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## **Delinquency**

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In **B.J.B. v. State**, 805 N.E.2d 870 (Ind. App. Ct. 2004), the Court reversed the juvenile court's order requiring a youth, who had been adjudicated delinquent for committing a sex offense, to register as a sex offender, and directed that his name be removed from the sex offender registry until the State presents evidence at a hearing that establishes by clear and convincing evidence that he is likely to commit another sex offense. The youth, born in 1986, had contact with the juvenile system in 1997 and 2000 for committing animal cruelty. The first time, he was referred to an informal adjustment program and, the second time, he was formally adjudicated delinquent and placed on probation. A psychological evaluation performed prior to disposition of the second charge stated that there were specific patterns of behavior which, if not curbed, would lead to a host of long term interpersonal and social consequences.

In 2001, the youth was charged with molesting a 5-year-old boy by fondling him. He denied the charge, which, following a fact-finding hearing, was found to be true. He was given another psychological evaluation which reported "a pattern of...increasingly prominent emotional factors that will likely lead to a personality disorder if left unchecked," and that the youth "is in immediate need of intensive services." The youth was placed with White's Institution for Boys, a private residential facility where he remained until June 2003. During his stay there, he attended three sex offense group counseling sessions per week, as well as individual counseling.

In July 2003, the juvenile court, acting *ex parte* and *sua sponte*, ordered the youth to register as a sex offender, based upon a discharge summary from White's indicating the youth did not successfully complete sex offender treatment. The youth moved for a hearing which was held in August 2003. The hearing was primarily a discussion between the juvenile court, the youth, his counsel and his parents. The State presented no evidence and made no argument. The juvenile court essentially agreed with the youth's counsel who argued that it was unfair to base the sex offender registration order solely on the White's discharge summary because the finding that the youth had not successfully completed treatment was based primarily on his refusal to take a polygraph test, pursuant to the advice of counsel and a specific court order. Nevertheless, the court reaffirmed its order requiring the youth to register as a sex offender, based on the psychological evaluations performed before he was sent to White's. The youth appealed the sex offender registration order.

**Before a juvenile who has been adjudicated delinquent for committing a sex offense may be ordered to publicly register as a sex offender, a court must hold an evidentiary hearing and find by clear and convincing evidence that the juvenile is likely to commit another sex offense.** The requirement that a judge find by clear and convincing evidence that the youth is likely to commit another sex offense before he can be ordered to register as a sex offender is statutory. IC 5-2-12-4. Citing In Re G.B., 709 N.E.2d 352, 354 (Ind. Ct. App. 1999), as an example, the Court stated that it has consistently construed this statute as requiring an evidentiary hearing before a juvenile may be ordered to register as a sex offender. The standard of review of a decision to place a juvenile on a sex offender registry requires that the court neither reweigh the evidence, nor judge the credibility of the witnesses, and that it determine whether any reasonable fact finder could find the elements of IC 5-2-12-4 to have been proven by clear and convincing evidence. R.G. v. State, 798 N.E.2d 238, 240 (Ind. Ct. App. 2003). The Court opined that it is impossible to apply the required standard of review if there has not been a hearing at which evidence and testimony was presented. Citing K.J.P. v. State, 724 N.E.2d 612, 615 (Ind. Ct. App. 2000), the Court noted that the clear and convincing standard “requires a stricter degree of proof than a mere preponderance of the evidence.” B.J.B. at 872-73.

The Court opined that, in light of considerations discussed in its opinion and the general policy of rehabilitation underlying the juvenile delinquency system, it is clear that there must be an inquiry at a full evidentiary hearing before a juvenile may be placed on the sex offender registry. Id. at 873. Citing G.B., at 354, the Court discussed the differences between the adult criminal justice system and the juvenile delinquency system. It mentioned the individualized diagnosis and treatment prescribed for juvenile law violators, and the State’s policy to ensure that children within the juvenile justice system are treated as persons in need of care, protection, treatment and rehabilitation, with the State’s primary interest being in the rehabilitation of juvenile delinquents, rather than their punishment. Id.

The Court also contrasted the affects of public registry on adult and juvenile offenders. As concluded in Spencer v. O’Connor, 707 N.E.2d 1039 (Ind. Ct. App. 1999), requiring an adult criminal sex offender to place his or her name on the sex offense registry is not a “punishment” within the meaning of the Ex Post Facto Clauses of the United States and Indiana Constitutions, in part, because much of the information contained in the registry with respect to adult criminal offenses is already in the public domain. The identity of juvenile delinquents, however, is often not a matter of public knowledge because of the underlying policy of rehabilitating, not punishing, juveniles. The indirect effect of registry notification on the offenders and their families may be harsh and may include lost employment opportunities, housing discrimination, threats, and violence. Id.

**When a juvenile is placed in a secure facility, a sex offender registry hearing can only be conducted after the juvenile has been released from the facility.** The statutory scheme helps insure that juveniles who have been rehabilitated by virtue of their detention are not required to register as sex offenders. G.B., at 354. Thus, whether the treatment received during detention has resulted in the juvenile’s rehabilitation, is the

required focus of inquiry. If the juvenile has been rehabilitated, there cannot be clear and convincing evidence that he is likely to re-offend, and he cannot be placed on the sex offender registry. B.J.B. at 874.

At the August 2003 hearing, the juvenile court relied primarily on the 2000 and 2001 psychological examinations of the youth conducted prior to his rehabilitative treatment. The Court found these reports insufficient to provide the needed clear and convincing evidence. The Court pointed out that they indicated the youth had moderate to severe psychological problems, not that he was beyond rehabilitation, and recommended long-term placement in a secure facility to address those problems. That placement took place and the youth received about a year and a half of intensive treatment. Thus, there needed to be an evaluation of whether that period of treatment sufficiently rehabilitated the youth and whether he was likely to commit another sex offense. Id.

**The State bears the burden of proving, by clear and convincing evidence, that the juvenile is likely to commit another sex offense.** The State argued on appeal that the August 2003 hearing was sufficient to meet the evidentiary hearing requirement because the youth could have presented evidence at that time to persuade the juvenile court not to require his registration. In response, the Court pointed out that IC 5-2-12-4(b)(3) clearly contemplates that the State bore the burden of proving, by clear and convincing evidence, that the youth was likely to commit another sex offense. At the August 2003 hearing, the State presented no evidence or argument. Id.

**For the court to conclude that absolute perfection in all respects is required before a juvenile can be deemed sufficiently rehabilitated so as to be unlikely to commit another sex offense would contravene the spirit and letter of the juvenile code generally and specifically.** The Court noted that, even if it were to assume without deciding that the August 2003 hearing was an adequate sex offender registry hearing and that the juvenile court could rely on materials in the court's official record which were not admitted into evidence at that hearing, the record lacked clear and convincing evidence that the youth was likely to commit another sex offense. Id. at 876.

As to the juvenile court's reliance on White's discharge summary, it was not contained in the record before the Court on appeal. The Court noted that there was no indication that it was ever filed with the juvenile court and it was not entered into evidence as an exhibit at the registry hearing. Thus, the Court could not review it or rely on the juvenile court's characterization of it in the Court's decision. Id. at 875.

On appeal, the State asserted that the youth's progress reports from White's provided clear and convincing evidence that he was likely to re-offend, even though the State did not introduce the reports at the August 2003 hearing. The Court reviewed these reports which were in the record and found that they generally noted that the youth was progressing in his therapeutic treatment and was generally well-behaved. The later reports pointed toward the youth's release in the spring or summer of 2003, without indicating that White's was inclined to release him because of a failure to progress in treatment. They referred to his overall good behavior but still noted his "sneaky and

manipulative” behavior concerning “usually mischievous but not always serious” incidents that did not involve other residents. There was no evidence or mention of inappropriate sexual behavior, or anything else that might be considered criminal or delinquent behavior. Id. at 875.

The Court noted that there was no evidence of other inappropriate sexual behavior either before or after the 2000 molestation incident. Id. at 875. There, also, was no expert opinion evidence in the record that the youth was likely to re-offend despite his treatment at White’s. Id. at 876.