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CHILDREN'S LAW

REPORT

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CHILDREN'S LAW OFFICE ESTABLISHED

This is the first issue of a newsletter that will be published monthly by the Children's Law Office. The Children's Law Office is operated by the USC School of Law in partnership with the USC Institute for Families in Society. Its purpose is to provide useful information and training to lawyers, judges, guardians ad litem, and other participants in South Carolina judicial proceedings related to child abuse and neglect.

Some of the things you will see in this and future issues of the newsletter are:

- ◆ recent cases
- ◆ new and proposed legislation
- ◆ new medical and social science findings related to child abuse and neglect
- ◆ training opportunities
- ◆ summaries of the law on specific issues
- ◆ summaries of recent article and book reviews

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In addition to the newsletter, the Children's Law Office will offer a variety of services to lawyers, guardians, judges, and other persons.

Resources : The Children's Law Office will have an extensive collection of legal and non-legal materials, including judicial decisions, briefs, treatises, manuals, and periodicals. From these, the staff will prepare and make available user-friendly materials such as case summaries, article summaries, forms, checklists, and issue summaries.

Computer Access to Information: A computer database that can be accessed through the Internet or by modem is being established, so that the resources of the Children's Law Office can be easily accessed from offices throughout the state.

Technical Assistance: Legal and non-legal technical assistance will be provided to lawyers and guardians representing the interests of children in abuse and neglect cases. Technical assistance consultations will be provided at no cost by staff attorneys and a multi-disciplinary team of professionals (e.g., physicians, psychologists, social workers) who are under contract with the Children's Law Office.

Training: Training programs on legal and non-legal issues related to child abuse and neglect will be provided, utilizing both local and national experts. These sessions will be offered at no cost or for a nominal fee.

The concept of the Children's Law Office originated with the planning process for S.C. Families For Kids, a joint project of the S.C. Department of Social Services and United Way of South Carolina. This project studied and made recommendations for

comprehensive reform of the child protection system, and is now in the process of implementing reforms, using grant funds from the Kellogg Foundation.

Family Court Judge William Byars established a Bench-Bar Committee as part of the Families For Kids project. This committee focused on the legal aspects of the child protection system. One of the needs identified by the Bench-Bar Committee was the need for additional training and assistance for legal professionals and others involved in family court proceedings related to child abuse and neglect.

It was noted that lawyers who represent children in these cases are frequently appointed from a list of general practitioners who may not be familiar with child abuse cases or family court, and who receive nominal or no compensation for their time. Further, in order to provide zealous representation of the child in an abuse and neglect case, areas of knowledge unfamiliar to most lawyers -- such as child development, family dynamics, and psychology -- must be utilized. Similarly, non-lawyers who work within the legal system, such as caseworkers and guardians ad litem, often lack an understanding of the law and legal process. The Children's Law Office was established to meet these needs.

The current staff of the Office includes Professor Elizabeth Patterson of the USC School of Law, who is serving as Interim Director; Project Administrator Carolyn Morris, and Administrative Assistant Margaret Wingard. In addition, two law students are employed as research assistants. Two staff attorneys will be hired as soon as approval for these positions is obtained from the S.C. Attorney General's office. A committee of community and university representatives has been formed to conduct a search for a permanent Project Director.

The Children's Law Office cannot become fully operational until the staff attorneys have been hired. At present, it is concentrating on development of training programs, resource materials, the computer data base, the consultant team, and this newsletter.

The Children's Law Office is able to offer these services due to the generous financial support of the Kellogg Foundation and the federal Department of Health and Human Services. Funding was facilitated by the Department of Social Services and United Way of South Carolina.

A Review of South Carolina Appellate Decisions Concerning Termination of Parental Rights

Establishing Sufficient Grounds

A. Severe or Repetitive Harm in a Home Unlikely to Be Made Safe in One Year - § 20-7-1572(1)

A mother's separation from her husband, who was caring for the child when harm occurred, was sufficient to deny TPR on mother when evidence of her acquiescence to or participation in abuse was absent. SCDSS v. Brown, 454 S.E.2d 335 (Ct. App. 1995). TPR grounds were not proven in a case where mother was complying with DSS treatment plan and adequately caring for other children and was found to have physically abused the subject child in only a single incident, causing abrasions and bruises. Greenville County DSS v. Bowes, 437 S.E.2d 107 (1993). Emotional instability related to marital distress and an incident of physical abuse outside mother's presence were not sufficient to support TPR on mother, although custody removal was upheld. Shake v. Darlington County DSS, 410 S.E.2d 923 (1991). A mother's history of repeated incarcerations and indifference to children during intervening periods of freedom was sufficient evidence of inability to provide safe home in 12 months. DSS v. Henry, 374 S.E. 2d 298 (1988).

B. Failure to Remediate Conditions Despite Reasonable Efforts of Agency - § 20-7-1572(2)

The agency's obligation to make "reasonable efforts" includes (1) identification of the condition that led to removal, (2) identification of appropriate rehabilitative services, and (3) a meaningful offer of those services. In a case where the agency met obligations, a ground for TPR was established where parents continued a "nomadic lifestyle" which had led to the initial removal. McCutcheon v. Charleston County DSS, 396 S.E.2d 115(Ct. App. 1990). Parents who delay attendance to counseling sessions and attend only sporadically may show attempt to remedy the situation

but it is insufficient to defeat TPR action based on failure to remediate the condition which caused removal. DSS v. Pritchett, 374 S.E. 2d 500 (Ct. App. 1988).

C. Failure to Visit - § 20-7-1572(3)

"Incidental visitation," defined as "fortuitous meetings between a parent and child," is not enough to overcome a claim of abandonment. However, if a parent attempts unsuccessfully to arrange visits with the child, the element of willfulness -which is a question of intent- is not established. Horton v. Vaughn, 423 S.E.2d 543 (Ct. App. 1992). Proving failure to visit as ground fails when custodian of child engages in "obstructionist behavior" that interferes with attempts to visit. Hopkins v. SCDSS, 437 S.E.2d 542 (1993). Refusal to meet "reasonable conditions" placed on visits establishes the ground. In re M. 439 S.E.2d 857 (1994). If it is found that abandonment occurred for a six month period, subsequent conduct to cure the abandonment may be considered by the court in lieu of all relevant fact. Abercrombie v. LaBoon, 348 S.E.2d 170 (1986).

Willfulness is shown when a parent's conduct "evinces a settled purpose to forego parental duties" because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." SCDSS v. Broome, 413 S.E. 835 (1992). A parent who resides in a distant state did not defeat claim of willfulness based on claim of poor financial circumstances where there was "a pattern of almost total indifference to the two children" shown by mother's never writing, seldom calling, nor asking the father of the children to provide for them. Leone v. Dilullo, 365 S.E.2d 39 (Ct. App. 1988). "A finding of a willful failure to visit will not be predicated upon parental conduct that can be reasonably explained." Wilson v. Hogans, 363 S.E.2d 911 (Ct. App. 1987).

TPR was granted on failure to visit where father was incarcerated in Florida for seven years and there was "no evidence that he ever attempted to locate or contact his daughter during that time." DSS v. Richardson, 378 S.E.2d 601 (Ct. App. 1989).

D. Failure to Support - § 20-7-1572(4)

Family Court decision not to terminate a

divorced father's rights was affirmed where support payments that he mailed to mother's address were returned and his attempts to contact mother were frustrated. Martin v. Ross, 331 S.E. 2d 785 (Ct. App. 1985). In ordering a new trial after the denial of TPR on father with drug abuse history, the Court said there is "no authority for the proposition that the failure to pay child support is excused by either non-psychotic depression or abuse of alcohol and drugs." Dorn v. Criddle, 410 S.E.2d 590 (Ct. App. 1991). Denial of TPR upheld where mother missed eight monthly support payments but testified that she caught up, and record did not indicate that she had not contributed to child's support in some other way during her regular weekend visits. Shake v. Darlington Cty. DSS, 410 S.E.2d 923 (Ct. App. 1991). A father's incarceration did not relieve him of duty to support child. S.C. DSS v. Phillips, 391 S.E. 2d 584 (Ct. App. 1990).

A parent's incarceration did not relieve him of duty to support the child when he earned \$25.50 per month and purchased cigarettes and canteen food while in prison. SCDSS v. Phillips, 391 S.E.2d 584 (Ct. App. 1990).

E. Diagnosable Condition - § 20-7-1572(6)

Clear and convincing proof of unlikelihood of change in condition and parent's inability to improve was not established where two mentally retarded parents had been accepted into program designed to educate in parenting. S.C. DSS v. Smith, 429 S.E.2d 807 (1993). The mention of "emotional instability" in DSS treatment plan was not sufficient to establish diagnosable condition without expert evidence. Shake v. Darlington Cty. DSS. Where it was shown that mother was mildly mentally deficient, "essentially illiterate," and unlikely to benefit from courses on parenting skills, DSS was not required to provide parenting classes, and TPR was granted. S.C. DSS v. Humpheys, 374 S.E.2d 922 (Ct. App. 1988).

Special Issues

A. Putative Father of Child Born out of Wedlock

Court denied TPR on unwed father who made "sufficient prompt and good faith efforts" to assume parental duties in a case where the father's efforts were frustrated by mother even though he did not meet literal requirements of statute on support being prerequisite to right to consent to adoption. Abernathy v. Baby Boy,

437 S.E.2d 25 (1993).

B. Revocation of Relinquishment of Parental Rights or Consent to Adoption § 20-7-1720

Birth parent's relinquishment and consent to adoption is ineffective until after the child is born. Doe v. Clark, Opinion No. 24232, (April 12, 1995). A revocation of consent requires a finding that revocation is in the best interests of the child and that consent was not voluntary or was obtained under duress or coercion. Johnson v. Horry Cty. DSS, 380 S.E.2d 830 (1989).

Procedure in TPR Cases

A. Notice

Despite a mother's limited mental capacity, due process was satisfied where she was personally served and her attorney and guardian ad litem represented her interests at the hearing. Orangeburg Cty. DSS v. Harley, 393 S.E.2d 597 (Ct. App. 1990). TPR was reversed where a mother had no prior notice of all the grounds that the petitioner asserted at trial. Greenville Cty. DSS v. Bowes, 437 S.E.2d 107 (1993).

B. Right to Counsel

Notwithstanding a determination that a parent in a TPR action has a right to counsel and is entitled to be so advised, the Court remanded the case for a rehearing instead of vacating the TPR order in a case where the parent was not advised of the right to counsel, because it made a finding that DSS acted in what it considered the best interests of the child. SCDSS v. Vanderhorst, 340 S.E.2d 149 (1986).

C. Standing

A TPR action need not be initiated by DSS because any interested party, including foster parents, may petition for TPR. Greenville Cty. DSS v. Bowes. A step-father married to and living with the mother who has custody of the children is an "interested party" and may file TPR petition. Boyer v. Boyer, 352 S.E. 2d 514 (Ct. App. 1987). A mother who voluntarily signed consent to adoption did not have standing to contest a removal petition. Edwards v. Hars, 326 S.E. 2d 408 (1985). A father who denied paternity of the child for eleven years does not have standing to challenge TPR. SCDSS v. Parker, 268 S.E.2d 282 (1980).

Recent Decision

Family Court Appointments

Attorneys in Hampton and Jasper Counties argued that family court appointments placed an undue burden on them because of the limited number of attorneys available for appointment in those counties.

The S.C. Supreme Court agreed that the burden on these attorneys was inequitable, because the number of appointments they received was "completely disproportionate" to the number received in counties with a larger number of attorneys. It denied relief to the petitioners, however, holding that the remedy lay in the family court's discretion to appoint attorneys from outside the county to ease the burden.

The court declined to adopt a comprehensive rule governing court appointments throughout the state, as urged by the S.C. Bar in an amicus brief. The court agreed that such a rule is needed, but stated that it should be promulgated through the normal rule-making process.

The court also admonished family court judges to insure that appointments are made sufficiently in advance of any hearing to allow adequate time for the attorney to prepare.

In re Hampton County DSS, 465 S.E.2d 354 (Jan. 17, 1996)

Book Review

Advocating for the Child in Protection Proceedings: A Handbook for Lawyers and Court Appointed Special Advocates

by Donald Duquette, et al
ISBN 0-669-21465-5

In less than two hundred pages, this handbook provides a comprehensive look at the child protection system for anyone who has ever been appointed to represent a child client. Beginning with the premise that these advocates are given few, if any, guidelines, Duquette has streamlined the system into graphs and checklists, with corresponding text.

Particularly helpful is the way the system has been outlined in a hypothetical case and followed through each possible stage of the proceedings. Using

the example of a neglect/possible abuse case, the authors ask a set of questions at each interval, considering: Assessment, Identifying the Child's Interests, Permanency Planning, Client Counseling, Decision making, and Action Steps. Also provided is a sampling of other cases, in physical abuse, sexual abuse, and neglect.

The book's main strength is in its common sense approach to responsible advocacy. Attorneys and volunteer Guardians ad Litem would find this book helpful.

Upcoming Training

The Children's Law Office will sponsor a conference **Expert Testimony in Child Abuse Cases**, on May 10, 1996. This conference will be beneficial to lawyers, judges, guardians ad litem, caseworkers, and the professionals who provide expert testimony. It will be pertinent to both child protection and criminal proceedings. Brochures will be available in March.

The Children's Committee of the S.C. Bar Association will sponsor a CLE in the fall on **Hidden Issues in Children's Cases**. Topics will include: addictions, handicapped children, fetal alcohol syndrome, the effect of domestic violence on children, treatment vs. prosecution of perpetrators, and the impact of block grants. The date and additional information will be provided in a future issue.

ABA Standards

The American Bar Association recently adopted **Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases**. In Part I, the standards address the roles and responsibilities of an attorney appointed to represent a child in an abuse and neglect case. The following areas are delineated:

- ◆ Definitions of the "child's attorney" and a lawyer appointed as "guardian ad litem";
- ◆ General authority and duties, including basic obligations, conflicts, the child's preferences, and the child's interests;
- ◆ Actions to be taken, including meeting with the child and others, filing pleadings and requesting services;

- ◆ Responsibilities at hearings;
- ◆ Post-hearing duties, and
- ◆ Appeals.

Part II addresses the role of trial judges and court administrators in assuring quality legal representation for children, including the selection, training, oversight, and payment of court-appointed lawyers.

The Abuse and Neglect Standards appeared in the fall issue of *Family Law Quarterly*. (The standards are identified as proposed in the journal, but were approved by the ABA House of Delegates on 2-5-96.) A copy can also be obtained from the Children's Law Office.

Scholarships for Judges

The State Justice Institute has scholarships available for judges or court managers to attend out-of-state training programs. The State Justice Institute is a private, non-profit corporation established by an act of Congress to improve the administration of justice in state courts. The scholarship program is intended to enhance the knowledge, skills, and abilities of judges and court managers by enabling their attendance at educational programs which would otherwise not be possible. These scholarships may be used to cover tuition and travel for amounts up to \$1500. Lodging and meals are excluded. Scholarships may not be used for meetings for national organizations of which the applicant is a member. Applications must be submitted by April 15 for programs beginning between July 13 and September 30, and by July 15 for programs to be held between October 1 and December 31. For more information or an application, contact the State Justice Institute at (703) 684-6100. An application form can also be found in the *Federal Register* / Vol. 60 No. 240 / December 14, 1995 / 64226. The Children's Law Office will assist judges in applying for scholarships to attend programs which are related to child abuse and neglect.

What do you think?

This is the first issue of the "Children's Law Report", which will be distributed monthly by the Children's Law Office. The following items are being considered for regular inclusion. Please note which of these, or other topics, would be most helpful to you.

_____ Legislative update

_____ Review of research

_____ Book reviews

_____ Reviews of recent case decisions

_____ Training announcements

_____ Articles of interest

other: _____

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