrete. Even if the Child's Services did not release the listing, DW's record would not be expunged and could thus effectuate his injury. Furthermore, DW asserted a procedural right — which the State claimed to be unclear until application of his employment — and the Court concluded that DW should not have to wait to challenge his classification.[5] Therefore, DW had standing to challenge the listing.

The Court also found that DW's claim was ripe for judicial review. To determine ripeness, the Court considered (i) "whether court would benefit from a 'concrete factual context,'" (ii) "whether the agency may modify its legal position or refine its policies, rendering a judicial decision premature," and (iii) "the hardship to the plaintiffs in waiting for enforcement."[6] First, the Court found that the factual issues were sufficiently developed to allow the courts to rule on the matter; second, the Court found that the Children's Services gave no indication of modifying its policies and, therefore, there was no need to delay adjudication; and third, the Court found that DW would suffer great hardship if denied relief.[7]

Because the Court found that DW had standing and his case was ripe for review, the Court reversed the district court and remanded for further proceedings.[8]

Devon Bell, *NACC Fellow*

4. *Id.* at 772 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 (1992)).
5. *Id.* at 773.
6. *Id.* at 774 (citing Ammex, Inc. v. Cox, 351 F.3d 697, 706 (6th Cir. 2003)).
7. *Id.* at 774-75.
8. *Id.* at 775.

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

Do you know of an important case which you feel NACC members should be made aware of?

If so, please let us know. Email: advocate@childrenscolorado.org.

Policy & News

MEDIATION MATTERS

NACC adopts Guidelines for Child Protection Mediation

As attorneys, we spend our careers resolving conflicts. It's our job to shape those resolutions in favor of our clients, through the sometimes stunningly complex processes of American courts. We all know from experience, though, that traditional, adversarial litigation isn't always the most effective way to achieve the outcomes our clients seek, and can even cause serious, collateral damage to the vulnerable kids and families we serve.

Mediation is an alternative strategy to build understanding on the issues parties face and consensus on mutually achievable solutions. In the context of child protection, mediation has been proven through research to expedite permanency, improve treatment plans, and (through better engaging parents) to result in more sustainable outcomes for families. Yet, as advocates we can rightly worry that any alternative process of dispute resolution may not properly protect our clients' rights and interests. Accustomed to managing and even controlling our clients' statements and strategies, how can we ensure that our clients are protected and supported away from what is to us the more comfortable, familiar confines of the courtroom?

The answer is that the practice of mediation, like the practice of law, must be guided and governed by ethical and professional standards. To that end, NACC partnered with multiple organizations and individuals to assist in the development of Guidelines for Child Protection Mediation. Special thanks go to Kelly Browe Olson of the University of Arkansas at Little Rock William H. Bowen School of Law for her hard work and perseverance. These guidelines, shepherded by our friends and colleagues at the Association of Family and Conciliation Courts (AFCC,) were formally endorsed by NACC at the annual meeting of our Board of Directors this August. The guidelines are now available on the websites of both AFCC and NACC, and we encourage you and your partners in your own jurisdiction to use this framework to build better mediation practice.

Mediation is a tool which can be used strategically in many stages of a child welfare case. Well-deployed, it can resolve issues seemingly impervious to judicial intervention, and help families learn how to communicate and understand each other, a help to your clients long after the court case is closed. We encourage you to embrace mediation as another arrow in your attorney's quiver, and to share and promote these guidelines. The goal is better outcomes for your clients, and mediation can be a highly effective way to reach that goal.

Find additional News, Policy and Training Updates on Facebook and LinkedIn.

JOIN US IN THE MILE HIGH CITY

37TH NATIONAL CHILD WELFARE, JUVENILE & FAMILY LAW CONFERENCE

SAVE THE DATE AUG 17–20, 2014

ABSTRACTS OPEN DEC 2013

FULL SCREEN

Thank You

to our Supporting, Sustaining and Patron Members!

Rita Anderson
Ann Haralambie
Christie Christie
Troy Dierking
Kathi Grasso
Stanley Harris
Karen Hazlaris
Katherin Holliday
Water Imhoff
Julie Kaminsky
Jeffrey Kauffman
Jean Kelly
Skip Kelly
Richard Krugman
Philip McCarthy
Amina Merritt
Michael Nash
Otha Nelson
James Ottesen
Kathy Richards
Robin Robb
Douglas Robison
Neal Snyder
Cynthia Spencer
Stephanie St. John
Kelly Waterfall
James Widirstky
Janet Wiig

Thank You to the NACC Board of Directors!

Candace J. Barr, JD
John Ciccolella, JD
Robert Fellmeth, JD
Gerard Glynn, MS, JD / LLM
Leslie Starr Heimov, JD, CWLS
H.D. "De" Kirkpatrick, Ph.D. / ABPP
Stephanie Smith Ledesma, MA, JD, CWLS
Jane Okrasinski, JD
Erik Pitchal, JD
Henry J. Plum, JD
Robert L. Redfearn Jr., JD
Janet G. Sherwood, JD, CWLS
John H. Stuemky, MD
Sonia C. Velazquez
Linda Weinerman, JD
Christopher N. Wu, JD

NACC Mission

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

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