



Center for Restorative Justice & Peacemaking

An International Resource Center in Support of Restorative Justice Dialogue, Research and Training

Legislative Statutes on Victim Offender Mediation : *A National Review*

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May 1, 2001

Introduction

The purpose of this report is to document the existing statutory authority among states relating to victim-offender mediation (VOM), which is a dialogue between crime victims and their perpetrators. VOM is a bedrock tool of restorative justice, which is an approach to criminal justice that views accountability to the victim and competency development of the offender as important in the justice system as community protection (Bazemore & Umbreit, 1997). While general mediation procedures are common in civil and family law statutes, the purpose of this analysis is to look at mediation in criminal, rather than civil cases. The existence of specific provisions in state codes for VOM is important for providing a structure to how VOM will be implemented in the state. It is important to note that the level of statutory authority for VOM in a state does not necessarily correspond with how prevalent VOM programs are within a state. While statutory authority for VOM provides VOM programs with added strength, VOM programs may also be promulgated at the agency level without specific statutory authority. For example, a state department of corrections may implement a VOM program on its own, or enter into a partnership with a nonprofit to provide VOM, without any statutory authority. However, without statutory provisions for VOM, there is little legal authority or protections for those involved in VOM, nor are there any specific funding mechanisms.

This study finds that there are currently 29 states that have VOM or VOM-type statutory authority. Twenty-three states have a specific statutory provision for VOM, and six more states have VOM-type programs that may entail dialogue between victims and offenders. The VOM provisions range from extremely comprehensive, with details on training requirements, costs, evaluation, confidentiality and liability, to a simple reference to VOM within a long list of sentencing alternatives. The vast majority of the VOM codes have been enacted within the past ten years, with many in the past five years.

There have been no previous studies on statutory authority for VOM within the states. However, there was one earlier study completed in 2000 that looked more broadly at "restorative justice" in state statutes or codes (O'Brien, 2000). The O'Brien study, which used survey methodology, found that 19 states had reflections of restorative justice principles in their codes or statutes. But, the existence of such principles does not necessarily mean that VOM, a common method of restorative justice, is also included in the state statute. In fact, four of the 19 states in the O'Brien study do not include statutory authority for VOM as of 2002. This more comprehensive study found that at least two-thirds of the states now have statutory references for VOM.

Methodology

The methodology for this report included a comprehensive search of all state codes on Lexis-Nexus on a state-by-state basis using VOM language and VOM types of activities. The researcher and two graduate assistants did the searches independently. Each state code and the code for the District of Columbia were

searched using standard terminology of VOM, including such terms as restorative justice, mediation, reconciliation, conferencing and dialogues. As states vary in their use of language within their codes, the searches also involved common cognates (mediators, reconciling, dialoguing, etc.) and related terms such as 'community resolution' or 'reparation'. The researchers also attempted to find programs similar to VOM through looking in sentencing alternatives and/or pretrial diversion sections of the codes. The researchers excluded other popular types of mediation or alternative dispute resolution techniques that often uses similar language as VOM, such as mediation between married couples involved in child custody disputes or persons involved in contract disputes. All mediation in civil cases was excluded from this analysis.

While finding authorizing codes and statutes was fairly straightforward in many states, other states had references to VOM-type programs buried deep within general mediation codes, or used non-standard VOM language within their codes. Thus, as the language varies so differently among states, the structure of state codes is not uniform, and as state codes are being updated continually in response to new legislation or court rulings, the following findings can only be assessed as a best effort at documenting statutory authority in the states for VOM as of Spring 2002.

Continuum of Statutory Authority.

There currently exists a continuum of statutory authority related to VOM in the states, ranging from "little or no mention of VOM" to a "comprehensive VOM legislative framework". Twenty-nine states currently have a reference to VOM or VOM-type programs in their codes, with 23 having a specific reference to a mediation or dialogue between a victim and an offender. The states fall loosely into five categories on this continuum. See Table I below for details.

Table 1. Statutory Authority for Victim-Offender Mediation

Little/No Mention of VOM	Codes detail programs that may involve victim offender dialogue	Basic Statutory Provision for VOM	Specific Statutory Provision for VOM	Comprehensive VOM Program
Connecticut District of Columbia Georgia Hawaii Idaho Kentucky Maryland Massachusetts Michigan Mississippi Nevada New Hampshire New Jersey New Mexico North Dakota Pennsylvania Rhode Island South Carolina South Dakota Utah West Virginia Wyoming	Alaska Florida Illinois Maine New York Vermont	Alabama Arizona California Colorado Iowa Missouri North Carolina Washington Wisconsin	Arkansas Louisiana Minnesota Ohio Oklahoma Texas Virginia	Delaware Indiana Kansas Montana Nebraska Oregon Tennessee
22 States & DC	6 States	9 States	7 States	7 States

The seven states in the "Comprehensive VOM Program" category have state statutes or codes that detail comprehensive guidelines for a VOM program or programs within the state (See Appendix A for copies of state codes). While the particular guidelines of each state within this category are by no means similar, they tend to include specifics regarding oversight, liability, funding, mediator training requirements, confidentiality, rights, costs and other particulars as to how VOM programs will be run. Some states with a comprehensive program have a specific statute detailing VOM. For example, in the Delaware State Code, there is one section on Victim-Offender Mediation that details all the specifics regarding VOM for both juvenile and adult offenders, including eligibility, liability, confidentiality, costs and other details (I I Del. C. § 9501-5). In other Comprehensive Program States, the

statutes or codes are found within various sections. For example, in Indiana, some of the VOM statutory language is within the Community Corrections section of the code (Bums Indiana Code Ann. § II - 12-1-2.5, § II - 12-8- 1) while other parts of the VOM authority are within the Victims Rights section of the code (Bums Ind. Code Ann § 35-40-6-4).

There are seven states that have clear, specific statutory authority for VOM programs, but fewer detailed requirements of VOM programs. The state codes in this category tend to have a specific section within their codes authorizing and/or requiring a VOM program, but offer fewer specific details on the requirements of the program. While they do not include an extensive list of details, they give an overall direction of how the VOM program will be established in the state, and may include one specific requirement, such as mediator training requirements, confidentiality, liability or costs to participants. There is often strong restorative justice language within these state codes. For example, an Arkansas statute authorizes a Youth Mediation Program (A.C.A. §§ 931-401-405). The statute provides authority on the inclusion of VOM within Arkansas institutions and provides funding to two University of Arkansas law schools to provide training and technical support in the establishment of VOM, but provides no other details on eligibility for participation, funding, confidentiality, costs or other practicalities. In another example, Arizona has a specific VOM statute relating to juvenile offenders that gives the presiding judge the authority to "establish and provide voluntary victim reconciliation and restitution services to assist victims of juvenile crimes (A.R. S. § 8419). This statute does not detail any requirements of what these VOM services may entail, leaving such details to be determined by the judge or court system.

There are nine states that include a basic statutory provision for VOM, but this provision is included as one option among a long list of options available. There are limited or no details on the specifics of how VOM programs are established or monitored. For example, the Alabama State Code on Community Punishment and Corrections allows that funds may be used to "develop or expand the range of community punishments and services at the local level. Community-based programs may include, but are not limited to the following: 1) community service supervision, community detention and restitution centers; *victim-offender reconciliation programs*, home confinement/ curfew; electronic surveillance; intensive supervision... (Code of Ala. 15-18-180)." The list goes on to mention 22 different options for which funds can be used in the area of community corrections. There is no other mention of VOM programs within the state code, aside from the inclusion of VOM on this list. Similarly, Missouri's state statutes have strong restorative justice language discussing how the community corrections program "promote(s) accountability of offenders to crime victims, local communities and the state ... (§ 217.777 R.S.Mo.)." It includes a long list of options to promote restorative justice, and "victim-offender mediation" is listed as one of the options, without further details on how it is to be established or monitored. In some of the states in this category, VOM programs are listed in a number of different statutes, but never are expanded upon greatly. For example, in California, VOM is authorized under truancy prevention programs (Cal Ed Code § 48720, § 48730), under the penal code for adults (Cal Pen Code § 8052), high-risk first time juvenile offenders (Cal Ed Code § 4776 1), and in the juvenile court provisions (Cal Wel & Inst Code § 202). While statutory support of VOM is clearly evident in California, the specifics of VOM are not provided legislatively, but rather left to the agencies developing and implementing VOM programs.

There are six states that have statutes authorizing programs that may entail dialogue between victims and offenders, but do not exactly fall within the rubric of VOM. For example, Illinois has a statutory authority for a community mediation program for juveniles, which has strong underlying restorative justice principles. Its goal is "to make the juvenile understand the seriousness of his or her actions and the effect that crime has on the minor, his or her family, his or her victim, and his or her community (§ 705 Ilcs 405/5-3 10)." This program involves the establishment of "community mediation panels" that will meet with a juvenile and his or her family to discuss the delinquent act. While the victim or a victim's representative may be involved in the panel, the panel is not formed for the purpose of dialogue between the victim and the juvenile, but rather for the rehabilitation of the juvenile. Maine has a similar statutory provision for "community resolution teams," whose purpose are to discuss a delinquent act and recommend sentencing or other alternatives. The victim or a victim's designee may be a member of a team, but the team is not set up primarily for dialogue between the victim and the offender. Thus, while these state statutes may result in dialogue between the victim and the offender in a similar fashion as a VOM program, the state statutes do not technically authorize a structured dialogue between a victim and a mediator in the same fashion as VOM.

Finally, there are 21 states and the District of Columbia that do not have any specific reference to VOM within their state statutes or codes. While some of these states contained a reference or stated a commitment to restorative justice principles, none was specific enough to imply any sort of meeting between a victim and an offender. It is important to note again that just because a state does not have a state statute or code mentioning VOM or restorative justice, it does not mean that such programs cannot exist. In fact, VOM programs may flourish without any code. For example, Pennsylvania's state statutes currently do not mention VOM. However, there is a general commitment to restorative justice within the Pennsylvania code, and indeed there are VOM programs within the state. Similarly, there is language within the South Carolina Children's Code that generally promotes restorative justice, but there is no language regarding any sort of meeting or dialogue between victims and their offenders as part of its restorative justice orientation

Variations in Statutory Provisions

Along with variation in the comprehensiveness of VOM statutory provision, there is also an enormous amount of variation in the details of VOM. The variation in the structure for the provision of VOM services is likely of most significance. There are eight different approaches states have taken in authorizing VOM. Table 11 outlines these different state approaches.

Table 2. Variations in Statutory Authority for Victim-Offender Mediation

General referral language	State Program	Grants to Nonprofits	County Program	Specific Program	Grants to Counties or Non Profits	Referrals to Individuals
Alabama Alaska North Carolina Washington Wisconsin	Colorado Florida Illinois Iowa Maine Missouri Oklahoma Texas	Delaware Minnesota Montana Nebraska New York Oregon Tennessee Vermont	Arizona Indiana Kansas Virginia	Arkansas	Ohio	Louisiana

In five states there is simply language that an offender will be "referred" to VOM services, without any more detail as to who is providing these services. One can assume that these services are either provided by non-profit agencies, as there are many such programs within the states, or that such services are available or could be available through the corrections department. However, there are no details on the specific provision of these services.

There are eight states that establish state VOM programs or assume state responsibility for providing VOM services. Some state programs, such as Iowa, specifically delegate the responsibility for establishing VOM to judicial or regional districts, while others, such as Colorado, have established a uniform statewide system. A state system does not necessarily mean that states will be providing the VOM services. For example, Oklahoma's statute states specifically that "the Department of Juvenile Justice may enter into contracts with private supervisors for implementation of the program ... (10 Okl. St. § 7302-8. I)." Others might not have this provision specifically written into its VOM code, but it is a generally accepted part of agency business.

Four states provide funding to counties to provide VOM services. Again, these counties may operate by contracting with local non-profits to provide VOM services. Arizona's code allows counties to "enter into agreements with qualified private human services agencies for provision of any or all of these programs or services (A.R. S. § 12299.01)."

Eight states operate explicitly with grants to non-profit organizations to provide the VOM services, with state or county agencies serving only a referring, monitoring or consulting role in the provision of services. Most

of these states detail the requirements for non-profits to receive funding, including eligibility and reporting requirements. One state, Montana, specifically mentions that "faith-based" organizations are eligible for funding (Mont. Code Ann., § 2-15-2014).

Three states have fairly unique provisions. Ohio, has statutory language allowing for grants to either local governments or to non-profits to establish VOM programs. Louisiana refers to juveniles to an approved list of mediators, who are not necessarily required to be part of a non-profit organization or community center. And Arkansas' code funds the state universities to provide technical assistance in establishing youth mediation services.

Three states, Delaware, Montana and Oregon, also have established statewide commissions to monitor and/or provide guidance on VOM. While other states surely also have state committees dedicated to VOM and restorative justice, these are the only three to have the committees statutorily mandated and focused narrowly on this issue.

Aside from the general structure of VOM provisions, there are many other variations among states in regards to VOM. Table III outlines some of these differences, including those related to the age of perpetrator, liability, mediator requirements, protections of confidentiality, and required participation by perpetrators. As discussed above, most of the variations in the details occur in the states with a specific statutory provision for VOM or a comprehensive VOM program.

Table 3. Characteristics of Statutory Authority for Victim-Offender Mediation

	Statute(s)		Req.	Structure	Med. Reqs.	Training Co	No Liability	Words	Costs	Conf	Used in Sentence
AL	15-18-180	A		General				victim-offender reconciliation			
AK	Alaska Stat. § 47.12.010; § 12.55.011	J/A	Vo	General				Community dispute resolution centers			Yes
AZ	A.R.S. § 8-419; A.R.S. § 12-299.01	J/A	Vo	General				victim reconciliation services; victim-offender reconciliation or mediation"			
AR	A.C.A. § 9-31-401,402,403, 404,405	J	--	Specific gency		X		Youth mediation			
CA		I/A						Victim-offender reconciliation			
CO	C.R.S. 19-2-309,5	I	Vo	State Program				"victim-offender mediation"			
DE	11 Del. C. § 9501, 9502, 9503,9504,9505	C	Vo	State Program	Gen.			"victim-offender mediation	Free	X	
FL	Fla. Stat. § 985.303	I	Vo	State Pro in							Yes
IL	§ 705 Ilcs 405/5-3 10	I		Program			X			X	
IN	Bums Indiana Code Ann. § 11-12-1-2.5, § 11-12-8-1,	C	--	pState County Program o.			Sign Waiver	Victim-offender reconciliation			Yes
IA	§35-40-64. § 11-12-8-6-5 Iowa C ode§90 I b I	A		State Program				RP) Victim & offender reconciliation			
KS	K.S.A. § 38-1635, § 38-1663, §75-7038; Kan. Sup. Ct. Rule 902	J	Y	Grants to Non-Profits	Det.			Mediation	Yes		
LA	La. Ch.C. Art 435,439, 44 1, 444	I	Y	General Referral	Det.			Mediation	Yes	X	Yes
ME	34-A M.R.S. § 1214 15 MA-S. §3301,15 M.R.S. §3204	I		State Program				Community resolution teams		X	Yes
	Statute(s)		Req.	Structure	Med Reqs.	Training Comp.	No Liability	Words	Costs		Conf. Used in sentence
MN	Minn. Stat. § 61 IA.77; §	J/A	No	Grants to	Gen.		X	Victim-offender			Yes

	61 IA.775; § 595.02 Minn. Juv. Ct. Proc. Appendix of Forms			Non-Profits				mediation			
MO	§ 217.777 R.S.Mo.	A		State Program		X		Victim-offender mediation			
MT	Mont. Code Anno. § 2-15-2013~ 2-15-2014,41-5-1304, 46-18-101	C		Grants to Non-Profits		X		Victim-offender meetings, family group conferencing, sentencing circles			
NE	R.R.S. Neb § 43-274, § 43-245, § 43-286; RKS. Neb. § 25-2901-2921 (2001)	I	Yes	Grants to Non-Profits	Detail	X	X	Victim offender mediation	Yes	X	Yes
NY	NY CLS Jud §§ 849-a-g, NY CLS CPL § 215. 10	A		Grants to Non-Profits	Gen			Dispute resolution	Yes	X	Yes
NC	N.C. Gen. Stat. § 713-2506	J	Yes	General				Victim-offender			
OK	10 Okl. St. § 7302-8. 1; 22 J/A Okl. St. § 991a	J/A	No	State Program			X	Victim/offender reconciliation Program	Low-cost	X	
OR	ORS § 36.105, ORS § I/A 36.115, ORS § 135.980, ORS § 135.95 1, ORS § 135.953, ORS § 135.955	J/A	No	Grants to Non-Profits				Mediation between victim and offender			Only if Yes waiver signed
TN	Tenn. Code Ann. § 16-20- C 10 1, § 16-20-102, § 16-20-103, § 16-20-104, § 16-20-105	C	V	Grants to Non-profits	General		X	Victim-offender mediation	Free	X	Yes
TX	Tex. Code Crim. Proc. Art. A 42.12, Tex. Code Crim. Proc. Art. 56.02, Tex. Code Crim. Proc. Art. 56.13, Tex. Code Crim. Proc. Art. 26.13, Tex. Gov't Code § 508.324, Tex. Gov't Code § 508.19 1, Tex. Civ. Prac. & Rem. Code § 154.073.	A	No	State Program		X		Victim-offender mediation		X	No
VT	13. V.S.A. § 7030,28 V.S.A. A §2a,28,28V.S.A.§ 102, V.S.A. § 252	A	Y	Grants to Non-Profits				Community reparative boards, restorative justice			
VA	Va. Code Ann, § 19.2-11.4 A	A		County Programs			X Sign a waiver	Victim-offender reconciliation			Yes
WA	ARCS § 13.40.070 J	J		General Referral				Mediation; Victim offender reconciliation programs			
WI	Wis. Stat. § 938.34 J	J	Y	General Referral				Victim-offender mediation			

Age of Offender. Of the 29 programs that involve VOM or VOM-type dialogues, all but seven provide these services for juvenile offender. There are 12 states that statutorily authorize program solely for juveniles, seven that have separate provisions that cover juveniles and adults, and four states that authorize VOM for both juveniles and adults under the same provision. There are seven states that provide statutory authority for VOM only for adults, without a similar program for juveniles.

Mediator Requirements. Seven states have codified mediator requirements for those providing VOM services. Three of the states have detailed requirements for mediators involved in VOM. For example, Kansas has detailed requirements for mediators involved in victim-offender mediation, including a 16 hour training that "must include conflict resolution techniques, neutrality, agreement writing, ethics, role playing, communication skills, evaluation of cases, and the laws governing mediation. Initial training must be done in a continuous manner within a 120-day period (Kan Sup. Ct. Rule 902)." There are also rules dictating annual reviews of qualification and outlining requirements to be a mediator trainer. Four states have more general requirements that agencies providing services establishment minimum training requirements for VOM mediators. For example, Delaware's code states that nonprofits can only receive funding for VOM programs if they provide "neutral mediators who have received training (I I Del. C. § 9502)."

Immunity. There are seven states that provide specific immunity to the people involved in VOM, including mediators, the agencies providing/supporting mediation, and those referring cases to VOM, such as prosecutors.

Two of the states have a statutory requirement that victims sign waivers, while others provide simple blanket immunity to participants. Other states may have more general provisions regarding liability in their broader juvenile justice or corrections code.

Confidentiality. Nine states explicitly state that the VOM proceedings are confidential, and cannot be used in court cases. For example, Tennessee has a specific statute dealing with the confidential nature of VOM, stating that "all memos, work notes and files are confidential and privileged and not subject to disclosure to judicial or administrative proceedings Tenn. Code Ann. § 16-20-103)."

Cost to Participant. There are a few states that discuss the costs of VOM participation to participants. Oklahoma requires the offender to pay a specific minimal cost for the VOM (more than \$5.00, less than \$25.00), and Kansas, Louisiana and New York may require a nominal fee if it does not burden the victim. Delaware and Tennessee both stipulate that participation in VOM should be free for all participants.

Required Participation. Findings from the study show that there is a difference in language used in 'requiring' participation in VOM. None of the states requires victims to participate in VOM, and indeed most that provide more than basic statutory provision state explicitly that VOM participation is voluntary for victims. However, there are eight states with statutes saying that a judge may require the offender to participate in VOM. For example, Kansas' Juvenile Justice Code states that "the court may order the Juvenile offender and the parents of the juvenile offender to ... participate in mediation as the court directs (K.S.A. § 38-1663) " Of these eight states, six of them are for juveniles only, while two states have it in adult VOM statutes. No state has a blanket requirement of VOM participation by offenders. Rather, discretion is given to the judge, who likely consults with VOM program specialists on the appropriateness of VOM for particular offenders.

On the other hand, there are nine states that have specific language mandating that participation in VOM be voluntary for the offender as well as the victim. For example, Texas has language in its Victim-Offender Mediation Code that states "the pardons or paroles division may not require the defendant to participate and may not reward the person for participation by modifying conditions of the release or the person's level of supervision by granting any other benefit ... (Tex. Gov't Code § 508.324)." Texas is alone in its statutory language saying that VOM should not be used in sentencing. In fact, most states codes specifically state that VOM may be used as a way to make a negotiated agreement of restitution or other punishment to be submitted to the court for sentencing, or in itself is a sentencing alternative.

Language of VOM. The language used for describing VOM within state statutes varies greatly too. While "victim-offender mediation" was the most common terminology, other states referred to it as victim offender reconciliation, victim reconciliation, mediation, community dispute resolution, dispute resolution, victimoffender meetings, family group conferencing, community resolution, community reparative boards, youth mediation, mediating criminal offenses, or sentencing circles. Some states used several different terms within their statutes.

Types of Offenses. The states have great variation in the type of offenses for which VOM is authorized (See Table 4). There are nine states that specifically state that VOM can be used in felonious offenses. Of these states, only Texas asserts that VOM can be used in cases of murder. Delaware, Iowa, Tennessee and Wisconsin simply state that VOM can be used in felonies or aggravated misdemeanors without specifically stating which types of felonies are appropriate, while others specifically disallow VOM in death penalty cases or cases with mandatory prison sentences. Eight other states specifically state that VOM is to be used only for non-violent offenders. Two states further restrict that to first-time offenders, while two others include restrictions on using VOM for serious offenses. Montana only allows VOM for persons with a low future risk of violence. The most common approach, used by 12 states, is to not specify the types of offenses appropriate for VOM. These states either explicitly or implicitly leave this decision to the discretion of the judge or other appropriate authority.

Table 4. Types of Offenses

Felonies &	Felonies	Felonies	Formula	Non-	Not for	First-time	Only	Unspecified
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Aggravated Misdemeanors	if no death sentence imposed	with no mandatory prison sentence (or fourth degree vehicular felonies with mandatory sentencing)	based on seriousness and criminal history	violent offenses only	violent or serious offenses	nonviolent offenses only	for persons with a low risk Of violence	or left to discretion Of authorities
Delaware Iowa Tennessee Texas Wisconsin	Minnesota Oklahoma	Ohio	North Carolina	Nebraska New York Oregon	Alabama Alaska	Florida Kansas	Montana	Arizona Arkansas California Colorado Illinois Indiana Louisiana Maine Missouri Vermont Virginia Washington

Other Provisions. There are numerous other unique provisions existing in some state codes that are worth note. First, there are five states, Kansas, Louisiana, Nebraska, New York and Oregon, that require the state or county to maintain comprehensive lists of individuals and/or programs that are trained to provide VOM. Second, there are four states that have statutory provisions for training in VOM. Arkansas' statute provides for training of lawyers in mediation, and technical assistance to local institutions to incorporate mediation programs (§ 9-31-405). Both Missouri's and Texas' programs require the state department of corrections to provide training in VOM to eligible volunteers § 217.777; Tex. Code Crim. Proc. Art. 56.13). Montana's code requires the Office of Restorative Justice to provide education, technical assistance and other information on restorative justice, including VOM (Mont. Code Anno. § 41-5-1304).

Conclusions

As there has been much activity in the past five years in enacting new legislation for VOM, it is not surprising that there are a number of states currently in the process of considering new legislation. In the 2002 legislative session, there are several proposed legislative changes involve VOM. For example, in January 2002 New Jersey Assemblywoman Previte introduced Bill No. 1168 which intends to incorporate balanced and restorative justice principles in the juvenile justice system, including a statement encouraging courts to engage in "fostering interaction and dialogue between the offender, victim and community... (New Jersey Assembly Bill A1 168, 2002) (See Appendix C)." As VOM becomes a more greatly recognized restorative justice program and as more states begin to experiment with VOM, we can expect that more of the states that currently have basic VOM statutory provisions or no VOM provisions to enact legislation that comprehensively authorizes and regulates VOM practice within their states.

The presence of VOM statutory language is important for VOM programs to continue to function. The following example illustrates its importance. The State of Minnesota has specific VOM language that discusses VOM, and specifically allows that a VOM process can "assign an appropriate sanction to the offender (Minn. Stat. § 61 1A.775)." In a recent case in the State of Minnesota, a district court had used its discretion to approve a recommended sanction from a sentencing circle conducted by a local VOM council. In this case, a defendant failed to disclose that she was working full time when applying for public assistance. In the sentencing circle it was decided that she repay the money, do community service, and obtain credit counseling and financial management help. The District Court accepted this recommendation. The Court of Appeals initially reversed this decision because it asserted that the district court abused its discretion by adhering to the sentencing circle's recommendation. The Minnesota Supreme Court overruled the appeals court, citing the VOM statute allowing for the assignment of sanctions as the reason for allowing the sentencing circle's sanction to stand Minnesota v. Pearson, 2002). If Minnesota did not have this clause regarding VOM in its statute, it is possible that the Supreme Court would have made the acceptance of recommendations by a sentencing circle illegal.

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**Appendix A:
Comprehensive Statutory Provision for VOM**

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*** CURRENT THROUGH DECEMBER 2001 ***
*** (2001 REGULAR SESSION OF THE 141ST GENERAL ASSEMBLY) ***
*** ANNOTATIONS CURRENT THROUGH APRIL 2002 ***
TITLE 11. CRIMES AND CRIMINAL PROCEDURE
PART VII. SPECIAL PROGRAMS
CHAPTER 95. VICTIM-OFFENDER MEDIATION
11 Del. C. § 9501 (2001)**

§ 9501. Purpose

(a) The General Assembly finds and declares that:

(1) The resolution of felony, misdemeanor and juvenile delinquent disputes can be costly and complex in a judicial setting where the parties involved are necessarily in an adversary posture and subject to formalized procedures; and

(2) Victim-offender mediation programs can meet the needs of Delaware's citizens by providing forums in which persons may voluntarily participate in the resolution of certain criminal offenses in an informal and less adversarial atmosphere.

(b) It is the intent of the General Assembly that each program established pursuant to this chapter:

(1) Stimulate the establishment and use of victim-offender mediation programs to help meet the need for alternatives to the courts for the resolution of certain criminal offenses, whether before or after adjudication;

(2) Encourage continuing community participation in the development, administration and oversight of local victim-offender mediation programs;

(3) Offer structures for victim-offender mediation which may serve as models for programs in other communities; and

(4) Serve a specific community or locale and resolve certain criminal offenses that arise within that community or locale.

HISTORY: 70 Del. Laws, c. 444, § 1.

NOTES APPLICABLE TO ENTIRE TITLE

CROSS REFERENCES. --As to Department of Public Safety, see Chapter 82 of Title 29. As to Council on Police Training, see § 8205 of Title 29.

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*** ANNOTATIONS CURRENT THROUGH APRIL 2002 ***
TITLE 11. CRIMES AND CRIMINAL PROCEDURE
PART VII. SPECIAL PROGRAMS
CHAPTER 95. VICTIM-OFFENDER MEDIATION
11 Del. C. § 9502 (2001)**

§ 9502. Program funding; operation; supervision

(a) There is hereby established a Victim-Offender Mediation Committee to be composed of the Attorney General, Public Defender, Chief Magistrate, Chair of the Criminal Justice Council, State Court Administrator and the Chief Judge of Family Court or their designees to administer this chapter. No funds shall be awarded or program approved without the approval of the Victim-Offender Mediation Committee.

(b) To be eligible for state funds, a program must do the following:

- (1) Be operated by a 501(c)(3) organization in Delaware;
- (2) Provide neutral mediators who have received training in conflict resolution techniques;
- (3) Comply with this chapter and the rules adopted by the Victim-Offender Mediation Committee;
- (4) Provide victim-offender mediation in felony, misdemeanor and juvenile delinquency cases without cost to the participants; and

(5) At the conclusion of the mediation process provide a written agreement or decision to the referral source setting forth the settlement of the issues and future responsibilities of each participant.

(c) Each program that receives funds under this chapter must be operated under a contract with the Victim-Offender Mediation Committee and must comply with this chapter.

(d) An organization applying to the Victim-Offender Mediation Committee for funding is to include the following information in its application:

- (1) Cost of operating the victim-offender mediation program, including the compensation of employees;
- (2) Description of the proposed area of service and number of participants expected to be served;
- (3) Proof of nonprofit status; and
- (4) Charter of incorporation.

(e) The Chair of the Victim-Offender Mediation Committee or his or her designee may inspect, examine and audit the fiscal affairs of victim-offender mediation programs.

(f) A program operated under this chapter is not a state agency or an instrumentality of the State. Employees and volunteers of a program are not employees of the State.

(g) A program that receives funds from the Victim-Offender Mediation Committee under this chapter must annually provide the Victim-Offender Mediation Committee with statistical data regarding the following:

- (1) The operating budget;
- (2) The number of case referrals, categories, or types of cases referred;
- (3) The number of parties serviced;
- (4) The number of cases resolved;
- (5) The nature of the resolution, amount, and type of restitution to the victim and/or community;
- (6) The rate of compliance;
- (7) The length of total case processing time by the victim-offender mediation program;
- (8) Community service hours agreed to, if applicable; and
- (9) Community service hours completed, if applicable. The data shall maintain the confidentiality and anonymity of all mediation participants.

HISTORY: 70 Del. Laws, c. 444, § 1; 72 Del. Laws, c. 190, § 3.

NOTES:

EFFECT OF AMENDMENTS. --72 Del. Laws, c. 190, effective July 20, 1999, substituted "State Court Administrator" for "Director of the Administrative Office of the Courts."

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, subchapter, chapter, part or title.

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***** ANNOTATIONS CURRENT THROUGH APRIL 2002 *****
TITLE 11. CRIMES AND CRIMINAL PROCEDURE
PART VII. SPECIAL PROGRAMS
CHAPTER 95. VICTIM-OFFENDER MEDIATION
11 Del. C. § 9503 (2001)

§ 9503. Confidentiality

All memoranda, work notes or products, or case files or programs established under this chapter are confidential and privileged and are not subject to disclosure in any judicial or administrative proceeding unless the court or administrative tribunal determines that the materials were submitted by a participant to the program for the purpose of avoiding discovery of the material in a subsequent proceeding. Any communication relating to the subject matter of the resolution made during the mediation process by any participant, mediator or any other person is a privileged communication and is not subject to disclosure in any judicial or administrative proceeding unless all parties to the communication waive the privilege. The foregoing privilege and limitation of evidentiary use does not apply to any communication of a threat that injury or damage may be inflicted on any person or on the property of a party to the dispute, to the extent the communication may be relevant evidence in a criminal matter. Nothing in this section shall prevent the Victim-Offender Mediation Committee from obtaining access to any information it deems necessary to administer this chapter.

HISTORY: 70 Del. Laws, c. 444, § 1.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, subchapter, chapter, part or title.

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PART VII. SPECIAL PROGRAMS
CHAPTER 95. VICTIM-OFFENDER MEDIATION
11 Del. C. § 9504 (2001)

§ 9504. Eligibility

No offender shall be admitted to the program unless the Attorney General certifies that the offender is appropriate to the program, regardless of any criteria established under any program or this chapter. Any person who voluntarily enters a mediation process at a victim-offender mediation program established under this chapter may revoke his or her consent, withdraw from mediation and seek judicial or administrative redress prior to reaching a written agreement. No legal penalty, sanction or restraint may be imposed upon the person for such withdrawal.

HISTORY: 70 Del. Laws, c. 444, § 1.

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TITLE 11. CRIMES AND CRIMINAL PROCEDURE
PART VII. SPECIAL PROGRAMS
CHAPTER 95. VICTIM-OFFENDER MEDIATION
11 Del. C. § 9505 (2001)

§ 9505. Immunity

(a) Members of the Victim-Offender Mediation Committee or board of directors of an organization with a victim-offender mediation program are immune from suit in any civil action based upon any proceedings or other official acts performed in good faith as members of the board.

(b) State employees and employees and volunteers of a victim-offender mediation program are immune from suit in any civil action based on any proceedings or other official act performed in their capacity as employees or volunteers, except in cases of wilful or wanton misconduct.

(c) A victim-offender mediation program is immune from suit in any civil action based on any of its proceedings or other official acts performed by its employees, volunteers or members of its board of directors, except (1) in cases of wilful or wanton misconduct by its employees or volunteers, and (2) in cases of official acts performed in bad faith by members of its board.

HISTORY: 70 Del. Laws, c. 444, § 1.

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TITLE 11. CORRECTIONS
ARTICLE 12. COMMUNITY CORRECTIONS
CHAPTER 1. LOCALLY AND REGIONALLY OPERATED COMMUNITY CORRECTIONS
Burns Ind. Code Ann. § 11-12-1-2.5 (2002)

§ 11-12-1-2.5. Types of programs -- Services

(a) The community corrections programs described in section 2 [IC 11-12-1-2] of this chapter may include the following:

- (1) Residential or work release programs.
- (2) House arrest, home detention, and electronic monitoring programs.
- (3) Community restitution or service programs.
- (4) Victim-offender reconciliation programs.
- (5) Jail services programs.

- (6) Jail work crews.
- (7) Community work crews.
- (8) Juvenile detention alternative programs.
- (9) Day reporting programs.
- (10) Other community corrections programs approved by the department.

(b) The community corrections board may also coordinate and operate educational, mental health, drug or alcohol abuse counseling, housing, as a part of any of these programs, or supervision services for persons described in section 2 [IC 11-12-1-2] of this chapter.

HISTORY: P.L.240-1991(ss2), § 59; P.L.104-1997, § 2; P.L.32-2000, § 4.

CITED: Davis v. State, 669 N.E.2d 1005 (Ind. App. 1996).

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TITLE 11. CORRECTIONS
ARTICLE 12. COMMUNITY CORRECTIONS
CHAPTER 8. INTERSTATE COMPACT ON COMMUNITY CORRECTIONS TRANSFERS
Burns Ind. Code Ann. § 11-12-8-1 (2002)

§ 11-12-8-1. "Community corrections program" defined

As used in this chapter, "community corrections program" means a community based program that provides preventive services, services to criminal or juvenile offenders, services to persons charged with a crime or an act of delinquency, services to persons diverted from the criminal or delinquency process, services to persons sentenced to imprisonment, or services to victims of crime or delinquency that may include the following:

- (1) Residential programs.
- (2) Work release programs.
- (3) House arrest, home detention, and electronic monitoring programs.
- (4) Community restitution or service programs.
- (5) Victim-offender reconciliation programs.
- (6) Jail services programs.
- (7) Jail work crews.
- (8) Community work crews.
- (9) Juvenile detention alternative programs.
- (10) Study release programs.

HISTORY: P.L.73-1994, § 1; P.L.32-2000, § 5.

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TITLE 35. CRIMINAL LAW AND PROCEDURE

ARTICLE 40. VICTIM RIGHTS

CHAPTER 6. PROSECUTING ATTORNEY DUTIES AND VICTIM ASSISTANCE PROGRAMS

Burns Ind. Code Ann. § 35-40-6-4 (2002)

§ 35-40-6-4. Duties of prosecuting attorney or victim assistance program

A prosecuting attorney or a victim assistance program shall do the following:

- (1) Inform a victim that the victim may be present at all public stages of the criminal justice process to the extent that:
 - (A) the victim's presence and statements do not interfere with a defendant's constitutional rights; and
 - (B) there has not been a court order restricting, limiting, or prohibiting attendance at the criminal proceedings.
- (2) Timely notify a victim of all criminal justice hearings and proceedings that are scheduled for a criminal matter in which the victim was involved.
- (3) Promptly notify a victim when a criminal court proceeding has been rescheduled or canceled.
- (4) Obtain an interpreter or translator, if necessary, to advise a victim of the rights granted to a victim under the law.
- (5) Coordinate efforts of local law enforcement agencies that are designed to promptly inform a victim after an offense occurs of the availability of, and the application process for, community services for victims and the families of victims, including information concerning services such as the following:
 - (A) Victim compensation funds.
 - (B) Victim assistance resources.
 - (C) Legal resources.
 - (D) Mental health services.
 - (E) Social services.
 - (F) Health resources.
 - (G) Rehabilitative services.
 - (H) Financial assistance services.
 - (I) Crisis intervention services.
 - (J) Transportation and child care services to promote the participation of a victim or a member of the victim's immediate family in the criminal proceedings.
- (6) Inform the victim that the court may order a defendant convicted of the offense involving the victim to pay restitution to the victim under IC 35-50-5-3.
- (7) Upon request of the victim, inform the victim of the terms and conditions of release of the person accused of committing a crime against the victim.
- (8) Upon request of the victim, give the victim notice of the criminal offense for which:

(A) the defendant accused of committing the offense against the victim was convicted or acquitted; or

(B) the charges were dismissed against the defendant accused of committing the offense against the victim.

(9) In a county having a victim-offender reconciliation program (VORP), provide an opportunity for a victim, if the accused person or the offender agrees, to:

(A) meet with the accused person or the offender in a safe, controlled environment;

(B) give to the accused person or the offender, either orally or in writing, a summary of the financial, emotional, and physical effects of the offense on the victim and the victim's family; and

(C) negotiate a restitution agreement to be submitted to the sentencing court for damages incurred by the victim as a result of the offense.

(10) Assist a victim in preparing verified documentation necessary to obtain a restitution order under IC 35-50-5-3.

(11) Advise a victim of other rights granted to a victim under the law.

HISTORY: P.L.139-1999, § 1.

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TITLE 35. CRIMINAL LAW AND PROCEDURE
ARTICLE 40. VICTIM RIGHTS
CHAPTER 6. PROSECUTING ATTORNEY DUTIES AND VICTIM ASSISTANCE PROGRAMS
Burns Ind. Code Ann. § 35-40-6-5 (2002)

§ 35-40-6-5. Waiver from victim in victim-offender reconciliation program

(a) If a victim participates in a victim-offender reconciliation program (VORP) operated by a victim assistance program under section 4(9) [IC 35-40-6-4(9)] of this chapter, the victim shall execute a waiver releasing:

(1) the prosecuting attorney responsible for the victim assistance program; and

(2) the victim assistance program;

from civil and criminal liability for actions taken by the victim, an accused person, or an offender as a result of participation by the victim, the accused person, or the offender in a victim-offender reconciliation program (VORP).

(b) A victim is not required to participate in a victim-offender reconciliation program (VORP) under section 4(9) of this chapter.

HISTORY: P.L.139-1999, § 1.

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CHAPTER 38. MINORS
ARTICLE 16. KANSAS JUVENILE JUSTICE CODE
DISPOSITIONAL PROCEDURE
K.S.A. § 38-1663 (2001)

38-1663. Sentencing alternatives.

(a) When a respondent has been adjudicated to be a juvenile offender, the judge may select from the following alternatives:

(1) Place the juvenile offender on probation for a fixed period, subject to the terms and conditions the court deems appropriate based on the juvenile justice programs in the community, including a requirement of making restitution as required by subsection (d).

(2) Place the juvenile offender in the custody of a parent or other suitable person, subject to the terms and conditions the court orders based on the juvenile justice programs in the community, including a requirement of making restitution as required by subsection (d).

(3) Place the juvenile offender in the custody of a youth residential facility or, in the case of a chronic runaway youth, place the youth in a secure facility, subject to the terms and conditions the court orders.

(4) Place the juvenile offender in the custody of the commissioner, as provided in K.S.A. 38-1664, and amendments thereto.

(5) Commit the juvenile offender to a sanctions house for a period no longer than seven days. Following such period, the court shall review the placement. The court may continue to recommit the juvenile offender to a sanctions house for a period no longer than seven days followed by a court review. Commitment to a sanctions house shall not exceed 28 total days for the same act or transaction. If in the adjudication order, the court orders a sanctions house placement for a verifiable probation violation and such probation violation occurs, the juvenile may immediately be taken to a sanctions house and detained for no more than 48 hours, excluding Saturdays, Sundays and holidays, prior to court review of the placement. The court and all other interested parties shall be notified of the sanctions house placement. An offender over 18 years of age or less than 23 years of age at sentencing may be committed to a county jail, in lieu of a sanctions house, under the same time restrictions imposed by this paragraph. No offender may be committed under this paragraph unless such offender has violated the terms of probation.

(6) Commit the juvenile offender to a community based program available in such judicial district subject to the terms and conditions the court orders.

(7) Impose any appropriate combination of paragraphs (1) through (6) of this subsection and make other orders directed to the juvenile offender as the court deems appropriate.

(8) Commit the juvenile offender to a juvenile correctional facility as provided by the placement matrix established in K.S.A. 38-16,129, and amendments thereto. The provisions of K.S.A. 38-1664, and amendments thereto, shall not apply to juvenile offenders committed directly to a juvenile correctional facility.

(9) Place the juvenile offender under a house arrest program administered by the court pursuant to K.S.A. 21-4603b, and amendments thereto.

(b) (1) In addition to any other order authorized by this section, the court may order the: (A) Juvenile offender and the parents of the juvenile offender to:

(i) Attend counseling sessions as the court directs; or

(ii) participate in mediation as the court directs. Participants in such mediation may include, but shall not be limited to, the victim, the juvenile offender and the juvenile offender's parents. Mediation shall not be mandatory for the victim;

(B) parents of the juvenile offender to participate in parenting classes; or

(C) juvenile offender to participate in a program of education offered by a local board of education including placement in an alternative educational program approved by a local board of education.

(2) Upon entering an order requiring a juvenile offender's parent to attend counseling sessions or mediation, the court shall give the parent notice of the order. The notice shall inform the parent of the parent's right to request a hearing within 10 days after entry of the order and the parent's right to employ an attorney to represent the parent at the hearing or, if the parent is financially unable to employ an attorney, the parent's right to request the court to appoint an attorney to represent the parent. If the parent does not request a hearing within 10 days after entry of the order, the order shall take effect at that time. If the parent requests a hearing, the court shall set the matter for hearing and, if requested, shall appoint an attorney to represent the parent. The expense and fees of the appointed attorney may be allowed and assessed as provided by K.S.A. 38-1606, and amendments thereto.

(3) The costs of any counseling or mediation may be assessed as expenses in the case. No mental health center shall charge a fee for court-ordered counseling greater than what the center would have charged the person receiving the counseling if the

person had requested counseling on the person's own initiative. No mediator shall charge a fee for court-ordered mediation greater than what the mediator would have charged the person participating in the mediation if the person had requested mediation on the person's own initiative.

(c) (1) If a respondent has been adjudged to be a juvenile offender, the court, in addition to any other order authorized by this section, may suspend the juvenile offender's driver's license or privilege to operate a motor vehicle on the streets and highways of this state. The duration of the suspension ordered by the court shall be for a definite time period to be determined by the court. Upon suspension of a license pursuant to this subsection, the court shall require the juvenile offender to surrender the license to the court. The court shall transmit the license to the division of motor vehicles of the department of revenue, to be retained until the period of suspension expires. At that time, the licensee may apply to the division for return of the license. If the license has expired, the juvenile offender may apply for a new license, which shall be issued promptly upon payment of the proper fee and satisfaction of other conditions established by law for obtaining a license unless another suspension or revocation of the juvenile offender's privilege to operate a motor vehicle is in effect. As used in this subsection, "highway" and "street" have the meanings provided by K.S.A. 8-1424 and 8-1473, and amendments thereto. Any respondent who is adjudicated to be a juvenile offender who does not have a driver's license may have such juvenile offender's driving privileges revoked. No Kansas driver's license shall be issued to a juvenile offender whose driving privileges have been revoked pursuant to this section for a definite time period to be determined by the court.

(2) In lieu of suspending the driver's license or privilege to operate a motor vehicle on the highways of this state of any respondent adjudicated to be a juvenile offender, as provided in subsection (c)(1), the court in which such juvenile offender was adjudicated to be a juvenile offender may enter an order which places conditions on such juvenile offender's privilege of operating a motor vehicle on the streets and highways of this state, a certified copy of which such juvenile offender shall be required to carry any time such juvenile offender is operating a motor vehicle on the streets and highways of this state. Any such order shall prescribe the duration of the conditions imposed and shall specify that such duration shall be for a definite time period to be determined by the court. Upon entering an order restricting a juvenile offender's license hereunder, the court shall require such juvenile offender to surrender such juvenile offender's driver's license to the court. The court shall transmit the license to the division of vehicles, together with a copy of the order. Upon receipt thereof, the division of vehicles shall issue without charge a driver's license which shall indicate on its face that conditions have been imposed on such juvenile offender's privilege of operating a motor vehicle and that a certified copy of the order imposing such conditions is required to be carried by the juvenile offender for whom the license was issued any time such juvenile offender is operating a motor vehicle on the streets and highways of this state. If the juvenile offender is a nonresident, the court shall cause a copy of the order to be transmitted to the division and the division shall forward a copy of it to the motor vehicle administrator of such juvenile offender's state of residence. Such court shall furnish to any juvenile offender whose driver's license has had conditions imposed on it under this section a copy of the order, which shall be recognized as a valid Kansas driver's license until such time as the division shall issue the restricted license provided for in this subsection. Upon expiration of the period of time for which conditions are imposed pursuant to this subsection, the licensee may apply to the division for the return of the license previously surrendered by such licensee. In the event such license has expired, such juvenile offender may apply to the division for a new license, which shall be issued immediately by the division upon payment of the proper fee and satisfaction of the other conditions established by law, unless such juvenile offender's privilege to operate a motor vehicle on the streets and highways of this state has been suspended or revoked prior thereto. If any juvenile offender shall violate any of the conditions imposed under this subsection, such juvenile offender's driver's license or privilege to operate a motor vehicle on the streets and highways of this state shall be revoked for a period as determined by the court in which such juvenile offender is convicted of violating such conditions.

(d) Whenever a juvenile offender is placed pursuant to subsection (a)(1) or (2), the court, unless it finds compelling circumstances which would render a plan of restitution unworkable, shall order the juvenile offender to make restitution to persons who sustained loss by reason of the offense. The restitution shall be made either by payment of an amount fixed by the court or by working for the persons in order to compensate for the loss. If the court finds compelling circumstances which would render a plan of restitution unworkable, the court may order the juvenile offender to perform charitable or social service for organizations performing services for the community.

Nothing in this subsection shall be construed to limit a court's authority to order a juvenile offender to make restitution or perform charitable or social service under circumstances other than those specified by this subsection or when placement is made pursuant to subsection (a)(3) or (4).

(e) In addition to or in lieu of any other order authorized by this section, the court may order a juvenile offender to pay a fine not exceeding \$ 250 for each offense. In determining whether to impose a fine and the amount to be imposed, the court shall consider the following:

(1) Imposition of a fine is most appropriate in cases where the juvenile offender has derived pecuniary gain from the offense.

(2) The amount of the fine should be related directly to the seriousness of the juvenile offender's offense and the juvenile offender's ability to pay.

(3) Payment of a fine may be required in a lump sum or installments.

(4) Imposition of a restitution order is preferable to imposition of a fine.

(5) The juvenile offender's duty of payment should be limited in duration and in no event should the time necessary for payment exceed the maximum term which would be authorized if the offense had been committed by an adult.

(f) In addition to or in lieu of any other order authorized by this section, if a juvenile is adjudicated to be a juvenile offender by reason of a violation of K.S.A. 41-719, 41-727, 65-4101 through 65-4164 or K.S.A. 2000 Supp. 8-1599, and amendments thereto, the court shall order the juvenile offender to submit to and complete an alcohol and drug evaluation by a community-based alcohol and drug safety action program certified pursuant to K.S.A. 8-1008, and amendments thereto, and to pay a fee not to exceed the fee established by that statute for such evaluation. The court may waive such evaluation if the court finds that the juvenile offender has completed successfully an alcohol and drug evaluation, approved by the community-based alcohol and drug safety action program, within 12 months before sentencing. If such evaluation occurred more than 12 months before sentencing, the court shall order the juvenile offender to resubmit to and complete such evaluation and program as provided herein. If the court finds that the juvenile offender and those legally liable for the offender's support are indigent, the fee may be waived. In no event shall the fee be assessed against the commissioner or the juvenile justice authority. The court may require the parent or guardian of the juvenile offender to attend such program with the juvenile offender.

(g) The board of county commissioners of a county may provide by resolution that the parents or guardians of any juvenile offender placed under a house arrest program pursuant to subsection (a)(9) shall be required to pay to the county the cost of such house arrest program. The board of county commissioners shall prepare a sliding financial scale based on the ability of the parents to pay for such a program.

(h) In addition to any other order authorized by this section, if child support has been requested and the parent or parents have a duty to support the respondent the court may order, and when custody is placed with the commissioner shall order, one or both parents to pay child support. The court shall determine, for each parent separately, whether the parent already is subject to an order to pay support for the respondent. If the parent currently is not ordered to pay support for the respondent and the court has personal jurisdiction over the parent, the court shall order the parent to pay child support in an amount determined under K.S.A. 38-16,117, and amendments thereto. Except for good cause shown, the court shall issue an immediate income withholding order pursuant to K.S.A. 23-4,105 et seq., and amendments thereto, for each parent ordered to pay support under this subsection, regardless of whether a payor has been identified for the parent. A parent ordered to pay child support under this subsection shall be notified, at the hearing or otherwise, that the child support order may be registered pursuant to K.S.A. 38-16,119, and amendments thereto. The parent also shall be informed that, after registration, the income withholding order may be served on the parent's employer without further notice to the parent and the child support order may be enforced by any method allowed by law. Failure to provide this notice shall not affect the validity of the child support order.

(i) Any order issued by the judge pursuant to this section shall be in effect immediately upon entry into the court's journal.

(j) In addition to the requirements of K.S.A. 38-1671, and amendments thereto, if a person is under 18 years of age and convicted of a felony or adjudicated as a juvenile offender for an offense if committed by an adult would constitute the commission of a felony, the court shall forward a signed copy of the journal entry to the commissioner within 30 days of final disposition.

(k) The sentencing hearing shall be open to the public as provided in K.S.A. 38-1652, and amendments thereto.

HISTORY: L. 1982, ch. 182, § 102; L. 1987, ch. 154, § 1; L. 1989, ch. 95, § 10; L. 1990, ch. 48, § 1; L. 1992, ch. 312, § 21; L. 1993, ch. 291, § 223; L. 1994, ch. 270, § 5; L. 1994, ch. 337, § 3; L. 1996, ch. 229, § 81; L. 1997, ch. 156, § 63; L. 1998, ch. 187, § 7; L. 1998, ch. 187, § 8; L. 1999, ch. 156, § 16; L. 2000, ch. 150, § 24; June 1.

NOTES:

REVISOR'S NOTE:

Section was amended twice in 1989 session, see also 38-1663a.

Section was amended twice in 1990 session, see also 38-1663b.

This section was also amended by L. 1992, ch. 239, § 280, but such amended version was repealed by L. 1993, ch. 291, § 283, effective July 1, 1993.

Section was also amended by L. 1997, ch. 156, § 64, but that version was repealed by L. 1998, ch. 187, § 19.

CROSS REFERENCES TO RELATED SECTIONS:

Departure sentences, see 38-16,132.

RESEARCH AND PRACTICE AIDS:

Infants 223.

C.J.S. Infants §§ 57, 69 to 85.

LAW REVIEW AND BAR JOURNAL REFERENCES:

"Juvenile Law: Jurisdiction Under the Kansas Juvenile Code: Juvenile Adjudication or Adult Trial?" Carmen D. Tucker, 27 W.L.J. 394, 402 (1988).

"Justice and Juveniles in Kansas: Where We Have Been and Where We Are Headed," Carla J. Stovall, 47 K.L.R. 1021 (1999).

"Criminal Procedure Survey of Cases," 48 K.L.R. 895 (2000).

ATTORNEY GENERAL'S OPINIONS

Sentencing; authorized dispositions; sentencing; probation; costs; home rule powers. 92-90.

Prosecution of juvenile traffic offenders; detainment of juvenile in jail. 94-68.

Juvenile offenders code; new offense; dispositions; commitment to youth center; custody expense; escape from custody; definition of "custody." 94-71.

Neither a school district nor an educational cooperative may charge fees for costs of conducting educational needs assessments ordered pursuant to 38-1514 or 38-1662. 97-44.

Discretion of court to suspend mandatory minimum fine for person under 21 possessing alcoholic liquor or cereal malt beverages. 1999-12.

CASE ANNOTATIONS

1. Authority to modify restitution exists; right to examine evidence, cross-examine and confront accuser also exists. In re C.A.D., 11 K.A.2d 13, 18, 22, 711 P.2d 1336 (1985).

2. Cited; deliberations and findings necessary to establish venue of dispositional hearing outside juvenile resident county (38-1605) examined. In re A.T.K., 11 K.A.2d 174, 177, 717 P.2d 528 (1986).

3. Exclusionary clause in insurance contract for intentional acts of mentally ill insured examined; "intentional" construed. Shelter Mut. Ins. Co. v. Williams, 248 K. 17, 19, 804 P.2d 1374 (1991).

4. Cited where driving with suspended license (8-262) held not a "traffic offense" under 8-2117(d); minor over 14 years subject to code. State v. Frazier, 248 K. 963, 970, 811 P.2d 1240 (1991).

5. Cited in holding crime of aiding a felon (21-3812) applies to aiding a juvenile offender. State v. Busse, 252 K. 695, 698, 847 P.2d 1304 (1992).

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KANSAS COURT RULES
***** THIS DOCUMENT IS CURRENT THROUGH SEPTEMBER 18, 2001 *****
RULES RELATING TO MEDIATION
Kan. Sup. Ct. Rule 902 (2001)

Review Court Orders which may amend this Rule

RULE 902 MEDIATOR AND MEDIATOR TRAINER QUALIFICATIONS

(a) The qualifications for mediators and trainers apply to individuals who handle cases referred by the state courts or under K.S.A. 5-501 et seq. No standards or qualifications should be imposed upon any person chosen and agreed to by the parties. These qualifications should not prevent parties having free choice of process, program and the individual neutral.

(b) "Mediators" are defined as persons specifically trained in the process of mediation who assist parties in dispute to reach a mutually acceptable resolution of their conflict. The role of the mediator is to aid the parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, and finding points of agreement. The agreement reached by the parties shall be based on the decisions of the parties and not on the decisions of the mediator.

(c) The director of dispute resolution shall keep a list of approved mediators, trainers, and trainings, and shall review any requests for approval within 60 days of the receipt of the written application and materials required by the director.

(d) To be approved as a mediator, an applicant must:

1. Complete the required training for the types of cases the applicant wishes to receive approval to mediate, and
2. Sign an agreement to follow the ethical standards of Supreme Court Rule 903, and
3. Co-mediate with or be supervised by an approved mediator for three cases or 15 hours during the first year of approved mediation practice after completing core training, and
4. Comply with Supreme Court Rule 904 concerning continuing mediator education.

(e) All approved mediators shall have participated in core mediation training of 16 hours. Training components must include conflict resolution techniques, neutrality, agreement writing, ethics, role playing, communication skills, evaluation of cases, and the laws governing mediation. Initial training must be done in a continuous manner within a 120-day period. Core training enables the applicant to mediate disputes which may include, but are not limited to, neighborhood, community, victim/offender, small claims, education, farmer-lender, or public policy problems. In addition, applicants wishing to mediate certain types of cases must have additional training as specified below:

1. To mediate domestic disputes, the applicant must have 14 hours of mediation skill training and 10 hours of training in child development, family systems, psychological aspects of divorce, domestic violence, or related substantive areas in addition to core training.

2. To mediate parent/adolescent disputes, the applicant must have 4 hours of mediation skill training and 10 hours of training in child and adolescent development, family psychology, the parent-adolescent relationship, or related substantive areas in addition to core training.

3. To mediate general Chapter 60 cases of a non-domestic nature, the applicant must have 14 hours of mediation skill training and 10 hours of training related to the subject being mediated or the civil litigation system in addition to core training.

(f) In addition to the requirements set forth in (e)(1)(2)(3), a trainer of an approved course must have the following experience:

1. Three years' practice of mediation, and
2. One year substantive experience in the subject area of the mediation training, and
3. Serving as an assistant or coach in three trainings with an approved trainer.

(g) Any training being conducted by an approved trainer may be monitored and evaluated by the director of dispute resolution.

(h) If an applicant has specialized experience or training but does not specifically meet the requirements set forth above, the applicant may apply to the director of dispute resolution for special approval.

(i) Mediator and trainer qualifications shall be reviewed by the director of dispute resolution and the advisory council on dispute resolution on an annual basis. Any modifications shall be presented to the Supreme Court by December 31 of each year, beginning in 1996.

(j) Mediator and trainer qualifications shall go into full force and effect on July 1, 1996.

COMMENT

The qualifications for mediators and trainers are the result of over five years of study. Recommendations and suggestions were received from members of the Supreme Court ADR Committee, Heartland Mediators Association, Kansas Bar Association, National Institute for Dispute Resolution, Society for Professionals in Dispute Resolution, American Bar Association, Academy of Family Mediators, State Justice Institute, judges, mediators, therapists and various representatives from other states. These recommendations and suggestions were collated and modified to encompass the statutory mandates of K.S.A. 5-501, current mediator training occurring in Kansas, national trends for minimum requirements, and future needs.

Conditions, including the availability of individuals with mediation training and experience, will vary between rural and urban areas. The minimum qualifications are listed to give judges and approved centers a beginning point to establish local policy. Judges and centers are encouraged to add requirements as necessary for the type of case to be mediated and the availability of individuals with additional qualifications.

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KANSAS STATUTES ANNOTATED
***** THIS DOCUMENT IS CURRENT THROUGH THE 2001 SUPPLEMENT *****
CHAPTER 75. STATE DEPARTMENTS; PUBLIC OFFICERS AND EMPLOYEES
ARTICLE 70. JUVENILE JUSTICE AUTHORITY
K.S.A. § 75-7038 (2001)

75-7038. Grants to counties for juvenile community correctional services.

On and after July 1, 1997, the commissioner of juvenile justice may make grants from the juvenile justice community initiative fund, created in K.S.A.75-7033, and amendments thereto, to counties for the development, implementation, operation and improvement of juvenile community correctional services including, but not limited to, restitution programs, victim services programs, balanced and restorative justice programs, preventive or diversionary correctional programs, community juvenile corrections centers and facilities for the detention or confinement, care or treatment of juveniles being detained or adjudged to be a juvenile offender.

HISTORY: L. 1997, ch. 156, § 7; May 22.

NOTES:

CROSS REFERENCES TO RELATED SECTIONS:

Adult community corrections act, see 75-5290 et seq.

LAW REVIEW AND BAR JOURNAL REFERENCES:

"Justice and Juveniles in Kansas: Where We Have Been and Where We Are Headed," Carla J. Stovall, 47 K.L.R. 1021 (1999).

ATTORNEY GENERAL'S OPINIONS

Judicial District Corrections Advisory Board is governmental entity for purposes of Kansas tort claims act. 2000-3.

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MONTANA CODE ANNOTATED
***** THIS DOCUMENT IS CURRENT THROUGH THE 2001 LEGISLATION *****
TITLE 2 GOVERNMENT STRUCTURE AND ADMINISTRATION
CHAPTER 15 EXECUTIVE BRANCH OFFICERS AND AGENCIES
PART 20 DEPARTMENT OF JUSTICE
Mont. Code Anno., § 2-15-2012 (2001)

2-15-2012 Intent.

The legislature recognizes that incarcerating offenders carries an extremely high cost and may not be the most effective strategy for restoring victims, reforming offenders, and reducing recidivism. It is the intent of 2-15-2013 to divert appropriate offenders who are at low risk for violence from incarceration to community programs based on restorative justice and to divert funds from the department of corrections to the department of justice to support an office of restorative justice and to support community programs based on restorative justice.

HISTORY:

En. Sec. 1, Ch. 581, L. 2001.

NOTES:

Chapter Cross-References

Elected executive officers -- Governor, Lieutenant Governor, Secretary of State, Attorney General, Superintendent of Public Instruction, and Auditor, Art. VI, sec. 1, Mont. Const.

Terms of executive elected officers -- 4 years commencing first Monday in January following election, Art. VI, sec. 1, Mont. Const.

General election -- state officers, 13-1-104.

Compiler's Comments

Effective Date: Section 7, Ch. 581, L. 2001, provided: " This act is effective July 1, 2001."

NOTES:

Chapter Law Review Articles

Energy in the Executive, Roeder, 33 Mont. L. Rev. 1 (1971).

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MONTANA CODE ANNOTATED
***** THIS DOCUMENT IS CURRENT THROUGH THE 2001 LEGISLATION *****
TITLE 2 GOVERNMENT STRUCTURE & ADMINISTRATION
CHAPTER 15 EXECUTIVE BRANCH OFFICERS AND AGENCIES
PART 20 DEPARTMENT OF JUSTICE
Mont. Code Anno., § 2-15-2013 (2001)

2-15-2013 Office of restorative justice.

- (1) There is an office of restorative justice in the department of justice.
- (2) The purposes of the office of restorative justice are to:
 - (a) promote the use of restorative justice throughout the state by balancing the needs of victims, communities, and juvenile and adult offenders;
 - (b) provide technical assistance to jurisdictions and organizations interested in implementing the principles of restorative justice; and

(c) bring additional resources to Montana communities for restorative justice programs.

(3) (a) For the purposes of 2-15-2012, 2-15-2014, and this section, the term "restorative justice" means the philosophy of promoting and supporting practices, policies, and programs that focus on repairing the harm of crime, strengthening communities around the state, emphasizing accountability, and providing alternatives to incarceration for offenders who are at low risk for violence.

(b) Restorative justice is intended to improve the ability of the justice system to meet the needs of victims, to encourage community and victim participation in the criminal justice process, to reduce crime and increase the public sense of safety, to hold offenders accountable, and to provide rehabilitation and reintegration of offenders back into the community.

(c) Restorative justice programs include but are not limited to victim-offender meetings, family group conferencing, sentencing circles, use of victim and community impact statements, restitution programs, constructive community service, victim awareness education, victim empathy programs, school expulsion alternatives, peer mediation, diversion programs, and community panels.

(4) Efforts of the office of restorative justice may include but are not limited to:

(a) providing educational programs on the philosophical framework of restorative justice;

(b) providing technical assistance to schools, law enforcement, youth courts, probation and parole officers, juvenile corrections programs, and prisons in designing and implementing applications of restorative justice;

(c) housing a repository for resources and information to coordinate expertise in restorative justice;

(d) serving as a liaison between victims, the judiciary, and state agencies, such as the department of justice and the department of corrections, that are involved in criminal and juvenile justice efforts, including victim compensation programs;

(e) providing information to schools, local governments, law enforcement, state agencies, the judiciary, and the legislature regarding systemic changes that may be necessary to enhance further development of restorative justice in the state; and

(f) securing additional resources for restorative justice programs through a grant program administered by the board of crime control, which may be coordinated with other appropriate grant programs of agencies, and providing sustained funding for successful community programs.

HISTORY:

En. Sec. 2, Ch. 581, L. 2001.

NOTES:

Chapter Cross-References

Elected executive officers -- Governor, Lieutenant Governor, Secretary of State, Attorney General, Superintendent of Public Instruction, and Auditor, Art. VI, sec. 1, Mont. Const.

Terms of executive elected officers -- 4 years commencing first Monday in January following election, Art. VI, sec. 1, Mont. Const.

General election -- state officers, 13-1-104.

Compiler's Comments

Effective Date: Section 7, Ch. 581, L. 2001, provided: " This act is effective July 1, 2001."

NOTES:

Chapter Law Review Articles

Energy in the Executive, Roeder, 33 Mont. L. Rev. 1 (1971).

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***** THIS DOCUMENT IS CURRENT THROUGH THE 2001 LEGISLATION *****
TITLE 2 GOVERNMENT STRUCTURE AND ADMINISTRATION
CHAPTER 15 EXECUTIVE BRANCH OFFICERS AND AGENCIES
PART 20 DEPARTMENT OF JUSTICE
Mont. Code Anno., § 2-15-2014 (2001)

2-15-2014 Restorative justice fund created -- source of funding -- use of fund.

- (1) There is an account in the state special revenue fund established by 17-2-102 to be known as the restorative justice fund.
- (2) There must be deposited in the account:
 - (a) money received from legislative allocations;
 - (b) a transfer of money from a state or local agency for the purposes of 2-15-2013; and
 - (c) a gift, donation, grant, legacy, bequest, or devise made for the purposes of 2-15-2013.
- (3) The fund may be used only to provide grants for restorative justice programs as provided in 2-15-2013 to community-based, including faith-based, organizations.

HISTORY:

En. Sec. 3, Ch. 581, L. 2001.

NOTES:

Chapter Cross-References

Elected executive officers -- Governor, Lieutenant Governor, Secretary of State, Attorney General, Superintendent of Public Instruction, and Auditor, Art. VI, sec. 1, Mont. Const.

Terms of executive elected officers -- 4 years commencing first Monday in January following election, Art. VI, sec. 1, Mont. Const.

General election -- state officers, 13-1-104.

Compiler's Comments

Effective Date: Section 7, Ch. 581, L. 2001, provided: " This act is effective July 1, 2001."

NOTES:

Chapter Law Review Articles

Energy in the Executive, Roeder, 33 Mont. L. Rev. 1 (1971).

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MONTANA CODE ANNOTATED
***** THIS DOCUMENT IS CURRENT THROUGH THE 2001 LEGISLATION *****
TITLE 41 MINORS
CHAPTER 5 YOUTH COURT ACT
PART 13 INFORMAL PROCEEDING
Mont. Code Anno., § 41-5-1304 (2001)

41-5-1304 Disposition permitted under consent adjustment.

- (1) The following dispositions may be imposed by consent adjustment:
- (a) probation;
 - (b) placement of the youth in substitute care in a youth care facility, as defined in 52-2-602 and pursuant to a recommendation made under 41-5-121;
 - (c) placement of the youth with a private agency responsible for the care and rehabilitation of the youth pursuant to a recommendation made under 41-5-121;
 - (d) restitution, as provided in 41-5-1521, upon approval of the youth court judge;
 - (e) placement of the youth under home arrest as provided in Title 46, chapter 18, part 10;
 - (f) confiscation of the youth's driver's license, if the youth has one, by the probation officer for a specified period of time, not to exceed 90 days. The probation officer shall notify the department of justice of the confiscation and its duration. The department of justice may not enter the confiscation on the youth's driving record. The probation officer shall notify the department of justice when the confiscated driver's license has been returned to the youth. A youth's driver's license may be confiscated under this subsection more than once. The probation officer may, in the probation officer's discretion and with the concurrence of a parent or guardian, return a youth's confiscated driver's license before the termination of the time period for which it had been confiscated. The confiscation may not be used by an insurer as a factor in determining the premium or part of a premium to be paid for motor vehicle insurance covering the youth or a vehicle or vehicles driven by the youth, nor may it be used as grounds for denying coverage for an accident or other occurrence under an existing policy;
 - (g) a requirement that the youth receive counseling services;
 - (h) placement in a youth assessment center for up to 10 days;
 - (i) placement of the youth in detention for up to 3 days on a space-available basis at the county's expense, which is not reimbursable under part 19 of this chapter;
 - (j) a requirement that the youth perform community service;
 - (k) a requirement that the youth participate in victim-offender mediation;
 - (l) an agreement that the youth pay a contribution covering all or a part of the costs for the adjudication, disposition, attorney fees for the costs of prosecuting or defending the youth, costs of detention, supervision, care, custody, and treatment of the youth, including the costs of counseling;
 - (m) an agreement that the youth pay a contribution covering all or a part of the costs of a victim's counseling or restitution for damages that result from the offense for which the youth is disposed;
 - (n) any other condition ordered by the court to accomplish the goals of the consent adjustment, including but not limited to mediation or youth assessment. Before ordering youth assessment, the court shall provide the family an estimate of the cost of youth assessment, and the court shall take into consideration the financial resources of the family before ordering parental or guardian contribution for the costs of youth assessment.
- (2) If the youth violates a parole agreement as provided for in 52-5-126, the youth must be returned to the court for further disposition. A youth may not be placed in a state youth correctional facility under consent adjustment.
- (3) If the youth is placed in substitute care, an assessment placement, or detention requiring payment by any state department or local government agency, the court shall examine the financial ability of the youth's parents or guardians to pay a contribution covering all or part of the costs for the adjudication, disposition, supervision, care, placement, and treatment of the youth, including the costs of necessary medical, dental, and other health care.

HISTORY:

En. 10-1210 by Sec. 10, Ch. 329, L. 1974; amd. Sec. 4, Ch. 100, L. 1977; amd. Sec. 3, Ch. 571, L. 1977; R.C.M. 1947, 10-1210(4); amd. Sec. 3, Ch. 246, L. 1979; amd. Sec. 3, Ch. 484, L. 1981; amd. Sec. 1, Ch. 129, L. 1983; amd. Sec. 7, Ch. 363, L. 1983; amd. Sec. 4, Ch. 465, L. 1983; amd. Sec. 5, Ch. 531, L. 1985; amd. Sec. 7, Ch. 14, Sp. L. June 1986; amd. Sec. 59, Ch. 609, L. 1987; amd. Sec. 8, Ch. 105, L. 1991; amd. Sec. 3, Ch. 696, L. 1991; amd. Sec. 6, Ch.

528, L. 1995; amd. Sec. 194, Ch. 546, L. 1995; amd. Sec. 2, Ch. 185, L. 1997; amd. Sec. 26, Ch. 550, L. 1997; Sec. 41-5-403, MCA 1995; redes. 41-5-1304 by Sec. 47, Ch. 286, L. 1997.

NOTES:

Chapter Cross-References

Civil liability of parent for shoplifting by minor, 27-1-718.

Crimes, Title 45.

Unlawful possession of intoxicating substance by children, 45-5-624.

Use of firearms by children under 14 prohibited, 45-8-344.

Department of Corrections -- youthful offenders, Title 52, ch. 5, part 1.

Cross-References

Suspending driving privileges of persons under age 18, 61-5-217.

Chapter Compiler's Comments

Section Not Codified: Section 10-1204, R.C.M. 1947, a severability clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 4, Ch. 329, L. 1974.

Section 10-1205, R.C.M. 1947, dealing with number and gender, was not codified in the MCA, as it was redundant with 1-2-105. This clause has not been repealed and is still valid law. Citation may be made to sec. 5, Ch. 329, L. 1974.

Compiler's Comments

1997 Amendments: Chapter 185 inserted (1)(f) allowing confiscation of a youth's driver's license; and made minor changes in style.

Chapter 550 in (1) substituted "by consent adjustment" for "by informal adjustment"; at end of (1)(b) and (1)(c) substituted "pursuant to a recommendation made under 41-5-525" (renumbered 41-5-121) for "as determined by the department"; in (1)(d) inserted reference to 41-5-1521; inserted (1)(g) through (1)(n) allowing counseling, assessment, detention, community service, victim-offender mediation, contribution for costs, contribution for victim's costs, or any other conditions; deleted former (2) that read: "(2) In determining whether restitution is appropriate in a particular case, the following factors may be considered in addition to any other evidence:

(a) age of the youth;

(b) ability of the youth to pay;

(c) ability of the parents, legal guardian, or persons contributing to the youth's delinquency or need for supervision to pay;

(d) amount of damage to the victim; and

(e) legal remedies of the victim. However, the ability of the victim or the victim's insurer to stand any loss may not be considered in any case"; in (2), in first sentence, substituted "a parole agreement" for "an aftercare agreement" and in second sentence substituted "under consent adjustment" for "under informal adjustment"; in (3) substituted "placed in substitute care, an assessment placement, or detention requiring payment by any state department or local government agency" for "placed in substitute care requiring payment by the department" and after "a contribution covering all or part of the costs for the" inserted "adjudication, disposition, supervision"; deleted (5) through (7) that read: "(5) If the court determines that the youth's parents or guardians are financially able to pay a contribution as provided in subsection (4), the court shall order the youth's parents or guardians to pay an amount based on the uniform child support guidelines adopted by the department of public health and human services pursuant to 40-5-209.

(6) (a) Except as provided in subsection (6)(b), contributions ordered under this section and each modification of an existing order are enforceable by immediate or delinquency income withholding, or both, under Title 40, chapter 5, part 4. An order for

contribution that is inconsistent with this section is nevertheless subject to withholding for the payment of the contribution without need for an amendment of the support order or for any further action by the court.

(b) A court-ordered exception from contributions under this section must be in writing and be included in the order. An exception from the immediate income withholding requirement may be granted if the court finds there is:

(i) good cause not to require immediate income withholding; or

(ii) an alternative arrangement between the department and the person who is ordered to pay contributions.

(c) A finding of good cause not to require immediate income withholding must, at a minimum, be based upon:

(i) a written determination and explanation by the court of the reasons why the implementation of immediate income withholding is not in the best interests of the child; and

(ii) proof of timely payment of previously ordered support in cases involving modification of contributions ordered under this section.

(d) An alternative arrangement must:

(i) provide sufficient security to ensure compliance with the arrangement;

(ii) be in writing and be signed by a representative of the department and the person required to make contributions; and

(iii) if approved by the court, be entered into the record of the proceeding.

(7) (a) If the court orders the payment of contributions under this section, the department shall apply to the department of public health and human services for support enforcement services pursuant to Title IV-D of the Social Security Act.

(b) The department of public health and human services may collect and enforce a contribution order under this section by any means available under law, including the remedies provided for in Title 40, chapter 5, parts 2 and 4"; and made minor changes in style. Amendment effective July 1, 1997.

The amendments to this section made by sec. 24, Ch. 286, L. 1997, were rendered void by sec. 49(3)(e), Ch. 286, L. 1997, a coordination section.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1995 Amendments: Chapter 528 in (2)(c) substituted "ability of the parents, legal guardian, or persons contributing to the youth's delinquency or need for supervision to pay" for "ability of the parents or legal guardian to pay"; and made minor changes in style.

Chapter 546 in (5), (7)(a), and (7)(b) substituted "department of public health and human services" for "department of social and rehabilitation services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendments: Chapter 105 inserted (1)(e) providing for placement of youth under home arrest; and made minor changes in style.

Chapter 696 inserted (4) through (7) regarding determination of the financial ability of parents or guardians to contribute to costs for care, placement, and treatment of a youth and regarding methods of contribution for those costs; and made minor changes in style. Amendment effective July 1, 1991.

Severability: Section 14, Ch. 105, L. 1991, was a severability clause.

Applicability: Section 15, Ch. 105, L. 1991, provided: " This act applies to sentences imposed after the effective date of this act effective October 1, 1991 ."

1987 Amendment: In (1)(b), after "41-3-1102", substituted "and as determined by the department" for "or into a home approved by the court"; at end of (1)(c), after "youth", inserted "as determined by the department"; deleted former (1)(d) that read: "(d) transfer of legal custody to the department of institutions for a period of 6 months, which period may be extended for 6 months upon further order of the court after notice and hearing"; and deleted former (3) that read: "(3) If the court finds that placement in a youth care facility other than a youth group home or youth foster home is necessary and in the best interests of the youth and the community, the court shall determine if the youth can receive appropriate treatment in a youth care facility located in Montana as follows:

(a) If the court finds the youth can receive appropriate treatment in a youth care facility located in Montana that will accept the youth, the court may not place the youth in a youth care facility located outside this state unless an out-of-state facility can provide appropriate treatment that:

(i) can be obtained at a cost less than that offered by any available facility in this state; and

(ii) is available in closer proximity to the youth's place of residence than any facility located in this state.

(b) When the department of social and rehabilitation services is ordered to pay the costs of caring for the child in a youth care facility other than a youth foster home or youth group home, the court shall provide the department with at least 5 days' written notice and opportunity to be heard before ordering the placement of the youth."

1986 Amendment: Deleted in second version language prohibiting commitment of youth in Department custody to youth treatment center unless commitment provisions are followed.

Effective Date: The 1986 amendment will be effective on the date the deed of sale of the Montana Youth Treatment Center from the Board of Land Commissioners is delivered to a buyer. (Deed delivered January 1, 1987.)

Repealer: Section 15, Ch. 14, Sp. L. June 1986, also repeals sections 53-21-164, 53-21-501, 53-21-502, and 53-21-505, effective upon the sale.

1985 Amendment: Inserted (3) allowing court to consider out-of-state placement in youth care facility.

1983 Amendments: Chapter 129 made the following changes: in (1)(d), substituted present language for "transfer of legal custody of the youth to the department of institutions, provided that such commitment does not authorize the department of institutions to place the youth in a state youth correctional facility, and such commitment may not exceed a period of 6 months without a subsequent order of the court, after notice and hearing;" and inserted (3) requiring that a youth in violation of an aftercare agreement be returned to the court for further disposition.

Chapter 363 inserted (4) prohibiting the commitment of a youth in departmental custody to the Montana Youth Treatment Center unless commitment provisions are followed.

Chapter 465 made the following changes: in (1)(b), substituted language after "placement of the youth" for "in a licensed foster home or other home approved by the court"; at end of (1)(c), deleted "including but not limited to a district youth guidance home".

1981 Amendment: Added the provision concerning ability to pay to (2)(e).

Chapter Case Notes

Youth Court -- Lack of Jurisdiction to Determine Place and Length of Commitment: B.L.T., a 15-year-old youth, was charged with theft, escape, and criminal mischief. The Youth Court ordered that B.L.T. be committed to the custody of the Department of Family Services (now Department of Corrections), with placement at Pine Hills until he reached the age of 18. The Supreme Court noted that 41-5-103 defines "legal custody" as including the right to determine "with whom the youth shall live and for what period". The Supreme Court noted that even though the Youth Court has continuing jurisdiction over a youth under 41-5-205, placement by the Youth Court is not tantamount to a sentence of imprisonment because the purpose of the Montana Youth Court Act is rehabilitation rather than punishment in a penal institution. This purpose is consistent with 41-5-523 (renumbered 41-5-1512), which allows the Department of Family Services (now Department of Corrections) to determine the place and length of placement of the youth. The Youth Court therefore had no authority to commit to Pine Hills for a specific period of time. In re B.L.T., 258 M 468, 853 P2d 1226, 50 St. Rep. 617 (1993).

Youth Not Denied Equal Protection by Sentencing System More Severe Than System Imposed on Adults: A youth has not been denied her right to equal protection of the law by imposition of a term of commitment upon her that is longer than the criminal sentence an adult would receive for the same act. Adults and minors are not similarly situated with respect to state

sentencing laws because: (1) the purpose of their detention is not the same, that of the adult offender being both retributive and rehabilitative; and (2) the physical liberty interests of minors and adults are qualitatively different. *In re C.S.*, 210 M 144, 687 P2d 57, 41 St. Rep. 970 (1984), followed in *In re T.A.S.*, 244 M 259, 797 P2d 217, 47 St. Rep. 1590 (1990).

Juvenile -- Traffic Violation -- Guilty Plea -- Ability to Waive Rights: The provisions of the Youth Court Act do not apply to traffic violations. The youth who was accused of failure to drive in a careful and prudent manner was not subject to a jail sentence if found guilty. He therefore did not have the right to counsel and could knowingly waive his rights without the presence of counsel or his parents. *State ex rel. Maier v. City Court*, 203 M 443, 662 P2d 276, 39 St. Rep. 1560 (1982).

Case Notes

Commitment to Correctional Facility Under Consent Adjustment Improper: The Youth Court's commitment of J.F. to Mountain View School, based on violation of probation imposed pursuant to a consent adjustment, was held improper under provision of 41-5-403(4) (renumbered 41-5-1304), which states "No youth may be placed in a state youth correctional facility under informal adjustment". *In re J.F.*, 219 M 140, 710 P2d 705, 42 St. Rep. 1904 (1985).

When Youth Court Without Jurisdiction: When, pursuant to a consent adjustment, J.F. was placed on probation for 6 months and the period of probation was not continued, the Youth Court was without jurisdiction to commit J.F. to Mountain View School upon petition of the County Attorney filed after the 6-month period charging a violation of probation. *In re J.F.*, 219 M 140, 710 P2d 705, 42 St. Rep. 1904 (1985).

Informal Hearing: Sections 10-605 and 10-611, R.C.M. 1947 (since repealed), must be read together, and the informal manner in which a hearing may be conducted as provided in section 10-611 refers to the preliminary inquiry provided for in section 10-605. *In re Gonzalez*, 139 M 592, 366 P2d 718 (1961).

NOTES:

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Assistance of counsel: validity and efficacy of minor's waiver of right to counsel--modern cases. 25 ALR 4th 1072.

Rehabilitation: possibility of rehabilitation as affecting whether juvenile offender should be tried as adult. 22 ALR 4th 1162.

Parent: criminal responsibility of parent for act of child. 12 ALR 4th 673.

Double jeopardy: applicability of double jeopardy to juvenile court proceedings. 5 ALR 4th 234.

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Federal Youth Corrections Act, 18 U.S.C. § 5005, et seq.

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***** THIS DOCUMENT IS CURRENT THROUGH THE 2001 LEGISLATION *****
TITLE 46 CRIMINAL PROCEDURE
CHAPTER 18 SENTENCE AND JUDGMENT
PART 1 POLICY AND PRELIMINARY PROCEDURE
Mont. Code Anno., § 46-18-101 (2001)

46-18-101 Correctional and sentencing policy.

(1) It is the purpose of this section to establish the correctional and sentencing policy of the state of Montana. Laws for the punishment of crime are drawn to implement the policy established by this section.

(2) The correctional and sentencing policy of the state of Montana is to:

(a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable;

(b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders;

(c) provide restitution, reparation, and restoration to the victim of the offense; and

(d) encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community.

(3) To achieve the policy outlined in subsection (2), the state of Montana adopts the following principles:

(a) Sentencing and punishment must be certain, timely, consistent, and understandable.

(b) Sentences should be commensurate with the punishment imposed on other persons committing the same offenses.

(c) Sentencing practices must be neutral with respect to the offender's race, gender, religion, national origin, or social or economic status.

(d) Sentencing practices must permit judicial discretion to consider aggravating and mitigating circumstances.

(e) Sentencing practices must include punishing violent and serious repeat felony offenders with incarceration.

(f) Sentencing practices must provide alternatives to imprisonment for the punishment of those nonviolent felony offenders who do not have serious criminal records.

(g) Sentencing and correctional practices must emphasize that the offender is responsible for obeying the law and must hold the offender accountable for the offender's actions.

(h) Sentencing practices must emphasize restitution to the victim by the offender. A sentence must require an offender who is financially able to do so to pay restitution, costs as provided in 46-18-232, costs of court-appointed counsel as provided in 46-8-113, and, if the offender is a sex offender, costs of any chemical treatment.

(i) Sentencing practices should promote and support practices, policies, and programs that focus on restorative justice principles.

HISTORY:

En. 95-2201 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2201; amd. Sec. 1, Ch. 533, L. 1983; amd. Sec. 2, Ch. 794, L. 1991; amd. Sec. 64, Ch. 10, L. 1993; amd. Sec. 6, Ch. 125, L. 1995; amd. Sec. 211, Ch. 546, L. 1995; amd. Sec. 3, Ch. 189, L. 1997; amd. Sec. 1, Ch. 474, L. 1997; amd. Sec. 4, Ch. 581, L. 2001.

NOTES:

Part Cross-References

Criminal justice policy -- rights of convicted, Art. II, sec. 28, Mont. Const.

Chapter Official Comments

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

Official Comments

Commission Comments

Source: Model Sentencing Act, section 1.

This statement expresses the purpose of sentencing which is not merely to punish but is oriented toward rehabilitation. It recognizes the necessity of focusing attention on the particular offender and that in many cases the best method of dealing with a particular offender is not incarceration.

Compiler's Comments

2001 Amendment: Chapter 581 in (2)(a) at end inserted "and to hold an offender accountable"; in (2)(b) after "public" inserted "reduce crime, and increase the public sense of safety"; in (2)(d) at end inserted "to provide rehabilitation and reintegration of offenders back into the community"; inserted (3)(i) providing that sentencing practices should promote and support restorative justice principles; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendments: Chapter 189 in (3)(a)(v), at end, substituted "a state prison" for "the state prison or the women's correctional system" (voided by Ch. 474 amendment); and made minor changes in style.

Chapter 474 in first sentence in (1) and at beginning of (2), after "correctional", inserted "and sentencing"; in second sentence in (1), after "crime", deleted "and for the rehabilitation of the convicted"; in first sentence in (2), after "is to", substituted language outlining state policy and (3) outlining sentencing principles for "protect society by preventing crime through punishment and rehabilitation of the convicted. The legislature finds that an individual is responsible for and must be held accountable for the individual's actions, including, whenever possible, the restoration of all pecuniary losses sustained by a victim of the offense. Corrections laws and programs must be implemented to impress upon each individual the responsibility for obeying the law. To achieve this end, it is the policy of the state to assure that prosecution of criminal offenses occurs

whenever probable cause exists and that punishment of the convicted is certain, timely, and consistent. Furthermore, it is the state's policy that persons convicted of a crime be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities. Finally, it is the policy of the state to recognize that the interests of crime victims should be considered so that, to the extent possible, victims of crime may be protected from threat of future harm by the offender.

(3) (a) Sentences imposed upon those convicted of crime must be based primarily on the following:

(i) the crime committed;

(ii) the prospects of rehabilitation of the offender;

(iii) the circumstances under which the crime was committed;

(iv) the criminal history of the offender; and

(v) consideration of alternatives to imprisonment of the offender in the state prison or the women's correctional system.

(b) Dangerous offenders who habitually violate the law and victimize the public must be removed from society and correctively treated in custody for long terms, as needed. Other offenders must be dealt with by probation, suspended sentence, community corrections, community service, or fine whenever the disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual. Whenever possible, sentences for offenders must include restitution to the victim, payment of costs as provided in 46-18-232, and payment of costs of court-appointed counsel as provided in 46-8-113.

(4) It is also the policy of the state that alternatives to imprisonment, such as community corrections, should be used whenever appropriate for nonviolent felony offenders in order to provide them opportunities to gain work experience, to learn life skills, to obtain education and training, or to participate in other activities that will reduce recidivism and enable offenders to become productive members of society"; and made minor changes in style.

1995 Amendments: Chapter 125 in (2), at end of second sentence, inserted phrase relating to restoration of pecuniary losses by victim and inserted last sentence relating to interests and protection of crime victims.

Chapter 546 in (3)(a)(v) substituted "women's correctional system" for "women's correctional center"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 10 in (3)(a)(v) substituted reference to the Women's Correctional Center for reference to a women's correctional facility; and made minor changes in style.

1991 Amendment: Inserted (3)(a)(v) concerning sentencing alternatives; in (3)(b), near middle of first sentence after "suspended sentence", inserted "community corrections, community service"; inserted (4) concerning alternative sentencing for nonviolent felony offenders; and made minor changes in style. Amendment effective July 1, 1991.

1983 Amendment: Substituted a new, three-subsection policy relating to protection of society; acceptance of responsibility for one's actions; certain, timely, and consistent punishment; individual treatment in fashioning punishments; what sentences must be primarily based on; and payment of restitution or costs for former text that read: "This chapter shall be liberally construed to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual."

Chapter Case Notes

Reliance of Sentencing Judge on Other Conviction Valid at Time of Sentencing but Later Found Invalid -- Inability of Defendant to Address Vacation of Prior Convictions as Due Process Violation: In 1983, Bauer was charged with and convicted of two felonies in Silver Bow County and sentenced to terms in the state prison. Bauer challenged the convictions. About 8 years later, Bauer was charged with felony intimidation in Powell County and was sentenced to an additional 5 years in prison. Following the 1991 prison riots, Bauer was moved to Blaine County, where he was later charged with three felonies arising out of an incident with a female inmate at the Blaine County jail. The presentence investigation report (PSI) referred to

the Silver Bow County convictions, and the sentencing court expressly referred to the PSI in sentencing Bauer. The court held that if Bauer was successful in challenging the 1983 convictions, the sentences for the Blaine County offenses would run from the date of judgment and sentence and Bauer would be credited with any time served from the date of filing of the information to the date of imposition of the Blaine County sentences. Bauer's 1983 sentences were subsequently voided based on newly discovered DNA evidence that exonerated Bauer. Bauer then sought postconviction relief on grounds that his due process rights had been violated when the sentencing court in Blaine County relied on the now incorrect information in the PSI regarding the Silver Bow County convictions. Under both the federal and state constitutions, a defendant is protected from a sentence predicated on misinformation about that defendant's criminal history and must be given an opportunity to explain, argue, and rebut any information, including presentencing information, that may lead to a deprivation of life, liberty, or property. Bauer could not be said to have been given that opportunity because the 1983 convictions were still valid at the time of sentencing in Blaine County, nor did the sentencing court have a full opportunity to consider the procedural and substantive consequences of the actual vacation of the 1983 convictions or the specific grounds upon which postconviction relief was granted by the Silver Bow County court. What was correct information at the time of sentencing became misinformation after the fact. Notwithstanding that the sentencing court specifically stated that it did not rely on the 1983 convictions, the Supreme Court reversed on grounds of fundamental fairness, refusing to allow the misinformation to go unchallenged before the District Court by denying Bauer the opportunity to be resentenced on the basis of materially accurate information. The case was remanded for resentencing before a new District Court Judge. *Bauer v. St.*, 1999 MT 185, 295 M 306, 983 P2d 955, 56 St. Rep. 715 (1999), following *St. v. Orsborn*, 170 M 480, 555 P2d 509 (1976), *St. v. Redding*, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), and *Bishop v. St.*, 254 M 100, 835 P2d 732, 49 St. Rep. 650 (1992).

Different Sentencing Judge -- No Presumption of Vindictiveness When Sentence Increased on Remand: Due process rights on resentencing create a presumption of vindictiveness when a sentence is increased on remand. However, when a different judge performs resentencing, there is no presumption of vindictiveness; rather, the defense must show actual vindictiveness. *St. v. Forsyth*, 233 M 389, 761 P2d 363, 45 St. Rep. 1577 (1988).

Due Process at Sentencing -- Protection of Community Versus Defendant's Liberty Interest: At the sentencing stage, due process requires that a convicted person's liberty interest and the risk of unjust deprivation of that interest be balanced against the state's interest in protecting the community. Due process must be observed and defendant's rights protected, but it is clear that his liberty interest does not rise to the level of an accused's at trial. *St. v. Nichols*, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986), followed in *St. v. Krantz*, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990).

No Right to Second Psychiatric Examination: Defendant was convicted of aggravated kidnapping and deliberate homicide, pursuant to pleas of guilty, and was sentenced to death. Judgment was affirmed by the Supreme Court. Subsequently, defendant filed a motion for an additional psychiatric evaluation based on the case of *Ake v. Okla.*, 470 US 68, 84 L Ed 2d 53, 105 S Ct 1087 (1985), which was decided after arguments in defendant's case. The Supreme Court distinguished the facts of defendant's case from the facts in *Ake* and denied defendant's motion. The Supreme Court found that defendant had already been afforded his right to access to a competent psychiatrist for the preparation of a defense based on his mental condition and was not entitled to an additional psychiatric examination. The *Ake* decision lacks direct application to Montana's capital sentencing proceedings and defendant's case. *St. v. Smith*, 217 M 453, 705 P2d 1110, 42 St. Rep. 1348 (1985).

Capital Sentence Requested by Defendant -- No Basis for Resentencing: Defendant pleaded guilty to two counts of aggravated kidnapping and two counts of deliberate homicide. Defendant requested the death penalty. After sentencing, defendant had second thoughts and on appeal sought a resentencing. The Supreme Court held there was no basis for resentencing because: (1) sentencing was not tainted by reliance on prior Canadian convictions obtained without counsel; (2) inclusion of juvenile offenses as adult offenses in presentence report was not error; (3) a court-ordered presentence interview was not violative of the fifth amendment; (4) commendation for the death penalty in the presentence report was not improper; (5) no judicial error was committed in the extent of review of mitigating factors and no unconstitutional limit was placed on the court's consideration of mitigating circumstances; (6) no error was found in the court's denial of defendant's motion for additional psychiatric evaluation; (7) defendant was not required to be present at proceedings occurring after the verdict; (8) jury participation is not constitutionally required in capital sentencing procedures; (9) no indication was found that the trial court imposed the death penalty out of passion or prejudice; and (10) the sentence was not excessive or disproportionate. *St. v. Smith*, 217 M 461, 705 P2d 1087, 42 St. Rep. 463 (1985) (Smith I). A habeas corpus petition was conditionally granted in *Smith v. McCormick*, 917 F2d 1153 (9th Cir. 1990), a subsequent resentencing of death was reversed and remanded for preparation of a new presentence investigation, *St. v. Smith*, 261 M 419, 863 P2d 1000 (1993) (Smith II), and following automatic appeal and review, the death sentence was affirmed in *St. v. Smith*, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

Jail Sentence for DUI Not Cruel and Unusual Punishment: The defendant, who has an extensive record of driving under the influence of alcohol, was convicted on three counts of driving under the influence (DUI) and sentenced to serve 10 months in the county jail. The defendant contends her sentence is cruel and unusual punishment and a denial of equal protection because it may be greater than would be served in the state prison for a more serious offense since county jail inmates are not entitled to

statutory good time allowance or parole eligibility as are prison inmates. However, the sentence falls within the maximum authorized by statute and is not so disproportionate to the crime that it shocks the conscience and outrages the moral sense of the community or of justice. Therefore, the sentence imposed is not cruel and unusual punishment that would render it unconstitutional. *St. v. Bruns*, 213 M 372, 691 P2d 817, 41 St. Rep. 2178 (1984).

No Jury Finding of Previous Conviction Necessary for Increased Penalty: The defendant was convicted of carrying a concealed weapon, and after stipulating to his prior conviction and being sentenced to an increased penalty because of that conviction, argued on appeal that the District Court had no jurisdiction to sentence him to an increased penalty under subsection (2) of 45-8-316 because the jury had not found the fact of his previous felony. On appeal the Supreme Court held, under the rationale of *St. v. Nelson*, 178 M 280, 583 P2d 435 (1978), that the prerequisites for the heavier sentence were not an element of the crime and that no finding by the jury on the issue of the defendant's previous conviction was therefore necessary. *St. v. Sanders*, 208 M 283, 676 P2d 1312, 41 St. Rep. 338 (1984).

Out-of-Court Conference Between Sentencing Judge and Probation Officer -- Denial of Due Process: The defendant was denied due process when the sentencing judge conferred with the presentence investigation officer behind closed doors where no opportunity was provided for argument, rebuttal, or explanation. *St. v. Redding*, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), distinguished in *St. v. Pease*, 233 M 65, 758 P2d 764, 45 St. Rep. 1296 (1988).

Rules of Evidence Not Applicable to Sentencing: The Montana Rules of Evidence do not apply to sentencing hearings. The court correctly used relaxed rules of evidence during the sentencing hearing. *St. v. Holmes*, 207 M 176, 674 P2d 1071, 40 St. Rep. 1973 (1983).

State Responsible for Medical Costs Incurred After Defendant Sentenced to State Prison -- State as Defendant's Legal Custodian: At the time of defendant's sentencing, she was pregnant and her child was due to be born within a few weeks. She was sentenced to 10 years' imprisonment in state prison with 2 years suspended. Rather than ordering defendant's transfer to the state prison immediately upon sentencing, the District Court ordered that defendant remain in the county jail until the baby's birth so that defendant could be attended by her personal physician. In a dispute between the county and the state Department of Institutions (now Department of Corrections) concerning who bore the responsibility for defendant's medical costs, the Supreme Court ruled that the responsibility was that of the state. The Supreme Court reasoned that since once the District Court has imposed a valid sentence, it lacks jurisdiction to modify it, the defendant became the legal responsibility of the Department of Institutions (now Department of Corrections) as soon as the judgment was filed. *Wilkinson v. St.*, 205 M 237, 667 P2d 413, 40 St. Rep. 1239 (1983).

Disparity Between Sentence Offered in Plea Bargaining and Sentence Actually Rendered After Trial: Because of the difficulty of distinguishing between situations where leniency is offered in exchange for a plea and situations where the defendant is punished for exercising his right to trial by jury, a sentencing court that becomes involved in the plea bargaining process and imposes a harsher sentence after trial than was offered in exchange for a guilty plea must specifically point out the factors that justify the increased sentence. (Citing *St. v. Baldwin*, 192 M 521, 629 P2d 222 (1981).) *St. v. Tate*, 196 M 248, 639 P2d 1149, 39 St. Rep. 69 (1982). *Baldwin* was distinguished in *St. v. Smith*, 276 M 434, 916 P2d 773, 53 St. Rep. 459 (1996).

To protect a criminal defendant's constitutional rights in plea bargaining situations and to help preserve public confidence in the judicial process, we today adopt ABA Standard 14-sec. 1.8(b). To implement that standard and to facilitate judicial review, a sentencing court that becomes involved in the plea bargaining process and imposes a harsher sentence after trial than was offered in exchange for a guilty plea must specifically point out the factors that justify the increased sentence. In this case, we cannot tell from the record why the trial court offered a very lenient sentence (45 days' jail time) in exchange for a plea of guilty. Nor can we tell why the court found imposition of a harsher sentence appropriate after jury trial (10 years' jail time). We have no assurance that the trial court did not increase the sentence in retaliation for defendant's insistence on a trial by jury. *St. v. Baldwin*, 192 M 521, 629 P2d 222, 38 St. Rep. 882 (1981), distinguished in *St. v. Smith*, 276 M 434, 916 P2d 773, 53 St. Rep. 459 (1996).

Defendant Sane at Time of Crime -- Insane at Other Times: Defendant, convicted of aggravated assault, contended that sentencing a man suffering from severe mental illness to prison violates the constitutional ban against cruel and unusual punishment as well as 53-21-101. When a defendant is convicted and claims that he was suffering at the time of the crime from a mental disease or defect that rendered him incapable of conforming his conduct to the requirements of the law, the sentencing judge is to consider the relevant evidence of the defendant's disorder. If the judge finds the defendant did not suffer mental illness at the time of the crime, he is to be sentenced according to the guidelines in this chapter. If the finding is to the contrary, the defendant must be sentenced to Warm Springs. Despite the lack of provisions in Title 46, ch. 14, for sentencing a defendant who was sane at the time of the crime but may be insane at other times, Title 53, ch. 21, relating to treatment for mental illness, does not apply to criminal defendants. The defendant's claim that he is covered by Title 53, ch. 21, is in error. Without a finding of insanity followed by sentencing to a penal institution without provision for adequate treatment, defendant has suffered no statutory or constitutional violation. *St. v. Mercer*, 191 M 418, 625 P2d 44, 38 St. Rep. 312 (1981).

Increase of Sentence After New Trial -- Due Process: The defendant, who had been sentenced to 100 years' imprisonment for deliberate homicide, was not denied due process of law when, after a new trial on the same charge, he was sentenced to death. The due process clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of vindictiveness. When the District Court Judge was replaced for the new trial and sentencing and the new judge stated his reasons for imposing the death penalty with clarity, the threat of vindictiveness was not a realistic likelihood. *St. v. Fitzpatrick*, 186 M 187, 606 P2d 1343 (1980).

Part Case Notes

Sentencing Judge Aware of Other Conviction That Was Overturned on Appeal -- No Error: As a result of his involvement in one incident, defendant was convicted at separate trials of criminal possession of dangerous drugs and of aggravated assault. His drug possession conviction was reversed on appeal. Prior to this reversal, he was sentenced on the aggravated assault charge. The sentencing judge alluded to the drug conviction. Defendant claimed, in an appeal of the aggravated assault conviction, that the District Court erred by considering a conviction that had later been overturned. The Supreme Court upheld the sentencing, stating that if it is obvious from the record that the judge did not rely on the infirm conviction and the sentence would not have been different had the judge disregarded the prior conviction, the Supreme Court will find no prejudice to the defendant. *St. v. Van Haele*, 207 M 162, 675 P2d 79, 40 St. Rep. 1964 (1983).

Sentencing Judge's Private Out-of-Court Contact -- Violation of Defendant's Right to Due Process: Private out-of-court contact by the sentencing judge with defendant's former employer affected the sentencing process and defendant's right to due process. Defendant was entitled to be resentenced by a different judge. *St. v. Baker*, 205 M 244, 667 P2d 416, 40 St. Rep. 1244 (1983).

Plea Bargain Nonbinding on Court: Defendant was charged with two counts of felony theft in a welfare fraud case. In conjunction with a plea bargain, she pleaded guilty to both counts and the State recommended a 3-year suspended sentence. The District Court ordered defendant to serve 3 years in prison with all but 30 days suspended and ordered restitution. Defendant contended the court erred by not imposing the sentence recommended by the State. The Supreme Court, relying on *St. v. Mann*, 169 M 306, 546 P2d 515 (1976), said that where the defendant was informed by the court that the recommendation of the State is not binding upon it and defendant stated she understood, she is bound by the sentence. *St. v. Gray*, 204 M 153, 665 P2d 781, 40 St. Rep. 735 (1983).

Factors in Sentencing -- Reference to Retracted Psychiatric Report: At presentence hearing psychiatrist testified that his prior psychiatric report diagnosing defendant as antisocial was inaccurate. The judge's order stated that the report had been considered in passing sentence. The mere reference to the retracted report was not sufficient grounds for reversal, as the judge heard the retraction by the psychiatrist and there was no indication that he did not abide by the retraction. *St. v. Hubbard*, 200 M 106, 649 P2d 1331, 39 St. Rep. 1608 (1982).

Sentencing Prerequisites -- Reading of Entire Transcript: The fact that the judge sentencing defendant following negligent homicide conviction did not read the entire trial transcript prior to passing sentence did not mandate reversal. *St. v. Hubbard*, 200 M 106, 649 P2d 1331, 39 St. Rep. 1608 (1982).

State's Introduction of Testimony and Exhibits at Sentencing Hearing: Petitioner alleged that the State's introduction of testimony and exhibits at his sentencing breached the plea agreement in which the State agreed to make "no sentencing recommendation". In view of the fact that there is no positive point in law on the State's introduction of evidence at the sentencing, as here, the State requested in fairness that a more equitable solution than granting request to withdraw the plea would be to allow petitioner to be resentenced, pursuant to the express terms of the plea agreement without any testimony or evidence introduced by the State or any statement by the prosecutor, and the Supreme Court so ordered. *Gardipee v. Blodgett*, 193 M 314, 631 P2d 1270, 38 St. Rep. 909 (1981).

Case Notes

CASES UNDER CURRENT LAW

Similar Purposes of Adult and Youth Sentencing Statutes Regarding Public Safety and Rehabilitation: In its transfer order, the Youth Court concluded that adult sentencing policies are similar to the sentencing purposes of the Montana Youth Court Act in that both are designed to ensure rehabilitation, accountability, and protection of the community. Spina contended that the conclusion was a misstatement of the law because the declaration of purpose in the Montana Youth Court Act does not promote accountability. The Supreme Court held that, although not identical, the statutes have similar purposes, including holding individuals accountable for their actions through the imposition of restitutionary measures. *St. v. Spina*, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Prison Murder -- Death Sentence Not Imposed Under Influence of Passion, Prejudice, or Arbitrary Factors: Johnson was convicted of killing another prison inmate and contended on appeal that the death sentence was imposed under the influence of passion, prejudice, or other arbitrary factors because the District Court predicated its sentence on Montana's correctional policy, as set forth in this section, but that the policy does not expressly provide for death as punishment for any crime. The Supreme Court agreed that the statute does not expressly discuss death as a punishment for criminal conduct, but noted that, being a general declaration of state correctional policy, the statute also does not discuss most of the sentencing options allowed by law. Notwithstanding the fact that the death sentence has been affirmed as constitutional, the District Court's findings reflected its consideration of the general statutory principles that a sentence be based primarily on the crime committed, the prospects of rehabilitation, the circumstances under which the crime was committed, and the offender's criminal history. The circumstances of this crime, coupled with Johnson's long history of assaultive and predatory behavior both in and out of prison, were reflected in the court's analysis and showed that the court carefully and dispassionately considered all the evidence before it concluded that the death penalty was appropriate. *St. v. Johnson*, 1998 MT 289, 291 M 501, 969 P2d 925, 55 St. Rep. 1186 (1998).

Application of Repealed Dangerous Offender Law to Offender Who Committed Crime Before Repeal and Was Sentenced After Repeal: The rule that the sentencing law in effect at the time a crime is committed governs the sentence to be imposed applies to situations in which that law is amended after the crime is committed but before the sentence is imposed and in which the law still exists when the sentence is imposed. It is the law as it read prior to the amendment that governs the sentence. This rule does not apply to a situation in which a sentencing law in effect when a crime is committed is repealed before imposition of sentence. In this case, a dangerous offender statute in effect when Wilson committed his crimes was repealed before the judge sentenced him for the crimes, yet the judge used it to designate Wilson as a dangerous offender, thus increasing the punishment. In this type of situation, when the effect of the repeal is to lessen, not to increase, punishment and the repealer has no saving clause, the law in effect at the time of sentencing applies. Because the dangerous offender statute had been repealed before sentencing, it was not in effect at the time of sentencing and did not apply to the sentence. *St. v. Wilson*, 279 M 34, 926 P2d 712, 53 St. Rep. 1034 (1996).

Dangerous Offender Determination -- Record Found to Show "Articulated Reasons": Hofman pleaded guilty to aggravated assault, felony assault (now assault with a weapon), misdemeanor assault, and criminal mischief. At the time of sentencing, the District Court designated Hofman a dangerous offender (See 1995 repeal of 46-18-404). Citing *St. v. Ford*, 218 M 215, 707 P2d 16 (1985), Hofman alleged that the District Court record lacked "articulated reasons" for the designation as dangerous offender. The Supreme Court reviewed the record and noted that the District Court Judge referred to facts demonstrating Hofman's propensity for violence and pointed out that Hofman had been given numerous opportunities to change. The Supreme Court held that the District Court adequately stated the reasons for the designation. *St. v. Hofman*, 275 M 455, 913 P2d 1256, 53 St. Rep. 223 (1996).

Alternative Sentencing for Nonviolent Offenders a Consideration, Not a Presumption: Stevens asserted that state law created a presumption that nonviolent felony offenders be alternatively sentenced rather than imprisoned and that the trial court's statement that the state had placed special emphasis on punishing sex offenders when the victims were under 16 years of age was contrary to the policy of alternative sentencing. The Supreme Court held that the record indicated that the trial court had considered alternative sentencing and found it inappropriate because of the nature of the crime and that the sentencing order was not error. *St. v. Stevens*, 273 M 452, 904 P2d 590, 52 St. Rep. 1078 (1995).

Prisoner Rehabilitation Not State Obligation: The plaintiffs sought recovery in tort from the state on the basis that the state was negligent in releasing a nonrehabilitated prisoner who killed their child. The Supreme Court held that the state is not a guarantor of its rehabilitation facilities and that the court would not impose that obligation on the state. *VanLuchene v. St.*, 244 M 397, 797 P2d 932, 47 St. Rep. 1609 (1990), followed in *King v. St.*, 259 M 393, 856 P2d 954, 50 St. Rep. 848 (1993).

Consecutive Terms Allowable for Sexual Assault: The District Court did not err in sentencing defendant to two consecutive terms upon conviction of sexual assault when the factors in this section were considered and the sentence fell within the legal limits of 45-5-502. *St. v. Gilpin*, 232 M 56, 756 P2d 445, 45 St. Rep. 863 (1988). Inability to Pay Restitution -- Not Violative of Equal Protection in Light of State Correctional Policy and Previous Offenses: A defendant convicted of felony theft was sentenced to 5 years in the state prison with 2 years suspended and, in addition, was ordered to pay restitution. The defendant asserted on appeal that he was sentenced to a prison term because of his indigency, in violation of his right to equal protection. However, the District Judge specifically noted the prison term was necessary to protect the property of others and that the defendant's criminal record contained three previous misdemeanor thefts. The Supreme Court found these to be sufficient reasons to support incarceration and upheld the state's correctional policy outlined in 46-18-101. The court noted that the sentence was well within the parameters of punishment for felony theft in 45-6-301. Finding no abuse of discretion or violation of the defendant's constitutional rights, the District Court was affirmed. *St. v. Carroll*, 220 M 466, 716 P2d 212, 43 St. Rep. 531 (1986).

Sentence of 100 Years -- Based on Prevention of Future Crimes: On conviction of deliberate homicide the defendant received the maximum allowable sentence, 100 years, and was determined ineligible for designation as a nondangerous offender, or for

parole. On appeal, he argued the sentence was not based on any credible evidence presented at the sentencing hearing or contained in the presentence report, but was motivated by the trial court's desire for vengeance on behalf of the victim's family. The court indicated it imposed the sentence because it believed defendant should be removed from society. The Supreme Court held that the sentence did not violate Art. II, sec. 28, Mont. Const., which requires that "laws for the punishment of crime shall be founded on the principles of prevention and reformation" (amended in 1998 to read prevention, reformation, public safety, and restitution for victims"), nor did it violate 46-18-101, which provides that the policy behind sentencing is the rehabilitation, if possible, of convicts. Article II, sec. 28, Mont. Const., allows a trial court in its discretion to base a sentence on the principle of prevention of future crimes. This includes the power to remove a person from society, as the court found necessary in this case. Also, the sentence is within the permissible statutory range, and in the absence of clear abuse of discretion is properly reviewed by the Sentence Review Division. *St. v. Beach*, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), followed in *St. v. Valcourt*, 254 M 174, 835 P2d 753, 49 St. Rep. 686 (1992).

Constitutional Requirement Satisfied by Sentence Founded on Prevention and Reformation: The defendant, who has an extensive record of driving under the influence of alcohol, was convicted on three counts of driving under the influence (DUI). She was sentenced to serve time in the county jail. The defendant contends her sentence violates the constitution as it does not provide for her rehabilitation. Article II, sec. 28, Mont. Const., requires that laws for punishment of crime be founded on the principles of prevention and reformation (amended in 1998 to read "prevention, reformation, public safety, and restitution for victims"). The defendant's sentence furthers the prevention principle through her incarceration, addresses the reformation principle through ordering her to abstain from the use of alcohol, and provides the avoidance of further incarceration as an incentive to reform. Thus, the constitutional requirement is satisfied. *St. v. Bruns*, 213 M 372, 691 P2d 817, 41 St. Rep. 2178 (1984).

No Proof Erroneous Information Considered by Sentencing Court: The defendants were sentenced to lengthy prison terms for deliberate homicide. They contend the sentencing judge considered information from a psychiatrist that is not directly reflected in the record, but the record does not support their contention. The comments concerning the doctor's report were made by defense counsel during oral presentation to the sentencing court. The defendants have failed to show that any information furnished by the psychiatrist was considered improperly by the court; thus they have failed to show any erroneous information was considered by the court in passing sentence. *St. v. Hintz*, 213 M 364, 691 P2d 814, 41 St. Rep. 2172 (1984).

Objection to Sentence for Punishment Rather Than Prevention and Reformation -- Lack of Proof: Objection that sentence was for punishment rather than for prevention of further crime and reformation of defendant was clearly without merit, as there was no evidence or authority cited by appellant to establish that the sentence would not deter him or others from future wrongful conduct or that the sentence would not lead to reformation. *St. v. Stroud*, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Mention of "Setting an Example" at Sentencing -- Not Error Viewed in Context: Although the trial court did mention "setting an example" when imposing sentence, that is not a reason for remanding for resentencing as a violation of Art. II, sec. 28, Mont. Const., because the judge's use of the presentencing report and his reasons for the length of the sentence indicate no impropriety in the sentencing. *St. v. DeSilva*, 209 M 169, 679 P2d 1237, 41 St. Rep. 620 (1984).

Consideration of Indigency in Sentencing -- Violation of Due Process: Defendant was convicted of theft of public assistance funds in violation of 45-6-301 and sentenced to the maximum term of imprisonment, 10 years. The sentence was then suspended on the conditions that defendant seek alcohol treatment, make restitution of the funds, and pay the fees of his court-appointed attorney. The Supreme Court ruled that if the reason for defendant's receiving the maximum sentence was that he is indigent and will therefore make restitution slowly, the sentence is a violation of his right to due process. The court remanded the case for reconsideration of the sentence in view of the opinion. *St. v. Farrell*, 207 M 483, 676 P2d 168, 41 St. Rep. 91 (1984).

Timing of Sentencing Required to Bring Defendant Within Operation of Statute: Where the defendant was convicted of two counts of negligent homicide following a previous conviction for burglary within 5 years prior to the negligent homicide convictions, the District Court did not err in sentencing the defendant under the persistent felony offender statute. The defendant's contention that he is not "presently being sentenced for a second felony" until after the court has determined to sentence him to a term of imprisonment for more than 1 year is a hypertechnical construction of the statute intended to avoid the clear intention of the Legislature. The defendant's case is covered by the legislative mandate (deleted by a 1983 amendment) that the chapter be liberally construed to the end that dangerous offenders be correctively treated in custody for long terms as needed. *St. v. Ballard*, 202 M 81, 655 P2d 986, 39 St. Rep. 2342 (1982).

Discretion of Court -- Different Sentences for Co-Offenders: On appellate review, undermining the legality of a sentence requires a showing that the judge abused his discretion in the sentencing process. There was no abuse of discretion where defendant and another were separately convicted of the same burglary, the other person was offered and accepted a bargain for a 3-year deferred sentence, and defendant was offered a bargain for a 10-year sentence with 5 years suspended, refused it, and was tried, convicted, and sentenced to 10 years. There was a strong possibility that his alibi defense was frivolous, and he had a prior felony record. *St. v. White*, 200 M 123, 650 P2d 765, 39 St. Rep. 1619 (1982).

Codefendants -- Disparate Sentences -- Suspension Versus Twenty Years: Defendant, a 28-year-old male with a history of involvement with weapons, and his codefendant, a 58-year-old alcoholic with no record of violence, were each convicted of two counts of kidnapping and two counts of assault in regard to two girls 12 and 14 years old. Defendant was sentenced to two consecutive 10-year prison sentences on the kidnapping convictions and to 6 months on each assault charge, to run concurrently with each other and with the kidnapping sentences. Codefendant, defendant's natural father, received a 10-year sentence, all of which was suspended on the condition that he commit himself to alcohol treatment at a state institution and remain a law-abiding citizen. The Supreme Court ruled that there was no denial of equal protection as claimed by defendant. *St. v. Herrera*, 197 M 462, 643 P2d 588, 39 St. Rep. 731 (1982).

Dangerous Offender Determination -- Use of Defective Information: After defendant and his father kidnapped two minor girls and took them to the father's house, father told defendant to "go get the gun" and defendant did so and placed it between the two men on the couch where they were sitting. The girls were not threatened with the gun. The trial judge told defendant that "the reason you're designated a dangerous offender is that's about the fourth gun incident you were in". Review of the record on appeal showed: (1) a possible misapprehension of defendant's actual criminal background and apparent confusion as to the crimes involved; (2) no convincing evidence that this was defendant's fourth gun incident; and (3) an indication that one of the prior convictions considered by the judge was constitutionally defective because defendant did not have counsel. The sentencing court cannot rely upon a previous criminal record in sentencing if that record contains constitutionally infirm convictions. Defendant had a right to have his sentence based upon substantially correct information and was entitled to a rehearing on his designation as a dangerous offender. *St. v. Herrera*, 197 M 462, 643 P2d 588, 39 St. Rep. 731 (1982).

Partially Disabled Defendant -- Excessive Sentence: Ordinarily a sentence is not cruel and unusual punishment if it is within the maximum established by statute, and review properly lies with the Sentence Review Division. The fact that defendant is partially disabled does not automatically render him incapable of harming other persons or society, and the facts here are sufficient to justify the designation of dangerous offender. *St. v. Austad*, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982).

Reasonable Notice as to Witness -- Remoteness of Evidence: The State, during sentencing, intentionally surprised the defendant by testimony of two women with whom the defendant had allegedly had sexual contact without consent some 10 years earlier. The court ordered resentencing because of the State's denial of reasonable notice. The defendant did not waive his right to complain when he did not request a continuance at the time of sentencing. The question of admissibility of such evidence as having a bearing on the sentencing and as to whether it is remote and uncorroborated was left to the reasonable discretion of the trial court. *St. v. Price*, 191 M 1, 622 P2d 160, 37 St. Rep. 1926 (1980).

Presentencing Hearing -- Cross-Examination: An in-chambers interview with the victim in order to determine her feelings as to an appropriate sentence, where defendant was absent, defense counsel was denied cross-examination, and no opportunity was afforded the defense to refute the information, violated defendant's right to be sentenced under circumstances free from misinformation. Sentence was vacated and the case remanded for resentencing. *St. v. Higley*, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

Constitutionality of Death Sentence: Under the law at the time of the crime, which has since been amended and then repealed, there was discretion in the procedures for imposing the death sentence. The statutes were held to have met the three general criteria requisite to a valid death penalty statutory scheme: (1) at least one statutory aggravating circumstance before a death sentence may be considered; (2) allowance for consideration of mitigating circumstances relating to the individual defendant; and (3) prompt judicial review. The Montana statutory scheme afforded the defendant the procedural safeguards necessary to protect his substantive right to be sentenced without arbitrariness or caprice. *St. v. McKenzie*, 186 M 481, 608 P2d 428 (1980).

CASES UNDER FORMER "NONDANGEROUS OFFENDER" DESIGNATION LAW

Designation as Dangerous Offender Supported by Record: Collier was arrested and charged with solicitation of deliberate homicide, which was reduced to criminal endangerment by a plea bargain. At the District Court level and on appeal, Collier challenged her designation as a dangerous offender for purposes of parole eligibility. The Supreme Court reviewed the findings of fact made by the District Court and noted that the District Court had made findings concerning her lack of remorse, the fact that she did not act with strong provocation, and the possibility of her committing the crime again. Because of these findings, the Supreme Court upheld the designation as a dangerous offender. *St. v. Collier*, 277 M 46, 919 P2d 376, 53 St. Rep. 534 (1996).

Error in Determining Offender Status When Statute Not in Effect: As set out in *St. v. Stevens*, 273 M 452, 904 P2d 590 (1995), the law in effect at the time of the commission of a crime, rather than the law at the time of sentencing, controls as to the possible sentence. Finley committed an offense on August 20, 1989. At that time, 46-18-404 (now repealed) did not grant a District Court the authority to determine dangerous or nondangerous offender status. The amendment that instituted that authority took effect October 1, 1989. Thus, the District Court had no authority to determine Finley's status, and its designation of Finley's offender status was reversible error. *St. v. Finley*, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996).

Designation Upheld: In a prosecution for kidnapping and assault, the District Court articulated numerous reasons for designating each defendant as a dangerous offender. These reasons included a chemical dependency problem, continuing to drink and engage in unlawful acts despite treatment, numerous misdemeanor convictions and a juvenile record, lack of remorse, disrespect for and a defiance of the law and its officers, a failure to recognize that the unlawful actions were wrong, and a finding that the defendant posed a threat to the public and the victims. When the District Court clearly articulated its reasons in support of its determination that the defendants presented a danger to society and the victims and its reasons were fully supported by the record, the court did not abuse its discretion when it designated the defendants dangerous offenders (see 1995 repeal of 46-18-404) for the purposes of parole. *St. v. Eichenlaub*, 272 M 332, 901 P2d 90, 52 St. Rep. 786 (1995).

Dangerousness to Others as Basis for Designation as Dangerous Offender: Henrich was convicted of several crimes stemming from the sexual abuse of his daughters and was designated a dangerous offender (see 1995 repeal of 46-18-404). Henrich appealed the designation, claiming that there was insufficient evidence of his dangerousness. The Supreme Court found that in making the designation, the District Court considered the evidence at trial, the presentence investigation report, and the sentencing hearing. The District Court found that Henrich was a danger to his daughters. Because dangerousness to others may serve as a basis for the designation, the Supreme Court upheld the designation. *St. v. Henrich*, 268 M 258, 886 P2d 402, 51 St. Rep. 1275 (1994).

No Statutory Requirement of Dangerous Offender Designation -- Court's Discretion: The provisions of 46-18-404 (now repealed) are mandatory only when the circumstances require the court to sentence one as a nondangerous offender. If a defendant satisfies only one of the prerequisites of this section for designation as nondangerous, then the court may in its discretion designate the defendant either dangerous or nondangerous. The court must exercise its discretion, and when the court refused to do so because it erroneously interpreted statute and concluded that it had no discretion, its designation of the defendant as dangerous must be reversed. *St. v. Lorenz*, 267 M 186, 883 P2d 98, 51 St. Rep. 1027 (1994).

Failure to Articulate Reasons for Dangerous Offender Designation as Warranting Remand: The District Court designated defendant as a dangerous offender for parole purposes but failed to articulate why defendant represented a substantial danger to other persons or to society. Under the rationale of *St. v. Morrison*, 257 M 282, 848 P2d 514 (1993), the Supreme Court remanded for additional articulation of the District Court's reasons for a dangerous or nondangerous designation. *St. v. Wing*, 264 M 215, 870 P2d 1368, 51 St. Rep. 223 (1994), on remand, reversed and remanded for further proceedings in *St. v. Lorenz*, 267 M 186, 883 P2d 98, 51 St. Rep. 1027 (1994).

Defendant to Be Sentenced Under Statute Existing at Time of Original Sentencing: Suiste argued that the District Court had violated the ban against ex post facto legislation by designating him as a dangerous offender when it revoked his suspended sentence for a crime that he was originally convicted of in 1979. By so doing, Suiste argued that the court was subjecting him to a harsher penalty than he could have received at the time that he committed the offense. The Supreme Court held that the defendant was entitled to be sentenced under the statute in effect at the time of the original sentencing. *St. v. Suiste*, 261 M 251, 862 P2d 399, 50 St. Rep. 1309 (1993).

Convicted Felon Designated Nondangerous Offender for Purposes of Parole Eligibility Not Automatically Entitled to Bail Pending Appeal: Prior to his conviction for deliberate homicide, Moore was allowed bail, and following conviction, he was designated a nondangerous offender for purposes of parole eligibility. After conviction, Moore was denied bail pending appeal. Moore petitioned for a writ of habeas corpus, claiming that he is entitled to bail pending appeal as a matter of law pursuant to 46-18-404 (now repealed). The Supreme Court found that the criteria for admitting a defendant to bail pending appeal and the criteria for designating the defendant a nondangerous offender are not the same. Under 46-18-404(1)(b) (now repealed) the trial court is required to determine whether the defendant constitutes a "substantial danger to other persons or society", while under 46-9-107, the trial court may not allow bail pending appeal unless it finds that the defendant "is not likely to flee". The Supreme Court held that it could therefore be appropriate to designate a defendant such as Moore a nondangerous offender for the purposes of parole eligibility but also be appropriate to deny him bail pending appeal. *Moore v. McCormick*, 260 M 305, 858 P2d 1254, 50 St. Rep. 1054 (1993).

Dangerous Offender Designation Consistent With Defendant's Actions and Prior Record: Defendant asserted error in being designated a dangerous offender because the District Court miscounted his felony convictions. However, the court's misinterpretation of defendant's criminal record was not reversible error, and the dangerous offender designation was appropriate given defendant's five felony convictions and his obvious threat to society, evidenced by his longstanding serious drug problem and his current offenses, including a high-speed chase through downtown Billings while under the influence of drugs, which resulted in property damage and injuries to innocent persons. *St. v. Willson*, 250 M 241, 818 P2d 1199, 48 St. Rep. 907 (1991).

Designation as Dangerous Offender Not Error: It was not error to designate defendant as a dangerous offender after he was convicted of aggravated kidnapping, aggravated assault, felony assault (now assault with a weapon), and resisting arrest.

Defendant had beaten his common-law wife over a period of at least 2 hours. *St. v. Brady*, 249 M 290, 816 P2d 413, 48 St. Rep. 667 (1991).

Nature of Crime Sufficient to Designate Person as Dangerous Offender -- Reasons Required to Be in Findings: The defendant argued that the trial court erred in designating him a dangerous offender because he had never been convicted of a previous crime. The Supreme Court held that the vicious nature of the offense was sufficient to allow the trial court to designate the defendant a dangerous offender but remanded the case because the trial court is required to state in its findings the reasons for the designation. *St. v. Belmarez*, 248 M 378, 812 P2d 341, 48 St. Rep. 472 (1991), followed in *St. v. Morrison*, 257 M 282, 848 P2d 514, 50 St. Rep. 270 (1993), and *St. v. Evans*, 272 M 58, 899 P2d 1073, 52 St. Rep. 593 (1995).

Designation as Extremely Dangerous Person -- Limitation of Eligibility of Parole: In its reasons for sentence, the District Court characterized defendant as "shrewd, self-serving, deceitful, extremely dangerous, a high risk for escape and for future crimes". This designation was sufficient to take defendant out of the category of nondangerous offender and to warrant limiting his eligibility for parole for 25 years. *St. v. Evans*, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991).

Defendant Designated Dangerous Offender -- No Felony Convictions in Previous Five Years: The defendant appealed his sentencing as a dangerous offender on the basis that his prior felony convictions were of a nonviolent nature and occurred more than 5 years prior to his conviction. The Supreme Court held that the lower court had not abused its discretion in characterizing the defendant as a dangerous offender due to the serious nature of the present crime that the defendant had committed. *St. v. Mazurkiewicz*, 245 M 172, 799 P2d 1066, 47 St. Rep. 1962 (1990).

Dangerous Offender Designation With No Previous Convictions: The defender argued that the lower court had erred in designating him a dangerous offender for selling drugs when he had no previous convictions. The Supreme Court affirmed the decision on the basis that the lower court had found that the defendant had been involved in the operation for a long period of time on a large scale and therefore represented a substantial danger to society. *St. v. Baldwin*, 242 M 176, 789 P2d 1215, 47 St. Rep. 614 (1990).

Separate Crime Not Created by Dangerous Offender Provision -- Due Process Considerations: Defendant argued that the restriction of parole eligibility under 46-18-404 (now repealed) was a distinct crime separate from the underlying offense or was an element of the underlying offense and as such the prosecution must charge dangerous offender status in the information or indictment and prove it beyond a reasonable doubt. The Supreme Court disagreed, holding that the dangerous offender status does not create a separate crime or element of a crime but rather is part of a sentencing scheme that does not circumvent due process. While federal due process imposes some limits beyond which states may not go, application of the reasonable doubt standard has always depended on how state legislatures choose to define a crime. *St. v. Krantz*, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990), followed in *St. v. Byers*, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), *St. v. Arlington*, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994), and *St. v. Henrich*, 268 M 258, 886 P2d 402, 51 St. Rep. 1275 (1994). *Byers* was overruled in part in *St. v. Egelhoff*, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995). See also *McMillan v. Pa.*, 477 US 79, 91 L Ed 2d 67, 106 S Ct 2411 (1986), and *Patterson v. N.Y.*, 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319 (1977).

Facts Supporting Dangerous Offender Status: The sentencing court satisfied the articulation requirements of 46-18-404 (now repealed) when, among other factors, it considered: (1) the presentence report; (2) the defendant's prior criminal history; (3) the inability of defendant to live in the community for more than 3 years without being convicted of felony drug possession and felony assault (now assault with a weapon); and (4) the violence of the crimes and the danger to the victim. *St. v. Hawkins*, 239 M 404, 781 P2d 259, 46 St. Rep. 1786 (1989).

Designation as a dangerous offender was proper upon finding that defendant: (1) admitted daily use of "lots of cocaine" prior to arrest; (2) had intense anger for any kind of authority; (3) had a long history of misdemeanor arrests; (4) threatened to harm several witnesses or their families; and (5) committed a serious crime while still on parole. *St. v. Smith*, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988).

Sufficiency of Reasons When Set Out in First Portion of Judgment: Although the list of findings articulating defendant a dangerous offender was set out in the first portion of a sentence and the dangerous offender designation in the latter portion, it was all part of the same judgment and therefore sufficient to meet the articulated reasons requirement. *St. v. McPherson*, 236 M 484, 771 P2d 120, 46 St. Rep. 525 (1989).

Consideration of Persistent Criminal Conduct in Designation as Dangerous Offender: The District Court properly exercised its discretion in designating defendant a dangerous offender after considering defendant's persistence in criminal conduct and the failure of earlier discipline to deter or reform him. *St. v. Buckman*, 236 M 37, 768 P2d 1361, 46 St. Rep. 163 (1989). See also *St. v. Nichols*, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986).

Statutory Conditions Mandatory Before Nondangerous Designation Required: Both conditions outlined in 46-18-404 (1) (now repealed) must be met before a court is required to designate an offender as nondangerous: (1) lack of a felony conviction in

the preceding 5 years; and (2) a finding that defendant does not present a substantial danger to society. *St. v. Miller*, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988).

Lengthy Sentence for Nondangerous Offender: Defendant pleaded guilty to charges of felony aggravated burglary and felony attempted mitigated deliberate homicide pursuant to 45-6-204 and 45-4-103. He was designated a nondangerous offender but sentenced to 30 concurrent years. The sentence is proper as it is within the legal limits set forth in the applicable statutes. The court considered the required factors listed in this statute in setting sentence. *St. v. Almanza*, 229 M 383, 746 P2d 1089, 44 St. Rep. 2064 (1987), followed in *St. v. Losson*, 262 M 342, 865 P2d 255, 50 St. Rep. 1588 (1993).

Questionable Presentence Report -- Substantial Support for Dangerous Offender Designation: Defendant contended he was improperly designated a dangerous offender due to hearsay and inaccuracies in the presentence report, but the trial court did not appear to rely on any particular offense or incident, emphasizing instead the brutality of the assault, subsequent witness tampering, and a general inability to conform to the law. Even without the questionable presentence report, there was substantial support for the designation. *St. v. Bingman*, 229 M 101, 745 P2d 342, 44 St. Rep. 1813 (1987).

Reasons for Finding Set Forth by Court: The trial court adequately articulated its reasons for finding defendant a dangerous offender when it stated it had reviewed the presentence report, found the crime committed was particularly vicious, determined that the victims did not provoke defendant, and found that defendant's history and the facts of the case indicate he represents a substantial danger to society. *St. v. Bell*, 225 M 83, 731 P2d 336, 44 St. Rep. 56 (1987).

Defendant on Bail Designated Dangerous -- Use of Juvenile Offenses in Sentencing: It was not an abuse of discretion to designate as a dangerous offender a defendant who argued on appeal that releasing him on bail after conviction and prior to sentencing was an implicit finding that he was not dangerous to society and that juvenile convictions were considered. The judge properly considered matters arising between conviction and sentencing in determining the dangerous offender designation, and evidence of juvenile offenses is prohibited only when the defendant was less than 18 when the offense for which he is currently being sentenced was committed. Defendant was 19 at that time. *St. v. Nichols*, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986). **Right to Notice That State Will Seek Dangerous Offender Designation:** Because 46-18-404 (now repealed) states the substantive criteria upon which a nondangerous offender designation must be based, no notice other than notice of the sentencing hearing is needed to comport with due process and it is not a denial of due process that the state is not required to give notice that it will seek application of a dangerous offender designation and to state the factual basis for the requested designation. The statutes governing sentencing provide ample notice of matters that may come up at the sentencing hearing. These statutes, along with notice of the hearing date, the full disclosure of presentencing information in open court, and defendant's ability to propound evidence, confront witnesses, and participate in the hearing, provide a full panoply of due process safeguards for defendant's liberty interest. *St. v. Nichols*, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986).

Term "Substantial Danger" Not Void for Vagueness: As used in 46-18-404 (now repealed) requiring a court to find that a convicted person is a substantial danger to other persons or society before the court may designate him a dangerous offender, the term "substantial danger" is not so loose and uncertain that a court's discretion in defining the term is unfettered. The term does not violate due process for vagueness. *St. v. Nichols*, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986).

No Collateral Estoppel and Due Process Bars to Sentencing: Defendant argued that collateral estoppel and due process barred his status as both a persistent felony offender and dangerous offender because the designations served to sentence him twice for the same offense. The court found no merit to the argument. *St. v. Campbell*, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

Prison's Custody Classification as Alleged Violation of Plea Bargaining Agreement -- Withdrawal of Plea Denied: Under a plea bargain agreement, defendant was sentenced to 10 years as a nondangerous offender without parole. Upon entering prison, he was held in close custody for 24 months under prison rules calling for dangerous offenders and those sentenced without parole to serve 24 months in close custody prior to being considered for transfer to lower, more amenable custody levels. The prosecution, defense counsel, defendant, and judge were all unaware of those rules. Defendant was not entitled to withdraw his plea on the ground he was kept in close custody for 24 months in violation of his plea agreement. There was no violation of the agreement, nor was he entitled to the additional good time credits he would have received had he not been held so long in close custody. Prison officials take many factors into account in making custody reclassifications, and there was no guarantee he would have been held in close custody only for the time he claimed he should have been upon entry to the prison. *St. v. Mesler*, 210 M 92, 682 P2d 714, 41 St. Rep. 939 (1984).

Dangerous Offender Determination -- Use of Defective Information: After defendant and his father kidnapped two minor girls and took them to the father's house, father told defendant to "go get the gun" and defendant did so and placed it between the two men on the couch where they were sitting. The girls were not threatened with the gun. The trial judge told defendant that "the reason you're designated a dangerous offender is that's about the fourth gun incident you were in". Review of the record on appeal showed: (1) a possible misapprehension of defendant's actual criminal background and apparent confusion as to the

crimes involved; (2) no convincing evidence that this was defendant's fourth gun incident; and (3) an indication that one of the prior convictions considered by the judge was constitutionally defective because defendant did not have counsel. The sentencing court cannot rely upon a previous criminal record in sentencing if that record contains constitutionally infirm convictions. Defendant had a right to have his sentence based upon substantially correct information and was entitled to a rehearing on his designation as a dangerous offender. *St. v. Herrera*, 197 M 462, 643 P2d 588, 39 St. Rep. 731 (1982).

"Dangerous Offender" Designation -- Findings Required -- Mere Recitation of 46-18-404 (Now Repealed) Insufficient: On appeal from his conviction for sexual intercourse without consent and sexual assault, the defendant alleged error in his designation as a "dangerous offender" for purposes of parole because the designation was conclusory. In the *McFadden* case, the Supreme Court held that a court must articulate its reasons for the designation and that a mere recitation of the statutory language was insufficient. The reason articulated in this case was that the defendant represented a substantial danger to other persons in society in the opinion of the court. That was found to be a mere recitation of 46-18-404 (now repealed). Because the record of the case revealed substantial evidence which could have led the District Judge to designate the defendant "dangerous", the case was remanded for findings to support the conclusion. Without having the reasons articulated in the judgment, it could not be determined whether there was an abuse of discretion by the judge. *St. v. Camitsch*, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981), following *In re McFadden*, 185 M 220, 605 P2d 599, 37 St. Rep. 55 (1980).

Under 46-18-404 (now repealed), an individual may be designated a dangerous offender if, in the discretion of the sentencing court, he is determined to represent a substantial danger to other persons or society; however, more than a mere recital of the statutory language is required. The sentencing court must articulate its reasons underlying its determination. The record revealed that the District Court never found that petitioner represented a substantial danger to other persons or society but rather concluded that petitioner was not able to be rehabilitated because he had not been truthful with the court and designated him a dangerous offender on that basis. The designation was not supported by substantial credible evidence. *In re McFadden*, 185 M 220, 605 P2d 599, 37 St. Rep. 55 (1980).

Delay in Determination as Nondangerous: Delay of 5 months from conviction until defendant was declared "nondangerous" because the judge wanted a psychological evaluation of the defendant did not constitute cruel and unusual punishment. Nor was the time taken unreasonable, in that it was in the interest of justice to obtain more information about the offender. *St. v. Higley*, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

Dangerous Offender Designation -- Prior Guilty Plea -- With Conviction After Current Conviction: Defendant was convicted of robbery and designated a dangerous offender. The felony burglary conviction upon which the defendant's dangerous offender designation was based was not a conviction for these purposes because the burglary conviction did not occur until some time after he was found to be a dangerous offender. The fact that the defendant had pleaded guilty to burglary prior to the time of his designation as a dangerous offender was of no consequence because 46-18-404 (now repealed) required a felony conviction within the 5 years preceding the commission of the offense for which the defendant was being sentenced. *St. v. Fisher*, 190 M 295, 620 P2d 1215, 37 St. Rep. 1988 (1980).

Designation of Convict as Nondangerous Offender When Court Fails to Designate as Dangerous: In appealing his conviction for robbery, the defendant claimed that the trial court erred in determining that it was required as a matter of law to designate the defendant as a dangerous offender for purposes of parole eligibility. The Supreme Court agreed that the sentencing court was not statutorily required to designate him as a dangerous offender and thus could have designated him as nondangerous. The Supreme Court, in remanding for resentencing, specifically noted 46-18-404 (3) (now repealed), which covers the case when a trial court does not make a designation of dangerousness. To declare a defendant ineligible for parole eligibility, the sentencing court is statutorily required to designate him as dangerous for that purpose as a part of the sentence. When a court fails to do so, 46-18-404 (now repealed) declares that the defendant is to be designated as a nondangerous offender for purposes of parole eligibility. *St. v. Dahl*, 190 M 207, 620 P2d 361, 37 St. Rep. 1852 (1980), followed in *St. v. Buckman*, 236 M 37, 768 P2d 1361, 46 St. Rep. 163 (1989), and *St. v. Lorenz*, 267 M 186, 883 P2d 98, 51 St. Rep. 1027 (1994).

Parole Eligibility -- Ex Post Facto Application: Defendant committed a crime in 1975 for which he was tried and convicted in 1979. In sentencing defendant, the trial court declared him a dangerous offender under 46-18-404 (now repealed), and declared him ineligible for parole under 46-18-202. Both of these statutes became effective July 1, 1977. Application of a law which eliminates or delays a defendant's parole eligibility after the criminal offense has been committed is ex post facto as applied to that defendant and is therefore unconstitutional. *St. v. Beachman*, 189 M 400, 616 P2d 337 (1980).

Jurisdiction to Designate Dangerous Offenders: At a previous hearing on the State's petition to revoke defendant's probation, the trial court not only revoked his probation but erroneously designated him as a dangerous offender for purposes of parole eligibility, which function is reserved to the sentencing court. Neither 46-18-404 (1) (now repealed) nor 46-18-203 gave the District Court authority to determine at the revocation hearing that the defendant was a dangerous offender for purposes of parole. In fact, when the sentencing court placed defendant on probation and suspended the 10-year sentence, the effect was to determine that defendant did not represent a substantial danger to society. *Smith v. St.*, 186 M 52, 606 P2d 153 (1980).

Designation Mandatory: Under former law, designation of an offender as nondangerous for purposes of parole eligibility was mandatory if either of the conditions of 46-18-404(1) (now repealed) were met. *Grifaldo v. St.*, 182 M 287, 596 P2d 847 (1979).

NOTES:

Chapter Law Review Articles

Sentencing, Everly & Mullaney, 42 Mont. L. Rev. 400 (1981).

Law Review Articles

Doctors, Lawyers, and the Unabomber, Newman, 60 Mont. L. Rev. 67 (1999).

Ramifications of Jail-Based Probation Upon Suspended Imposition of Sentence, (Petition of Williams, 145 M 45, 399 P2d 732), 27 Mont. L. Rev. 98 (1965).

Chapter Collateral References

Corrections Policy and Facility Needs, Mont. Legislative Council, 1980.

Part Collateral References

Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 ALR 4th 1069.

Propriety of sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial. 34 ALR 4th 888.

Collateral References

Factfinding Task Force on Corrections--Final Report, pp. 15-25, Montana Legislative Council, 1983.

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R.R.S. Neb. § 25-2901 (2002)

§ 25-2901. Act, how cited

Sections 25-2901 to 25-2921 shall be known and may be cited as the Dispute Resolution Act.

HISTORY: Laws 1991, LB 90, § 1; Laws 1996, LB 922, § 1.

NOTES:

EFFECT OF AMENDMENTS.

Laws 1996, LB 922, effective July 19, 1996, substituted "to 25-2921" for "to 25-2920."

RESEARCH REFERENCES

UNIVERSITY OF NEBRASKA LAW REVIEW.

A Practitioner's Guide to General Order 95-10: Mediation Plan for the United States District Court of Nebraska. 75 Neb. L. Rev. 91 (1996).

NOTES APPLICABLE TO ENTIRE CHAPTER

CROSS REFERENCES.

Constitutional provisions, see Article V, Constitution of Nebraska.
Courts, see Chapter 24.
Evidence, see Chapter 27.

NOTES APPLICABLE TO ENTIRE ARTICLE

RESEARCH REFERENCES

CREIGHTON LAW REVIEW.

Mediation in Nebraska: An innovative past, a spirited present, and a provocative future. 31 Creighton L. Rev. 183 (1997).

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R.R.S. Neb. § 25-2902 (2002)

§ 25-2902. Legislative findings

The Legislature finds that:

- (1) The resolution of certain disputes can be costly and time consuming in the context of a formal judicial proceeding;
- (2) Mediation of disputes has a great potential for efficiently reducing the volume of matters which burden the court system in this state;
- (3) Unresolved disputes of those who do not have the resources for formal resolution may be of small social or economic magnitude individually but are collectively of enormous social and economic consequences;
- (4) Many seemingly minor conflicts between individuals may escalate into major social problems unless resolved early in an atmosphere in which the disputants can discuss their differences through a private informal yet structured process;
- (5) There is a need in our society to reduce acrimony and improve relationships between people in conflict which has a long-term benefit of a more peaceful community of people;
- (6) There is a compelling need in a complex society for dispute resolution whereby people can participate in creating comprehensive, lasting, and realistic resolutions to conflicts;
- (7) Mediation can increase access of the public to dispute resolution and thereby increase public regard and usage of the legal system; and
- (8) Nonprofit dispute resolution centers can make a substantial contribution to the operation and maintenance of the courts of this state by preserving the court's scarce resources for those disputes which cannot be resolved by means other than litigation.

HISTORY: Laws 1991, LB 90, § 2.

RESEARCH REFERENCES

UNIVERSITY OF NEBRASKA LAW REVIEW.

A Practitioner's Guide to General Order 95-10: Mediation Plan for the United States District Court of Nebraska. 75 Neb. L. Rev. 91 (1996).

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§ 25-2903. Terms, defined

For purposes of the Dispute Resolution Act:

- (1) Approved center shall mean a center that has applied for and received approval from the director under section 25-2909;
- (2) Center shall mean a nonprofit organization or a court-established program which makes dispute resolution procedures available;
- (3) Council shall mean the Advisory Council on Dispute Resolution;
- (4) Director shall mean the Director of the Office of Dispute Resolution;
- (5) Dispute resolution process shall mean a process by which the parties involved in a dispute voluntarily agree to enter into informal discussion and negotiation with the assistance of a mediator;
- (6) Mediation shall mean the intervention into a dispute by a third party who has no decisionmaking authority and is impartial to the issues being discussed;
- (7) Mediator shall mean a person trained in the process of mediation who assists parties in dispute to reach a mutually acceptable resolution of their conflict; and
- (8) Office shall mean the Office of Dispute Resolution.

HISTORY: Laws 1991, LB 90, § 3.

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R.R.S. Neb. § 25-2904 (2002)

§ 25-2904. Office of Dispute Resolution; established; director; qualifications; duties

The Office of Dispute Resolution is hereby established in the office of the State Court Administrator. The director of the office shall be hired by the Supreme Court. The director may but need not be an attorney and shall be hired on the basis of his or her training and experience in mediation. The director shall administer the Dispute Resolution Act and shall serve as staff to the council.

HISTORY: Laws 1991, LB 90, § 4.

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R.R.S. Neb. § 25-2905 (2002)

§ 25-2905. Advisory Council on Dispute Resolution; created; members

The Advisory Council on Dispute Resolution is hereby created. The council shall be comprised of individuals from a variety of disciplines who are trained and knowledgeable in mediation and selected to be representative of the geographical and cultural diversity of the state and to reflect gender fairness. The council shall consist of eleven voting members. The membership shall include a representative from the Nebraska District Court Judges Association, the Nebraska County Court Judges Association, and the Nebraska State Bar Association. The council shall be appointed by the Supreme Court or a designee. Nominations shall be solicited from the Nebraska District Court Judges Association, the Nebraska County Court Judges Association, the Nebraska State Bar Association, the Nebraska Mediation Coalition, the Public Counsel, social workers, mental health professionals, educators, and other interested groups or individuals. The Supreme Court or its designee shall not be restricted to the solicited list of nominees in making its appointments. Two nonvoting, ex officio members shall be appointed by the council from among the approved centers.

HISTORY: Laws 1991, LB 90, § 5; Laws 1999, LB 315, § 2.

NOTES:

EFFECT OF AMENDMENTS.

Laws 1999, LB 359, effective Aug. 28, 1999, twice substituted "Nebraska County Court Judges Association" for "Nebraska County Judges Association."

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R.R.S. Neb. § 25-2906 (2002)

§ 25-2906. Council; members; terms; vacancy; officers

The initial members of the council shall be appointed for terms of one, two, or three years. All subsequent appointments shall be made for terms of three years. Any vacancy on the council shall be filled in the same manner in which the original appointment was made and shall last for the duration of the term vacated. Appointments to the council shall be made within ninety days after September 6, 1991. The council shall select a chairperson, a vice-chairperson, and such other officers as it deems necessary.

HISTORY: Laws 1991, LB 90, § 6.

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R.R.S. Neb. § 25-2907 (2002)

§ 25-2907. Council; powers and duties; members; expenses

- (1) The council shall advise the director on the administration of the Dispute Resolution Act.
- (2) The council shall meet at least four times per year and at other times deemed necessary to perform its functions. Members of the council shall be reimbursed for their actual and necessary expenses as provided in sections 81-1174 to 81-1177.
- (3) The council may appoint task forces to carry out its work. Task force members shall have knowledge of, responsibility for, or interest in an area related to the duties of the council.

HISTORY: Laws 1991, LB 90, § 7.

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R.R.S. Neb. § 25-2908 (2002)

§ 25-2908. Director; duties

Consistent with the purposes and objectives of the Dispute Resolution Act and in consultation with the council, the director shall:

- (1) Make information on the formation of centers available statewide and encourage the formation of centers;
- (2) Approve centers which meet requirements for approval;
- (3) Develop a uniform system of reporting and collecting statistical data from approved centers;
- (4) Develop a uniform system of evaluating approved centers;
- (5) Prepare a yearly budget for the implementation of the act and distribute funds to approved centers;
- (6) Develop guidelines for a sliding scale of fees to be charged by approved centers;
- (7) Develop curricula and initiate training sessions for mediators and staff of approved centers and of courts;
- (8) Establish volunteer training programs;
- (9) Promote public awareness of the dispute resolution process;
- (10) Apply for and receive funds from public and private sources for carrying out the purposes and obligations of the act; and

(11) Develop a uniform system to create and maintain a roster of mediators for juvenile offender and victim mediation, as provided in section 43-245, and centers approved under section 25-2909. The roster shall be made available to courts and county attorneys.

HISTORY: Laws 1991, LB 90, § 8; Laws 1998, LB 1073, § 7.

NOTES:

EFFECT OF AMENDMENTS.

Laws 1998, LB 1073, effective Apr. 15, 1998, and operative July 15, 1998, added (11).

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R.R.S. Neb. § 25-2909 (2002)

§ 25-2909. Grants; application; contents; approved centers; reports

(1) The office shall annually award grants to approved centers. It is the intent of the Legislature that centers be established and grants distributed statewide.

(2) A center or an entity proposing a center may apply to the office for approval to participate in the dispute resolution process pursuant to the Dispute Resolution Act by submitting an application which includes:

- (a) A plan for the operation of the center;
- (b) The center's objectives;
- (c) The areas of population to be served;
- (d) The administrative organization;
- (e) Record-keeping procedures;
- (f) Procedures for intake, for scheduling, and for conducting and terminating dispute resolution sessions;
- (g) Qualifications for mediators for the center;
- (h) An annual budget for the center; and
- (i) Proof of 501(c)(3) status under the Internal Revenue Code or proof of establishment by a court.

The office may specify additional criteria for approval and for grants as it deems necessary.

(3) Annual reports shall be required of each approved center. The reports shall include the number and types of cases handled in the year and a showing of continued compliance with the act. Any programs existing on September 6, 1991, shall not be included in the act unless they apply and are approved under this section.

HISTORY: Laws 1991, LB 90, § 9.

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§ 25-2910. Approved center; funding; fees

An approved center may use sources of funds, both public and private, in addition to funds appropriated by the Legislature. An approved center may require each party to pay a fee to help defray costs based upon ability to pay. A person shall not be denied services solely because of an inability to pay the fee.

HISTORY: Laws 1991, LB 90, § 10.

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R.R.S. Neb. § 25-2911 (2002)

§ 25-2911. Dispute resolution; types of cases; referral of cases

(1) The following types of cases may be accepted for dispute resolution at an approved center:

- (a) Civil claims and disputes, including, but not limited to, consumer and commercial complaints, disputes between neighbors, disputes between business associates, disputes between landlords and tenants, and disputes within communities;
- (b) Disputes concerning child custody and visitation rights and other areas of domestic relations; and
- (c) Juvenile offenses and disputes involving juveniles.

(2) An approved center may accept cases referred by a court, an attorney, a law enforcement officer, a social service agency, a school, or any other interested person or agency or upon the request of the parties involved. A case may be referred prior to the commencement of formal judicial proceedings or may be referred as a pending court case. In order for a referral to be effective, all parties involved must consent to such referral. If a court refers a case to an approved center, the center shall provide information to the court as to whether an agreement was reached. If the court requests a copy of the agreement, the center shall provide it.

HISTORY: Laws 1991, LB 90, § 11.

NOTES:

CROSS REFERENCES.

Farm Mediation Act, see § 2-4801.

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R.R.S. Neb. § 25-2912 (2002)

§ 25-2912. Dispute resolution process; procedures

Before the dispute resolution process begins, an approved center shall provide the parties with a written statement setting forth the procedures to be followed.

HISTORY: Laws 1991, LB 90, § 12.

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R.R.S. Neb. § 25-2913 (2002)

§ 25-2913. Mediators; qualifications; compensation; powers and duties

(1) Mediators of approved centers shall have completed at least thirty hours of training in conflict resolution techniques, neutrality, agreement writing, and ethics. For disputes involving marital dissolution, mediators of approved centers shall have an additional thirty hours in family mediation. An initial apprenticeship with an experienced mediator shall be required for at least three sessions for all mediators without prior mediation experience.

(2) An approved center may provide for the compensation of mediators or utilize the services of volunteer mediators or both.

(3) The mediator shall assist the parties in reaching a mutually acceptable resolution of their dispute through discussion and negotiation. The mediator shall be impartial, neutral, and unbiased and shall make no decisions for the parties.

(4) The mediator shall officially terminate the process if the parties are unable to agree or if, in the judgment of the mediator, the agreement would be unconscionable. The termination shall be without prejudice to either party in any other proceeding.

(5) The mediator has no authority to make or impose any adjudicatory sanction or penalty upon the parties.

(6) The mediator shall be aware of and recommend outside resources to the parties whenever appropriate. The mediator shall advise participants to obtain legal review of agreements as necessary.

HISTORY: Laws 1991, LB 90, § 13.

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R.R.S. Neb. § 25-2914 (2002)

§ 25-2914. Confidentiality; exceptions

Any verbal, written, or electronic communication made in or in connection with matters referred to mediation which relates to the controversy or dispute being mediated and agreements resulting from the mediation, whether made to the mediator, the staff of an approved center, a party, or any other person attending the mediation session, shall be confidential. Mediation proceedings shall be regarded as settlement negotiations, and no admission, representation, or statement made in mediation, not otherwise discoverable or obtainable, shall be admissible as evidence or subject to discovery. A mediator shall not be subject to process requiring the disclosure of any matter discussed during mediation proceedings unless all the parties consent to a waiver. Confidential communications and materials are subject to disclosure when all parties agree in writing to waive confidentiality regarding specific verbal, written, or electronic communications relating to the mediation session or the agreement. This section shall not apply if a party brings an action against the mediator or center, if the communication was made in furtherance of a crime or fraud, or if this section conflicts with other legal requirements.

HISTORY: Laws 1991, LB 90, § 14; Laws 1994, LB 868, § 1.

JUDICIAL DECISIONS

ANALYSIS

Construction.

CONSTRUCTION.

The limit of authority possessed by a party's representative at a mediation hearing is not confidential information protected from disclosure by this section. *Doe v. Nebraska*, 971 F. Supp. 1305 (D. Neb. 1997). In a proceeding concerning a motion for sanctions, this section does not preclude the admission or consideration of evidence related to parties' settlement proposals, provided that such evidentiary materials are kept under seal and not made available to the trial judge. *Doe v. Nebraska*, 971 F. Supp. 1305 (D. Neb. 1997).

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§ 25-2915. Immunity; exceptions

No mediator, staff member, or member of a governing board of an approved center may be held liable for civil damages for any statement or decision made in the process of dispute resolution unless such person acted in a manner exhibiting willful or wanton misconduct.

HISTORY: Laws 1991, LB 90, § 15.

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R.R.S. Neb. § 25-2916 (2002)

§ 25-2916. Agreement; contents; enforceability

If the parties involved in the dispute reach an agreement, the agreement may be reduced to writing and signed by the parties. The agreement shall set forth the settlement of the issues and the future responsibilities of each party. If a court referred the case, the agreement as signed and approved by the parties may be presented to the court as a stipulation and, if approved by the court, shall be enforceable as an order of the court.

HISTORY: Laws 1991, LB 90, § 16.

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CHAPTER 25. COURTS; CIVIL PROCEDURE
ARTICLE 29. DISPUTE RESOLUTION
(a) DISPUTE RESOLUTION ACT
R.R.S. Neb. § 25-2917 (2002)

§ 25-2917. Tolling of statute of limitations; when

During the period of the dispute resolution process, any applicable statute of limitations shall be tolled as to the parties. The tolling shall commence on the date the approved center accepts the case and shall end on the date of the last mediation session. This period shall be no longer than sixty days without consent of all the parties.

HISTORY: Laws 1991, LB 90, § 17.

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(a) DISPUTE RESOLUTION ACT
R.R.S. Neb. § 25-2918 (2002)

§ 25-2918. Rules and regulations

The Supreme Court, upon recommendation by the director in consultation with the council, shall adopt and promulgate rules and regulations to carry out the Dispute Resolution Act.

HISTORY: Laws 1991, LB 90, § 18.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading.

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ARTICLE 29. DISPUTE RESOLUTION
(a) DISPUTE RESOLUTION ACT
R.R.S. Neb. § 25-2919 (2002)

§ 25-2919. Application of act

The Dispute Resolution Act shall apply only to approved centers and mediators of such centers.

HISTORY: Laws 1991, LB 90, § 19.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading.

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ARTICLE 29. DISPUTE RESOLUTION
(a) DISPUTE RESOLUTION ACT
R.R.S. Neb. § 25-2920 (2002)

§ 25-2920. Director; report

The director shall report annually to the Chief Justice, the Governor, and the Legislature on the implementation of the Dispute Resolution Act. The report shall include the number and types of disputes received, the disposition of the disputes, any problems encountered, any recommendations to address problems, and a comparison of the cost of mediation and litigation.

HISTORY: Laws 1991, LB 90, § 20.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading.

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CHAPTER 25. COURTS; CIVIL PROCEDURE
ARTICLE 29. DISPUTE RESOLUTION
(a) DISPUTE RESOLUTION ACT
R.R.S. Neb. § 25-2921 (2002)

§ 25-2921. Dispute Resolution Cash Fund; created; use; investment

The Dispute Resolution Cash Fund is created. The fund shall consist of proceeds received pursuant to subdivision (10) of section 25-2908. The fund shall be used for the administration of the office. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

HISTORY: Laws 1996, LB 922, § 2.

NOTES:

EFFECTIVE DATE: July 19, 1996.

CROSS REFERENCES.

Nebraska Capital Expansion Act, see § 72-1269.

Nebraska State Funds Investment Act, see § 72-1260.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading.

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CHAPTER 43. INFANTS AND JUVENILES
ARTICLE 2. JUVENILE CODE
(e) PROSECUTION
R.R.S. Neb. § 43-274 (2002)

§ 43-274. Criminal complaint; proceedings; by whom and how instituted; mediation; procedures

(1) The county attorney or any reputable person residing in the county, with the consent of the county attorney, having knowledge of a juvenile in his or her county who appears to be a juvenile described in subdivision (1), (2), (3), or (4) of section 43-247 may file with the clerk of the court having jurisdiction in the matter a petition in writing specifying which subdivision of section 43-247 is alleged, setting forth the facts verified by affidavit, and requesting the court to determine whether support will be ordered pursuant to section 43-290. Allegations under subdivisions (1), (2), and (4) of section 43-247 shall be made with the same specificity as a criminal complaint. It shall be sufficient if the affidavit is based upon information and belief. Such petition and all subsequent proceedings shall be entitled In the Interest of , a Juvenile Under Eighteen Years of Age, inserting the juvenile's name in the blank. In all cases involving violation of a city or village ordinance, the city or village prosecutor may file a petition in juvenile court.

(2) (a) If a juvenile appears to be a juvenile described in subdivision (1), (2), (3)(b), or (4) of section 43-247 because of a nonviolent act or acts, the county attorney may offer mediation to the juvenile and the victim of the juvenile's act. If both the juvenile and the victim agree to mediation, the juvenile, his or her parent, guardian, or custodian, and the victim shall sign a mediation consent form and select a mediator or approved center from the roster made available pursuant to section 25-2908. The county attorney shall refer the juvenile and the victim to such mediator or approved center. The mediation sessions shall occur within thirty days after the date the mediation referral is made by the county attorney unless an extension is approved by the county attorney. The juvenile or his or her parent, guardian, or custodian shall pay the mediation fees. The fee shall be determined by the mediator in private practice or by the approved center. A juvenile shall not be denied services at an approved center because of an inability to pay.

(b) Terms of the agreement shall specify monitoring, completion, and reporting requirements. The county attorney, the court, or the probation office shall be notified by the designated monitor if the juvenile does not complete the agreement within the agreement's specified time.

(c) Terms of the agreement may include one or more of the following:

(i) Participation by the juvenile in certain community service programs;

(ii) Payment of restitution by the juvenile to the victim;

(iii) Reconciliation between the juvenile and the victim; and

(iv) Any other areas of agreement.

(d) If no mediation agreement is reached, the mediator or approved center will report that fact to the county attorney within forty-eight hours of the final mediation session excluding nonjudicial days.

(e) If a mediation agreement is reached and the agreement does not violate public policy, the agreement shall be approved by the county attorney. If the agreement is not approved and the victim agrees to return to mediation (i) the juvenile may be referred back to mediation with suggestions for changes needed in the agreement to meet approval or (ii) the county attorney may proceed with the filing of a criminal charge or juvenile court petition. If the juvenile agrees to return to mediation but the victim does not agree to return to mediation, the county attorney may consider the juvenile's willingness to return to mediation when determining whether or not to file a criminal charge or a juvenile court petition.

(f) If the juvenile meets the terms of an approved mediation agreement, the county attorney shall not file a criminal charge or juvenile court petition against the juvenile for the acts for which the juvenile was referred to mediation.

HISTORY: Laws 1981, LB 346, § 30; Laws 1987, LB 638, § 4; Laws 1998, LB 1073, § 20.

NOTES:

EFFECT OF AMENDMENTS.

Laws 1998, LB 1073, effective Apr. 15, 1998, and operative July 15, 1998, added (2), and redesignated the existing paragraph as (1).

JUDICIAL DECISIONS

ANALYSIS

County attorney.

COUNTY ATTORNEY.

Petition to terminate mother's parental rights was deficient where there was no record establishing that the petition was filed by or with the consent of the county attorney. In re Joeylann H., 6 Neb. App. 472, 574 N.W.2d 185 (1998).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

Guardian ad litem

GUARDIAN AD LITEM

A guardian ad litem may institute proceedings to terminate parental rights only with the consent of the county attorney. 1986 Op. Att'y Gen. No. 9.

NOTES APPLICABLE TO ENTIRE CHAPTER

CROSS REFERENCES.

Constitutional provisions:

Electors must be eighteen years of age, see Article VI, § 1, Constitution of Nebraska.

Free instruction in common schools for persons between five and twenty-one years of age, Legislature shall provide, see Article VII, § 1, Constitution of Nebraska.

Minimum wages and regulation of hours and conditions of employment of children, Legislature may provide, see Article XV, § 8, Constitution of Nebraska.

Nonsectarian educational or other services for handicapped children under the age of twenty-one, Legislature may provide for, see Article VII, § 11, Constitution of Nebraska.

Sale or mortgage of real estate belonging to minors, local or special laws prohibited, see Article III, § 18, Constitution of Nebraska.

Schools for safekeeping, education, employment, and reformation of children under eighteen years of age, Legislature may establish, see Article VII, § 12, Constitution of Nebraska.

Abortion on minor:

Parental notification requirements, see §§ 71-6901 to 71-6908.

Without giving notice, unprofessional conduct, see § 71-148.

Actions:

Depositions by videotape, see § 29-1925 et seq.

Legal, see §§ 25-304 and 25-307 to 25-310.

Limitation of action, see §§ 25-213 and 77-1855.

Arrest procedures, see § 29-401.

Births and deaths, statistics and certificates, see Chapter 71, article 6.

Building and loan association stock, acquisition and ownership of, see § 8-318.

Checks, capacity of minors to endorse, see §§ 8-135 and 8-410.02.

Child care:

Facilities and programs, regulation, see §§ 71-1908 to 71-1917 and 81-502.

Foster care, see §§ 71-1901 to 71-1907.

Child labor, see Article XV, § 8, Constitution of Nebraska, and Chapter 48, article 3.

Child support:

General provisions, see Chapter 42, articles 3 and 7.

Income tax or lottery prize setoff, see §§ 77-27,160 to 77-27,173.

Children with disabilities:

Medical Center, University of Nebraska, role, see §§ 85-178 and 85-179.

Special Education Act, see § 79-1110.

Condemnation, valid releases by guardian of minor, see § 76-724.

Crimes and punishments:

Abandonment of child, see § 28-705.

Abuse or neglect, see §§ 28-707 and 28-710 to 28-727.

Child pornography, see §§ 28-1463.01 to 28-1463.05.

Contributing to the delinquency of a child, see § 28-709.

Criminal nonsupport, see § 28-706.

Debauching a minor, see § 28-805.

Delivery of drug paraphernalia to a minor, see § 28-443.

Incest, see § 28-703.

Obscene materials and shows, see §§ 28-807 to 28-829.

Poisons, sale to person under eighteen, see § 71-2508.

Sexual assault, see § 28-320.01.

Tobacco, use by and sale to minor, see § 28-1418 et seq.

Unlawful possession of a revolver, see § 28-1204.

Violation of custody, see § 28-316.

Cruelty to, powers of metropolitan-class cities, see § 14-102.

Custody of children, see § 43-104.22, Chapter 42, article 3, and Chapter 43, articles 12 and 15.

Domestic abuse, protection from, see §§ 42-901 to 42-930.

Drug abuse and alcoholism, counseling, see § 71-5041.

Education, schools, see Chapter 79.

Electric and communication facilities, power of guardian to execute contracts, see § 86-337.

Facilities for care of children, Department of Health and Human Services, see § 83-108.04.

Fair Employment Practices Act, Nebraska, inapplicable to employment by parent or child, see § 48-1103.

Force, when use on minor is justifiable, see § 28-1413.

Gambling:

Horseraces, parimutuel wagers prohibited, see § 2-1207.

Participation in or presence at bingo, lottery by the sale of pickle cards, lottery, or raffle, restrictions, see §§ 9-345, 9-430, and 9-823.

Guardian:

Declaratory judgment, may maintain action for, see § 25-21,152.

General provisions, see §§ 30-2605 to 30-2616.

Who may and may not act as, see §§ 8-206, 8-409, and 21-610.

Guardian ad litem:

Appointment, see §§ 25-309 et seq., 43-265, and 43-272.

Attorneys, duties as, see § 7-113.

Duties, see §§ 25-819 and 43-272.01.

Hearing aid, fitting and selling to child, see § 71-4712.

Hunter education programs, see § 37-413 et seq.

Husband-wife privilege, inapplicable to certain cases involving children, see § 27-505.

Imprisonment in county jail, matron required, when, see § 47-111.

Industrial loan and investment company:

Certification of indebtedness, issuance or payment to minor, see § 8-410.02.

Loan to finance education of officer's or employee's children, see § 8-409.02.

Inheritance and probate, see Chapter 30.

Inheritance tax, see Chapter 77, article 20.

Insurance contracts:

Benefit contract prior to age of majority, effect, see § 44-1090.

Fraternal insurance, see §§ 44-1074, 44-1077, and 44-1087.

Group life insurance, see § 44-1614.
Life, health, and accident insurance, see §§ 44-703 to 44-710.19 and 44-761.
Interstate Family Support Act, Uniform, see §§ 42-701.
Judgments involving minors:
Review, limitation of time for, see § 25-1931.
Setting aside after majority, see § 25-1317.
Vacation or modification after term, see §§ 25-2001 and 25-2009.
Legal settlement for public assistance programs, see § 68-115.
Legitimacy:
Children of Indian marriages, see § 42-402.
When marriage relationship is dissolved or annulled, see § 42-377.
Liquor:
Handling related to minor's employment, see § 53-168.06.
Prohibition on sales to or use by minors, see §§ 53-180 to 53-180.07.
Second-class cities, powers of, see § 17-135.
Marriage:
Consent of parent or guardian, when required, see § 42-105.
Minimum age for, see § 42-102.
Void, when, see § 42-103.
Voidable, when, see § 42-118.
Maternal and child health, see §§ 71-2201 to 71-2208 and 71-2225 to 71-2230.
Metabolic diseases, screening, see §§ 71-519 to 71-524.
Minimum wage, child employed by parent not an employee, see § 48-1202.
Missing minor, duties of law enforcement agency, see § 29-214.
Motor vehicles:
Learner's permit, violation, see § 60-4,125.
Liability of owner or operator to child or parent for damages, see § 25-21,237.
Provisional operators' licenses, types and requirements, see §§ 60-4,118 and 60-4,120.01 et seq.
National Guard, tuition credits for surviving children, see § 85-507.
Pawnbroker, prohibited from dealing with person under eighteen, see § 69-210.
Physician-patient privilege, inapplicable to injuries to children, see § 27-504.
Pregnant woman, syphilis test, see § 71-502.03.
Property:
Protective proceedings, appointment of conservator, see §§ 30-2630 to 30-2661.
Redemption or recovery of real property after tax sales, see §§ 77-1826 and 77-1855.
Publication or intrusion, consent by parent or guardian, see § 20-205.
Publicly funded college or university, prohibition on denial of admission of child, see § 85-607.
Rules of the road, violation by child, duty of parent or guardian, see § 60-6,117.
Schools and institutions:
Beatrice State Developmental Center, see § 83-217 et seq.
Elementary and secondary schools, see Chapter 79.
Seat safety belts or passenger restraint systems, required for children, see §§ 60-6,267, 60-6,269, and 71-1907.
Sexually transmitted diseases, liability of parents for treatment, see § 71-504.
Shoplifting, liability of parents, see § 25-21,194.
Snowmobile, operation, restrictions, see § 60-6,340.
State residential facility, continued detention upon reaching age of majority, see § 83-388.
Students, elementary and secondary education, see Chapter 79.
Surrogate parenthood contracts, void, see § 25-21,200.
Veterans:
Aid for children, see § 80-403.
Servicemen's Readjustment Act of 1944, obligation binding on minor, see § 80-701.
University tuition waiver for children, see § 80-411.
Tuition waiver for children, see § 80-411.
Voting:
Age qualifications, see Article VI, § 1, Constitution of Nebraska, and § 32-312.
Aiding unlawful voting by underage person, penalty, see § 32-1532.
Challenge for being underage, procedure, see § 32-931.
Penalty for voting under age, see § 32-1530.
Workers' compensation:
Action by guardian or next friend, see § 48-132.
Benefits, to whom and how payable, see §§ 48-122.01, 48-122.03, and 48-124.
Employees, included as, see § 48-115.

NOTES APPLICABLE TO ENTIRE ARTICLE

CROSS REFERENCES.

Constitutional provision:

Establishment of separate juvenile courts authorized, see Article V, § 27, Constitution of Nebraska.

Death penalty, imposition on person under eighteen prohibited, see § 28-105.01.

Juvenile cases:

Appeals procedures, see §§ 25-2728 to 25-2738.

Duty of clerk of district court to report number filed, see § 24-1006.

Procedure for payment of uncollectible costs, see § 29-2709.

Recording and preservation of evidence, see § 24-1003.

Juvenile criminal matters, fees, see § 33-124.

Juvenile detention facilities, see § 83-4,124 et. seq.

Juvenile Services Act, see § 43-2401.

Physician-patient privilege, inapplicable to judicial proceedings under Nebraska Juvenile Code, see § 27-504.

EDITOR'S NOTES.

A number of the cases and opinions in this article were decided under former statutory provisions, but notes have been retained where they might be helpful in interpreting present provisions.

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CHAPTER 43. INFANTS AND JUVENILES

ARTICLE 2. JUVENILE CODE

(b) GENERAL PROVISIONS

R.R.S. Neb. § 43-245 (2002)

§ 43-245. Terms, defined

For purposes of the Nebraska Juvenile Code, unless the context otherwise requires:

- (1) Age of majority means nineteen years of age;
- (2) Approved center means a center that has applied for and received approval from the Director of the Office of Dispute Resolution under section 25-2909;
- (3) Cost or costs means (a) the sum or equivalent expended, paid, or charged for goods or services, or expenses incurred, or (b) the contracted or negotiated price;
- (4) Juvenile means any person under the age of eighteen;
- (5) Juvenile court means the separate juvenile court where it has been established pursuant to sections 43-2,111 to 43-2,127 and the county court sitting as a juvenile court in all other counties. Nothing in the Nebraska Juvenile Code shall be construed to deprive the district courts of their habeas corpus, common-law, or chancery jurisdiction or the county courts and district courts of jurisdiction of domestic relations matters as defined in section 25-2740;
- (6) Juvenile detention facility has the same meaning as in section 83-4,125;
- (7) Mediator for juvenile offender and victim mediation means a person who (a) has completed at least thirty hours of training in conflict resolution techniques, neutrality, agreement writing, and ethics set forth in section 25-2913, (b) has an additional eight hours of juvenile offender and victim mediation training, and (c) meets the apprenticeship requirements set forth in section 25-2913;
- (8) Mental health facility means a mental health center as defined in section 83-1006 or a government, private, or state hospital which treats mental illness;

(9) Nonoffender means a juvenile who is subject to the jurisdiction of the juvenile court for reasons other than legally prohibited conduct, including, but not limited to, juveniles described in subdivision (3)(a) of section 43-247;

(10) Nonsecure detention means detention characterized by the absence of restrictive hardware, construction, and procedure. Nonsecure detention services may include a range of placement and supervision options, such as home detention, electronic monitoring, day reporting, drug court, tracking and monitoring supervision, staff secure and temporary holdover facilities, and group homes;

(11) Parent means one or both parents or a stepparent when such stepparent is married to the custodial parent as of the filing of the petition;

(12) Parties means the juvenile as described in section 43-247 and his or her parent, guardian, or custodian;

(13) Except in proceedings under the Nebraska Indian Child Welfare Act, relative means father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece;

(14) Secure detention means detention in a highly structured, residential, hardware-secured facility designed to restrict a juvenile's movement;

(15) Status offender means a juvenile who has been charged with or adjudicated for conduct which would not be a crime if committed by an adult, including, but not limited to, juveniles charged under subdivision (3)(b) of section 43-247 and sections 53-180.01 and 53-180.02; and

(16) Traffic offense means any nonfelonious act in violation of a law or ordinance regulating vehicular or pedestrian travel, whether designated a misdemeanor or a traffic infraction.

HISTORY: Laws 1981, LB 346, § 1; Laws 1985, LB 447, § 11; Laws 1987, LB 638, § 1; Laws 1989, LB 182, § 9; Laws 1996, LB 1296, § 20; Laws 1997, LB 622, § 62; Laws 1998, LB 1041, § 20; Laws 1998, LB 1073, § 11; Laws 2000, LB 1167, § 11.

NOTES:

CROSS REFERENCES.

Nebraska Indian Child Welfare Act, see § 43-1501.

REVISOR'S NOTE.

The Revisor of Statutes has pursuant to § 49-769 correlated LB 1041, § 20, with LB 1073, § 11, to reflect all amendments. The changes made by LB 1041 became operative July 1, 1998. The changes made by LB 1073 became operative July 15, 1998.

EFFECT OF AMENDMENTS.

Laws 2000, LB 1167, effective Apr. 12, 2000, and operative July 1, 2001, inserted present (10) and (14), redesignated former (10) through (12) as (11) through (13), and redesignated former (13) and (14) as (15) and (16).

Laws 1998, LB 1041, effective Apr. 15, 1998, and operative July 1, 1998, added (8) (now (12)), and redesignated former (8) as (9) (now (14)); in (4) (now (5)), in the last sentence, deleted "and, on and after October 1, 1997, the county courts and district courts" preceding "of their habeas corpus," and substituted "the county courts and district courts of jurisdiction of domestic relations matters as defined in section 25-2740" for "jurisdiction acquired in an action for divorce, legal separation, or annulment"; and made stylistic changes.

Laws 1998, LB 1073, effective Apr. 15, 1998, and operative July 15, 1998, added (2), and redesignated former (2) through (4) as (3) through (5); added (6) and (7), and redesignated former (5) as (8); added (9), and redesignated former (6) and (7) as (10) and (11); added (12) (now (13)), and redesignated former (8) as (13) (now (14)); and made stylistic changes.

Laws 1997, LB 622, effective June 17, 1997, and operative Sept. 13, 1997, rewrote the section.

Laws 1997, LB 229, effective Sept. 13, 1997, and operative Jan. 1, 1998, amended this section by substituting January 1, 1998 for October 1, 1997, as the operative date of Laws 1996, LB 1296.

Laws 1996, LB 1296, effective July 19, 1996, and operative Oct. 1, 1997, inserted "county courts or" preceding "district courts" in the second sentence of (3).

JUDICIAL DECISIONS

ANALYSIS

Age

Discretion of court

Habeas corpus

Parties.

Review.

Rules of evidence.

AGE

Although evidence presented may not have been sufficient to fix defendant's age at precisely 14, it was sufficient to prove that he was under the age of 18 years. *State v. Roy R.*, 3 Neb. App. 816, 533 N.W.2d 107 (1995).

DISCRETION OF COURT

A juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. *State v. Beth S.*, 247 Neb. 629, 529 N.W.2d 534 (1995).

Juvenile courts have broad discretion to accomplish the purpose of serving the best interests of the children involved. *State v. R.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), modified on other grounds, *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

HABEAS CORPUS

A decision in a habeas corpus case involving the custody of a child is reviewed by the supreme court de novo on the record. *L.G.P. ex rel. R.G. v. Nebraska Dep't of Social Servs.*, 239 Neb. 644, 477 N.W.2d 571 (1991).

A question in every habeas corpus child custody case is the best interests of the child. *L.G.P. ex rel. R.G. v. Nebraska Dep't of Social Servs.*, 239 Neb. 644, 477 N.W.2d 571 (1991).

Proceedings in habeas corpus to obtain the custody of a child are governed by considerations of expediency and equity and should not be bound by technical rules. *L.G.P. ex rel. R.G. v. Nebraska Dep't of Social Servs.*, 239 Neb. 644, 477 N.W.2d 571 (1991).

Nothing in the Juvenile Code shall be construed to deprive the district courts of, inter alia, their habeas corpus jurisdiction. *L.G.P. ex rel. R.G. v. Nebraska Dep't of Social Servs.*, 239 Neb. 644, 477 N.W.2d 571 (1991).

PARTIES.

Grandparents have a sufficient legal interest in dependency proceedings involving their biological or adopted minor grandchildren to entitle them to intervene in such proceedings prior to final disposition. *In re Interest of Kayle C.*, 253 Neb. 685, 574 N.W.2d 473 (1998).

REVIEW.

Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and the appellate court is required to reach conclusions independent of the trial court's findings and rulings. *State v. Renetta*, 253 Neb. 613, 571 N.W.2d 608 (1997).

RULES OF EVIDENCE.

Although the rules of evidence are inapplicable in dispositional proceedings arising under the Nebraska Juvenile Code, they nonetheless provide a guidepost in determining whether fundamental due process has been afforded. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

Party

PARTY

Any person who comes within the definition of "party" can file an appropriate motion to review the disposition. 1985 Op. Att'y Gen. No. 13.

RESEARCH REFERENCES

CREIGHTON LAW REVIEW.

Child abuse: The legal framework in Nebraska. 8 *Creighton L. Rev.* 771 (1975).

Nebraska juvenile courts: Jurisdiction, new rights for juveniles, new responsibilities for prosecutors. 8 *Creighton L. Rev.* 81 (1974).

Due process, equal protection and Nebraska's system allowing the county prosecutor to determine whether a juvenile will be tried as an adult. 7 *Creighton L. Rev.* 223 (1974).

UNIVERSITY OF NEBRASKA LAW REVIEW.

Juvenile court reform: The juvenile offender after L.B. 620. 54 *Neb. L. Rev.* 405 (1975).

NOTES APPLICABLE TO ENTIRE CHAPTER

CROSS REFERENCES.

Constitutional provisions:

Electors must be eighteen years of age, see Article VI, § 1, Constitution of Nebraska.

Free instruction in common schools for persons between five and twenty-one years of age, Legislature shall provide, see Article VII, § 1, Constitution of Nebraska.

Minimum wages and regulation of hours and conditions of employment of children, Legislature may provide, see Article XV, § 8, Constitution of Nebraska.

Nonsectarian educational or other services for handicapped children under the age of twenty-one, Legislature may provide for, see Article VII, § 11, Constitution of Nebraska.

Sale or mortgage of real estate belonging to minors, local or special laws prohibited, see Article III, § 18, Constitution of Nebraska.

Schools for safekeeping, education, employment, and reformation of children under eighteen years of age, Legislature may establish, see Article VII, § 12, Constitution of Nebraska.

Abortion on minor:

Parental notification requirements, see §§ 71-6901 to 71-6908.

Without giving notice, unprofessional conduct, see § 71-148.

Actions:

Depositions by videotape, see § 29-1925 et seq.

Legal, see §§ 25-304 and 25-307 to 25-310.

Limitation of action, see §§ 25-213 and 77-1855.

Arrest procedures, see § 29-401.

Births and deaths, statistics and certificates, see Chapter 71, article 6.

Building and loan association stock, acquisition and ownership of, see § 8-318.

Checks, capacity of minors to endorse, see §§ 8-135 and 8-410.02.

Child care:

Facilities and programs, regulation, see §§ 71-1908 to 71-1917 and 81-502.

Foster care, see §§ 71-1901 to 71-1907.

Child labor, see Article XV, § 8, Constitution of Nebraska, and Chapter 48, article 3.

Child support:

General provisions, see Chapter 42, articles 3 and 7.

Income tax or lottery prize setoff, see §§ 77-27,160 to 77-27,173.

Children with disabilities:

Medical Center, University of Nebraska, role, see §§ 85-178 and 85-179.

Special Education Act, see § 79-1110.

Condemnation, valid releases by guardian of minor, see § 76-724.

Crimes and punishments:

Abandonment of child, see § 28-705.

Abuse or neglect, see §§ 28-707 and 28-710 to 28-727.

Child pornography, see §§ 28-1463.01 to 28-1463.05.

Contributing to the delinquency of a child, see § 28-709.

Criminal nonsupport, see § 28-706.

Debauching a minor, see § 28-805.

Delivery of drug paraphernalia to a minor, see § 28-443.

Incest, see § 28-703.

Obscene materials and shows, see §§ 28-807 to 28-829.

Poisons, sale to person under eighteen, see § 71-2508.

Sexual assault, see § 28-320.01.

Tobacco, use by and sale to minor, see § 28-1418 et seq.

Unlawful possession of a revolver, see § 28-1204.

Violation of custody, see § 28-316.

Cruelty to, powers of metropolitan-class cities, see § 14-102.

Custody of children, see § 43-104.22, Chapter 42, article 3, and Chapter 43, articles 12 and 15.

Domestic abuse, protection from, see §§ 42-901 to 42-930.

Drug abuse and alcoholism, counseling, see § 71-5041.

Education, schools, see Chapter 79.

Electric and communication facilities, power of guardian to execute contracts, see § 86-337.

Facilities for care of children, Department of Health and Human Services, see § 83-108.04.

Fair Employment Practices Act, Nebraska, inapplicable to employment by parent or child, see § 48-1103.

Force, when use on minor is justifiable, see § 28-1413.

Gambling:

Horseraces, parimutuel wagers prohibited, see § 2-1207.

Participation in or presence at bingo, lottery by the sale of pickle cards, lottery, or raffle, restrictions, see §§ 9-345, 9-430, and 9-823.

Guardian:

Declaratory judgment, may maintain action for, see § 25-21,152.

General provisions, see §§ 30-2605 to 30-2616.

Who may and may not act as, see §§ 8-206, 8-409, and 21-610.

Guardian ad litem:

Appointment, see §§ 25-309 et seq., 43-265, and 43-272.

Attorneys, duties as, see § 7-113.

Duties, see §§ 25-819 and 43-272.01.

Hearing aid, fitting and selling to child, see § 71-4712.

Hunter education programs, see § 37-413 et seq.

Husband-wife privilege, inapplicable to certain cases involving children, see § 27-505.

Imprisonment in county jail, matron required, when, see § 47-111.

Industrial loan and investment company:

Certification of indebtedness, issuance or payment to minor, see § 8-410.02.

Loan to finance education of officer's or employee's children, see § 8-409.02.

Inheritance and probate, see Chapter 30.

Inheritance tax, see Chapter 77, article 20.

Insurance contracts:

Benefit contract prior to age of majority, effect, see § 44-1090.

Fraternal insurance, see §§ 44-1074, 44-1077, and 44-1087.

Group life insurance, see § 44-1614.

Life, health, and accident insurance, see §§ 44-703 to 44-710.19 and 44-761.

Interstate Family Support Act, Uniform, see §§ 42-701.

Judgments involving minors:

Review, limitation of time for, see § 25-1931.

Setting aside after majority, see § 25-1317.

Vacation or modification after term, see §§ 25-2001 and 25-2009.

Legal settlement for public assistance programs, see § 68-115.

Legitimacy:

Children of Indian marriages, see § 42-402.

When marriage relationship is dissolved or annulled, see § 42-377.

Liquor:

Handling related to minor's employment, see § 53-168.06.

Prohibition on sales to or use by minors, see §§ 53-180 to 53-180.07.

Second-class cities, powers of, see § 17-135.

Marriage:

Consent of parent or guardian, when required, see § 42-105.

Minimum age for, see § 42-102.

Void, when, see § 42-103.

Voidable, when, see § 42-118.

Maternal and child health, see §§ 71-2201 to 71-2208 and 71-2225 to 71-2230.

Metabolic diseases, screening, see §§ 71-519 to 71-524.

Minimum wage, child employed by parent not an employee, see § 48-1202.

Missing minor, duties of law enforcement agency, see § 29-214.

Motor vehicles:

Learner's permit, violation, see § 60-4,125.

Liability of owner or operator to child or parent for damages, see § 25-21,237.

Provisional operators' licenses, types and requirements, see §§ 60-4,118 and 60-4,120.01 et seq.

National Guard, tuition credits for surviving children, see § 85-507.

Pawnbroker, prohibited from dealing with person under eighteen, see § 69-210.

Physician-patient privilege, inapplicable to injuries to children, see § 27-504.

Pregnant woman, syphilis test, see § 71-502.03.

Property:

Protective proceedings, appointment of conservator, see §§ 30-2630 to 30-2661.

Redemption or recovery of real property after tax sales, see §§ 77-1826 and 77-1855.

Publication or intrusion, consent by parent or guardian, see § 20-205.

Publicly funded college or university, prohibition on denial of admission of child, see § 85-607.

Rules of the road, violation by child, duty of parent or guardian, see § 60-6,117.

Schools and institutions:

Beatrice State Developmental Center, see § 83-217 et seq.

Elementary and secondary schools, see Chapter 79.
Seat safety belts or passenger restraint systems, required for children, see §§ 60-6,267, 60-6,269, and 71-1907.
Sexually transmitted diseases, liability of parents for treatment, see § 71-504.
Shoplifting, liability of parents, see § 25-21,194.
Snowmobile, operation, restrictions, see § 60-6,340.
State residential facility, continued detention upon reaching age of majority, see § 83-388.
Students, elementary and secondary education, see Chapter 79.
Surrogate parenthood contracts, void, see § 25-21,200.
Veterans:
Aid for children, see § 80-403.
Servicemen's Readjustment Act of 1944, obligation binding on minor, see § 80-701.
University tuition waiver for children, see § 80-411.
Tuition waiver for children, see § 80-411.
Voting:
Age qualifications, see Article VI, § 1, Constitution of Nebraska, and § 32-312.
Aiding unlawful voting by underage person, penalty, see § 32-1532.
Challenge for being underage, procedure, see § 32-931.
Penalty for voting under age, see § 32-1530.
Workers' compensation:
Action by guardian or next friend, see § 48-132.
Benefits, to whom and how payable, see §§ 48-122.01, 48-122.03, and 48-124.
Employees, included as, see § 48-115.

NOTES APPLICABLE TO ENTIRE ARTICLE

CROSS REFERENCES.

Constitutional provision:
Establishment of separate juvenile courts authorized, see Article V, § 27, Constitution of Nebraska.
Death penalty, imposition on person under eighteen prohibited, see § 28-105.01.
Juvenile cases:
Appeals procedures, see §§ 25-2728 to 25-2738.
Duty of clerk of district court to report number filed, see § 24-1006.
Procedure for payment of uncollectible costs, see § 29-2709.
Recording and preservation of evidence, see § 24-1003.
Juvenile criminal matters, fees, see § 33-124.
Juvenile detention facilities, see § 83-4,124 et. seq.
Juvenile Services Act, see § 43-2401.
Physician-patient privilege, inapplicable to judicial proceedings under Nebraska Juvenile Code, see § 27-504.

EDITOR'S NOTES.

A number of the cases and opinions in this article were decided under former statutory provisions, but notes have been retained where they might be helpful in interpreting present provisions.

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***** ANNOTATIONS CURRENT THROUGH JANUARY 10, 2002 *****
CHAPTER 43. INFANTS AND JUVENILES
ARTICLE 2. JUVENILE CODE
(g) DISPOSITION
R.R.S. Neb. § 43-286 (2002)

§ 43-286. Juvenile violator or juvenile in need of special supervision; disposition; violation of probation; procedure

(1) When any juvenile is adjudicated to be a juvenile described in subdivision (1), (2), or (4) of section 43-247:

(a) The court may continue the dispositional portion of the hearing, from time to time upon such terms and conditions as the court may prescribe, including an order of restitution of any property stolen or damaged or an order requiring the juvenile to

participate in community service programs, if such order is in the interest of the juvenile's reformation or rehabilitation, and, subject to the further order of the court, may:

(i) Place the juvenile on probation subject to the supervision of a probation officer;

(ii) Permit the juvenile to remain in his or her own home or be placed in a suitable family home, subject to the supervision of the probation officer; or

(iii) Cause the juvenile to be placed in a suitable family home or institution, subject to the supervision of the probation officer. If the court has committed the juvenile to the care and custody of the Department of Health and Human Services, the department shall pay the costs of the suitable family home or institution which are not otherwise paid by the juvenile's parents.

Under subdivision (1)(a) of this section, upon a determination by the court that there are no parental, private, or other public funds available for the care, custody, and maintenance of a juvenile, the court may order a reasonable sum for the care, custody, and maintenance of the juvenile to be paid out of a fund which shall be appropriated annually by the county where the petition is filed until a suitable provision may be made for the juvenile without such payment; or

(b) The court may commit such juvenile to the Office of Juvenile Services, but a juvenile under the age of twelve years shall not be placed at the Youth Rehabilitation and Treatment Center-Geneva or the Youth Rehabilitation and Treatment Center-Kearney unless he or she has violated the terms of probation or has committed an additional offense and the court finds that the interests of the juvenile and the welfare of the community demand his or her commitment. This minimum age provision shall not apply if the act in question is murder or manslaughter.

(2) When any juvenile is found by the court to be a juvenile described in subdivision (3)(b) of section 43-247, the court may enter such order as it is empowered to enter under subdivision (1)(a) of this section or enter an order committing or placing the juvenile to the care and custody of the Department of Health and Human Services.

(3) Beginning July 15, 1998, when any juvenile is adjudicated to be a juvenile described in subdivision (1), (2), (3)(b), or (4) of section 43-247 because of a nonviolent act or acts and the juvenile has not previously been adjudicated to be such a juvenile because of a violent act or acts, the court may, with the agreement of the victim, order the juvenile to attend juvenile offender and victim mediation with a mediator or at an approved center selected from the roster made available pursuant to section 25-2908.

(4) (a) When a juvenile is placed on probation or under the supervision of the court and it is alleged that the juvenile is again a juvenile described in subdivision (1), (2), (3)(b), or (4) of section 43-247, a petition may be filed and the same procedure followed and rights given at a hearing on the original petition. If an adjudication is made that the allegations of the petition are true, the court may make any disposition authorized by this section for such adjudications.

(b) When a juvenile is placed on probation or under the supervision of the court for conduct under subdivision (1), (2), (3)(b), or (4) of section 43-247 and it is alleged that the juvenile has violated a term of probation or supervision or that the juvenile has violated an order of the court, a motion to revoke probation or supervision or to change the disposition may be filed and proceedings held as follows:

(i) The motion shall set forth specific factual allegations of the alleged violations and a copy of such motion shall be served on all persons required to be served by sections 43-262 to 43-267;

(ii) The juvenile shall be entitled to a hearing before the court to determine the validity of the allegations. At such hearing the juvenile shall be entitled to those rights relating to counsel provided by section 43-272 and those rights relating to detention provided by sections 43-254 to 43-256. The juvenile shall also be entitled to speak and present documents, witnesses, or other evidence on his or her own behalf. He or she may confront persons who have given adverse information concerning the alleged violations, may cross-examine such persons, and may show that he or she did not violate the conditions of his or her probation or, if he or she did, that mitigating circumstances suggest that the violation does not warrant revocation. The revocation hearing shall be held within a reasonable time after the juvenile is taken into custody;

(iii) The hearing shall be conducted in an informal manner and shall be flexible enough to consider evidence, including letters, affidavits, and other material, that would not be admissible in an adversarial criminal trial;

(iv) The juvenile shall be given a preliminary hearing in all cases when the juvenile is confined, detained, or otherwise significantly deprived of his or her liberty as a result of his or her alleged violation of probation. Such preliminary hearing shall be held before an impartial person other than his or her probation officer or any person directly involved with the case. If, as a result of such preliminary hearing, probable cause is found to exist, the juvenile shall be entitled to a hearing before the court in accordance with this subsection;

(v) If the juvenile is found by the court to have violated the terms of his or her probation, the court may modify the terms and conditions of the probation order, extend the period of probation, or enter any order of disposition that could have been made at the time the original order of probation was entered; and

(vi) In cases when the court revokes probation, it shall enter a written statement as to the evidence relied on and the reasons for revocation.

HISTORY: Laws 1981, LB 346, § 42; Laws 1982, LB 787, § 18; Laws 1987, LB 638, § 6; Laws 1989, LB 182, § 13; Laws 1994, LB 988, § 21; Laws 1996, LB 1044, § 134; Laws 1998, LB 1073, § 26; Laws 2000, LB 1167, § 21.

NOTES:

CROSS REFERENCES.

Juvenile probation officers, appointment, see § 29-2253.

Placements and commitments, restrictions, see § 43-251.01.

EFFECT OF AMENDMENTS.

Laws 2000, LB 1167, effective Apr. 12, 2000, and operative July 1, 2001, in (1)(a)(ii), inserted "or be placed in a suitable family home."

Laws 1998, LB 1073, effective and operative Apr. 15, 1998, rewrote the section.

Laws 1996, LB 1044, effective Apr. 4, 1996, and operative Jan. 1, 1997, in (1)(c), substituted "Department of Health and Human Services" for "Department of Social Services"; in (2), deleted "to the care and custody of" preceding "the Office of Juvenile Services," and deleted "or the Department of Correctional Services" following "the Office of Juvenile Services"; and in (4)(e), deleted "the Department of Public Institutions" and "the Department of Correctional Services" preceding and following "the Office of Juvenile Services" respectively.

JUDICIAL DECISIONS

ANALYSIS

Construction

Authority of court.

Discretion of court

Disposition of juvenile

Due process

Equal protection

Murder

Revocation of probation

Supervision of probationer

Term of commitment

CONSTRUCTION

As used in subdivision (1)(a)(iii), the term "supervision" is not synonymous with the term "custody." *State v. Nebraska Dep't of Health & Human Servs.*, 257 Neb. 736, 600 N.W.2d 747 (1999).

AUTHORITY OF COURT.

The juvenile court acted within its powers pursuant to this section in extending and modifying defendant's probation given that defendant violated her original probation order, and even after revocation of probation had difficulty complying with court orders and her only improvement came after spending time in two detention centers and then being placed on home detention with electronic monitoring. *State v. Angela C.* (Neb. App. Apr. 4, 2000). This section does not allow the juvenile court to place a juvenile on probation or exercise any of its other options under subsections (1) and (2) and, at the same time, continue the dispositional hearing. *State v. Torrey*, 6 Neb. App. 658, 577 N.W.2d 310 (1998). This section does not provide authority for a court to place a juvenile on probation under the care of the office of juvenile services. *State v. David C.*, 6 Neb. App. 198, 572 N.W.2d 392 (1997).

DISCRETION OF COURT

Juvenile court has broad discretion as to the disposition of a delinquent juvenile. *State v. J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994).

Confinement in the youth development center for the sole offense of driving without a license was unreasonable and an abuse of discretion, and could not stand. *State v. A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989).

A juvenile court has broad discretion as to the disposition of a child found to be delinquent. *State v. Jones*, 230 Neb. 462, 432 N.W.2d 46 (1988).

Where 16-year-old defendant raped a 10-year-old girl who became pregnant, the juvenile court did not abuse its discretion in confining him to a youth center. *State v. Jones*, 230 Neb. 462, 432 N.W.2d 46 (1988).

DISPOSITION OF JUVENILE

This section does not provide for a further disposition when a juvenile has been committed to the office of juvenile services but only when the juvenile has been placed on probation or under supervision of the court. *State v. Juan L.*, 6 Neb. App. 683, 577 N.W.2d 319 (1998).

Where the record, though sparse, revealed that the county court, sitting as a juvenile court, considered that the juvenile was making no progress in his efforts to complete a study program and that the judge feared juvenile would get into more trouble if he kept on this way, the disposition order which committed him to the youth development center was not excessive. *State v. J.R.*, 221 Neb. 102, 375 N.W.2d 142 (1985).

A juvenile court has no statutory authority to place children adjudged under § 43-247(1) with the department of social services (now department of health and human services). *State, Dep't of Social Servs. v. C.G.*, 221 Neb. 409, 377 N.W.2d 529 (1985).

DUE PROCESS

An order committing the juvenile to the office of juvenile services constituted plain error as it had the effect of revoking the juvenile's probation in the absence of any motion, pleading, or notice that the state claimed the juvenile had violated the terms of probation, and the juvenile was not provided an attorney or advised of his rights to one. *State v. Torrey*, 6 Neb. App. 658, 577 N.W.2d 310 (1998).

The juvenile court's failure to adequately advise the juvenile of his right to counsel before accepting the juvenile's admission that he violated the terms of his probation was plain error. *State v. David C.*, 6 Neb. App. 198, 572 N.W.2d 392 (1997).

Subsection (4) of this section was enacted to provide a due process procedure of revoking probation to conform to the decisions of the U.S. Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). *State v. Thomas W.*, 3 Neb. App. 704, 530 N.W.2d 291 (1995).

EQUAL PROTECTION

Since juvenile offenders and adult offenders are not similarly situated, there is no deprivation of equal protection when a juvenile adjudged to be a juvenile within the meaning of § 43-247(1), (2), or (4) is confined for a longer period than an adult convicted of the same offense could be incarcerated. *State v. A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989).

MURDER

Where the court found that because of the serious nature of the offense, the security of the public required that defendant be incarcerated for a period of time extending beyond his minority, the trial court had sound basis for retaining jurisdiction and overruling the motion to transfer. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

REVOCACTION OF PROBATION

The written statement requirement contained in subdivision (4)(f) (see now (4)(b)(vi)) is satisfied if the judge's oral statements appearing in the bill of exceptions from the revocation hearing, as well as in the revocation order, when taken together, reveal the evidence relied upon and reasons for the revocation. *State v. Thomas W.*, 3 Neb. App. 704, 530 N.W.2d 291 (1995).

Subsection (4)(f) (see now (4)(b)(vi)) applies only when a juvenile court revokes probation; in the absence of an order a juvenile court has no obligation to comply. *State v. J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994).

SUPERVISION OF PROBATIONER

The juvenile court lacks the statutory authority to order the department of social services (now department of health and human services) to supervise a juvenile's probation. *State v. Robin C.*, 3 Neb. App. 936, 535 N.W.2d 831 (1995).

TERM OF COMMITMENT

It was neither necessary nor proper for the committing court to fix a limit to the term of detention. Having made the necessary findings and order of commitment, the court was without power to fix the term of its duration. The statute determines the term of commitment. *Cohen v. Clark*, 107 Neb. 849, 187 N.W. 120 (1922).

RESEARCH REFERENCES

ALR.

Jurisdiction or power of juvenile court to order parent of juvenile to make restitution for juvenile's offense. 66 ALR4th 985.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading.

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**TITLE 3. REMEDIES AND SPECIAL ACTIONS AND PROCEEDINGS
CHAPTER 36. MEDIATION AND ARBITRATION
MEDIATION
GENERALLY
ORS § 36.105 (2001)**

36.105. Declaration of purpose of ORS 36.100 to 36.245.

The Legislative Assembly declares that it is the purpose of ORS 36.100 to 36.245 to:(1) Foster the development of community-based programs that will assist citizens in resolving disputes and developing skills in conflict resolution;

(2) Allow flexible and diverse programs to be developed in this state, to meet specific needs in local areas and to benefit this state as a whole through experiments using a variety of models of peaceful dispute resolution;

(3) Find alternative methods for addressing the needs of crime victims in criminal cases when those cases are either not prosecuted for lack of funds or can be more efficiently handled outside the courts;

(4) Provide a method to evaluate the effect of dispute resolution programs on communities, local governments, the justice system and state agencies;

(5) Encourage the development and use of mediation panels for resolution of civil litigation disputes;

(6) Foster the development or expansion of integrated, flexible and diverse state agency programs that involve state and local agencies and the public and that provide for use of alternative means of dispute resolution pursuant to ORS 183.502; and

(7) Foster efforts to integrate community, judicial and state agency dispute resolution programs.

HISTORY: 1989 c.718 § 2; 1997 c.706 § 3

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**TITLE 3. REMEDIES AND SPECIAL ACTIONS AND PROCEEDINGS
CHAPTER 36. MEDIATION AND ARBITRATION
MEDIATION
GENERALLY
ORS § 36.110 (2001)**

36.110. Definitions for ORS 36.100 to 36.245.

As used in ORS 36.100 to 36.245:

(1) "Arbitration" means any arbitration whether or not administered by a permanent arbitral institution.

(2) "Commission" means the Dispute Resolution Commission created under ORS 36.115.

(3) "Director" means the director appointed by the Dispute Resolution Commission under ORS 36.130.

(4) "Dispute resolution services" includes but is not limited to mediation, conciliation and arbitration.

(5) "Dispute resolution program" means an entity that receives state funds to provide dispute resolution services.

- (6) "Mediation" means a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated.
- (7) "Mediation agreement" means an agreement arising out of a mediation, including any term or condition of the agreement.
- (8) "Mediation communications" means:
- (a) All communications that are made, in the course of or in connection with a mediation, to a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings; and mediation agreement, that are prepared for or submitted in the course of or in connection with a mediation or by a mediator, a mediation program or a party to, or any other person present at, mediation proceedings.
- (9) "Mediation program" means a program through which mediation is made available and includes the director, agents and employees of the program.
- (10) "Mediator" means a third party who performs mediation. "Mediator" includes agents and employees of the mediator or mediation program and any judge conducting a case settlement conference.
- (11) "Public body" means any state agency, county or city governing body, school district, special district, municipal corporation, any board, department, commission, council, or agency thereof, and any other public agency of this state.
- (12) "State agency" means any state officer, board, commission, bureau, department, or division thereof, in the executive branch of state government.

HISTORY: 1989 c.718 § 3; 1997 c.670 § 11

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**TITLE 3. REMEDIES AND SPECIAL ACTIONS AND PROCEEDINGS
CHAPTER 36. MEDIATION AND ARBITRATION
MEDIATION
DISPUTE RESOLUTION COMMISSION**

ORS § 36.115 (2001)

36.115. Dispute Resolution Commission; terms; confirmation.

- (1) There is established a Dispute Resolution Commission consisting of seven members appointed by the Governor.
- (2) The term of office of each member is four years, but a member serves at the pleasure of the Governor. Before the expiration of the term of a member, the Governor shall appoint a successor whose term begins on July 1, next following. A member is eligible for reappointment. If there is a vacancy for any cause, the Governor shall make an appointment to become immediately effective for the unexpired term.
- (3) The appointment of the members of the Dispute Resolution Commission is subject to confirmation by the Senate in the manner prescribed in ORS 171.562 and 171.565.

HISTORY: 1989 c.718 § 4; 1991 c.538 § 1

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**TITLE 14. PROCEDURE IN CRIMINAL MATTERS GENERALLY
CHAPTER 135. ARRAIGNMENT AND PRETRIAL PROVISIONS
MEDIATING CRIMINAL OFFENSES
ORS § 135.951 (2001)**

135.951. Authorization; determining when appropriate; exclusions.

(1) Law enforcement agencies, city attorneys and district attorneys may consider the availability and likely effectiveness of mediation in determining whether to process and prosecute criminal charges. If it appears that mediation is in the interests of justice and of benefit to the offender, victim and community, the law enforcement agency, city attorney or district attorney may propose mediation through a qualified mediation program.

(2) In determining whether mediation is in the interests of justice and of benefit to the offender, victim and community, the law enforcement agency, city attorney or district attorney shall consider, at a minimum, the following factors:

- (a) The nature of the offense;
- (b) Any special characteristics of the offender or the victim;
- (c) Whether the offender has previously participated in mediation;
- (d) Whether it is probable that the offender will cooperate with and benefit from mediation;
- (e) The recommendations of the victim;(f) Whether a qualified mediation program is available or may be made available;
- (g) The impact of mediation on the community;
- (h) The recommendations of the involved law enforcement agency; and
- (i) Any mitigating circumstances.

(3) Mediation shall not be used for:

- (a) Disputes between family or household members, as defined in ORS 107.705, that involve conduct that would constitute assault under ORS 163.160, 163.165, 163.175 or 163.185; or
- (b) Offenses that involve sex crimes, as defined in ORS 181.594.

HISTORY: 1995 c.323 § 1

NOTES:

135.951 to 135.959 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 135 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

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**TITLE 14. PROCEDURE IN CRIMINAL MATTERS GENERALLY
CHAPTER 135. ARRAIGNMENT AND PRETRIAL PROVISIONS
MEDIATING CRIMINAL OFFENSES
ORS § 135.953 (2001)**

135.953. How mediation may be used.

- (1) A defendant may participate in mediation as part of a diversion agreement under ORS 135.881 to 135.901.

(2) A court, including, but not limited to, a justice court, may:

(a) Authorize, in a pretrial release order, contact between a defendant and a victim as part of mediation between the defendant and the victim;

(b) Consider mediation as the basis of a compromise of crimes under ORS 135.703; or

(c) Include participation in mediation as a condition of probation under ORS 137.540.

(3) A district attorney or city attorney:

(a) May suspend prosecution of a case referred to mediation and dismiss the charges in the referred case if the defendant successfully completes the terms of the agreement resulting from the mediation; or

(b) May include, with a defendant, mediation between the defendant and the victim as part of a plea agreement entered into under ORS 135.405.

(4) A county juvenile department may include mediation between a child and a victim as one of the terms of an informal disposition agreement under ORS 419C.230.

(5) The Department of Corrections may use mediation for the purposes of rehabilitation and treatment.

(6) Mediation may be used in any other appropriate manner in resolving disputes involving criminal matters.

HISTORY: 1995 c.323 § 2

NOTES:

See note under 135.951.

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***** THIS DOCUMENT IS CURRENT THROUGH THE 2001 REGULAR SESSION OF THE 71ST LEGISLATIVE
ASSEMBLY *****

**TITLE 14. PROCEDURE IN CRIMINAL MATTERS GENERALLY
CHAPTER 135. ARRAIGNMENT AND PRETRIAL PROVISIONS
MEDIATING CRIMINAL OFFENSES
ORS § 135.955 (2001)**

135.955. Notifying victims and person charged with crime of mediation opportunities.

(1) Law enforcement agencies, district attorneys and city attorneys may inform:

(a) The victim of a crime of:

(A) Any mediation opportunities that may be available to the victim in the victim's community, within or as an alternative to the criminal justice system; and

(B) How to request mediation; and

(b) A person charged with a crime of:

(A) Any mediation opportunities that may be available to the person in the person's community, within or as an alternative to the criminal justice system; and

(B) How to request mediation.

(2) No party to a dispute may be compelled to participate in mediation.

HISTORY: 1995 c.323 § 3

NOTES:

See note under 135.951.

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**TITLE 14. PROCEDURE IN CRIMINAL MATTERS GENERALLY
CHAPTER 135. ARRAIGNMENT AND PRETRIAL PROVISIONS
MEDIATING CRIMINAL OFFENSES
ORS § 135.957 (2001)**

135.957. Application of ORS 36.220 to 36.238 to mediation of criminal offenses; information to parties.

The provisions of ORS 36.220 to 36.238 do not apply to a mediation conducted under ORS 135.951 or 135.953 unless the parties to the mediation enter into a written agreement for confidentiality of the mediation. If the parties enter into a written agreement for confidentiality of the mediation, a court may not receive in evidence in any proceeding any mediation communications or mediation agreement to the extent provided by ORS 36.220 to 36.238. The parties participating in mediation must be informed:

- (1) Of the right to enter into a written agreement concerning confidentiality of the mediation proceedings; and
- (2) That mediation communications or agreements may not be used as an admission of guilt or as evidence against the offender in any adjudicatory proceeding.

HISTORY: 1995 c.323 § 4; 1997 c.670 § 13

NOTES:

See note under 135.951.

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**TITLE 14. PROCEDURE IN CRIMINAL MATTERS GENERALLY
CHAPTER 135. ARRAIGNMENT AND PRETRIAL PROVISIONS
MEDIATING CRIMINAL OFFENSES
ORS § 135.959 (2001)**

135.959. Authority to contract with dispute resolution programs; standards for data collection.

(1) A law enforcement agency, city attorney, district attorney, county juvenile department or court may contract with qualified dispute resolution programs to provide mediation services under ORS 135.951 or 135.953.

(2) The Dispute Resolution Commission in consultation with referring agencies, courts and mediation service providers shall establish standards for data collection for disputes referred to mediation.

(3) As used in this section, "qualified dispute resolution program" means a program that meets the standards for mediators and mediation programs established by the Dispute Resolution Commission.

HISTORY: 1995 c.323 § 5

NOTES:

See note under 135.951.

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**TITLE 14. PROCEDURE IN CRIMINAL MATTERS GENERALLY
CHAPTER 135. ARRAIGNMENT AND PRETRIAL PROVISIONS
MISCELLANEOUS
ORS § 135.980 (2001)**

135.980. Rehabilitative programs directory; compilation; availability.

(1) By January 1, 1990, the Director of the Department of Corrections shall compile and thereafter maintain a directory of public and private rehabilitative programs known and available to corrections agencies of the state and of each county. For purposes of this subsection, "rehabilitative program" means a planned activity, in a custodial or noncustodial context, designed and implemented to treat drug or alcohol abuse, to prevent criminal sexual behavior, to modify a propensity to commit crimes against persons or property or to achieve restitution for losses caused by an offender and includes programs that employ the device of mediation between the victim and offender. The director shall include:

- (a) The name, address and telephone number of the program and the identity of its director or other principal contact;
- (b) The geographical jurisdiction of the program;
- (c) The types of offenders that the program claims to be able to serve and the criteria that the program applies in selecting or soliciting cases;
- (d) The claims of the program regarding its effectiveness in reducing recidivism, achieving restitution or otherwise serving correctional objectives;
- (e) An assessment by the relevant corrections agency of the actual effectiveness of the program; and
- (f) The capacity of the program for new cases.

(2) The Director of the Department of Corrections shall make the directory available to the Oregon Criminal Justice Commission and to judges in a form that will allow sentencing judges to determine what rehabilitative programs are appropriate and available to the offender during any period of probation, imprisonment or local incarceration and post-prison supervision. The Director of the Department of Corrections shall also make the directory available to its employees who prepare presentence reports and proposed release plans for submission to the State Board of Parole and Post-Prison Supervision.

(3) The directory shall be updated as frequently as is practical, but no less often than every six months.

(4) The Director of the Department of Corrections shall prepare a plan for monitoring the scope and measuring the effectiveness of existing rehabilitative programs and shall deliver that plan to the Oregon Criminal Justice Commission no later than January 1, 1990.

HISTORY: 1989 c.790 § 7a

NOTES:

135.980 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 135 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

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*** CURRENT THROUGH THE 2001 SESSION OF THE 102ND GENERAL ASSEMBLY ***

*** ANNOTATIONS CURRENT THROUGH 52 S.W.3d 930 ***

TITLE 16. COURTS

CHAPTER 20. THE VICTIM-OFFENDER MEDIATION CENTER

Tenn. Code Ann. § 16-20-101 (2001)

16-20-101. Legislative findings and intent

(a) The general assembly finds and declares that:

(1) The resolution of felony, misdemeanor and juvenile delinquent disputes can be costly and complex in a judicial setting where the parties involved are necessarily in an adversary posture and subject to formalized procedures; and

(2) Victim-offender mediation centers can meet the needs of Tennessee's citizens by providing forums in which persons may voluntarily participate in the resolution of disputes in an informal and less adversarial atmosphere.

(b) It is the intent of the general assembly that programs established pursuant to this chapter:

- (1) Stimulate the establishment and use of victim-offender mediation centers to help meet the need for alternatives to the courts for the resolution of certain disputes;
- (2) Encourage continuing community participation in the development, administration, and oversight of local programs designed to facilitate the informal resolution of disputes between and among members of the community;
- (3) Offer structures for dispute resolution which may serve as models for centers in other communities; and
- (4) Serve a specific community or locale and resolve disputes that arise within that community or locale.

HISTORY: Acts 1993, ch. 420, § 1.

NOTES TO DECISIONS

LAW REVIEWS. Alternative Dispute Resolution in the Personal Injury Forum (William P. Zdancewicz), 26 U. Mem. L. Rev. 1169 (1996).

Mediation U.S.A. (Peter S. Chantilis), 26 U. Mem. L. Rev. 1031 (1996).

Victim-Offender Reconciliation Program -- A New Paradigm toward Justice (Susan C. Taylor), 26 U. Mem. L. Rev. 1187 (1996).

Victim-Offender Mediation Act:

Code § 16-90-701 et seq.

COLLATERAL REFERENCES. 21 Am. Jur. 2d Criminal Law § 572 et seq.

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TITLE 16. COURTS

CHAPTER 20. THE VICTIM-OFFENDER MEDIATION CENTER

Tenn. Code Ann. § 16-20-102 (2001)

16-20-102. Operation by a corporation

(a) A victim-offender mediation center may be created and operated by a corporation organized to resolve disputes. The corporation shall not be organized for profit and no part of the net earnings may inure to the benefit of any private shareholders or individuals. The majority of the directors of such a corporation shall not consist of members of any single profession.

(b) To be eligible for funds under this chapter, a center must do the following:

- (1) Comply with this chapter and the rules adopted by the supreme court of Tennessee;
- (2) Provide neutral mediators who have received training in conflict resolution techniques in accordance with rules of the supreme court;
- (3) Provide victim-offender mediation in felony, misdemeanor and juvenile delinquent cases without cost to the participants;
- (4) Provide dispute resolution services to the community on a voluntary basis; and
- (5) At the conclusion of the mediation process, provide a written agreement or decision to the referral source setting forth the settlement of the issues and future responsibilities of each participant.

(c) Each center that receives funds under this chapter must:

- (1) Be operated by a grant recipient;
- (2) Be operated in compliance with rules adopted by the supreme court;

- (3) Be operated under a contract with the administrative office of the courts; and
 - (4) Comply with this chapter.
- (d) (1) Funds available for the purposes of this chapter may be allocated for services provided by eligible centers.
- (2) A center applying for funding is to include the following information in its application:
 - (A) Cost of operating the center, including the compensation of employees;
 - (B) Description of the proposed area of service and number of participants expected to be served;
 - (C) Proof of non-profit 501(c)(3) status;
 - (D) Charter of incorporation; and
 - (E) Evidence of support of criminal justice agencies to make referrals.
 - (e) The administrative office of the courts may accept, apply for, and disburse public or private funds for the purposes of this chapter.
 - (f) (1) The comptroller of the treasury or the comptroller's authorized representatives may inspect, examine, and audit the fiscal affairs of local programs or centers.
 - (2) Centers must, whenever reasonably possible, make use of public facilities at free or nominal cost.
 - (g) A center operated under this chapter is not a state agency or an instrumentality of the state. Employees and volunteers of a center are not employees of the state.
 - (h) A center that receives funds under this chapter must annually provide the administrative office of the courts with statistical data regarding the following:
 - (1) The operating budget;
 - (2) The number of referrals, categories, or types of cases referred;
 - (3) The number of parties serviced;
 - (4) The number of disputes resolved;
 - (5) The nature of the resolution, amount, and type of restitution to the victim and/or community; and
 - (6) Rates of compliance.

The data shall maintain the confidentiality and anonymity of all mediation participants.

HISTORY: Acts 1993, ch. 420, § 2.

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TITLE 16. COURTS
CHAPTER 20. THE VICTIM-OFFENDER MEDIATION CENTER
Tenn. Code Ann. § 16-20-103 (2001)

16-20-103. Confidential and privileged documents and communications

All memoranda, work notes or products, or case files of centers established under this chapter are confidential and privileged and are not subject to disclosure in any judicial or administrative proceeding unless the court or administrative tribunal determines that the materials were submitted by a participant to the center for the purpose of avoiding discovery of the material in a subsequent proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person is a privileged communication and is not subject to disclosure in any judicial or administrative proceeding unless all parties to the communication waive the privilege. The foregoing privilege and limitation on evidentiary use does not apply to any communication of a threat that injury or damage may be inflicted on any person or on the property of a party to the dispute, to the extent the communication may be relevant evidence in a criminal matter. Such communications shall not be construed to be public records pursuant to title 10, chapter 7.

HISTORY: Acts 1993, ch. 420, § 3.

COLLATERAL REFERENCES. Waiver of evidentiary privilege by inadvertent disclosure--state law. 51 A.L.R.5th 603.

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TITLE 16. COURTS
CHAPTER 20. THE VICTIM-OFFENDER MEDIATION CENTER
Tenn. Code Ann. § 16-20-104 (2001)

16-20-104. Withdrawal from dispute resolution

Any person who voluntarily enters a dispute resolution process at a center established under this chapter may revoke such person's consent, withdraw from dispute resolution, and seek judicial or administrative redress prior to reaching a written resolution agreement. No legal penalty, sanction, or restraint may be imposed upon the person.

HISTORY: Acts 1993, ch. 420, § 4.

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TITLE 16. COURTS
CHAPTER 20. THE VICTIM-OFFENDER MEDIATION CENTER
Tenn. Code Ann. § 16-20-105 (2001)

16-20-105. Immunity from suit

(a) Members of the board of directors of a victim-offender mediation center are immune from suit in any civil action based upon any proceedings or other official acts performed in good faith as members of the board.

(b) Employees and volunteers of a center are immune from suit in any civil action based on any proceedings or other official acts performed in their capacity as employees or volunteers, except in cases of willful or wanton misconduct.

(c) A center is immune from suit in any civil action based on any of its proceedings or other official acts performed by its employees, volunteers, or members or its board of directors, except:

- (1) In cases of willful or wanton misconduct by its employees or volunteers; and
- (2) In cases of official acts performed in bad faith by members of its board.

HISTORY: Acts 1993, ch. 420, § 5.

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TITLE 16. COURTS
CHAPTER 20. THE VICTIM-OFFENDER MEDIATION CENTER
Tenn. Code Ann. § 16-20-106 (2001)

16-20-106. Raising and disbursing funds -- State funding

(a) A victim-offender mediation center may raise and disburse funds from any public or private source for the purposes of this chapter.

(b) A center's share of funding from the state of Tennessee shall not exceed fifty percent (50%) of the approved estimated cost of the program; provided, that during the first three (3) years of operation for any new center, the fifty percent (50%) limitation upon funding from the state of Tennessee shall not apply.

(c) (1) By a two-thirds (2/3) vote of its legislative body, each county and municipality, as provided in this subdivision, is authorized to levy an additional one dollar (\$ 1.00) litigation tax per case, to be denominated as a part of the court costs, in matters before the local general sessions courts and juvenile courts. The provisions of this subdivision shall only apply in any municipality in any county having a metropolitan form of government and a population of more than one hundred thousand (100,000), according to the 1990 federal census or any subsequent federal census, and in any county having a population according to such census as follows:

not less than -----	nor more than -----
9,000	9,250
34,735	34,800
51,350	51,450
54,600	55,000
68,100	68,400
335,000	336,000

(2) Any revenue generated by a county pursuant to subdivision (c)(1) shall be used exclusively to support local victim-offender mediation center or centers organized pursuant to this chapter and shall be distributed on a monthly basis by the county to such victim-offender mediation center or centers.

(d) By a two-thirds (2/3) vote of its legislative body, each county, to which the provisions of subdivision (c)(1) do not apply, is authorized to levy an additional one dollar (\$ 1.00) litigation tax per case, to be denominated as a part of the court costs, in matters before the local general sessions courts and juvenile courts. Any revenue so generated by the county shall be held in a separately designated account until a local victim-offender mediation center is established in the county pursuant to this chapter. Upon the establishment of such victim-offender mediation center, the revenue generated pursuant to this subsection shall be distributed by the county in the manner prescribed by subdivision (c)(2).

(e) The taxes levied by the provisions of subsections (c) and (d) shall be in addition to any other taxes levied on litigation.

HISTORY: Acts 1993, ch. 420, § 6; 1999, ch. 533, §§ 1-3.

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TITLE 40. CRIMINAL PROCEDURE
CHAPTER 36. COMMUNITY CORRECTIONS
PART 3. FINANCES
Tenn. Code Ann. § 40-36-302 (2001)

40-36-302. Community-based options and services

(a) Community corrections funds can be used to develop or expand the range of community punishments and services at the local level. Community-based program options may include, but are not limited to, the following:

(1) Noncustodial community corrections options which involve close supervision but which do not involve housing of the offender in a jail, workhouse or community facility. Examples include, but are not limited to: community service supervision; victim restitution supervision and victim-offender mediation; alcohol/drug outpatient treatment; house arrest; and psychiatric counseling;

(2) Short-term community residential treatment options which involve close supervision in a residential setting. Examples include, but are not limited to: emergency shelters; detoxification centers; community residential restitution centers for nonviolent offenders, and probation and parole violators; community residential treatment centers for special needs offenders, and probation and parole violators; and inpatient drug/alcohol treatment. Such residential options are not intended to create overcrowding in the local jail, but rather to develop additional small community-based facilities whose focus is on treatment rather than detention;

(3) Enrolling community corrections participants in residential in-house drug and alcohol treatment for detoxification and counseling. Enrollments shall be based upon an objective assessment that a participant is alcohol or drug dependent and requires detoxification. Awards for detoxification services shall only be made for inpatient services; and

(4) Individualized services which evaluate and treat the special needs of the population served under this chapter. Services to the court to assist in the evaluation and screening of eligible candidates may include the purchase of psychological, medical, educational/vocational, drug/alcohol urine screening, and client specific plan diagnostic evaluations. Other services which may be purchased on an individualized basis may include job training, alcohol/drug counseling, individual/family counseling, G.E.D. or transportation subsidies. Such services are intended to fill gaps in the local community correctional system and to enable the nonviolent offender to be treated near such offender's home.

(b) The options set out in subsection (a) may be used in conjunction with a period of shock incarceration, or in conjunction with a term of probation and/or a term of split confinement or periodic confinement as provided in chapter 35 of this title.

(c) Community corrections funds may also be used to acquire, renovate and operate community facilities established to provide the options and services set forth in subsection (a).

(d) Counties may provide or contract with qualified proprietary, nonprofit or governmental entities for the provision of services under this chapter.

(e) Any options or services established under this chapter shall serve offenders from the entire judicial district in which the county is located.

HISTORY: Acts 1985 (1st E.S.), ch. 3, § 10; 1986, ch. 731, § 3.

NOTES:

SECTION TO SECTION REFERENCES. This section is referred to in § 40-36-102.

CITED: Bentley v. State, 938 S.W.2d 706 (Tenn. Crim. App. 1996), overruled on other grounds, State v. West, 19 S.W.3d 753 (Tenn. 2000); State v. Anderson, 7 S.W.3d 100 (Tenn. Crim. App. 1999); State v. Kendrick, 10 S.W.3d 650 (Tenn. Crim. App. 1999).

Appendix B: Statutory Provision for VOM (Not Comprehensive)

The following are brief highlights of statutory VOM provisions in state codes. It is important to note that *the following are NOT the full* codes from any of the states, but rather a sampling of language and provisions in state codes. For full information on each state's codes, please refer to the citations listed in Table 3.

Alabama

Community punishment and corrections funds may be used to develop or expand the range of community punishment and services at the local level. Community-based programs options may include, but are not limited to, the following... victim-offender reconciliation programs.

Arizona

Monies may be used to develop or expand the range of community punishment programs and services at the local level. Programs and services may include the following.... Noncustodial programs and services which involve supervision and surveillance but do not involve housing the offender. Examples include ... victim-offender reconciliation or mediation.

Arkansas

The (youth mediation) program's goals are to ... encourage youth offenders to understand the consequences of their actions and take responsibility for those actions by providing suitable restitution to victims of their offence and/or other rehabilitative dispositions; provides victims of juvenile crime an opportunity to constructively confront offenders to explain the impact of the offense and develop suitable restitution plans or other rehabilitative dispositions... train lawyers and law students in ... negotiation and mediation.

California

"Community-based punishment" means a partnership between the state and the county or a collaboration of counties to manage and provide correctional services, especially those services considered to be intermediate sanctions at the local level of government for targeted, select offender populations pursuant to the community corrections plan of a county or a collaboration of counties. "Intermediate sanctions" means punishment options and sanctions other than simple incarceration in prison or jail or traditional routine probation supervision. They may be provided by correctional agencies directly or through community-based public or private correctional service providers. May include Restorative justice programs such as mandatory victim restitution and victim-offender reconciliation.

Colorado

The Community Accountability Program consists of two components: 1) a sixty day residential program, and 2) community reintegration.... Community reintegration may include ... victim-offender mediation.

Iowa

Non-community-based correction sanctions including "self-monitored sanctions" which are not monitored for compliance (e.g. fines and community service), and "other than self-monitored sanctions" which are monitored for compliance (e.g. mandatory mediation, victim & offender reconciliation, non-community-based corrections supervision).

Louisiana

At any time the court may order the referral for mediation in any proceedings authorized by this Code, except domestic abuse proceedings... The referral order shall recite that while the parties must attend a scheduled mediation session and must attempt to mediate in good faith, they are not required to reach an agreement. . -"Approved register" means the register of qualified mediators prepared and maintained by the Alternative Dispute Resolution Section of the Louisiana State Bar Association. "Mediation" is a procedure in which a mediator facilitates communication between the parties concerning the matters in dispute and explores possible solution to promote reconciliation, understanding, and settlement. "Mediation parties" means... in a delinquency proceeding, the alleged victim and offender.

Minnesota

A community-based organization, in collaboration with a local government unit, may establish a restorative justice program. A restorative justice program is a program that provides forums where certain individuals charged with or petitioned for having committed an offense meet with the victim, if appropriate; the victim's family members or other supportive persons, if appropriate, the offender's family members or other supportive persons, if appropriate; a law enforcement official or prosecutor when appropriate; other criminal justice system professionals when appropriate; and members of the community in order to: 1) discuss the impact of the offense on the victim and the community; 2) provide support to the victim and methods for reintegrating the victim into community life; 3) assign an appropriate sanction to the offender; and 4) provide for reintegrating the offender into community life.

Missouri

I

The department shall administer a community corrections program to encourage the establishment of local sentencing alternatives for offenders to: promote accountability... ensure that victims of crime are included in meaningful ways... The program shall provide a program of training to eligible volunteers and develop specific conditions of probation for offenders referred to it by the court. Such conditions... may include... victim-offender mediation.

North Carolina

The court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives... order the juvenile to participate in the victim-offender reconciliation program.

Ohio

The court may establish a victim-offender mediation program in which victims and their offenders meet to discuss the offense and suggest possible restitution. If the court obtains the assent of the victim of the delinquent act committed by the child, the court may require the child to participate in the child.

The court imposing a sentence for a felony upon which an offender is not required to serve a mandatory prison term may impose any nonresidential sanction or combination of nonresidential sanctions authorized under this section... Nonresidential sanctions include, but are not limited to, the following ... provided the court obtains the prior approval of the victim, a requirement that the offender participate in victim-offender mediation.

Oklahoma

... when a defendant is convicted of a crime and no death sentence is imposed, the court shall either: 1. suspend the sentence ... (and) may order the convicted defendant.. to do one or more of the following... to be placed in a victims impact panel or victim/offender reconciliation program and payment of a fee to the program of not less than Five Dollars (\$5.00) nor more than Twentyfive Dollars (\$25.00) as set by the governing authority of the program to offset the cost of participation by the defendant. Provided each victim/offender reconciliation program shall be required to obtain a written consent form voluntarily signed by the victim and defendant that specifies the methods to be used to resolve the issues, the obligations and rights of each person, and the confidentiality of the proceedings. Volunteer mediators and employees of a victim/offender reconciliation program shall be immune from liability and have rights of confidentiality...

Oregon

If it appears that mediation is in the interests of justice and of benefit to the offender, victim and community, the law enforcement agency, city attorney or district attorney may propose mediation through a qualified mediation program. In determining whether mediation is (appropriate, the following factors shall be considered)... The nature of the offense, any special characteristics of the offender or the victim; whether the offender has previously participated in mediation; whether it is probable that the offender will cooperate with and benefit from the mediation; the recommendations of the victim; whether a qualified mediation program is available or may be made available; the impact of mediation on the community; the recommendations of the involved law enforcement agency; and any mitigating circumstances.

Texas

The victim services division of the Texas Department of Criminal Justice shall: 1) train volunteers to act as mediators between victims, guardians of victims, and close relatives of deceased victims and offenders whose criminal conduct caused bodily injury or death to victims; and 2) provide services through referral of a trained volunteer, if requested by a victim, guardian of a victim, or close relative of a deceased victim.

If the pardons and paroles division receives notice from the victim services office of the department that a victim of the defendant, or the victim's guardian or close relative, wishes to participate in victim-offender mediation with a person released on parole or to mandatory supervision, the division shall cooperate and assist if the person chooses to participate in the mediation program provided by the office. The pardons and paroles division may not required the defendant to participate and may not reward the person for participation by modifying conditions of release or the person's level of supervision or by granting any other benefit to the person.

Virginia

Any Crime Victim and Witness Assistance Program may establish a victim-offender reconciliation program to provide an opportunity after conviction for a victim, at his request and upon the subsequent agreement of the offender, to: 1) meet with the offender in a safe, controlled environment, 2) give to the offender, either orally or in writing, a summary of the financial, emotional and physical effects of the offense on the victim or the victim's family, 3) discuss a proposed restitution agreement which may be submitted for consideration by the sentencing court for damages incurred by the victim as a result of the offense. If the victim chooses to participate in a victim-offender reconciliation program, the victim shall execute a waiver releasing the Crime Victim and Witness Assistance Program from civil and criminal liability for all actions by victim or offender... The failure to participate in a reconciliation program cannot be used in sentencing.

Washington

The prosecutor, juvenile court probation counselor or a diversion unit may, in exercising their authority, refer juvenile to mediation or victim offender reconciliation programs. Such mediation or victim reconciliation programs shall be voluntary for victims.

Wisconsin

If the court adjudges a juvenile delinquent, the court shall enter an order deciding one or more of the dispositions of the case as provided in this section under a care and treatment plan. The dispositions under this section are... Victim-Offender Mediation Program. Order the juvenile to participate in a victim-offender mediation program if the victim of the juvenile's delinquent act agrees.

