Family Law Pro Facto

A publication of the Stark County Family Court

Judge Jim James Judge Michael Howard

May 1, 2011

Governor to Name New Judge

Family Court's newest judge is expected to be named soon by Ohio Governor John Kasich. The governor's office conducted interviews on Thursday, April 28th of the four candidates for the office endorsed by the Stark County Republican Party Executive Committee. Brant Luther, Kristin Farmer, Lori Flowers and Rosemarie Hall are all under consideration for the seat vacated by Judge David Stucki. Judge Michael Howard has relocated his office and courtroom to Courtroom 2, Courtroom 3 will be assigned to the new judge and staff.

Beginning May 1, 2011, the Stark County Family Court will work toward implementation of a "One Judge, One Family" approach to assignment of cases. Under this assignment policy change, one Judge will be assigned to the same juvenile throughout various case types and for all time. When a new case is opened the Judge to be assigned shall be the same Judge that was assigned for the previous case involving that juvenile.

Do You Need an Interpreter/Translator for a Family Court Case?

If you have a Family Court case for which you are in need of an interpreter for a hearing-impaired client or a translator for a client who does not speak English, please contact Assistant Court Administrator Mary Ann Abel, 330.451.7084, or MAAbel@co.stark.oh.us to make arrangements. Because interpreters and translators are in great demand, and their schedules fill very quickly, it is much easier to schedule an interpreter/translator well in advance of the needed date. It is often difficult, if not impossible to schedule an interpreter/translator on short notice.

Many find amnesty for child support warrants

(CANTON, OH) - On Thursday, April 14, 28 individuals cleared 32 child support warrants at a local Child Support Amnesty event.

The 62 individuals who attended the event represented more than $750,000 in arrearages. Many of these attendees worked out payment arrangements at the event which was sponsored by the Stark County Family Court, Stark County Job and Family Services' (SCJFS) Child Support Division, Stark County Community Action Agency, Stark County Coalition to Advance Fatherhood and the Interdenominational Ministerial Association of Stark County.

"The purpose of this outreach effort was to re-engage a population of non-custodial parents who were not meeting their financial obligation to their children," Rob Pierson, SCJFS Deputy Director, Child Support Enforcement Division. "We hope they now stay connected with the system and work with our agency and the Family Court to pay their support."

Close to $1,500 in support was paid at the event. Amnesty Day organizers reported that 24 participants had their driver's licenses, which had been suspended for non-payment of support, reinstated.

"The success of the event was not in the amount of support collected, warrants canceled or licenses reinstated, but in the opportunity these non-custodial parents were given in a positive, non-threatening environment to get back on track in paying their child support obligations," Pierson said.

Local organizations were available at the event to offer information on programs that help non-custodial parents overcome lack of employment, education or job skills. Those included Employment Source, Stark County Job and Family Services, Stark County Community Action Agency, Stark State University and the United Way's 2-1-1 service.

Family Court Chief Magistrate **Sally Efremoff** and Assistant Chief Magistrate **David Nist** conducted the hearings on behalf of the court.

For information on child support cases, contact Stark County Job and Family Services' Child Support Enforcement Division at 330-451-8930.

Sweeping Change to Custody Law Proposed

Senate Bill 144 – Summary by Louis Tobin, Esq. Legislative Liaison Ohio Judicial Conference

Technical Amendments

- Amends R.C. 3105.65 (Power of court), 3109.041 (Prior decrees), 3109.051 (Parenting time), 3109.09 (Liability of parents), 3109.56 (Power of attorney), 3119.022 (Child support worksheet), 3119.24 (Child support provisions), 3313.98 (School enrollment), 5120.653 (Termination of participation in DRC program) to reflect technical changes from a "shared parenting" model to and "equal legal and physical access" model.

R.C. 3109.03 (Equality of parental rights and responsibilities)

- Would require courts to grant equal legal and physical access to the parents unless clear and convincing evidence shows that that access would be harmful to the children. If the court does not grant equal legal and physical access, the court must explain, in writing, its reasoning for not doing so.

R.C. 3109.04(A) – (Designation for Public Assistance)

- Would prohibit the court from designating one of the parents' residences to serve as the child's home for the purpose of receiving public assistance unless the designation is made for the sole purpose of receiving public assistance.

R.C. 3109.04(B) – (Interviewing the Children)

- Would permit the court in its own discretion, and require the court upon the motion of either party, to interview the children in chambers regarding their wishes and concerns with respect to the allocation of parental rights.

- Permits the court, upon the written motion of either parent, to appoint a guardian ad litem and requires the court to order the costs divided equally between the parties.

- Would permit the court to make a determination as to the child's wishes and concerns if:

  (1) The court determines that the child has sufficient reasoning capability AND

  (2) To do so would be in the best interests of the child AND
  (3) Special circumstances exist.

R.C. 3109.04(C) – (Medical, Psychological, and Psychiatric Investigations)

- Would permit the court, upon the written request of either party, to order medical, psychological, and psychiatric evaluations and to divide the costs between the parties equally or tax the costs to the moving party.

R.C. 3109.04(D)(1) - (Allocating parental rights and responsibilities)

- Would require the court to allocate parental rights and responsibilities in one of five ways depending on who, if anyone, files the motion and/or plan:

  (1) Both parents jointly request equal and physical legal access and also jointly file a plan
  (2) Each parent individually makes a request for equal legal and physical access and each individually files a plan
  (3) Each parent makes a request for equal legal and physical access but only one parent files a plan
  (4) Only one parent makes a request for equal legal and physical access and files a plan
  (5) Neither parent files a plan or the court finds by clear and convincing evidence that equal access would be harmful to the children

- Under any of the above circumstances, the court must review the plan or plans. If none of the plans provide for equal access, the court must work with the parent or parents to create a plan that does.

- The court must approve the plan:

  (1) When both parents jointly request equal legal and physical access and jointly file a plan OR
  (2) When the court, in reviewing a plan or plans, discovers that one of the plans provides for more equality
  (3) When the court has worked with the parent or parents to address concerns and to create a plan that provides equal access

- The court need not provide equal legal and physical access when it finds by clear and convincing evidence that equal access would be harmful to the children. When the court makes such a finding, it may proceed to allocate parental rights in a manner that is consistent with the best interests of the children. Otherwise, the court need not consider the best interests of the children.

- In all cases, the court must enter into the record of the case findings of fact and conclusions of law as to the reasons for the approval, or the rejection or denial.

R.C. 3109.04(D)(2) – (Temporary designation of relative)

- If the court finds by clear and convincing evidence, that it is in the best interests of the child for neither parent to be designated the residential parent and legal custodian, it may temporarily commit the child to a relative. The court must certify a copy of its findings, along with relevant portions of the record to the juvenile court for further proceedings.

R.C. 3109.04(E) – (Modification or termination of prior order)

- A court may, upon a motion by either or both parents, modify a prior decree allocating parental rights and responsibilities if it finds that a substantial change has occurred in the circumstances of the child or either of the parents and that the modification is necessary to serve the best interests of the child.

- The court may also terminate a prior equal legal and physical access decree, upon the request of one or both parents, or whenever it determines by clear and convincing evidence that equal access is not in the best interests of the child.

- Whenever the court allocates parental rights and responsibilities in an unequal manner on the grounds that one of the parents is unsuitable for equal access, the court must create a plan to allow that parent to eliminate the reasons for unsuitability.

- When the unsuitable parent removes the grounds for unsuitability, the court, upon a motion by that parent, must modify its order or decree to provide for equal legal and physical access.

R.C. 3109.04(F) – (Presumption of equal parenting)

- Would require the court, in all determinations concerning the allocation of parental rights and responsibilities to recognize a presumption that an equal allocation between the parents is in the best interests of the child.

- In the absence of clear and convincing evidence that an equal allocation would be harmful to the children, the court must allocate parental rights in a way that is equal.

- When there is clear and convincing evidence that an equal allocation would be harmful, the bill would amend two of the factors that the court is to consider in determining the child's best interests:

  (1) When considering whether a parent has failed to make all child support payments and to pay all arrearages the court must also consider whether the parent had the ability to pay the support ordered.
  (2) When considering whether a parent has a history of child abuse, spousal abuse, other domestic violence, or parental kidnapping, the court is prohibited from considering the potential for such abuse and may only consider clear and convincing evidence.

R.C. 3109.043 (Temporary custody order while action pending)

- Would require the court to make a temporary order regarding parental rights and responsibilities while an action is pending whenever such an order is requested in a complaint, answer, or counterclaim, or by motion served with the pleading filed with the clerk of court.

- When making a temporary allocation, there is a presumption that equal parenting is in the best interests of the children and the court must set parenting time equally unless there is clear and convincing evidence of unfitness or the parents agree to an alternate schedule

- Would require the court, when determining parenting time for a putative father, to consider whether the putative father is named on the birth record, the child has the putative father's birth name, or whether there is a clear pattern of a parent child relationship.

- The court must put a putative father on equal footing with the mother unless clear and convincing evidence can be presented as to the unfitness of either parent.

Scouting Out the Law

The attorneys litigating in Courtroom One looked a little younger than normal, but the trials went without a hitch. On trial for delinquency by reason of Complicity to Petty Theft was John, who was arrested at Kmart when his buddy, Robert, took a CD without paying. Then it was a trial for Wendell Humphrey, a member of the Shoshone-Bannock Tribe. Humphrey is a Hocking Correctional Facility guard who was fired for not cutting his hair.

In a joint project sponsored by the Stark County Bar Association and the Buckeye Council of the Boy Scouts of America, over one-hundred scouts visited courtrooms throughout Canton to earn their Law Merit Badge. Local attorney, Ivan Redinger, also a scout leader, organized and led the experience which is in its second year. Judge James hosted the mock trials with the scouts to complete one of the merit badge requirements. The trials were followed with discussions of First Amendment freedoms and personal responsibilities.

The National Pulse

‘Sext’ Education: States Look for Ways to Chastise Teens for Bawdy Cellphone Shots

Posted May 1, 2011 2:50 AM CDT
By Wendy N. Davis

Witold Walczak of the Pennsylvania ACLU with MaryJo Miller, who filed suit against the Wyoming County DA after he threatened to prosecute her daughter and two other teens. Photo by AP Photo/Matt Rourke

When school authorities in Wyoming County in northeastern Pennsylvania learned three years ago that high school students were sending nude or scantily clad images of each other via cellphones, they were confronted with one of the country’s first major “sexting” scandals.

Among the photos was one of two girls in bras, while another showed a teen wearing a white towel wrapped under her breasts.

Former District Attorney George Skumanick Jr. threatened to prosecute all of the students involved—those who sent the images as well as the recipients—on child pornography charges unless they attended a program run by the probation department.
Most teens complied, but three girls and their families sued, seeking an injunction banning prosecution. Represented by the American Civil Liberties Union of Pennsylvania, the teens argued that the prosecutor’s stance violated their First Amendment right of free expression. Additionally, they said, the program would violate their free-speech rights because they would have been required to write an essay about why what they did was wrong.

U.S. District Judge James Munley in the Middle District of Pennsylvania agreed with the teens and, in March 2009, enjoined prosecution. He said the authorities couldn’t constitutionally require the teens to write an essay condemning their behavior. Imposing such an obligation would violate their free-speech rights and also would violate their parents’ rights to raise their children free of governmental interference, he said.

The 3rd U.S. Circuit Court of Appeals at Philadelphia upheld that relatively narrow ruling, but punted on the larger question of whether the photos were unlawful child pornography or protected under the First Amendment. Soon after that decision, the case settled and Munley entered a permanent injunction against prosecution.
THE LEGISLATIVE RESPONSE

The case law is far from settled about whether authorities can constitutionally prosecute teens sending or receiving sexually explicit photos. Nevertheless, states are enacting their own statutes, trying to carve a middle path between completely decriminalizing sexting on one hand and prosecuting teens as sex

offenders on the other.

Bills or resolutions have been introduced in at least 20 states, according to the National Conference of State Legislatures, and new legislation has been enacted in at least 10 states. Most of those bills aim to lessen the penalties for sexting by treating it as a misdemeanor or other low-level infraction instead of a felony sex offense.

In Illinois, for instance, teens who forward or post online racy pictures of their underage classmates would get juvenile court supervision that could result in mandatory counseling or community service.

“As the Internet explodes and people are taking advantage of it, these images hang around forever,” says state Sen. Ira Silverstein, a Chicago Democrat. “Once they’re disseminated, they can ruin somebody’s career.”

And in New Jersey, the state assembly unanimously passed a bill in March that would allow first-time offenders to undergo a diversionary program.

In Ohio, Republican Rep. Ron Maag introduced a measure that would make it a misdemeanor for minors to recklessly create, possess or send nude photos of other minors.

Maag says that some legal intervention is needed because sexting poses hazards to teens. “What about the real pedophile,” he says, “who might be able to pick it up on the Internet and track you down?” He argues that his measure would give prosecutors an alternative to bringing child pornography charges and convictions that carry mandatory registration as a sex offender.

But some advocates say that hauling minors into the criminal justice system for taking or sending racy photos is dangerous even if the charge is only a misdemeanor. Marsha Levick, deputy director and chief counsel of the Juvenile Law Center in Philadelphia, points out that getting hauled into court in itself can damage teens.

“If my daughter were arrested for sharing a silly photo with her boyfriend and hauled off to court by a male DA, and went before a male judge and a male probation officer—I can’t think of anything more traumatic,” she says. “The concern about kids’ foolish use of technology is entirely legitimate, but why wouldn’t we want to think about education? Why would we waste judicial resources and traumatize our kids by putting them into the justice system?”

THE FEDERAL APPROACH

Even if new laws are enacted by the states, those laws wouldn’t necessarily prevent federal prosecutions. In February, U.S. District Judge Jennifer Coffman in the Eastern District of Kentucky ruled that federal laws criminalizing the distribution of sexually explicit photos of children apply regardless of the age of the creators or senders.

In that case, a 14-year-old girl sued three 14-year-old boys for allegedly distributing a sexually explicit video of her that she had made and sent to one of them. She argued that she is entitled to civil damages for violations of federal law. The boys asked for the lawsuit to be dismissed, arguing that Congress didn’t intend for the statute to apply to teens.

Coffman denied the motion to dismiss. “Nothing in the plain language of the statutes or their legislative history indicates that Congress intended [the statutes] to apply only to the conduct of adults. Both statutes prohibit creation, possession and transmission of child pornography by any ‘person,’ ” the judge wrote.

The issue isn't going away. The Pew Research Center's Internet & American Life Project reported in December 2009 that 4 percent of teens ages 12 to 17 who own cellphones have sent nude or nearly nude images or videos of themselves, while 15 percent in that group have received such images of someone they know.

When these photos come to the attention of authorities, prosecutions sometimes follow.

For instance, Antjuanece Brown of Tigard, Ore., then 19, was convicted last year of a felony for exchanging allegedly pornographic photos with her 16-year-old girlfriend. Brown was sentenced to three years' probation, assessed $3,000 in court fees, and ordered to keep away from the younger girl until she turns 18.

These types of cases confound legal experts because the situation doesn't fit people's conception of child pornography. In a 1982 case, New York v. Ferber, the U.S. Supreme Court said that child porn wasn't protected by the First Amendment. The court held that such material victimized minors involved in its production.

That decision, however, dealt with whether the child pornography laws violated adults' rights to free speech. At the time, few people contemplated that teens would one day send photos of themselves to others.

"There's a long history of government efforts to prevent dissemination of material harmful to minors," says John Palfrey, co-director of Harvard's Berkman Center for Internet & Society. "But not in the context of student-to-student speech. That's why this sexting stuff can be so challenging."

Palfrey adds: "It's not the paradigm that legislatures have attempted to deal with, which is adults doing this to kids."

At the same time, some observers say that teens who send explicit photos of themselves are leaving themselves vulnerable to victimization. For example, a recipient could forward the photo to other people or post it online. In one high-profile tragedy, 18-year-old Jessica Logan of Cincinnati committed suicide after a photo she sent to her boyfriend was more widely circulated.

"It's a very difficult issue," says Parry Aftab, a Wyckoff, N.J.-based child advocate and cyberlaw expert. "An image takes on a life of its own and has the power to do serious damage to the people in it."

Aftab says she doesn't believe that teens should be prosecuted for taking photos of themselves, as opposed to sending them. "The laws run too hot and too cold here," Aftab says. "You want a situation that gives prosecutors and law enforcement the ability to do something without going overboard."

But civil libertarians say that prosecuting teens for taking photos of themselves, or voluntarily sharing them, violates their free-expression rights. "Our position is that the consensual exchange of naked or semi-naked pictures between two minors should not be a crime at all," says Pennsylvania ACLU legal director Witold "Vic" Walczak, who represented the teens and their families. "If you've got nonconsensual transmission, that could be a form of harassment."

Save Your Subpoena

The Stark County Educational Service Center hosted Judge David Stucki, Judge Jim James and Chief Magistrate Sally Efremoff at its April 21, 2011 Superintendents' Meeting to discuss matters of mutual concern to the schools and the courts. Not surprisingly, orders which effect school funding are high on the Superintendent's list. Judge James reminded the officials that Ohio law requires the Juvenile Court to identify a child's school district of origin when making custody change orders. Any subsequent challenges to the school district responsible for the student's funding are to be directed to the Ohio Department of Education, not the court.

In another matter, the Superintendents reported receiving many subpoenas for school records from attorneys. The subpoenas are costly and unnecessary as both parents have free access to those records on their own.

REMINDER from your Court Transcriptionists:

When filing Objections with Family Court and a praecipe for a transcript is ordered, upon filing the praecipe with the Clerk of Courts, please deliver a copy back to the appropriate staff member to prepare the transcript.

If the praecipe is not returned to us, the transcript may be missed and not prepared for your hearing.

Hips Don’t Lie

As reported by NPR

A New York City woman recently lost some of her divorce settlement money. She had claimed a car accident left her too injured to work. Then she blogged about belly-dancing performances. When her ex-husband found out about her hip-shaking hobby, he took her back to court.

MARY LOUISE KELLY, host:

Good morning. I'm Mary Louise Kelly. Shakira sings a song called "Hips Don't Lie," and apparently she's right. Just ask the Staten Island woman who recently lost her divorce settlement money. She had claimed a car accident left her too injured to work, then she blogged about belly-dancing performances. When her ex-husband found out about her hip shaking hobby, he took her back to court. The woman says the dance was medical treatment. Her doctor did not corroborate the story.

Court Options Program in Fifth Year

A total of sixty-nine Stark County youth were served by the Family Court’s OPTIONS program last year. OPTIONS is a court diversion program designed for youth who commit substance abuse violations. Since July of 2005, 604 juveniles have participated in the program with a total recidivism rate of 12%. Of the 69 served last year, the recidivism rate dropped to .5% according to program director, Katheryn Zindren.