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"Ultimately, the success of the efforts that we are talking about depends on the commitment of child welfare champions from all three branches of the government, the bar, and the public, who must come together, unified by two common goals: protecting the legal rights of families and improving outcomes for Oregon's most vulnerable children."

Past, Present and Future: A Juvenile Law Perspective, Part II

By Justice David V. Brewer, Oregon Supreme Court (retired)

Adapted from remarks at the 2017 Juvenile Law Academy, October 2017, Eugene, Oregon. Part I appeared in the Winter 2017 issue of the Juvenile Law Reader.

Views from the Bench

To provide a broader context for this discussion, in preparing for our time together today, I asked several highly respected Oregon juvenile court judges to give me their perspectives on the most pressing needs for system improvement. Here is a summary of their no-holds barred comments. Although each judge has his or her own priorities, the themes are consistent.

I would describe the first issue as the tension between the complexity of presenting family problems and the timelines required for solutions. Here is what my colleagues had to say about that.

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Complex Needs versus Tight Timelines

The presenting problems in dependency court are becoming more and more serious. For example, almost every case has some aspect of addiction. While we have resources to treat such addictions, the treatment and recovery process is long. It is not something that typically can successfully be accomplished within the federal time frames of a dependency case. As a result, in the best of circumstances, we find ourselves continuing cases further and further out so the parent(s) can successfully complete their services. This delays permanency for the children but it also is our goal to have the children return to parents whenever it is safe to do so. As a result, we are left with problems that cannot be successfully resolved within the required timelines and this sometimes serves as a disincentive to parents to even try to be successful in recovery efforts. Many times, it's easier to just give up. And, they do. We are left with children languishing in the foster care system as a result of this.

Culture Clashes

A second major theme involves perceived cultural and structural deficiencies within the child welfare system. Our child welfare system in Oregon has real deficits and it is not always responsive to the needs of children and families. Sometimes the bureaucracy appears to be more concerned with paperwork and procedures than it is in providing effective services to children and families. The parents (and their attorneys) sense this in the courtroom and this affects the courts' ability to have successful resolutions of dependency matters. Parents many times fall into the trap of fighting the agency instead of trying to successfully complete their required services. The agency frequently exacerbates the problem when it is then unresponsive to the court's orders. Again, I think this probably is a result of a leadership issue at the agency and statewide level. Hopefully, this will improve.

Revolving Doors: Inexperience and Inconsistency

Another judge put it this way: The high turnover rate for DHS case workers continues to be a problem. Ideally a family should have the same caseworker from beginning to end but in most cases if they are in the system for more than a few months they will have multiple workers. Also, because the turnover is so high, many workers are very inexperienced, and this is an area that cries out for people with a personal commitment to the work and the experience and training to do it well.

Lack of Appropriate Placements and Services

Of course, many of the problems in the system are resource-related. As one judge said, "There are so many children who need foster care placement, but there is a lack of foster parents who can provide the needed homes and families for these children." While we have great foster parents, there simply are not enough of them to fill the needs. In particular, we don't have enough foster homes, therapeutic foster homes, or treatment facilities for the harder-to-place children. It is more problematic to find appropriate placements for children with mental health issues, substance abuse issues, or behavioral and emotional issues. One Judge said: "I had a permanency hearing this week for a young man who is in his 21st placement. He has attended 15 schools. I should not allow this to happen to children on my docket, but I don't have a solution."

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Youth, Rights & Justice
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Another judge focused on the same problem in terms of trauma to children. She said: "It seems like children are suffering more severe damage, injury, and trauma than ever before, but we do not have the resources to treat them. The court is pretty good at achieving permanency for kids, but I worry about child wellbeing. I have two boys who were tortured for almost two months. They've been adopted, but they will never recover from the trauma."

Which leads to the third overall dominant theme: a shortage of well-allocated resources throughout the system.

Not Enough Time, Not Enough Resources

As one judge put it: "While we are provided aspirational guidelines on procedural time frames (i.e. the proper amount of time we should be spending on permanency hearings, shelter care hearings, etc.), there is no way that many courts can devote that amount of time to these cases. As a result, we are forced to race through procedures without the ability to devote sufficient time. This probably affects results in ways that we really don't even understand."

Additionally, the attorneys who are appointed to represent parents and children likewise have overflowing caseloads, and it is difficult for them to be able to devote the necessary attention to their cases. Many times, attorneys do not attend CRB proceedings because they cannot docket the time; however, the attorney's absence prevents his or her open discussion about the case during the CRB procedure. Our court highly values the CRB procedure and recommendations and it is important that everyone fully participates in this process.

As another judge said: "We don't have enough well-trained DHS protective service workers or permanency workers. I have great respect for those we have, but there aren't enough of them. We have a great CASA program, but we don't have a CASA for each child in the system. We have good lawyers, but we need more juvenile-court-trained lawyers to represent parents and children."

Another judge described the same problem this way: "Time, time, time. We consistently do not provide adequate time to address issues presented by the families that come before the court. We need time for DHS to really work the case and assist the families in ways that will make a difference, i.e., appropriate forms of treatment whether mental health, trauma or addiction." (I can't think of a dependency family that does not present with a trauma history).

We need time for attorneys to truly work with their respective clients to understand their particular needs and listen—really listen—to what the client is saying. (Nine tenths of what any of us want is to be listened to.) We need time for the court to really determine how to help steer the

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direction of the case for there to be a successful outcome for the children who appear before the court. Almost without exception, the court is under docket constraints that dictate what will be addressed within the time allotted.

The same theme, with a more expansive twist, came from yet a third judge: "Judges need more docket time to do this work. We need well-trained juvenile judges who are committed to doing the work well and doing it for at least three to five years. As you well know, this area of the law has become very complex, and judges need training and experience to be effective. This will take money, of course, and a commitment from OJD."

And, well-trained and adequately compensated attorneys for parents and children are absolutely essential. We have seen some good results with the OPDS pilot project. We are blessed with having great attorneys in this area to begin with, but this could improve statewide.

Finally, each of the judges also expressed strong support for collaboration, with an emphasis on positive action. Here's what they said about those issues.

Teamwork and Collaboration

Everyone involved in the "system" cares about the work and the children and families that appear in court. The challenge is to determine how each of us can channel that energy in a direction that is the most productive for the children, whether it is a raging parent, attorney, DHS worker, CASA, family member, or judge. (This makes me think of how good coaches will take every type of talent and draw the best out of them to provide a productive result for the team.) Each of us needs to be a coach for the "system" to draw the best possible result for the child. A mindset of criticism serves no purpose and when a participant starts down that path, one of the team members needs to be able to step forward and determine how to channel that frustration into a positive outcome for the child.

Collaboration is the key to a successful outcome. The system allows for each party to be protected from unfair interference by the state. We must recognize how any and all events can be spun in a positive tone. That is the challenge and responsibility of every participant whether a judge, attorney, DHS worker, CASA, administrator, or court staff—anyone who is involved with the family. Even a contested jurisdiction hearing can be a positive event for the family and system.

One judge summed it up aptly: "In the end, children will grow up, the question is how will each of us (judge, parent, attorney, DHS worker, CASA, extended family) influence that growth."

A Time for Change and Collective Action

I could go on a lot longer, but I'm sure you get the drift. Each of the challenges that these thoughtful judges talked about—case complexity in the face of rigid timelines for action, the need for intelligent system-wide allocation of scarce resources, making the case for greater resources, and overcoming cultural and structural deficiencies in the child welfare system, including the judicial system that oversees it—demands a commitment to systemic change based on the most powerful tool at our disposal: collective and coordinated action in which all parts of the system are supported in balance and where all stakeholders advocate for the system as a whole, not just their own slice of the pie.

That kind of a response demands that all participants have a shared vision for change, a vision that includes a common understanding of the presenting problems and a joint approach to solving them through agreed-upon action. Take a close look at any alliance of organizations, including, for example, funders and nonprofits that believe they are working on the same social issue, and you quickly find that it may not be the same issue at all. Each stakeholder can have a slightly different definition of the problem and the ultimate goal.

These differences are easily ignored when stakeholders work independently on isolated initiatives, yet they can splinter the efforts and undermine the impact of the field as a whole. Effective collective impact requires that these differences be discussed and resolved. Each

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stakeholder need not agree with the others on all dimensions of the systemic problems that confront them. In fact, disagreements will continue to divide participants in all examples of effective collective impact. All stakeholders must agree, however, on the primary goals for the child welfare and juvenile justice system as a whole.

Developing a shared outcome measurement system is essential to collective action. Agreement on a common agenda is illusory without agreement on the ways that success will be measured and reported. Recent advances in web-based technologies have facilitated the development of integrated systems for reporting performance and measuring outcomes. These systems increase efficiency and reduce cost. They can also improve the quality and credibility of the data collected, increase effectiveness by enabling grantees to learn from each other's performance, and document the progress of the field as a whole. We need to emphasize the sharing of data and information systems throughout the juvenile system that accurately describe our reality on the ground and that provide a dynamic array of data sorts to facilitate better system-wide planning.

Developing trust is also a real challenge. Stakeholders need regular meetings to build up enough experience with each other to recognize and appreciate the common motivation behind their different efforts. They need time to see that their own interests will be treated fairly, and that decisions will be made on the basis of objective evidence and the best possible solution to the problem, not to favor the priorities of one organization over another.

All of these concerns indicate that creating and managing collective impact in our juvenile system requires a separate organization and staff with a very specific set of skills to serve as the backbone for the effort. Coordination takes time, and none of the participating organizations has any to spare. The expectation that collaboration can occur without a supporting infrastructure is one of the most frequent reasons why these efforts fail.

A standing multidisciplinary inter-branch organization that is given statutory funding and authority is a necessary piece of the puzzle. This type of organization must embody the principles of adaptive leadership: the ability to focus people's attention and create a sense of urgency, the skill to apply pressure to stakeholders without overwhelming them, the competence to frame issues in a way that presents opportunities as well as difficulties, and the strength to mediate conflict among stakeholders.

I'm not talking about just another commission; I'm talking about an approach that is based on sound enterprise management practices that have been proven to work in the most successful partnerships, both public and private. Nothing short of that will produce the kinds of improvements that we all know are necessary.

Making the Commitment

With that, let's step back for a moment. We've talked about the history of Oregon's dependency system, its emerging strengths, and its structural weaknesses and challenges. We've also talked about existing opportunities for system improvement and a way of thinking about developing a functional model for collective impact that can help effectuate those improvements.

So I return to where I began. Dependency work is critical and, common misconceptions notwithstanding, it can be some of the most complicated and legally challenging work performed by attorneys in our legal system. Dependency cases involve families who are in crisis in the context of a maze of overlapping statutes and multiple sources of law, and in an environment of extreme time pressure. These cases involve high stakes and high stress, include toxic stress for children and families. And the stakes couldn't be higher: decisions made in dependency courtrooms across our state have many short-term and long-term consequences for Oregon's most vulnerable children and families.

More than 20 years ago, as the federal laws that govern child welfare policy grew more complicated

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and child welfare practices grew more sophisticated, the notion that dependency court was somehow of lesser stature could no longer stand. The importance of high quality legal representation in dependency cases became increasingly clear. As a starting point, we need to rally around the tasks set out in the 2017 Legislative Budget Note and make common cause to implement all of the recommendations of the 2016 Task Force, to produce the changes to Oregon's models of dependency representation necessary to allow dependency practitioners and the child welfare system to properly perform their expected roles in the modern era of child welfare.

Ultimately, the success of the efforts that we are talking about depends on the commitment of child welfare champions from all three branches of the government, the bar, and the public, who must come together, unified by two common goals: protecting the legal rights of families and improving outcomes for Oregon's most vulnerable children.

Moving forward, we must reinforce the value of multidisciplinary three-branch work in the child welfare arena. To truly improve that system in Oregon, all stakeholders must continue to convene to identify, prioritize, develop, and implement changes that support shared goals and better outcomes. The well-being of Oregon's children and families must always be in the vanguard of these efforts. We must make and heed a collective statewide call to action for legislators, judicial officers, department directors, and legal leadership to work toward the implementation of recommendations relevant to their roles in the child welfare system and to continue the collaborative work that we have set in motion.

Overcoming obstacles to change will be paramount in producing the improved outcomes that the public expects from a functional system of dependency representation. However, the benefits to be gained are simply too great to warrant anything other than our fierce and unrelenting effort to make necessary change.

Thank you for the critical role that you play in this system, for all you do to promote just and fair outcomes for your clients, and for your commitment to collaborative solutions to systemic challenges that none of us can solve alone.

Update on Juvenile Detention Facility at NORCOR in The Dalles

By Mark McKechnie, MSW, YRJ Executive Director

Disability Rights Oregon issued a troubling report on the conditions and treatment of youth in the juvenile detention facility at NORCOR in The Dalles, OR, in December 2017.

Youth, Rights & Justice signed on to a letter with DRO and other advocates asking Oregon policy makers, including Governor Brown and legislative leaders, to take steps to remedy problems at NORCOR and to prevent them from occurring again there or in other Oregon facilities. Governor Brown responded that her office is working with the Oregon Youth Authority and the Youth Development Commission to address some of the concerns. She ordered OYA to stop placing youth in its custody at NORCOR until she has been assured that "the facility is safe and appropriate." Both the advocates' letter and Governor Brown's response are posted on the Law Reader website.

Class Action Lawsuit Settled

Oregon Agrees to Reduce Number of Children Housed in Hotels, Limit Use of Hotels to Emergencies and Ensure Children in Hotels are Able to Attend School

By Janeen Olsen, YRJ Development and Communications Director

Bringing an end to a lawsuit started in 2016, the State of Oregon committed in a settlement on file in federal court on February 27, 2018, to "incrementally" reducing the number of foster children placed in hotel rooms.

Hoteling Case Background

In the case, filed in United States District Court on September 27, 2016, lawyers representing children in Oregon foster care asked a judge to put an end to the practice of housing vulnerable children in a series of hotels and offices at night and providing no home for them during the day.

The plaintiffs were represented by a team of attorneys from the Oregon Law Center, Youth Rights & Justice, and Miller Nash Graham & Dunn.

The plaintiffs alleged that:

Tonight, some of the most vulnerable children in the state of Oregon will sleep on temporary cots in state offices; in hotel rooms; in hospitals, despite being cleared for discharge; or in juvenile detention facilities, despite the absence of any criminal charge against them. Some may have spent the day sitting in a DHS office, missing school. These are children over whom the state has custody. Some are as young as two years old; many are children with disabilities; all have experienced trauma. The state has removed these children from their homes despite not having any home to move them to. As experts in the field agree, the state's practice of rendering foster children functionally homeless is unconscionable. It is also unlawful.

Additionally, the complaint noted that children forced to stay in hotels or state offices are likely to miss school, adding to the uncertainty and instability of their lives.

At the time the lawsuit was filed, Angela Sherbo, Supervising Attorney at Youth, Rights & Justice, who has represented children and parents in the foster care system in Oregon and elsewhere for nearly 40 years, said that the legal team filed the complaint after approaching DHS directly to cease the practice.

"Children in the custody of the DHS are there because they have already suffered harm and because they have *already* experienced trauma. It's the state's responsibility to protect them—not to inflict further harm—and it is our responsibility, as Oregonians, to make sure the state ends these practices immediately," said Sherbo, one of the lawyers representing the children.

"We know that DHS has many dedicated, skilled caseworkers doing their best to serve kids in trying circumstances," said Sherbo, "but documents show that DHS has been either unwilling or unable to remedy the longstanding problem. That is why we are taking immediate action, and seeking a court order to force DHS to find appropriate placements for kids in its custody in the most integrated, family-like environment possible."

Two months later, the suit was placed on hold as the sides participated in settlement talks. An interim agreement was reached in November 2016 saying that effective December 31, DHS would cease placing children overnight in DHS offices unless there is no "available and safe hotel" within 30 miles or 30 minutes of the office. The agreement also said that foster children would be placed in hotels only in "emergency circumstances" where no "safe or appropriate" licensed residential placement or certified foster home is available. Settlement talks continued, with one interruption during which more pleadings were filed, and more public attention was directed at the practice.

Read *The Oregonian* editorial online.

Secretary of State Audit Addresses the Placement of Children in Hotels

In January, 2018 the Secretary of State issued an audit of the DHS foster care system. Among its findings were several about hoteling, including the number of children affected, the lengths and number of their stays in hotels and the cost to the state.

"From September 2016 to July 2017, DHS placed 189 individual children in hotels at least 284 times. Several of these instances involved

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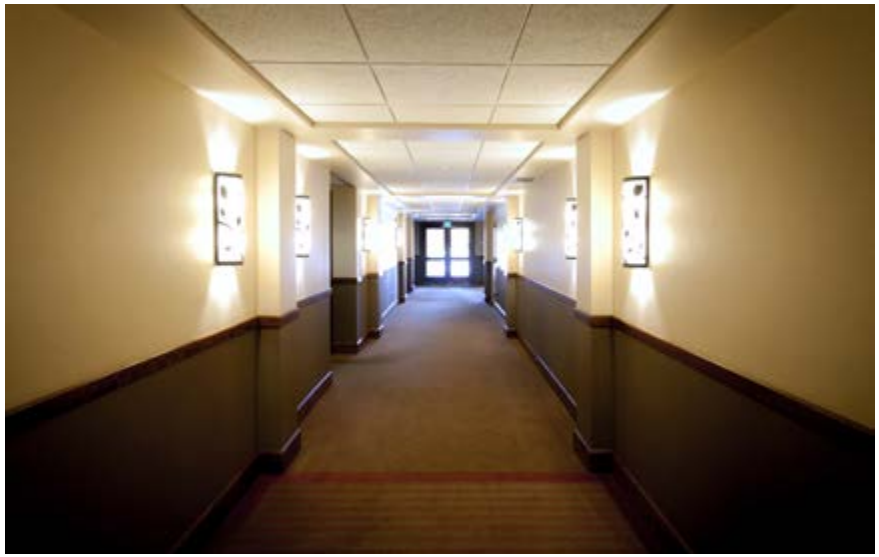
the same child being placed in a hotel multiple times. One child was placed in a hotel nine separate times in a 14-month period. Several other children had three or four separate hotel stays. The average length of stay was approximately seven days, but 26 children were placed in hotels longer than 20 days. One ten-year-old child stayed 81 days. For each stay, two adults, including at least one DHS caseworker, is required to be with the child around the clock.

* * * * *

"We estimate that one hotel room, overtime, meals and one activity for one child and two caseworkers is about $1,350 per day. We also estimate total hoteling costs from September 2016 to July 2017 are over $2.5 million."



The full audit report can be found online.

Condition of the Settlement Agreement

The lawsuit was settled on Tuesday, February 27, 2018. Among the provisions of the settlement are:

- Incrementally reducing the number of foster children who are temporarily lodged in hotel or motel rooms to no more than 24 per year statewide by the end of the year 2020.
- Children younger than age 11 may not be lodged in hotel rooms for more than five nights, and children ages 11 to 17 and in DHS care must spend no more than 12 nights in a hotel or motel, with limited exceptions.
- If children must be lodged temporarily at a hotel, DHS must ensure that the child is transported to school, with limited exceptions. Age-appropriate activities must be available to those who are not in school.
- DHS is not permitted to temporarily lodge children in child welfare offices, except under extremely limited circumstances.
- DHS has also agreed to hire an expert to uncover the root causes of these temporary emergency placements and to assist the agency and its partners in finding alternatives to the practice.

Of particular interest to judges and to lawyers for children, parents and DHS is the provision that governs what must be done to avoid hotel placement (referred to in the Agreement as "temporary lodging").

Section III entitled "ELIMINATION OF NONPLACEMENTS AND LIMITS ON TEMPORARY LODGING" provides in subsection I:

"**DHS will only temporarily lodge a foster child or young adult after determining there is no possibility of supporting the foster child or young adult in a family member's home with appropriate safety planning or in the current placement with services and supports,** and no safe and appropriate certified regular, relative, special, (including with kith or person with a caregiver relationship with the foster child or young adult) expedited or emergency foster home or licensed residential placement is available for the foster child or young adult. DHS' efforts to avoid temporarily lodging a foster child or young adult may include but are not limited to the provision of a DHS caseworker making daily visits to, and/or a contracted provider staying overnight in, the foster child's or young adult's current placement or parent's home, so long as these efforts are intended to ensure the foster child's or young adult's safety. **DHS must consider services and supports despite the costs, unless those costs exceed the amount of money it would otherwise spend to provide temporary lodging.**"

You can find the full settlement here. *The Oregonian's* article on the settlement can be found here.

Children Need Lawyers

Part II, How Children Harmed by DHS Lose their Rights & Proposed Reforms to Preserve Them

By Rob Kline, Kline Law Offices PC

Part I appeared in the Winter 2017 issue of the Juvenile Law Reader. Part I is on Tort Claims and the Juvenile Dependency Lawyer.

The State of Oregon is failing to protect the legal rights of children who are harmed due to acts or omissions of the Department of Human Services (DHS). The rights of children to seek justice for their injuries fall through the cracks for a number of reasons. First, under the law, a child's right to seek compensation for injuries can vanish in as little as 270 days unless a responsible and legally savvy adult in the child's life sends a required tort claim notice to the state. Second, when a child suffers abuse or neglect due to the acts or omissions of DHS, the agency has no system in place—or incentive—to inform anyone about the child's potential legal claim or to take any steps to ensure that the child's rights are not lost due to tort claim notice or statute of limitations requirements. Third, although dependency lawyers have an important role in ensuring that children's legal rights to seek redress for their injuries do not disappear, it is both ineffective and impractical to place upon dependency lawyers the entire burden of protecting the rights of children who are harmed by DHS.[1]

This article explores these problems in greater detail and proposes a number of reforms for addressing them.

1. Unreasonably Short Time Limitations Strip Away the Rights of Children

As discussed in Part I of this article (see *Children Need Lawyers Part I, Tort Claims and the Juvenile Dependency Lawyer*, Volume 14, Issue 4, Winter 2017), claims against the State of Oregon and its agents and employees generally are governed by the Oregon Tort Claims Act (OTCA), which has a two-year statute of limitations. ORS 30.275(9). Claims for civil rights violations against state employees under 42 U.S.C. § 1983 also must be commenced within two years. ORS 12.110; *Sanok v. Grimes*, 306 Or 259, 262 760 P2d 228 (1988).

ORS 12.160 tolls the running of the statute of limitations for a minor's cause of action for up to five years, but for no more than one year after the minor reaches age 18. The five-year period for minor tolling under ORS 12.160 applies to claims against the state governed by the OTCA, and to federal law claims against state actors. *Smith v. OHSU Hospital and Clinic*, 272 Or App 473, 356 P3d 142 (2015); *Robbins v. State*, 276 Or App 17, 366 P3d 752 (2016); *Wallace v. Kato*, 549 US 384, 397 (2007) (applying state's minor tolling statute to calculation of timeliness of § 1983 claim).

Under the OTCA, with exceptions described below, a notice of claim must be submitted to the state within 180 days of the alleged loss or injury, or within one year if the claim is for wrongful death. ORS 30.275(2). The tort claim notice deadline is extended an additional 90 days for minors. *Id.* However, while ORS 12.160 tolls the statute of limitations under the OTCA, it does not toll the notice requirement. *Buchwalter-Drumm v. State of Oregon*, 463 Or App 64, 71, _ P3d _ (2017). Therefore, a child's right to pursue a tort claim can vanish in as little as 270 days.

There is no justification for extinguishing a child's right to seek justice 270 days after being harmed by a government actor. Children are both legally and practically unable to protect their own rights—legally, because they cannot file a lawsuit on their own, and practically, because they do not have the knowledge or resources to do so. When a child's tort claim is subject to the 270-day notice requirement, protection of the child's rights depends entirely on the fortuity of there being a responsible adult in the child's life who is sophisticated enough to be aware of the tort claim notice requirement and take action. However, if the child is in state custody, it is almost a given that there are no responsible adults in the child's life who reasonably can be expected to protect the child's legal rights.

In Washington, claims of minors are tolled until the minor turns 18 years old. RCW 4.16.190. Tort claims are subject to a three year statute of limitations. RCW 4.16.080. Therefore, in Washington, a child

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has until he or she reaches the age of 21 to file a tort claim. Claims against the state generally are subject to a claim presentment requirement that the claimant wait 60 days after presenting the claim before filing suit. RCW 4.92.110. In summary, a child harmed by the State of Oregon may have a deadline of 270 *days* to pursue a tort claim while a child harmed by the State of Washington has until they are 21 *years* old to pursue a tort claim.

There is also an incongruity between the OTCA's oppressive notice requirements for minors and ORS 12.117, which is the statute of limitations that applies to all non-government child abusers, and those that knowingly allow, permit or encourage child abuse. Under ORS 12.117, a victim of child abuse has until age 40, and potentially even longer under a discovery rule, to bring a claim against private individuals and organizations. Why does the state get a pass in as little as 270 days?

Some claims of children harmed by DHS are saved by ORS 30.275(8), which provides that a tort claim notice is not required if the claim is against DHS or the Oregon Youth Authority, the claimant was under the age of 18 when the acts or omissions giving rise to the claim occurred, *and* the claimant was in the custody of DHS or the Oregon Youth Authority when the acts or omissions giving rise to the claim occurred. Unfortunately, some children's claims fall through the cracks of this provision.

For example, Oregon DOJ has taken the position that the tort claim notice exception for children in state custody under ORS 30.275(8) does not apply to claims against foster parents. The exception under ORS 30.275(8) also does not apply if, for example, multiple calls about a child were made to the child abuse hotline, but the child died and was never in DHS custody. Moreover, the exception does not apply if the harm-causing acts or omissions of DHS occurred when the child was not in custody, and then the child subsequently was taken into DHS custody, as was the case in *Buchwalter-Drumm, supra*.

A discovery rule applies to both the notice and statute of limitations requirements for claims subject to the OTCA. *Edwards v. State*, 217 Or App 188, 197 175 P3d 490 (2007) ("The notice and commencement periods set forth in the OTCA begin to run when the plaintiff knows or, in the exercise of reasonable care should know, facts that would make an objectively reasonable person aware of a substantial possibility that all three of the following elements exist: an injury occurred, the injury harmed one or more of the plaintiff's legally protected interests, and the defendant is the responsible party.") (internal citations and quotations omitted). The relevant inquiry is when the injured child has a reasonable opportunity to discover his or her injury and the identity of the person responsible for that injury. *Buchwalter-Drumm*, 463 Or App at 73-74.

The discovery rule is an imperfect remedy for preserving the rights of children. The facts corresponding to each element of the discovery rule may not be clear, which results in litigation. Moreover, the discovery rule may not save the claim of, for example, a young teenager who is old enough to be charged with knowledge of all three elements of the discovery rule, but is too young to understand the need to submit a tort claim notice within 270 days of acquiring that knowledge or to have the means to do so.

For similar reasons, it is extremely difficult to justify the five-year timeframe of the minor tolling statute, which gives a child a maximum of seven years to file a tort claim (five year minor tolling under ORS 12.160 plus two year statute of limitations under ORS 30.275(9) equals seven years). What is the rationale for taking away the rights of a young teenager to seek compensation for abuse or neglect that occurs in DHS custody, particularly when there is no system in place for DHS to inform anyone about the child's potential legal rights or to take any steps to ensure that the child's rights are not lost on the agency's watch?

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2. DHS Has No System in Place to Notify Anyone about a Child's Potential Claim

DHS has no rules, systems or procedures in place for notifying anyone—such as the child's dependency attorney or the court—that a child harmed by acts or omission of DHS may have a potential tort claim against the agency, foster parents or other acting under its auspices. Nor is there any mechanism for ensuring a child's potential legal rights do not vanish while the child is in DHS custody. DHS has no incentive to implement such measures. Moreover, the agency has probably been aware for at least ten years that it may have an obligation to disclose potential tort claims[2], but has taken no steps to do so.

DHS arguably should have procedures in place to disclose to the child's dependency attorney and/or the court the potential tort claims of children in its custody. Absent such a requirement, a child's right to seek compensation for harm caused by the agency and its agents is left to the happenstance that the child has a responsible adult in his or her life that recognizes the potential claim and takes action before it is too late.

3. Placing the Entire Burden for Preserving Children's Rights on Dependency Lawyers Is Not Working

The author is not aware of any legal authority that definitely establishes whether the dependency lawyer is obligated to take steps to preserve a child client's potential tort claim when, in the course of representing the child, the lawyer learns that the child may have a potential tort claim against DHS, foster parents or others involved in the child's care. As discussed in Part I of this article, this topic is the subject of a March 13, 2008 informal written advisory ethics opinion authored by Sylvia Stevens, then general counsel of the OSB. Ms. Stevens concludes that the court-appointed lawyer has no ethical obligation to "address" a tort claim that the lawyer learns about during the representation of his or her child client in the dependency matter. However, the bar's opinion does not discuss whether, in the absence of an obligation to *represent* a child client regarding a potential tort claim, the dependency lawyer nevertheless may be obligated to notify someone about the child's potential tort claim or otherwise take steps to ensure the tort claim is not lost.

Standard 2 G. of the OSB performance standards that guide the actions of dependency lawyers, states that with respect to "collateral issues" such as potential tort claims, the lawyer has no obligation to represent the child client, but may have a duty to take some steps to protect the child's rights:

> "The child-client's lawyer does not have an ethical duty to represent the child client in these collateral matters when the terms of the lawyer's employment limit duties to the dependency case. However, the child-client's lawyer may have a duty to take limited steps to protect the child client's rights, ordinarily by notifying the child-client's legal custodian about the possible claim unless the alleged tortfeasor is the legal custodian. In the latter case, ordinarily the child-client's lawyer adequately protects the child client by notifying the court about the potential claim."

Whether or not the dependency lawyer is ethically—or legally—obligated to take steps to protect a child client's potential tort claim, the best practice is for the lawyer to take steps to ensure the child's claim is not lost. Dependency lawyers often are in the best position to learn about torts committed against their child clients. Since other participants in the dependency proceedings may be the ones committing the tortious acts or omissions, dependency lawyers frequently also are in the best position to take action on behalf of children to protect their tort claims.

Dependency lawyers have an important role in ensuring that when a child client suffers abuse or neglect due to the acts or omissions of DHS, foster parents or others involved in the child's care, the child's legal rights to seek redress for his or her injuries do not fall through the cracks. Nevertheless, for the reasons discussed below, it is both ineffective and impractical to place upon dependency lawyers the entire burden of ensuring the rights of children who are harmed by DHS and its agents are not lost.

First, Standard 2 G. of the OSB performance standards does not create an across-the-board rule requiring dependency lawyers to take some steps to protect the child client's potential tort claim in every case. Instead, Standard 2

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G. states in pertinent part that "* * * the child-client's lawyer *may* have a duty to take limited steps to protect the child client's rights * * * *" (emphasis added). Moreover, some of the language in Standard 2 G. is cast in aspirational rather than mandatory language ("* * * the child-client's lawyer should *consider* asking the court * * * to either appoint a guardian ad litem (GAL) for the child client * * * or issue an order permitting access to juvenile court records by a practitioner who can advise the court * * *." (emphasis added). As a result, placing the entire burden for preserving children's rights on dependency lawyers results in a system in which there is no assurance that a child's potential tort claim is preserved in a particular case.[3]

Other participants in the dependency proceeding should play a role in ensuring children do not lose their legal rights to seek redress for neglect or abuse caused by acts or omissions of DHS. As discussed above, DHS arguably should have procedures in place to disclose to the child's dependency attorney and/or the court the potential tort claims of children in its custody. As discussed below, the courts should examine whether to expand their role too.[4]

Second, it must be acknowledged that there may be a disincentive for a dependency lawyer to notify the court and/or make a referral to a tort lawyer when the child client may have a potential tort claim arising from injuries the child suffered while being represented by the dependency lawyer. The dependency lawyer may per ceive that he or she also may be in the cross hairs of a possible legal action brought on behalf of the child client. The fact that some dependency lawyers have a large volume of open matters and limited resources may be a further disincentive to spend the time necessary to ensure the child's potential tort claim is not lost.

Third, when the dependency lawyer does act, there is no guarantee that the child's rights will be preserved. As discussed in Part I, Standard 2 G. provides that:

> "If a child-client's lawyer, in the course of representing a child client under the age of 18, becomes aware that the child client has a possible claim for damages that the child client cannot pursue because of the child's age or disability, the child-client's lawyer should consider asking the court that has jurisdiction over the child client to either appoint a guardian ad litem (GAL) for the child client to investigate and take action on the possible claim or issue an order permitting access to juvenile court records by a practitioner who can advise the court whether to seek appointment of a GAL to pursue a possible claim."

There is no state-wide system for courts to respond to a request from a dependency lawyer to appoint a GAL to investigate and take action on a potential tort claim, or to release confidential court records to a tort lawyer for the same purpose. The author is aware of a case in Washington County in which a judge ordered the appointment of a GAL in response to such a motion from a dependency lawyer, but is also aware of a case in which a judge in a different county did not respond to such a request. It is also not clear how the GAL's services are to be paid. These issues should be examined by all stakeholders involved in child dependency cases.

5. The System Is Broken, Let's Fix It

Our current "system" of ensuring that the rights of children harmed by DHS do not fall through the cracks consists almost entirely of a standing threat of disciplinary action by the bar and potential legal liability for dependency lawyers who do not act to protect a child client's potential tort claim. This arrangement is not working. The author proposes the following reforms to protect the rights of children in such circumstances.

A. Change State Laws Pertaining to Tort Claim Notice and Statute of Limitations.

Existing laws pertaining to tort claim notice and statute of limitations requirements have the effect of stacking the deck against children and depriving them of their legal rights when they are too young to protect themselves. The rights of a child to seek justice for the acts or omissions of DHS should not be

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dependent upon the fortuity that the child has a responsible adult in his or her life to protect those rights. In most such cases, there is no responsible adult in the child's life. The best solution to remedy this unconscionable failure to protect children's rights is for the legislature to extend the five-year minor tolling timeframe under ORS 12.160 to age 19 in all cases against public and private individuals and entities. This action, combined with eliminating for minors the tort claim notice requirement under ORS 30.275(2), would have the effect of giving children until they are 21 years old to pursue tort claims, just like in the State of Washington.

At an absolute minimum, the legislature should amend ORS 12.160 so that the five-year minor tolling provision in that statute applies to the requirement to send a tort claim notice under ORS 30.275(2). There is no justification for stripping away in only 270 days a child's right to seek redress for harm caused by acts or omissions of DHS.

B. Require DHS to Disclose the Potential Tort Claims of Children in its Custody.

DHS should be required to disclose to a child's dependency attorney and/or the court the potential tort claims of children harmed in its custody. The entire burden of ensuring the rights of children harmed by DHS do not vanish should not fall on dependency lawyers. As the potential tortfeasor and the legal guardian of children in its custody, DHS should play a role in protecting the legal rights of children harmed by its actions and omissions.

C. Improve Procedures for Getting Potential Tort Claims to Lawyers.

When a dependency lawyer follows the performance standards and files a motion with the court requesting appointment of a GAL, or release of confidential court records to a lawyer who can advise the court whether to seek appointment of a GAL, there is no statewide system for courts to respond. It also is not clear how a GAL is to be compensated for his or her services. All stakeholders in dependency cases should examine these issues and strive to establish a uniform system for ensuring that children's potential tort claims get to lawyers who are capable of handling them.

Conclusion

For a variety of reasons, the State of Oregon is failing to ensure that children who are harmed due to the acts or omissions of DHS do not lose their legal rights to seek justice. Fixing these problems will require a concerted effort by the legislature, DHS, and the courts. The solutions are within our reach. As a society, we can and must do better for our children.

Footnotes

[1] For ease of reference, this article generally refers to DHS only, but, in most instances, the discussion applies equally to the Oregon Youth Authority.

[2] In a February 29, 2008 letter to attorney Mark A. Taleff, Ingrid Swenson of the Office of Public Defense Services wrote: "While the planning committee had hoped that the 'Preserving and Pursuing Tort Claims for Children' segment of the February 8 CLE would clear up some issues which have arisen for lawyers in dependency cases, I am afraid most people went away more confused than ever. * * * * Some of the assistant AGs who were present expressed concern about whether DHS or its counsel may have a duty to disclose to a child's attorney, or parent or the court a potential claim against DHS or its agents for torts committed against a child in the agency's care. Whether or not such a duty exists, the group will consider whether one should be created by statute." Ms. Swenson was responding to a letter from Mr. Taleff, who said in pertinent part: "I am writing to follow up to the presentation at the most recent juvenile law continuing legal education program on February 8, 2008. As you no doubt perceived, there was a strong reaction to the presentation concerning attorney responsibilities for claims against public bodies. * * * * * I am appointed to represent clients in juvenile dependency proceedings (and delinquency proceeding too) and of course a significant portion of those clients are children. In addition to being abused in some fashion by a parent or other person while in the parent's care, a number of these children experience injury while in substitute care, be that a DHS foster placement, guardianship, residential care, or the other varieties of care. * * * * * "

[3] The foreword to the performance standards states that they are not intended to establish a legal standard of care: "These guidelines, as such, are not rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon rules of professional conduct, however[,] which are mandatory. Questions as to whether a particular decision or course of action meets a legal standard of care must be answered in light of all circumstances presented."

[4] New Mexico, and apparently other states, has an expansive view of the role of the courts when it comes to children. "We note that New Mexico, like many other states, has a long tradition of interpreting laws carefully to safeguard minors." *Rider v. Albuquerque Public Schools*, 122 N.M. 237, 923 P2d 604, 607-608 (1996) *citing, e.g., Garcia v. Middle Rio Grande Conservancy Dist.*, 99 N.M. 802, 664 P2d 1000, 1006 for the proposition that: "A trial court in an action involving minor children has a special obligation to see that they are properly represented, not only by their own representative, but also by the court itself."

2018 Legislative Session Wrap-Up

By Mark McKechnie, MSW, YRJ Executive Director

The Oregon Legislature convened for its "short session" on February 5, 2018, and voted to adjourn *Sine Die* on Saturday, March 3, 2018. The tight budget seemed to temper some enthusiasm for new initiatives seen in previous sessions. However, there were new bills enacted and some new funds appropriated that may be of interest to our readers. A chart summarizing bills of interest that passed during the 2018 Oregon Legislative Session is included at the end of this article.

Policy

Youth, Rights & Justice worked with the Oregon Criminal Defense Lawyers Association (OCDLA) to pass HB 4009. The final version of the bill creates a new section of the juvenile code permitting either the ward or DHS to file a motion to reinstate parental rights.

HB 4009 safeguards adoptive families and those in the process of adopting by excluding motions to reinstate parental rights in cases where the child has been adopted (unless that adoption has been disrupted and the child no longer has a legal parent) or where there is an adoption proceeding underway. Among the other safeguards are an 18-month waiting period, the requirement of proof by clear and convincing evidence, children's entitlement to court-appointed counsel, a prompt permanency hearing, and period of juvenile court oversight for at least six months after the motion is granted.

The original version of the bill would also have amended ORS 419B. 150 to conform to the constitutional standard for warrantless removals of children from their families set by the Ninth Circuit Court of Appeals in *Kirkpatrick v. Cty. of Washoe*, 843 F.3d 784 (9th Cir. 2016) and acknowledged by the Oregon Court of Appeals in *Nathan v. Dept. of Human Svs.*, 288 Or App 554 (2017). The session proved too short to resolve these issues but the House Judiciary Committee will convene a work group, headed by Representative Sanchez, to further address the issue and report back before the beginning of the 2019 session.

For additional information on the history of the bill and the negotiations up to its unanimous passage out of the House Judiciary Committee, see the below sidebar on Mary Sofia's article in the *Oregon Criminal Defense Attorney*.

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Excerpt from OCDLA Lobbyist Mary Sofia's "News from the Capitol" (February 2018)

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Last fall, OCDLA's Juvenile Law Committee presented the Legislative Committee with two juvenile dependency concepts. The first concept strengthened the warrantless removal standard to bring it into compliance with the Ninth Circuit. The second created a process to reinstate a parent's rights in limited circumstances, a policy shift that has also been undertaken in California and Washington. Representative Tawna Sanchez (D–Portland), an experienced social worker, agreed to sponsor our concepts in one bill, which, after many meetings and drafts, became HB 4009.

Working with Angela Sherbo of Youth, Rights & Justice, Amy Miller as liaison from the Juvenile Law Committee, Rep. Sanchez and representatives from the Oregon Judicial Department, departments of Justice and Human Services, and the Oregon District Attorneys Association, we were able to reach agreement on the second concept regarding reinstating parental rights in limited circumstances with only a handful of concessions and safeguards. We all agreed to ask for a Judiciary workgroup on strengthening the warrantless removal standard to prepare a consensus bill for 2019. HB 4009 was heard in the House Judiciary Committee on Valentine's Day, and it was unanimously passed out of committee on Friday, February 16.

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Budget

For the first time since 2013, the Oregon Legislature appropriated new money to expand the original Parent Child Representation pilot project, currently operating in Columbia, Linn and Yamhill Counties. The new appropriation is for $1.34 million for the current biennium (which would be a $2.68 million cost for the next full biennium). The funding will be used to expand the program to Coos and Lincoln counties, beginning July 1, 2018.

In addition, OPDS will receive $450,000 to conduct a workload/caseload study as well as obtain a system-wide assessment from the 6th Amendment Center. OPDS will work with the American Bar Association to create recommended caseload standards using the methodology developed by the ABA. The 6th Amendment Center will assess the public defense system as a whole and identify deficiencies and areas for improvement to ensure compliance with the 6th amendment. Both the study and the assessment have been endorsed by the Public Defense Services Commission, and this funding is an indication that legislative leaders realize the need for improvement within the public defense system.

In addition, the Legislature approved an increase to the current service level calculation of the OPDS budget for the 2019-21 biennium, which starts July 2019. According to the analysis and summary of the Legislative Fiscal Office (LFO), "The Commission is instructed to add $4.2 million General Fund to the current service level as otherwise historically calculated. This adjustment is intended to address concerns about contract rate amounts paid to trial-level public defense contract and hourly-paid providers. The amount is calculated to equal the cost of providing a 2% increase in rates for the full twenty-four months of the 2019-21 biennium, however, it is understood that the Commission may choose to allocate the funds in another manner to best address concerns about provider pay." (LFO report on HB 5201, p. 52) Presumably, most of this change will impact public defense contractors in the 2020-2021 contract cycle.

In response to a critical audit of the state's child welfare and foster care systems by the Oregon Secretary of State's office in January, Governor Brown proposed a substantial increase in funding for child welfare positions. The audit highlighted the large caseload sizes managed by DHS child welfare case workers. The staffing increases approved by the 2018 Legislature include an increase in 85.9 FTE (a pro-rated figure that represents less than a full biennium) between April 2018 and January 2019, including 75 new case worker positions.

There are also 73 additional case aide (SSA), three recruiter (HRA3), 10 manager (PEMC), and 25 Office Specialist (OS2) positions added, for a total of 186 new positions. The total appropriation is for $13.2 million in general funds and $4.5 million in federal funds, for a total of $17.8 million in funding for these new child welfare positions. (LFO Summary of HB 5201, p. 45) In addition to the new positions, *The Oregonian* reported last month, "As of mid-February, the child welfare program had 141 vacant caseworker jobs it was working to fill."

The Legislature also appropriated an additional $750,000 for supporting foster parents. According to the LFO summary: "About 60% of the funding would go to respite

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care, paying for a mix of services for both group (Foster Parents' Night Out model) and child-specific services. The program plans to spend 25% on training experienced foster parents to be mentors; these parents will provide support to new foster parents by helping them meet the needs of children in care and navigate the system. The remaining 15% will be used to cover immediate needs, such as purchasing a car seat or crib, of a child or sibling group in a foster home." (LFO Summary of HB 5201, p. 44)

Summaries of these and other budget actions taken by the 2018 Oregon Legislature can be found online.

Bill Summary

The following chart is a selected list of bills that were passed during the short legislative session:

Bill Number	Summary	Result
HB 4009	Permits reinstatement of parental rights under certain circumstances (see above).	Passed
HB 4014	Removes requirement that current foster child or former foster child complete volunteer service hours during previous academic year to qualify for tuition waiver.	Passed
HB 4082	Directs Oregon Youth Authority to administer Juvenile Justice Information System in partnership with county juvenile departments. Permits disclosure of certain juvenile records to researchers, evaluators and data analysts, government agencies, post-secondary institutions of education and persons with whom youth authority, county or county juvenile department has entered into disclosure agreement.	Passed
HB 4095	Establishes privilege for communications with lawyer referral service.	Passed
SB 1522	Modifies requirements imposed on school districts for persons receiving special education who have received modified diploma, funding for youths in Youth Corrections Education Program who have received modified diploma, and eligibility for Expanded Options Program for students who have received modified diploma. (i.e., Fixes change from 2017 SB 20, which made students who received a modified diploma potentially ineligible for special education services up to age 21.)	Passed
SB 1526	Prohibits court from considering parent's disability in determining whether to terminate parental rights absent finding that behaviors or limitations related to parent's disability will endanger health, safety or welfare of child or ward even when accommodations or support services are in place unless parent's conduct related to disability is of such nature and duration as to render parent incapable of providing proper care to child or ward for extended periods of time.	Passed
SB 1540	Modifies definition of child abuse for purpose of mandatory reporting. Adds provisions regarding child abuse investigations conducted on school premises. Expands scope of investigation of abuse of persons with mental illness or substance use disorders that may be conducted by Department of Human Services or Oregon Health Authority.	Passed
SB 1562	Provides that person commits crime of strangulation if person knowingly impedes normal breathing or circulation of another person by applying pressure to chest of other person. Increases penalty for crime of strangulation when victim is family or household member. Punishes by maximum of five years' imprisonment, $125,000 fine, or both. Directs Oregon Criminal Justice Commission to classify felony strangulation as crime category 5 if committed against family or household member.	Passed

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JLRC Contact Information

Alison Roblin is the contact person for trainings and other JLRC services.

To receive a call back within two business days from a JLRC attorney for advice, email the workgroup and please include your name, telephone number, county, and brief description of your legal question.

CASE SUMMARIES

By Tyler Neish, YRJ Attorney, and Christa Obold Eshleman, YRJ Supervising Attorney

Oregon Supreme Court

Dept. of Human Services v. A.B., 362 Or 412 (2018)

In *Dept. of Human Services v. A.B.*, 362 Or 412 (2018), the Oregon Supreme Court affirmed a Court of Appeals ruling dismissing mother's appeal of a jurisdictional judgment as moot.

The juvenile court took jurisdiction over mother's child based on three allegations:

- The mother is aware that her domestic partner has a conviction for a sex offense . . . that presents a threat to the child's safety because mother continues to allow him in the home and around the child;
- The child is in need of therapeutic treatment that mother has failed to provide;
- Mother failed to provide for the educational needs of the child.

While mother's appeal challenging the jurisdictional determination was pending, the juvenile court dismissed the petition. Nonetheless, mother sought to continue her appeal based on the claim that she would suffer collateral consequences based on the jurisdictional judgment.

On appeal, mother argued for a categorical rule—that when wardship is terminated, an appeal of a jurisdictional judgment is moot only if there is no possibility of collateral legal consequences. Meanwhile, DHS sought a rule that when wardship is terminated, an appeal will ordinarily be moot absent a showing from the parent that there are non-speculative collateral consequences.

Ultimately, the Supreme Court described a rule in the middle. A parent need only identify potential collateral consequences, after which, the burden rests with DHS to show that the legal effects or consequences identified by the parent are legally insufficient or factually incorrect.

Turning to the facts of the case, mother identified potential collateral consequences, including but not limited to:

- Disadvantage in any future child abuse and neglect proceedings;
- Limited options for employment;
- Social stigma.

However, the Supreme Court held that DHS had met the burden of persuasion. The Supreme Court reasoned that the mother would not be disadvantaged in future custody proceedings because the jurisdictional judgment, and associated findings, would be unlikely to affect the outcome, given other available information. The Supreme Court went on to dismiss the claim that mother's employment would be limited by the jurisdictional judgment, because the cited law did not provide clear limits.

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Finally, the Supreme Court indicated that the social stigma in the present case did not rise to the level of legal sufficiency; the child was not removed from mother's custody, there was no evidence that people knew of the jurisdictional judgment, and the law protects the confidentiality of juvenile court records.

Court of Appeals

Dependency Cases

Dept. of Human Services v. F.S.B., 289 Or App 633, 634, 407 P3d 982 (2017)

In *Dept. of Human Services v. F.S.B.*, 289 Or App 633, 634, 407 P3d 982 (2017), the Court of Appeals remanded for entry of judgments omitting the requirement that father undergo a psychological evaluation, after DHS conceded that the juvenile court erred in imposing that requirement. DHS had not alleged "that father had psychological problems that contributed to the bases for jurisdiction," and DHS did not request a psychological evaluation. The Court of Appeals cited *Dept. of Human Services v. B. W.*, 249 Or App 123, 128, 275 P3d 989 (2012) "(there must be a rational relationship between the requirement to undergo a psychological evaluation and the basis for juvenile court jurisdiction)."

Dept. of Human Services v. L.L.S., 290 Or App 132, P3d (2018)

In *Dept. of Human Services v. L.L.S.*, 290 Or App 132, P3d (2018), the Court of Appeals reversed and remanded the juvenile court's judgment that changed the child's permanency plan from reunification to adoption, holding that DHS had not made reasonable efforts.

In this case, jurisdiction was based on the fact that the father was convicted of sexually abusing another child and was thus incarcerated and unavailable as a custodial resource.

At the permanency hearing, the evidence showed that father was to be incarcerated until the child was 32 years of age, that the Department of Human Services (DHS) caseworker had never spoken with father, but had sent a letter of expectation to father and arranged phone visits between father and child after ten months had elapsed.

The juvenile court changed the permanency plan to adoption, holding that reasonable efforts for reunification had been made. The juvenile court reasoned that there were no services that would ameliorate the jurisdictional bases because no service would shorten father's incarceration. The juvenile court also made a second finding, that under ORS 419B.340(5)(a)(D), DHS was relieved of the duty to make further reasonable efforts to reunify.

In reversing, the Court of Appeals held: "when the dependency code is construed in view of the scope of the fundamental Fourteenth Amendment right to parent, reunification of a child with a parent means the restoration of the parent's right to make the decisions about the child's care, custody, and control without state supervision, even if the child will not be returned to the parent's physical custody because of other impediments, such as incarceration." *Id.* at 138. The court reasoned that while an incarcerated parent may not be able to be physically reunified, a parent could enlist another caregiver. DHS had not asked the father about any other potential caregivers.

The Court of Appeals next held reversal would have an impact, despite the juvenile court's prospective finding under 419B.340(5)(a)(D). The father was now entitled to a new permanency hearing. At this permanency hearing, the father would be able to present evidence of his progress or that another permanency plan was in the best interests of the child, regardless of whether or not DHS provided any assistance.

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Dept. of Human Services v. J.E.F., 290 Or App 164 (2018)

In *Dept. of Human Services v. J.E.F.*, 290 Or App 164 (2018), the Court of Appeals affirmed the juvenile court's judgment asserting jurisdiction over father's child.

In this case, the juvenile court was faced with a petition that contained four allegations as it related to the father: (D) Father is the biological father of the child, (F) Father has an anger and impulse control problem, (G) Domestic Violence and (H) Father does not understand the basic needs of his child.

On appeal, father made two assignments of error. First, father argued that allegation D (that he was the biological father of the child) was not jurisdictional. Second, father argued that, as to allegations F, G and H, the evidence was insufficient.

The Court reiterated that allegations in a petition are viewed together, and in conjunction with each other. Therefore, the question is not whether or not allegation D alone was jurisdictional. Rather, the question to analyze is whether the allegation D, when viewed together with allegations F, G and H is jurisdictional. The court held that allegation D was relevant in light of the other allegations, and that all four allegations were proven by a preponderance of the evidence.

Dept. of Human Services v. J.M.T.M., 290 Or App 635 (2018)

In *Dept. of Human Services v. J.M.T.M.*, 290 Or App 635 (2018), the Court of Appeals reversed and remanded a juvenile court judgment changing the permanent plan for three children from reunification to adoption.

The mother and children argued that the permanency plan should not be changed to adoption under ORS 419B.476(5)(d), because DHS had not met its burden to prove that there were no compelling reasons under ORS 419B.498 to forgo termination of mother's parental rights. Specifically, they argued under ORS 419B.498(2)(b)(B) that guardianship was a more appropriate plan because no adoptive resource had been identified, the siblings had strong bonds, and bonds with the mother and extended family were also strong.

The Court of Appeals agreed, reasoning that DHS had presented no evidence that guardianship was not a better plan than adoption.

Dept. of Human Services v. N.J.V./D.L.O., 290 Or App 646 (2018)

In *Dept. of Human Services v. N.J.V./D.L.O.*, 290 Or App 646 (2018), the Court of Appeals reversed and remanded juvenile court judgments establishing guardianships for two children, holding that the juvenile court erred in denying mother's motion for continuance of the guardianship hearing, without making a record of its reasons for doing so.

In this case, the mother made an admission in December of 2015 (more than two years after removal) that she, "[S]truggled with mental health and substance abuse issues and needs to address those issues to be safely reunified…" By July of 2016, the court changed the permanent plan for both children to guardianship. In May of 2017, DHS sought an order establishing the foster parent as legal guardian

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for the children; for which the court scheduled a hearing for June 20, 2017.

Mother's appeal is based on the denial of a motion for continuance, which she filed on June 14, 2017. Mother sought a continuance due to a recent mental health assessment for which she did not yet have a written report, and which she anticipated would lead to evidence on her behalf. On June 15, 2017, without receiving an explanation of DHS's objection, or having oral argument, the juvenile court denied mother's motion in an order that stated only, "MOTHER's Motion to Continue the contested Guardianship Hearing currently set for June 20, 2017 is Hereby: X DENIED."

Mother assigned two errors on appeal: first, that the juvenile court had no reasonable basis to deny the motion—an abuse of discretion; and second, that the juvenile court made no record of an exercise of discretion in denying the motion.

In reversing the guardianship judgments, the Court of Appeals agreed that the juvenile court failed to make a record that reflected an exercise of discretion. By failing to make a record of an exercise of discretion, the Court of Appeals could not conduct a meaningful review of the juvenile court's denial of mother's continuance. Furthermore, the error was not harmless, because, in ordering the guardianship, the judge relied upon lack of evidence of a change to mother's mental health.

Delinquency Cases

State v. E.C.-P., 289 Or App 569 (2017)

In *State v. E.C.-P.*, 289 Or App 569 (2017), the Court of Appeals affirmed a juvenile court's modification of a ten-year old delinquency disposition.

In this case, the juvenile court modified a delinquency disposition in a closed case by imposing two conditions the court had deferred in its original 2004 dispositional order: a requirement that the youth provide a DNA sample and a requirement that the youth comply with sex offender registration.

In 2010, the juvenile court entered a dismissal order terminating juvenile court jurisdiction. The dismissal order did not address the deferred conditions. In 2014, the juvenile court granted the state's motion to modify the 2004 order to lift the deferrals.

On appeal, youth argued that the modification imposed additional requirements upon the youth after he had fully served his disposition, which was not allowed by either ORS 419C.610, or the Fourteenth Amendment.

The Court of Appeals first held that the argument regarding the requirement to register as a sex offender was moot in light of the 2015 and 2016 changes to the sex offender registration law, which required youth to register regardless of the outcome of the appeal.

The Court of Appeals then affirmed the juvenile court's modification regarding the DNA sample. The court reasoned that the DNA sample was not a punitive sanction and that the juvenile court did not, thus, add an additional requirement to youth's disposition. Instead, the juvenile court merely sought to correct an order that the youth agreed was unlawful.

The Court of Appeals also disagreed with the youth that the modification was fundamentally unfair because it upset his expectation of finality, reasoning again that this was merely a correction of an unlawful order, not an increase in the sanction.

State v. M.S.S.K., 289 Or App 450 (2017)

In *State v. M.S.S.K.*, 289 Or App 450 (2017), the Court of Appeals reversed and remanded a juvenile

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court's denial of a youth's motion to suppress statements made to a juvenile probation officer in a custodial setting, without Miranda warnings by the officer.

The juvenile court's denial of the youth's motion to suppress statements was based on the argument that the youth's statements were unresponsive to the probation officer's inquiries. The state abandoned this rationale on appeal.

Nonetheless, the state argued that the Court of Appeals could affirm on an alternative basis that the youth was informed of her Miranda rights mere hours before by a police officer.

In reversing the juvenile court, the Court of Appeals agreed with the youth, that had the state raised the issue of prior Miranda warnings at the trial level, the youth could have developed a different record that could have affected the disposition of the issue.

State v. J.R.C., 289 Or App 848 (2018)

In *State v. J.R.C.*, 289 Or App 848 (2018), the Court of Appeals vacated and remanded a juvenile court judgment that continued the youth's placement with the Oregon Youth Authority (OYA).

On appeal, youth first argued that the determination that continued placement was in the youth's best interest was not supported by the evidence in the record. Second, youth argued the juvenile court failed to make the required written findings as to why remaining with OYA was in the best interest of the youth.

The Court of Appeals dismissed youth's first assignment of error, relying on the holding of youth's related dependency appeal, *Dept. of Human Services v. H.F.E.*, 288 Or App 609, 612, (2017).

As to the youth's second assignment of error, the Court of Appeals concluded that the juvenile court erred by not making the required written findings pursuant to ORS 419C.478(1), and remanded for the juvenile court to make written findings.

State v. N.S.B., 290 Or App 576 (2018)

In *State v. N.S.B.*, 290 Or App 576 (2018), the Court of Appeals reversed a juvenile court order requiring forfeiture of a rifle as a consequence of a delinquency adjudication for unlawful possession of another firearm (a handgun).

In this case, the juvenile court imposed a special probation condition that a rifle, given to the youth by his mother, would be forfeited if not sold within 30 days.

On appeal, the youth argued that the rifle was not, "possessed, used or available," to facilitate the offense of possession of a different gun. The State conceded this argument and the Court of Appeals reversed and remanded with instructions to delete the special condition that required forfeiture of the rifle.

Audit of Oregon's Child Welfare System

The Oregon Secretary of State's office released its audit of Oregon's child welfare system on January 31, 2018:

"State of Oregon Department of Human Services Child Welfare System Foster Care in Oregon: Chronic management failures and high caseloads jeopardize the safety of some of the state's most vulnerable children."

The full report can be found here. Highlights and key findings from the report follow.

Report Highlights

Oregon's most vulnerable children are being placed into a foster care system that has serious problems. Child welfare workers are burning out and consistently leaving the system in high numbers. The supply of suitable foster homes and residential facilities is dwindling, resulting in some children spending days and weeks in hotels. Foster parents are struggling with limited training, support and resources. Agency management's response to these problems has been slow, indecisive and inadequate. DHS and child welfare managers have not strategically addressed caseworker understaffing, recruitment and retention of foster homes, and a poorly implemented computer system that leaves caseworkers with inadequate information.

Key Findings

1. DHS and Child Welfare struggle with chronic and systemic management shortcomings that have a detrimental effect on the agency's ability to protect child safety. Management has failed to address a work culture of blame and distrust, plan adequately for costly initiatives, address the root causes of systemic issues, use data to inform key decisions, and promote lasting program improvements. As a result, the child welfare system, which includes the foster care program, is disorganized, inconsistent, and high risk for the children it serves.

2. DHS does not have enough foster placements to meet the needs of at-risk children, due in part to a lack of a robust foster parent recruitment program. The agency struggles to retain and support the foster homes it does have within its network. The agency also lacks crucial data regarding how many foster placements are needed and the capacity of current foster homes, inhibiting the agency's ability to fully understand the scope of the problem.

3. A number of staffing challenges compromise the division's ability to perform essential child welfare functions. These challenges include chronic understaffing, overwhelming workloads, high turnover, and a large proportion of inexperienced staff in need of better training, supervision, and guidance.

More information and the response from DHS can be found online.

Save the Date

Annual Juvenile Law Conference
Aptil 20-21, 2018
Agate Beach Inn, Newport, OR

Western Juvenile Defender Center Regional Summit
May 11-12, 2018
Boise, ID

Juvenile Law Training Academy
October 8-9, 2018
Valley River Inn, Eugene, OR

National Juvenile Defender Center 2018 Juvenile Defender Leadership Summit
October 26-28
St. Paul, MN

Resources

Kathryn E. Fort and Adrian T. Smith, Indian Child Welfare Annual Case Law Update and Commentary
Am. Indian Law Journal, Vol. 6, Issue 2.
Forthcoming May 2018

There are, on average, 200 appellate cases dealing with the Indian Child Welfare Act annually—including published and unpublished opinions. There are usually around 30 reported state appellate court cases involving ICWA issues every year. However, there has never been a systematic look at the cases on appeal, including an analysis of who is appealing, what the primary issues are on appeal, and what trends are present. This article seeks to fill that void by providing a comprehensive catalogue of published Indian Child Welfare Act ("ICWA") jurisprudence from across all 50 states in 2017. Designed as a quick reference for the ICWA practitioner, this article also summarizes key case decisions that have interpreted the law in meaningful, significant, or surprising ways.

Once published, this article can be accessed here.

If you want help with an ICWA case, don't hesitate to contact Addie Smith, YRJ Attorney via email or phone: (503) 232-2540, ext 201.