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

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

Adapted from remarks at the 2017 Juvenile Law Academy, October 2017, Eugene, Oregon. Part II will follow in the Spring 2018 Juvenile Law Reader issue.

A Brief History

When I was a young lawyer here in Lane County 40 years ago, I remember noticing how little attention and few resources were expended to support juvenile dependency practice. The term "Kiddie Court" captures the mindset of the era very well. For many people in the system, including some judges, this wasn't thought of as true legal work. It was social work that really didn't require the attributes of a highly skilled advocate and was somehow less important than more serious work of the court. Few lawyers did juvenile work, either for the government or for parents or children, and there were no CASAs, Citizen Review Boards, or other support organizations for that work. The pay for those few lawyers who practiced juvenile law was ridiculously low and they labored largely anonymously.

This wasn't just an Oregon phenomenon; it was a national problem that

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"The Parent Child Representation Project, a workload model with case caps and increased accountability, has already shown promising results in promoting better court practice and better outcomes for children and families in the three Oregon counties where it has been piloted"

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persisted for the next two decades, when longstanding concerns about the implications of this state of neglect surfaced in the form of federal legislation: the Adoption and Safe Families Act. The Oregon legislature soon followed suit with conforming legislation of its own.

Here's what Chief Justice Wally Carson said about those changes when he invited Oregon judges to attend the first annual Juvenile Court Improvement Program conference in 1998:

> "New Oregon and federal laws have changed the way business is done in juvenile court. The judge is in the leadership role. With the new court structure, more Oregon judges will have the opportunity to work in the juvenile arena."

At that first conference, judicial advocates from across the country addressed Oregon judges on the paradigm shift of viewing cases "through the eyes of a child," and they elaborated the principles on which a judge can rely in making reasonable efforts determinations.

And things have developed from there—in a very mixed bag—of progress, setbacks, and growing pains. There have been many changes to state and federal laws since the mid 1990's, and there has been some good news. Most importantly, more judges and lawyers have passionately adopted this work, which has grown into the greatest interdisciplinary model court effort in our justice system. And there have been some good results. In the last decade, the number of children in foster care has decreased, as has the number of children entering foster care, and the length of time that children are spending in foster care has decreased, as well. There has also been a decrease in the number of children waiting to be adopted.

But statistical results like foster care and adoption measures are just proxies for qualitative outcomes; in and of themselves, they don't tell us whether children are actually safe and thriving. We need to remember that we're after more than proxy statistical improvements here.

Despite the commitment of good people throughout the system, many challenges face the children, families, and communities that we serve. Among other problems, the number of children living in poverty and who are at risk for abuse and neglect remains too high, and the number of children aging out in foster care needs to decline. And, in the last decade, we have experienced a roller coaster budget ride; it has been especially difficult to implement system improvement measures for our courts, lawyers, and public sector stakeholders who serve children and families due to stifling budget reductions and the unpredictability, for planning purposes, of public revenue streams.

These mixed results and the funding challenges that accompany them require a thoughtfully conceived strategy from those of us who believe that promoting the best outcomes for at risk children and their families is among the most important responsibilities of our justice system. In the end, it's up to all stakeholders in the system to take the lead, acting as champions for children and families, to ensure that their rights to safety, permanency, well-being and fair process are met. My message today is that, to make sure we're consistently producing outcomes that ensure children are safe and thriving and that families are properly supported, we need to adopt a more coordinated approach to collective action and joint responsibility for the problems

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affecting our children and families.

Recent Developments – Reimagining Dependency Courts

Let's focus on a few recent initiatives in critical areas of reform where that principle is being applied and needs to be more consistently applied:

First, in 2016, the National Center for State Courts, in partnership with Casey Family Programs, selected four states to pilot the Reimagining Dependency Courts, a program that focuses on implementing court policies and practices that will reduce the number of children in foster care and improve permanency outcomes, with a particular focus on children in care more than two years ("long stayers"). As one of the four states selected, Oregon participated in the initial planning, visit, and assessment by the NCSC Team. Part of this effort included a file review of 200 cases in three different Oregon counties, with the goal of identifying strategies to reduce the number of children who remain in the foster care system for more than two years.

Timothy Travis [ABA Juvenile Court Consultant] and Senior Judge Eveleen Henry from Lane County conducted the file review, and they noted several overall issues in the case files that they reviewed. Even after reviewing the entire court case file, it was often difficult to ascertain a coherent history of the case due to the passage of time and a number of missing, out of date, or confusing documents.

The most glaring of these missing or out of date documents was the DHS case plan. In addition to the incomplete case files, the file reviewers were concerned about the completeness of court hearings for "long stayers." When looking at the court reviews for these children, the file reviewers noted that very often the hearings were brief and sparsely attended. It was common to find that the only participants at these hearings were the DHS caseworker and the child's attorney. The file reviewers found that often the court does not receive any information about the child's treatment goals and progress before the court hearing, and due to the limited participation of people involved in the case, the court does not receive meaningful information about the child's circumstances at the hearing.

We could spend a full hour talking about the reviewers' analysis, because their findings have significant implications for the role of lawyers in the process, but in the interest of time, let's just consider their conclusions.

Meaningful Planning for Permanency

Although the majority of children who enter foster care will be reunified with a parent or will achieve permanency within two years, there is a population of children who will spend the majority of their childhoods in foster care. These "long stayers," children who have been in care for at least

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two years, often have high needs and unique challenges. While it is impossible to ensure that no child will age out in foster care, there are certain strategies that can reduce the number of long stayers in foster care, and can reduce some of the negative effects of being raised in the system. Chief among these strategies is the need for a continuous diligent relative search on the part of DHS, as well as thoughtful and substantive concurrent planning. A concurrent plan, including the identification and necessary certification of any prospective permanent placement resources, needs to be developed and ready by the time of the first permanency hearing.

If the court is to fulfill its function of oversight and monitoring of the child welfare system, then court reviews need to be full and complete. If a child has a permanency plan of adoption or guardianship, the case plan should include information about the reasonable efforts to finalize the plan and services being provided to ensure that the placement does not disrupt. Only collective action, including vigilance from judges, lawyers for parents, children, and the government, as well as CASAs, CRBs, and other stakeholders, can ensure that these fundamental planning and process requirements are satisfied. Children growing up in foster care – as well as their families – deserve no less.

Parenting Time and Reunification

The frequently underemphasized issue of parenting time is also fertile ground for collective action among system stakeholders. As we all know, research shows that there is a strong connection between family time and safe reunification. We know that quality family time is a key indicator of earlier, and safer, reunifications. Oregon judges have recently received training on this topic, and it should be central to lawyers and other stakeholders as well. This issue is layered with trauma-informed principles including the recognition that concurrent planning matters and that the logistics of parent child interactions can't be overlooked. We need to give more careful consideration to how much and what kind of supervision is really necessary. We need to understand and apply the principle that family time should resemble family life. And we must creatively and persistently confront the barriers to consistent high quality family time, including transportation issues, the need to devise less expensive supervision options, including the use of college and graduate students receiving course credits, developing creative ways to establish family time centers, and probably the most difficult, the will to change "the way we do things."

The Court as Agent of Change

While all of these are real concerns, many jurisdictions have joined together to figure out creative solutions to overcoming these issues. In some places, like a county in North Carolina, all it took was a judge who kept ordering family time for babies to happen three times a week. At first this move stressed the system, but then the stakeholders came together and figured out how to make it happen. Understanding the importance of family time to a child's wellbeing, as the judge did, provided strong motivation for facilitating family time in that jurisdiction.

Judges, lawyers, and other stakeholders all need to demand improved outcomes in this critical area. As a critical component of coordinated collective action, the application of new scientific understanding of how abuse and neglect affect child development, and what children need to build resilience, offers a powerful op¬portunity to change the life trajectories of children in the system.

The Science of Child Development

We are learning that the child's developmental process is fueled by reciprocal, "serve-and-return" interaction between children and the adults who care for them. Infants and young children naturally reach out for interaction through facial expressions, gestures, and words while nurturing adults respond with similar vocalizing, gesturing, and

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emotional engagement. This serve-and-return behavior continues like a game of tennis or passing a ball back and forth. If the adult's responses are unreliable, inappropriate, or simply absent, the game falls apart. Without the responsive interaction that builds neural connections, the architecture of the child's developing brain may be weakened, and later learning, behavior, and health may be impaired. Young children and their caregivers both can initiate and respond in this ongoing process.

In the context of this emerging knowledge, science points to the prevalence of individuals in the child welfare system who are experiencing toxic stress, and the science of toxic stress gives us a way of understanding developmental and behavioral challenges common in child welfare.

By itself, translating the science and making it available to those involved in child welfare is insufficient to drive change. But making the science usable is an important step in creating a context within which positive and innovative change becomes more feasible. An understanding of the science of child development by system leaders, judges, lawyers, caseworkers, kinship and foster parents, and also by birth parents and older youth involved with the system, has the potential to open up new ways of examining and explaining what they encounter in their life and work. And that increased understanding can promote openness to change and create new possibilities for action.

Three factors — reducing external sources of stress, developing responsive relationships, and strengthening core life skills— are mutually reinforcing. A well-regulated environment reduces stress on developing children, and this supports both a responsive relationship with caregivers (who are themselves less stressed by the child's behavior) and the child's developing self-regulation. Similarly, a parent's improved executive function supports her ability both to engage in serve-and-return interactions with children and to create a safer, more predictable caregiving environment. Promoting positive change in all three of these areas is our best chance to help adults provide safe and responsive parenting, and children to get on track for healthy development.

Scientists use the term "plasticity" to refer to the capacity of the brain to learn from experience, which is greatest early in life and decreases with age. By applying the science of child development in the child welfare system, we can promote frequent contact between birth parents and young children who have been placed in foster care. For children who have a significant likelihood of ultimately being reunified with their parent(s), the schedule of visits typical in foster care systems, in which contact is weekly at best and sometimes considerably less frequent, is insufficient to build the bonds that will be a stable base for promoting healthy development when and if reunification occurs.

Many parents of young children involved with the child welfare system can benefit from coaching about the importance of serve-and-return relationships, especially when accompanied by opportunities to practice and get feedback. For children who enter foster care, there are additional challenges. For example, foster parents are sometimes cautioned not to get "too attached" to children, especially babies, because of the possibility that the children will ultimately be removed from their care. Quite the opposite, they should be encouraged and supported to have frequent serve-and-return interactions with children, and to model these interactions for birth parents.

Each of us needs to take responsibility for incorporating evidence based and trauma informed practices—based on scientific principles in the field of early childhood development—in all aspects of juvenile dependency practice. By applying scientific principles, child welfare systems can do much more to promote strong,

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secure, responsive connections between foster parents and children. But, it will take insistent united action by all system stakeholders to achieve critical change in this area.

Legal Representation for Parties in Dependency Cases

Another area where collective effort has helped but still must be exerted is in the critical area of attorney representation. Progress certainly is reflected in the Oregon State Bar's recently adopted revised Standards for Representation in Juvenile Dependency Cases for attorneys representing parents and children. The key premise is that lawyers must have limited caseloads to do the critical work assigned to them in a way that ensures justice in a functioning system.

The new standards get at the core of interbranch initiatives; that is, they recognize that the dependency system cannot function optimally unless it is understood and administered as a comprehensive whole, not as a set of disconnected components. But these standards are not self-effectuating. They must be enforced through adequate funding for legal services as part of an even larger collective effort to implement the recommendations of the 2016 Statewide Dependency Representation Task Force that I will turn to now.

For me, one of the most telling barometers of the condition of our dependency system can be found in the work of that group, which I had the privilege to observe closely as chair. The process that we followed didn't just ask how one part of the system could improve but rather examined the dependency system and dependency representation system as a whole trying to find improvements across the system and among the branches.

The work of the Task Force was based on two premises: first, that there must be shared ownership of child welfare outcomes across the branches and throughout the system; and second, there must be shared accountability for the protection of the rights of Oregon children and families.

As our process unfolded, it soon became apparent that there were real obstacles to quality representation in Oregon. Specifically, the Task Force found that:

- Although all children and parents receive attorneys, the attorneys' high caseloads and their inability to access social service experts sometimes stand in the way of high quality representation;
- The Parent Child Representation Project, a workload model with case caps and increased accountability, has already shown promising results in promoting better court practice and better outcomes for children and families in the three Oregon counties where it has been piloted;
- In many cases, judges don't believe that they are receiving the information they need to make good decisions because of various obstacles to quality representation;
- Billing models across the system are not cost-effective or cost efficient;
- There continues to be a significant risk of unlawful practice of law by DHS caseworkers;
- Caseworkers are often unable to access legal advice and counsel when making important case decisions outside of court;
- Transferring cases between two legal entities and two attorney agencies (from DAs to DOJ and state to agency) comes at a cost to Oregon families and the dependency system; and
- There is a great deal of inconsistent judicial and legal practice in local courts that is a drag on access to quality justice.

Consistent with these findings, nationally, experts recommend that the child welfare agency have full representation and case caps, and that parents and children have representation funded by a workload model with case caps and access to social service experts.

Based on its findings, the Task Force made the following core

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recommendations for system reform to the Governor and the legislature that:

1. OPDS be fully funded to expand the PCRP workload model across the state;
2. DHS funding be used to provide full representation for the agency;
3. DOJ move to a block grant or flat fee workload model for DHS Child Welfare billing; and
4. District attorneys should continue to represent the state as they see fit (but that DHS funding must be spent on Attorneys who represent DHS).

The Task Force also recommended that the CASA network have funding for additional statewide attorneys available to provide legal advice and counsel to CASA volunteers and agencies as necessary to promote the best interest of children in court and in the child welfare process.

In addition, there were important recommendations with regard to Crossover Cases, Continuous Quality Improvement Efforts, and Performance Standards, and the Task Force began a conversation about ICWA, Disproportionality and Judicial Resources that we hope will receive attention and result in important system improvements. The final report of the Task Force can be found here.

In particular, I want to emphasize what the American Bar Association has said about our recommendation to expand the Parent and Child Representation Program model:

> "Your recommendation to expand the PCRP is an excellent one. Based on evidence from several jurisdictions, most notably New York and Washington, the ABA recommends that a legal team approach like the PCRP's is a best practice which leads to strong outcomes for children and families and best protects due process rights. Housing your program at the Office of Public Defense Services will lead to ongoing accountability and support for the lawyers and other professional staff that will result in high quality representation for their clients. With the expansion of the model, Oregon can emerge as a true leader in our field. The ABA strongly supports your effort to improve outcomes for children and their families, through your examination of representation."

As a whole, the Work Group's report provided a comprehensive three-branch analysis and set of recommendations for a coordinated collective response to the problems associated with legal representation in the dependency system. Sadly, in the end, budget shortfalls kept most of these recommendations from being funded in the 2017 legislature. It is especially disappointing to me that the PCRP rollout was not funded across the state. With perseverance, we must continue to elevate that issue to the highest priority and never give up on it.

A Call to Action

In that regard, I want to tell you about a meeting that the Chief Justice and I had in June with Senator Steiner Hayward when it finally became clear that we weren't going to obtain across-the-board funding for our suite of recommended systemic improvements. She said, let's lay the foundation for keeping all this alive. Let's devise a budget note to elevate these system wide recommendations as we prepare for the next session. That budget note is:

> "The [Ways and Means] co-chairs expect the Department of Human Services, Department of Justice, Public Defense Services Commission, and Oregon Judicial Department to work collaboratively, at both the state and local levels, to solicit input on, develop, and implement strategies to improve the effectiveness and efficiency of Oregon's juvenile dependency systems. Potential strategies should include the implementation of standardized forms and streamlined and consistent practices wherever practicable, and include adoption of administrative or court rules. Local level efforts should be reviewed and analyzed at the state level to identify best practices that can be implemented statewide. The Department of Human Services, Department of Justice, Public Defense Services Commission, and Oregon Judicial Department will also provide an update on their specific roles, activities, and strategies to improve the effectiveness and efficiency of Oregon's juvenile dependency system as part of their budget presentations during the 2019 legislative session."

If you think about it, that note is a call to action for a coordinated system wide response to these entrenched problems

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and an invitation to collaborate on data driven inter-branch recommendations for the next legislative session. Despite the unfortunate budget climate, we must fight discouragement. We need to accept this invitation from the Co-Chairs as a sign of our own commitment to adequate representation and related system reforms, and we must work together to see larger system improvements that will produce better outcomes for our children and families.

Coordinated collective action on the entrenched issues that I've just highlighted could greatly improve those outcomes. Those issues must be understood and addressed in the broader context of conditions that demand our collective action.

Children Need Lawyers

Part I, Tort Claims and the Juvenile Dependency Lawyer

By Rob Kline, Kline Law Offices PC

When a lawyer is appointed to represent a child client in a dependency case, the lawyer may discover that, in addition to the circumstances that brought the child before the court in the first place, the child also may have experienced abuse, neglect or other injuries while in the custody of the Oregon Department of Human Services (DHS). What are the dependency lawyer's responsibilities when his or her child client may have a tort claim against DHS, foster parents or others involved in the child's care? This article addresses the ethical duties of the dependency lawyer in this situation, best practices for addressing potential tort claims, practical considerations involved in working with tort lawyers, legal time limitations for tort claims, and malpractice exposure.

Part Two of this series discusses how children who suffer abuse, neglect and other injuries while in state custody lose their legal rights to bring tort claims against DHS and others, and presents proposals to preserve children's rights in such circumstances.

1. OSB Informal Advisory Opinion on Dependency Lawyer Duties

When an appointed lawyer learns that his or her child client has been injured due to acts or omissions of others, the lawyer can inform the child's custodian and let the custodian decide whether and how to pursue a tort claim. The situation becomes more complicated if the child is in the legal custody of DHS and the potential tort claim is against DHS or persons working under its auspices, such as foster parents.[1]

The Oregon State Bar (OSB) has addressed the ethical duties of the court-appointed juvenile dependency lawyer when the lawyer learns his or her child client has potential torts claims against DHS or others. Sylvia Stevens, then general counsel of the OSB, wrote in a March 13, 2008 informal written advisory ethics opinion[2] that the dependency lawyer's ethical obligations are dictated by the lawyer's scope of representation.

Rule of Professional Conduct (RPC) 1.2 (b) permits a lawyer to limit the scope of representation, provided that the limitation is reasonable under the circumstances, and the client gives informed consent. Ms. Stevens wrote: "Comment [6] to ABA Model Rule 1.2, on which the Oregon rule is based, indicates that the scope of services to be provided by a lawyer may be limited by agreement with the client 'or by the terms under which the lawyer's services are made available to the client.'" The services of a dependency

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lawyer "are made available to clients under statute and, if [the lawyer] is working under contract to PDSC [Public Defense Services Commission], pursuant to terms of its contract with [the lawyer] or the contracting group of which [the lawyer is] a part. ORS 419B.195 refers to 'the case,' which suggests that [the lawyer's] representation is limited to the specific dependency proceeding. The PDSC contact refers to 'a case assigned under this contract' and 'all matters related to the appointment' but specifically excludes 'other civil proceedings.'"

Ms. Stevens stated that: "[T]he foregoing language suggests that your responsibilities are limited to the issues related to the dependency matter to which you are appointed. That may include advocating for the child's best interests with regard to safety and other issues affecting temporary and permanent placement decisions. Expressing concern or disagreement about a placement that may be unsafe for the child is quite a different thing, however, than initiating a tort claim on behalf of the child for injuries resulting from that placement." Ms. Stevens concluded: "Assuming, then, that the scope of representation is limited by statute and contract (or perhaps by order) when a lawyer is appointed to represent a child in a juvenile dependency matter, it follows that the lawyer has no 'duty' to address unrelated civil claims of which the lawyer might learn or become aware."

In short, the OSB informal advisory opinion 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. The bar's opinion does not discuss whether, in the absence of an obligation to *represent* a child client in a tort matter, the dependency lawyer nevertheless is obligated to notify someone about the child's potential tort claim or otherwise take steps to ensure the tort claim is not lost.[3]

2. OSB Performance Standards

Additional guidance for the court-appointed dependency lawyer is found in performance standards adopted by the OSB. The standards, known as Specific Standards for Representation in Juvenile Dependency Cases, were updated by a work group, including members from academia as well as private practice and public defender offices, and approved by the OSB Board of Governors in June 2017. The purpose of the standards is to "alert the attorney to possible courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible." The foreword to the 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."

Standard 2 G., under "The Obligations of the Lawyer for Children in Child Protective Proceedings with Action Items and Commentary," states: "[t]he child-client's lawyer should take appropriate actions on collateral issues." It further provides: "The child-client's lawyer may request authority from the appropriate authority to pursue issues on behalf of the child client, administratively or judicially, even if those issues do not specifically arise from the court appointment. Such ancillary matters may include *** tort actions for injury."

Standard 2 G. states that with respect to such collateral issues, 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 this solution will work

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> depends on whether a lawyer capable of assessing the potential tort claim is available to be appointed by the court. A juvenile court judge might well expect the child-client's lawyer to recommend someone to whom the case could be referred."

Although the standard states the dependency lawyer *may* have an obligation to take limited steps to protect the child's potential tort claim, bringing the potential claim to the attention of the court is cast in aspirational rather than mandatory language:

> "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 [1] appoint a guardian ad litem (GAL) for the child client to investigate and take action on the possible claim or [2] 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."

It is a simple matter to submit a motion and order informing the court about the potential tort claim

and asking the court to take action. The motion should explain that:

(1) The dependency lawyer has become aware that the child has a possible tort claim for damages that he or she cannot pursue due to his or her civil disability;

(2) No action has been taken to protect the child's tort claim;

(3) ORS 419A.255(3) provides in relevant part that "no information appearing in the record of the case or in the supplemental confidential file may be disclosed to any person not described in subsections (1)(b) and (2)(b) of this section, respectively, *without the consent of the court* ***."; (4) The child's lawyer may have an obligation to take limited steps to protect the child's rights under Performance Standard 2 G., which obligation, if any, the lawyer is attempting to discharge by informing the court about the potential claim; and

(5) The dependency lawyer moves the court to appoint a guardian ad litem to evaluate the potential claim or to order release of confidential court records to another lawyer who can assess the potential tort claim.

In practice, courts have had varied responses to such motions. The author's information is only anecdotal, but in one case, a Washington County judge appointed a guardian ad litem in response to such a motion from the court-appointed counsel for the child's father. In another case in another county, the court took no action at all. In Multnomah County, Judge Susan Svetkey reports that, in her experience, it is rare for potential tort claims of children in state custody to be brought to the attention of the court. There is no formal procedure for addressing such claims in Multnomah County. Judge Svetkey states that the court is interested in working with OPDS to develop a plan to educate dependency lawyers about their roles and responsibilities in such circumstances.

As noted above, Performance Standard 2 G. states: "A juvenile court judge might well expect the child-client's lawyer to recommend someone to whom the case could be referred." One method of matching a child with a tort lawyer, which is no longer available, was the Oregon Trial Lawyer Association's Juvenile Justice Project ("JJP"). The JJP was established to coordinate referrals of personal injury claims for children who are wards of the court in Multnomah County. The JJP established screening criteria for attorneys who wanted to take referrals. During the first ten years it operated, the JJP reported assisting dozens of children in state custody in pursing claims arising from the acts or omissions of their state custodians. One benefit of the program is that it provided a measure of protection from a negligent referral claim for the referring lawyer or entity.

The performance standards describe two other options for the dependency lawyer who learns the child client has a potential tort claim: "The lawyer may pursue,

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[1] personally, [2] or through a referral to an appropriate specialist, issues on behalf of the child client, administratively or judicially, even if those issues do not specifically arise from the court appointment."

As a practical matter, representing a child client in a tort claim often is outside the scope of the dependency lawyer's expertise. There also may be a potential conflict of interest if the child suffered abuse, neglect or other injury while being represented by the dependency lawyer. Moreover, such work is beyond the scope of representation provided by attorneys under contract with PDSC, and PDSC is not authorized to pay for it.[4]

Referring the tort claim to an appropriate specialist is discussed in section 4 below.

3. Best Practice: Act So Child Doesn't Lose Rights

Whether or not the dependency lawyer is ethically—or, as discussed in section 6 below, legally—obligated to take steps to protect a child client's tort claim, the best practice is for the lawyer to take steps to ensure the child's claim is preserved.[5] Children need lawyers; many children who are abused, neglected or otherwise injured in state custody lose their legal rights because no one acts to protect them.

Pursuant to the performance standards:

- The lawyer "should meet with the child client regularly throughout the case. The meeting should occur well before any hearings, not at the courthouse just minutes before the case is called before the judge." Performance Standard 2, p. 9.[6]
- "The child client's lawyer should work collaboratively with the child client to ascertain independent sources to corroborate the child client's information." *Id.*
- "The child's lawyer should conduct a thorough, continuing, and independent review and investigation of the case, including obtaining information, research, and discovery to prepare the case for trial in hearings. **** The child's lawyer should not rely solely on the disclosure information provided by the agency caseworker, the state, or other parties as investigation of the facts and circumstances underlying the case." Performance Standard 3, p. 27.
- "The child's lawyer should contact and meet with the parents, legal guardians, or caretakers of the child with permission of their lawyer(s)." *Id.* at p. 28.
- "The child's lawyer should interview individuals involved with the child client and parent such as: 1. Domestic partners; 2. Educators; 3. Friends; 4. Neighbors; and/or 5. Church members." *Id.* at pp. 28-29.
- "The child-client's lawyer should determine whether obtaining independent evaluations or assessments of the child client is needed for the investigation of the case." *Id.* at p. 29.
- "As part of the discovery phase, the child-client's lawyer should review the following kinds of documents: 1. Social service records; 2. Medical records; 3. School records; 4. Evaluations of all types; 5. Housing records; and 6. Employment records. *Id.* at p. 31.

Under the performance standards, dependency lawyers are charged with a very high degree of knowledge of, and inquiry into, the child client's health, safety and welfare. As such, the dependency lawyer often is in the best position to know about circumstances giving rise to a potential tort claim. In fact, due to a child's isolation following removal from his or her home, the dependency lawyer may be the only person who has knowledge of a potential tort claim. Using such reasoning, some state bars require dependency lawyers to take actions such as notifying the court about potential tort claims, and even filing notices required by statute. For more information, see Oregon Child Advocacy Project, When a Child May Have a Tort Claim: What's a Child's Court-Appointed Attorney to Do? (2010).

The author is not in favor of creating additional burdens for court-appointed dependency lawyers who frequently are overworked and underpaid. Nevertheless, dependency lawyers are on the front lines of representing vulnerable children whom other adults have failed to protect. Given their unique position, it is imperative that dependency lawyers act to preserve their child client's tort claims. *A child's right to pursue a tort claim can vanish in as little as nine months.* Since time frequently is of the essence, the best practice for the dependency lawyer who becomes aware of a potential tort claim is to immediately notify

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the court or refer the claim to an appropriate specialist as discussed in the next section.

In a given case, it may not be apparent to the dependency lawyer whether the facts or the law support a tort claim, or whether such a claim is viable in light of the circumstances. When such questions arise, the best approach is to get a tort specialist involved—either directly or through the court—and let the specialist make the call. Doing so helps ensure that a child's tort claim is not lost and provides the additional benefit of avoiding a potential malpractice claim.

4. Acting on the Child's Potential Tort Claim—Working with the Tort Lawyer

Lawsuits arising from children harmed in foster care are complex and rife with procedural and substantive legal issues that can be malpractice traps for attorneys. The cases are aggressively defended by the Oregon Department of Justice (DOJ), which tends to assert every possible defense. Discovery can involve many thousands of pages of documents. As a result, cases involving foster children can be extremely time consuming; it is not uncommon for the tort lawyer to expend well over 1,000 hours of time—and sometimes substantially more—to get to trial. The tort lawyer also typically is required to advance an extensive amount of case costs given the level of discovery required and the need for qualified expert witnesses to address both liability and damages issues; costs of $50,000.00 and more are not uncommon in cases involving such complexities.

Given the circumstances, the tort lawyer ordinarily will carefully screen a potential case before committing the resources to move forward with a lawsuit. Every case is different, but among other questions the tort lawyer will want to evaluate:

- Are there any issues associated with tort claim notice requirements or statutes of limitations?

- How straightforward or complex are the liability issues?
- Is the child capable of and willing to testify about the abuse or neglect?
- Will such testimony further traumatize the child to a degree that outweighs the potential benefit of pursuing litigation?
- Who will decide if the potential harm to the child from litigation outweighs the potential benefit?
- Will the child, if old enough, and the child's current legal guardian be cooperative with tasks like deposition preparation and getting the child to experts for evaluation?
- How long has the child been in DHS custody? The longer the time, the more documents will have to be reviewed and the more witnesses will have to be deposed prior to trial.
- Who will serve as the GAL?
- Are there third parties besides DHS who also may be at fault?
- Have any individuals involved been criminally charged or convicted?
- How serious are the child's injuries?
- What is the potential recovery for the child?

In our civil system, it is an unfortunate and hard truth: not every claim is economically viable to pursue.

When the dependency lawyer determines that it is necessary or appropriate to get a specialist involved in a child's potential tort claim, it frequently sets into motion a major fire drill for the tort lawyer. Time is running, the tort lawyer has an immediate need for information to evaluate the case, and the lawyer often has no client who would enable the lawyer to take action. To make matters worse, little information may be available since court records are withheld from public inspection under ORS 419A.255(3).

The dependency lawyer has several options at this point. As discussed above, one option is to file a motion with the court and ask the court to appoint a GAL to investigate the claim or to order release of confidential information to an appropriate specialist. The downside with this approach—particularly asking the court to appoint a GAL—

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is that it takes time. The other option is to make a direct referral to a suitable tort lawyer. The downside here, as noted above, is that the tort lawyer may have insufficient information to evaluate whether there appears to be a viable case that warrants further investigation and pursuit of a claim. When the tort case appears to be viable and time is of the essence, the best approach is to do both: file a motion with the court that hopefully will result in release of the records and have a qualified tort lawyer waiting in the wings to take action.

Finally, there may be some limited circumstances in which the dependency lawyer can disclose confidential client information to a tort lawyer without prior court approval. A dependency lawyer's ability to do so requires careful assessment of the RPCs and a variety of legal authorities. This topic is beyond the scope of this article.

5. Summary of Time Limitations

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 USC § 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 cause of action held by a minor 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. *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).

Under the OTCA, a notice of claim must be filed with the state within 180 days of the injury; the period is extended to one year for wrongful death. ORS 30.275(2). The tort claim notice deadline is extended an additional 90 days for minors. *Id.* Note that ORS 12.160 does not toll the notice requirement. *Buchwalter-Drumm v. State of Oregon*, 463 Or App 64, 71, __ P3d __ (2017). However, under ORS 30.275(8), 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 a claim occurred, *and* the claimant was in the custody of DHS or the Oregon Youth Authority when the acts or omissions giving rise to a claim occurred.

The notice requirements of the OTCA do not apply to section 1983 claims brought in state court. *Sanok*, 306 Or at 262.

A discovery rule applies to OTCA claims. "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." *Edwards v. State*, 217 Or App 188, 197, 175 P3d 490 (2007) (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. A GAL's knowledge is imputed to the child, but knowledge prior to the time of appointment is irrelevant. *Id.*

Tort claims involving children in the custody of a federally recognized Indian tribe present a host of additional considerations. For tribes that have adopted a tribal tort claim law that provides a limited waiver of sovereign immunity for certain types of claims, a tort claim notice must be sent to the tribe. Additionally, the Indian Self-Determination and Education Assistance Act, 25 USC § 450 *et seq*., authorizes tribes to take over the administration of a variety of programs—including those pertaining to social services and child welfare—through contractual arrangements with the agencies that previously administered them: the Department of Interior's Bureau of Indian Affairs, and the Department of Health and Human Services' Indian Health Service. Under the statute, individuals injured by tribal employees may, under certain circumstances, seek compensation from the federal government. Such claims are subject to the Federal Tort Claims Act (FTCA), and the requirement to send a tort claim notice within two years of accrual

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under 28 USC § 2401.

Time limits create many malpractice traps. 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 would not apply if, for example, multiple calls about a child were made to the child abuse hotline, but the child was never removed from his or her home and, therefore, was never in DHS custody.

Submitting the tort claim notice also can be problematic. Under ORS 30.275(4), "Formal notice of claim is a written communication from a claimant or representative of a claimant ***." A parent or legal custodian ordinarily should be able to submit a tort claim notice, but it may not be practical, or even possible, to contact such persons and obtain their cooperation. Moreover, until a GAL is appointed, the tort lawyer may not have a client and, therefore, may not be serving in a formal representative capacity.[7] Under the FTCA, "A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and *be accompanied by evidence of his/her authority to present a claim on behalf of the claimant* as agent, executor, administrator, parent, guardian or other representative." (italics added). Form 95; *see* 32 CFR § 564.56. If time is limited, it may be faster for the dependency lawyer to file the tort claim notice. Doing so has the added benefit of avoiding any legal challenge to the tort lawyer's capacity to send a tort claim notice.

6. Malpractice Exposure

What happens when a dependency lawyer is aware of a child client's potential tort claim, but takes no action to ensure the claim is preserved? Whether or not there is an ethical obligation to undertake some action to protect a child client's tort claim, the dependency lawyer may have malpractice exposure. The author is aware of one instance where a dependency lawyer was sued for failing to protect a tort claim, and there may be other instances. To avoid a professional negligence claim, the best practice when learning about a child client's potential tort claim, as discussed above, is to take action so the child's rights are not lost.

Performance Standard 2 G. provides some tips on minimizing malpractice exposure:

"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 this solution will work depends on whether a lawyer capable of assessing the potential tort claim is available to be appointed by the court. A juvenile court judge might well expect the child-client's lawyer to recommend someone to whom the case could be referred. *In this situation, the child-client's lawyer should research the other lawyer's reputation and communicate clearly to the court and to the child client that the child's lawyer is turning the work over to the receiving lawyer and is not vouching for the receiving lawyer's work or monitoring the receiving lawyer's progress in pursuing the claim.* For more information, see Oregon Child Advocacy Project, *When a Child May Have a Tort Claim: What's a Child's Court-Appointed Attorney to Do? (2010)*." (italics added).

The article referenced in the standard, authored by University of

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Oregon Professor Leslie J. Harris in 2010, states: "Under Oregon law, it is also highly unlikely that a juvenile court attorney who simply referred a case to another attorney, without becoming actively involved or monitoring the case and without a fee-splitting arrangement, would be held jointly liable if the other attorney mishandled the case." The viability of negligent referral claims, and whether Professor Harris's assessment of the law in 2010 remains accurate today, are beyond the scope of this article.

Finally, it must be noted that, as discussed above, the dependency lawyer is responsible for investigating, monitoring and reporting on a vast array of circumstances that affect the child client's well-being, including the appropriateness of both temporary and permanent placements. Although it is beyond the scope of this article, the dependency lawyer has civil liability exposure when the lawyer knows, or reasonably should know, about abuse, neglect or other injuries that occur in a placement on the lawyer's watch and the lawyer fails to take action to protect the child.[8] The author is aware of more than one instance where such a claim was successfully pursued against a dependency lawyer, and there may be others.

Conclusion

Court-appointed dependency lawyers may have an ethical and a legal duty to take limited steps to protect a child client's tort claim. 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. A child's right to pursue a tort claim can vanish in as little as nine months. Therefore, whether or not a dependency lawyer is ethically or legally obligated to do so, the best practice is for the dependency lawyer to act immediately so that the child's legal rights are not lost.

Footnotes

[1] The focus of this article is tort claims against DHS and persons working under its auspices, but similar ethical, legal and practical considerations apply to tort claims arising in other contexts, such as motor vehicle collisions.

[2] Under Oregon RPC 8.6(b), a lawyer's adherence to a formal or informal written advisory opinion may be used to show a lawyer's "good faith effort to comply with [the RPCs]" and as "a basis for mitigation of any sanction that may be imposed." However, "our case law makes clear that, with regard to advice from the Bar that leads a lawyer to engage in a particular set of actions, that advice does not estop the Bar from subsequently bringing disciplinary charges if warranted by the resulting conduct. Neither can such advice be invoked as a defense to the charged violations." *In re Gatti*, 356 Or 32, 49–50, 333 P3d 994 (2014) (internal citations omitted).

[3] The dependency lawyer's mandatory child abuse reporting obligations are independent of any ethical obligations arising from knowledge of a child client's potential tort claim. See footnote 5.

[4] See February 29, 2008 correspondence from Ingrid Swenson, OPDS, to Mark Taleff.

[5] As addressed in Performance Standard 2 D. at page 13: "Under ORS 419B.010, lawyers are mandatory child-abuse reporters. However, a lawyer is not required to report if the information that forms the basis for the report is privileged. **** Under ORS 419B.010(1), 'An attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client.'" Statutory child-abuse reporting requirements are beyond the scope of this article.

[6] OPDS has a similar requirement, but has recognized inconsistent practices of court-appointed dependency lawyers. In an undated document on its website titled "Role Of Counsel For Children and Youth," OPDS states in pertinent part: "During the course of numerous site reviews over the last four years, OPDS has noticed significantly inconsistent practices regarding the role of appointed counsel for children in both dependency and delinquency cases. **** For example, some attorneys believe that it is not necessary to meet and confer with child clients. **** It is hoped that this statement will clarify what OPDS believes to be the role of counsel for children in dependency cases and youth in delinquency cases. The statement is being sent to all public defense providers."

[7] Whether or not a tort lawyer must be serving in a formal representative capacity in order to send a legally sufficient notice on behalf of a client under the OTCA, a tort claim notice nevertheless may be sufficient under the actual notice provisions of ORS 30.275(6).

[8] Civil liability exposure, and the possibility of a corresponding conflict of interest, are mentioned in Sylvia

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Steven's March 13, 2008 informal written advisory opinion: "If overseeing the child's placement into foster or other care is within the scope of the lawyer's representation, the lawyer could well be civilly liable to the child for failing to meet the standard of care with regard to that aspect of the representation. In that situation, if there is a significant risk that the lawyer's continued representation of the client will be materially limited by the lawyer's interest in avoiding civil liability, the lawyer may continue the representation only with the client's informed consent, confirmed in writing. RPC 1.7(a)(2) and (b). See also *In re Obert*, 336 Or 640 (2004). Because the client here is a child, the consent presumably will have to come from another source including, possibly, the court." *Id.* at p. 3.

Nathan v. Dept. of Human Services: Oregon Court of Appeals Articulates the Constitutional Standard for Warrantless Removals in Juvenile Dependency Cases

By Caitlin Mitchell, YRJ Attorney

The question of whether a child should be removed from her parents and placed in substitute care is one of the most critical junctures in a child welfare case. Studies have shown that removal from the home, even for a short period of time, is traumatic for children and leads to poor long-term outcomes.[1] The state action of separating families also implicates the constitutional rights of parents and children alike. Because of the high stakes involved, we rely on judicial authorization to determine whether and when removal is necessary—authorization that is obtained either through a warrant, or through an order issued following a shelter hearing.

There is a broad exception to this rule, however: Pursuant to ORS 419B.150, Department of Human Services case workers, police officers, and other Oregon state officials are permitted to take children into protective custody *without* judicial authorization, if the official believes that the "child's conditions or surroundings reasonably appear to be such as to jeopardize the child's welfare." While most states permit child welfare agencies to remove children without prior authorization in emergency situations, Oregon's statute is significantly more open-ended than its counterparts in other jurisdictions,[2] and appears to be inconsistent with the constitutional standard for warrantless removals articulated by the Ninth Circuit Court of Appeals.

The United States Supreme Court has held that, under the Fourteenth Amendment to the United States Constitution, parents have a fundamental right to the integrity of the family unit. *Stanley v. Illinois*, 405 US 645, 651, 92 S Ct 1208, 31 L Ed 2d 551 (1971). Courts have articulated the common sense proposition that this right to maintain family ties and attachments is something that children and parents share:

> "[The] right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the 'companionship, care, custody and management of his or her children,' and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association,' with the parent."

Duchesne v. Sugarman, 566 F2d 817, 825-26 (2d Cir 1977) (citing *Stanley v. Illinois*, 405 US at 651 and *Smith v. Organization of Foster Families for Equality and Reform*, 431 US 816, 844, 97 S Ct 2094, 53 L Ed 14 (1977)). For those reasons, the Ninth Circuit Court of Appeals has held that the removal of children from their parents must be authorized by

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a judicial warrant or order, unless exigent circumstances require otherwise: "Parents and children will not be separated by the state without due process of law *except in an emergency*." *Kirkpatrick v. Cty. of Washoe*, 843 F3d 784, 788 (9th Cir 2016) (emphasis added).

The Oregon Court of Appeals recently articulated the constitutional standard for removal in *Nathan v. Dept of Human Services*, 288 Or App 554 (2017), a case in which the child's adoptive parents filed for civil damages under 42 USC section 1983. The Court of Appeals emphasized that, under the Fourteenth Amendment, "parents and children will not be separated by the state without due process of law except in an emergency"; warrantless removal is only allowed "if the information [the official] possess[es] at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury." *Id.* (quoting *Wallis v. Spencer*, 202 F3d 1126, 1138 (9th Cir 1999)).

The Court of Appeals' decision in *Nathan* is an important reminder that ORS 419B.150 is out of sync with the constitutional standard for removal, as it appears to authorize warrantless removal under non-emergency circumstances.

Footnotes

[1] Church & Sankaran, 2016; Mitchell, 2016; Schneider et al., 2009; Doyle, 2007; Lawrence et al., 2006.

[2] Guggenheim and Sankaran, "Representing Parents in Child Welfare Cases," 34, American Bar Association 2012.

From Opinion to Action

Implementing New Guidance from Oregon Appellate Courts in Everyday Delinquency Practice

By Addie Smith, YRJ Attorney

Those who have been watching Oregon's appellate courts know that in the last four months three noteworthy juvenile delinquency appellate decisions have been handed down: *State v. K.A.M.*, 362 Or 805 (2017), *State v. B.H.C.*, 288 Or App 120 (2017), and *State v. R.W.G.*, 288 Or App 238 (2017). The issues in these cases include, respectively: the appropriate standard for a stop under Article I, section 9 of the Oregon Constitution; whether a judge can, as a condition of probation, authorize a juvenile department to detain a child at its discretion; and what type of closing argument is necessary to preserve for appeal the issue of insufficiency of evidence.

Each of these cases has practical implications for the juvenile trial practitioner in Oregon. Included below are brief discussions of each case followed by practice tips on how to integrate this new guidance from the appellate courts into trial-level case practice.

Is a reasonable child standard used to determine what constitutes a stop under Article I, section 9 of the Oregon Constitution?

In *K.A.M.*, the supreme court held that youth, who was 17 years and nine months old, was "stopped during the search of a drug house when a detective came upon youth and a friend in one of the bedrooms, told youth's friend to 'stay off the meth,' asked them their names, and then asked whether they had anything illegal on them." 361 Or at 807.

The test for whether state action constitutes a stop under Article I, section 9 of the Oregon Constitution is whether, under the totality of the circumstances, a reasonable person would have felt free to leave. *Id.* at 810. The Oregon Supreme Court found that youth would not have felt free to leave, because the officer

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entered the bedroom without explanation and "effectively accused" the woman in the room with youth of using methamphetamine. Together, these factors would lead a reasonable person "to conclude that he or she was not free to leave" until the detective finished his inquiry. *Id.* at 813.

The court left "for another day" the issue of whether the assessment under Article 9, section 1 is based on the reasonable *child* standard, as opposed to the reasonable *person* standard. Youth argued that under *J.D.B. v. North Carolina*, 564 US 261, the court was required to consider that he was not 18 years old and "thus was more impressionable than an adult." *Id.* at 809.

Ultimately, the Oregon Supreme Court found that that issue was not preserved; youth was nearly 18 years old; and under the totality of the circumstances (regardless of youth's age) youth would not have felt free to leave, and therefore was stopped for the purposes of Article I, section 9. *Id.* at 809-10.

Bottom line: The Oregon Supreme Court did not use a "reasonable child" standard to decide this case, but specifically stated "[w]e do *not* foreclose considering a youth's age as part of the reasonableness inquiry." 361 Or App at 809 (emphasis added).

Practice Tip:

- *So, did this change anything?* Because the Oregon Supreme Court did not reach the issue of whether the stop analysis requires courts to apply a reasonable *child* standard, the issue remains, in many juvenile delinquency cases, whether under the reasonable child and/or the reasonable (adult) person standard, the state action constituted (or did not constitute) a stop.
- For more ideas on how to best make or defend against this argument, re-read *J.D.B. v. North Carolina*, 564 US 261 (2011) (applying the reasonable child standard to determine whether a child is "in custody" and therefore protected by the Fifth Amendment) or contact YRJ to staff your case with one of our delinquency appellate attorneys.

Can the court authorize the juvenile department to detain a youth at its discretion?

In *B.H.C.*, the trial court judge authorized, as a condition of probation, "the use of 30 days of detention to be used by the Juvenile Department at their discretion. The Juvenile Department is authorized to utilize up to 8 days without further order of the court on a given violation if the youth admits to the Juvenile Department that the probation violation has occurred, and youth consents to the sanction." 288 Or App 123. This was a standard condition of probation in Union County

The Court of Appeals found that "[t]he text, context, and legislative history of ORS 419C.453 all indicate that the legislature intended to authorize the use of detention to punish a youth for a probation violation *only* in the manner provided for by that statute." 288 Or App at 133 (emphasis added). The Court of Appeals then concluded that the juvenile court may not order a condition of probation that "authorizes someone other than the juvenile court to decide whether detention should be used to punish a probation violation," or that "authorizes that decision [to] be made without a hearing before the court." *Id.* at 133-34.

Bottom Line: An order or judgment that purports to delegate the authority to detain a youth to the discretion of a juvenile court counselor is unlawful under ORS 419C.4534.

Practice Tip:

- *Do your local court forms include checkboxes or stock language that allows a judge to order the juvenile department to detain youth at its discretion?* If so, it may be advisable

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to discuss this with the presiding juvenile court judge and ask that the forms be changed to comply with the *B.H.C.* ruling. It may also be advisable to share this decision at any bench and bar, court improvement, or local practitioner meetings.

How is an argument about insufficiency of the evidence preserved?

In *R.W.G.*, trial counsel began her closing argument by stating "it's our position that this [alleged delinquent act] did not happen." Appellate counsel argued that this statement appropriately preserved the issue of whether the evidence was legally sufficient to prove that youth committed the alleged delinquent act. 288 Or App at 240.

The Court of Appeals found that "[t]here is an important distinction between (1) an argument that seeks to convince a trial court, sitting as fact finder, not to be *persuaded* by the evidence favoring the other party, and (2) an argument that seeks to convince the trial court that the evidence is *legally* insufficient to support a verdict for that other party." *R.W.G.*, 288 Or App at 240. The Court of Appeals concluded that in order to preserve an insufficiency of the evidence claim for an appeal a party must include, in her closing statement, an argument that the evidence presented was "legally insufficient to support a verdict for the other party." *Id.*

Bottom line: A closing argument in which the attorney advocates that the court not be persuaded by the state's evidence does not "serve to preserve an argument that the evidence is legally insufficient." 288 Or App at 240. The argument that the state's evidence was legally insufficient must be specifically preserved during the course of a closing argument.

Practice Tips:

• *So, now what?* For juvenile defenders it will be important to clarify on the record that you are not only asking that the judge not be persuaded by the state's evidence, but that you are also asking that the judge find that "there is no evidence to support a decision that the youth is under the jurisdiction of the court for [delinquent act]," or that "the evidence is legally insufficient to support a decision that the youth is under the jurisdiction of the court for [delinquent act]." Also, don't

hesitate to give the YRJ a call to discuss the best way to preserve your issue (whether it is sufficiency of the evidence or something else) with one of our appellate attorneys.

• *How much is too much and what is enough?* Remember, more recently, appellate courts have taken a "pragmatic" approach to preservation. It is important to ensure that "(1) the trial court had a fair chance to consider the issue and avoid error, and (2) the other parties had had a fair chance to meet the argument and make a record in response to it. *See, e.g., State v. Amaya*, 336 Or 616, 629, 89 P 3d 1163 (2004)."[1]

Footnote

[1] Justices Walters, Justice Landau, Chief Judge Hadlock, and Judge Armstrong, Preservation of Error and Plain Error Review (Written Materials) from Appellate Practice Section CLE: A Day with the Oregon Supreme Court and Oregon Court of Appeals 2 (May 19, 2017).

Juvenile Law Resource Center

JLRC Contact Information

Natalie O'Neil 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 Addie Smith, YRJ Attorney

Dept. of Human Services v. T.L., 287 Or App 753 (2017)

In *Dept. of Human Services v. T.L.*, 287 Or App 753 (2017), the Court of Appeals reversed and remanded the juvenile court's judgment changing the child's permanency plan from reunification to adoption.

In this case, the jurisdictional judgment expressly identified a single barrier to father parenting his daughter: substance abuse. The juvenile court found at the permanency hearing that "father appears to have firmly beaten his addiction" and noted that it had previously returned one of father's other children to his care. Nonetheless, the juvenile court concluded that father was estranged from his daughter and therefore had failed to make "sufficient progress," because (1) the estrangement was a consequence of father's substance abuse, and (2) ORS 419B.476(2)(a) requires the court to "consider the ward's health and safety the paramount concerns," and the child had threatened to run away if placed with father.

The court noted that a juvenile court may not rely on facts other than those "explicitly stated or fairly implied by the jurisdictional judgment" to change the permanency plan, and that facts are not "fairly implied" if a reasonable parent would not have had notice from the jurisdictional judgment as to what he must do in order to prevent the state from continuing jurisdiction over the child.

As to the first finding, the Court of Appeals held that estrangement was not "fairly implied" in the jurisdictional judgment (and indeed did not exist at the time that jurisdiction was taken) and that this finding was, therefore, improper. As to the second finding, the court held that ORS 419B.476(2)(a) does not authorize a juvenile court to change a child's plan because of risks posed by an unadjudicated condition or circumstance, and that this finding was, therefore, improper. The court concluded by suggesting that when there are concerns about an unadjudicated condition or circumstance, an amended petition "set[s] in motion the proper procedures for addressing" those concerns.

Dept. of Human Services v. C.E., 288 Or App 649 (2017)

In *Dept. of Human Services v. C.E.*, 288 Or App 649 (2017), the Court of Appeals affirmed the juvenile court's judgment changing the permanency plan away from reunification. Jurisdiction was established based on findings that father had substance abuse issues, domestic violence issues, and engaged in physical discipline that was a safety threat to his children.

At the permanency hearing, DHS presented evidence of father's recent prostitution charges and

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commentary about his ex-wife "selling herself" in their bed, as well as the children's extreme behavioral issues. The juvenile court changed the permanency plan, concluding that father had not made sufficient progress with regard to domestic violence because of concerns about prostitution. The court also concluded that father had not made sufficient progress with regard to discipline, because he was unwilling and unable to implement interventions suggested by service providers. Father argued that the juvenile court erred when it considered evidence extrinsic to the jurisdictional bases, namely evidence of his involvement in prostitution and children's special needs.

Because a permanency plan cannot change from reunification "based on conditions or circumstances not explicitly stated or fairly implied by the jurisdictional judgment," the court looks to the petition, the jurisdictional judgment, and any documentation attached to the judgement to determine whether a parent was on notice that his progress would be assessed based on particular facts. Here, the court reasoned, the contents of the initial case plan, filed concurrently with the combined jurisdictional and dispositional judgment, stated that father's issues included "controlling behavior" and "engaging in unhealthy relationships;" and that father would need to care for his children "to the level of effort necessary to manage" their "behavior." The court found that that language in the initial case plan had put father on notice that engaging in healthy relationships and learning the skills to care for his children's specific needs were necessary for reunification. Thus, evidence of prostitution and children's special needs was not extrinsic and the juvenile court correctly considered it at the permanency hearing.

***Dept. of Human Services v. H.F.E.*, 288 Or App 609 (2017)**

In *Dept. of Human Services v. H.F.E.*, 288 Or App 609 (2017), the Court of Appeals affirmed the juvenile court's judgment that continued child's placement with the Oregon Youth Authority and denied mother's request to place child in her custody.

The Court of Appeals found that the juvenile court's failure to make the findings required by ORS 419B.449(3) was not plain error because it was not "obvious" that the hearing was "of the sort required by ORS 419B.449." In so finding, the court pointed to the fact that the hearing was primarily held to address issues in the child's concurrent delinquency case and that nothing in the record showed that it was triggered by a request under ORS 419B.449 or the court's receipt of a report under ORS 419B.440 (which prompts a ORS 419B.449 hearing).

The court also found that there was evidence to support the juvenile court's placement decision and that the use of unsworn testimony to make that decision was not plain error because, "had the error been called to the court's attention, it could easily have avoided or corrected[.]"

***Dept. of Human Services v. J.W.T.*, 288 Or App 593 (2017)**

In *Dept. of Human Services v. J.W.T.*, 288 Or App 593 (2017), the Court of Appeals held that the appeal in this case was not moot, despite the fact that jurisdiction and wardship were dismissed during the pendency of the appeal. Turning to the merits, the Court of Appeals affirmed the juvenile court's judgment asserting jurisdiction over father's children, based in part on a determination that the juvenile court had correctly admitted the testimony of an expert witness, over the child's objection.

The Court of Appeals held that the appeal was not moot for two reasons. First, the judgment that

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father appealed held that father had exposed his children to domestic violence, and this finding would have an adverse effect on father's ability to obtaining legal custody of the children. Second, under OAR 413-010-0722, father would not be able to challenge the underlying founded dispositions in his case.

Turning to the merits, the Court of Appeals held that the trial court had correctly admitted the testimony of an expert, over the child's objection. Child argued that, under OEC 702, the trial court erred by admitting testimony of an expert witness because (1) the witness misstated certain facts, and (2) some of the witness' testimony was too tangential be helpful to the court. The Court of Appeals held that those inclusions were not plain error, because the trial court's decision was not ultimately based on any of the expert's misstatements; any misstatements went to the weight of the testimony, rather than its admissibility; and the expert's statements were not speculative.

Child also argued that the juvenile court's inclusion of testimony from a DHS caseworker regarding one of the children's disclosures of sexual abuse was hearsay and not admissible, because the DHS caseworker had erroneously been designated an expert. Without reaching the merits of this argument, the court found the admission of the evidence harmless.

Viewing the record as a whole, the Court of Appeals determined that the juvenile court properly asserted jurisdiction based on a current risk of domestic violence. Because at the time of the hearing the parents remained married, there was no evidence of dissolution proceedings, mother's residential instability contributed to the likelihood that they would reunite, and father retained a romantic interest in mother, the evidence was sufficient and the risk was not speculative.

***Dept. of Human Services v. J.C.*, 289 Or App 19 (2017)**

In *Dept. of Human Services v. J.C.*, 289 Or App 19 (2017) the Court of Appeals reversed and remanded the juvenile court's judgment, denying mother's motion to vacate a guardianship and terminate the court's wardship over her child. Jurisdiction had been established due to mother's substance abuse issues. The juvenile court subsequently changed the plan from reunification to guardianship with a relative, and in November 2013, pursuant to that permanency plan, a durable guardianship under ORS 419B.366 was established.

In April 2016 mother moved to vacate the guardianship and terminate the court's wardship. As the permanency plan had already been changed away from reunification, under *Dept. of Human Services v. T.L.*, 279 Or App 673 (2016), child and guardian opted, at the prompting of the trial court, to hold mother to her burden of proof. Mother put on evidence that she had ameliorated the bases for jurisdiction (she was clean and sober and a minimally adequate parent), that she had a plan for the transition of the child to her care that included contact with her current guardian, and that as to the best interest of the child, the family's therapist testified that losing contact with either her mother or guardian would be detrimental to the child. The juvenile court denied mother's motion because it was not in the child's best interest as required to set aside a guardianship under ORS 419B.368. Mother appealed, guardian appeared on appeal but the child did not.

Mother argued that, because she had proven that the factual bases for jurisdiction no longer existed, the court was required to terminate wardship and, consequently, the guardianship. The court found that by "the plain terms of ORS 419B.366, a guardianship established under that statute can continue only if the court continues to have jurisdiction over the child" and that "[i]n turn, a court is not permitted

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to retain jurisdiction over a child if the jurisdictional bases cease to exist." The court then held that the juvenile court erred when it failed to confront whether it could continue its jurisdiction over the child under the two-part test set out in *T.L.*: (1) Do the original bases for jurisdiction pose a current threat of harm? 2) If so, what is the likelihood that that harm will be realized? The court remanded so that the trial court could address those factors.

In re S.H., 289 Or App 88 (2017)

In *In re S.H.*, 289 Or App 88 (2017), the Court of Appeals reversed and remanded the order of the juvenile court denying mother's motion to set aside the guardianship over her three children.

Mother had previously appealed a permanency judgment changing the plan from reunification to adoption. While the appeal was pending, DHS filed petitions for the juvenile court to establish a guardianship under ORS 419B.366, with children's aunt and uncle. Mother filed a motion to stay in light of the pending appeal. The motion was denied. At the guardianship hearing mother stipulated to orders appointing aunt and uncle children's guardians with the understanding that she was appealing the permanency plan, but that if the guardianship was allowed to stand this placement was appropriate.

The Court of Appeals reversed the underlying permanency judgments. Mother, with the support of the state and fathers, moved the juvenile court to set aside the guardianship orders under ORS 419B.923. The court denied that motion, stating that mother's remedy was provided under ORS 419B.368(3) (which requires the court to determine before vacating a guardianship is doing so is in the child's best interest, that conditions and circumstance leading to the guardianship have been ameliorated, and the parent is able and willing to adequately care for the ward).

On appeal from the denial of the motion to set aside, the court found, because the permanency judgment was reversed by the Court of Appeals, there was no validly "approved plan of guardianship" to support the orders establishing children's guardianship as required of ORS 419B.366 (the statute providing authority for guardianships). The court then concluded that "under those circumstances, the [juvenile] court had no discretion to deny mother's motion to set aside the guardianship judgments" citing to *Dept. of Human Services v. M.H.*, 266 Or App 361 (2014) where the court held that when it invalidates an underlying permanency judgment the juvenile court is required to grant a motion under ORS 419B.923 to set aside any termination judgments entered pursuant to that permanency plan.

Oregon Supreme Court: Pending Dependency Opinions

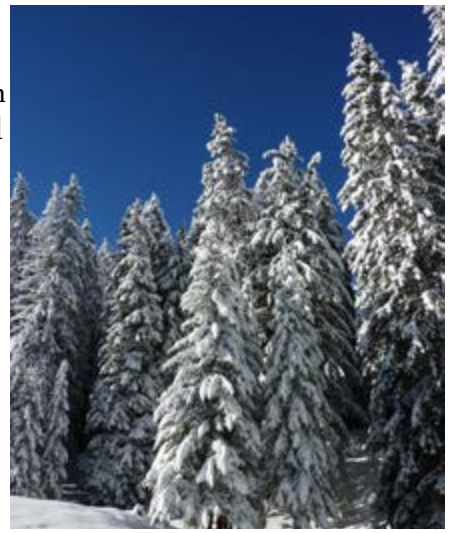
***Dept. of Human Services v. A.B.*, 283 Or App 907, 389 P3d 409, *rev allowed*, 361 Or 524 (2017)**

By Juvenile Appellate Section, Office of Public Defense Services

ORS 419B.100 authorizes the juvenile court to assert dependency jurisdiction over a child requiring the court's protection. If the court concludes that jurisdiction is necessary to protect the child, the court then makes the child a ward of the court and enters a jurisdictional judgment memorializing those rulings. The establishment of a wardship marks a profound interference into the parent-child relationship in that it transfers virtually all parental decision-making authority from the child's parents to the court. The jurisdictional judgment is appealable.

The court's jurisdiction and wardship is intended to be temporary, with the goal for the parents to correct or mitigate the adjudicated bases for jurisdiction in a timely manner to allow the child to return home. Consequently, while a parent's appeal from the jurisdictional judgment is pending, the juvenile court may determine that the child no longer requires the court's protection and enter an order terminating the wardship. But, in ruling to terminate the wardship, the court does not reconsider its decision to assert jurisdiction in the first instance. Instead, the court's subsequent decision to terminate the wardship is based on current circumstances and, thus, does not vacate the original jurisdictional judgment or in any manner abridge its historical determination that the child earlier needed the court's protection.

In this case, the juvenile court asserted jurisdiction over mother's special needs child based on its conclusions that mother had abused and neglected him. Mother appealed from the court's jurisdictional judgment. While her appeal was pending in the Oregon Court of Appeals, she complied with the juvenile court's and the department's expectations and directives as part of the ongoing dependency case. As a result of both her conformance and her agreement to continue her compliance in the future, the juvenile court determined that her child no longer needed the court's protection and so terminated the wardship.



For appeals in that procedural posture, the Court of Appeals' rule is that "a juvenile court's termination of jurisdiction and wardship ordinarily renders the parent's appeal of the underlying jurisdictional judgment moot." Accordingly, the Court of Appeals will dismiss the parent's appeal unless the parent proves through affidavits and other extra-record material that the appeal is not moot because the original jurisdictional judgment gives rise to instant and particularized adverse collateral consequences. The Court of Appeals determined that mother had not done so in this case and dismissed her appeal as moot. The Oregon Supreme Court allowed mother's petition for review.

On review, mother argued that the Court of Appeals has inverted the mootness analysis in these types of cases and that, absent extraordinary circumstances, a parent's appeal from a jurisdictional judgment is not rendered moot by a subsequent decision to terminate the wardship. In doing so, mother analogized a parent's challenge to the lawfulness of the juvenile court's assertion of dependency jurisdiction to a defendant's challenge to the denial of a motion for a judgment of acquittal in a criminal case. For the same reasons that a criminal defendant's release from custody does not render an appeal from the underlying conviction presumptively moot, a juvenile court's order terminating its wardship does not render a parent's appeal from the jurisdictional judgment presumptively moot. In both cases, the appellate court's reversal would vindicate the appellant and safeguard the appellant from potential collateral consequences attendant to

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the judgment on appeal.

In the event the Supreme Court rejected her categorical rule, mother argued in the alternative that she had affirmatively demonstrated that an appellate decision on the merits would have a practical effect on or concerning her rights and, thus, was not moot.

The Department of Human Services (the department) disagreed with the proposition that a jurisdictional judgment was analogous to a judgment of conviction in a criminal case because, in the department's view, criminal convictions (even low-level misdemeanors) are inherently stigmatizing and jurisdictional judgments are not. To the extent a particular jurisdictional judgment is stigmatizing, the department reasoned, any potential negative consequences are mitigated by virtue of the confidentiality of juvenile cases.

This case was submitted to the Supreme Court after oral argument on November 7, 2017.

***Dept. of Human Services v. A.B.B.,* 285 Or App 409, 396 P3d 306, *rev allowed*, 361 Or 885, 403 P3d 767 (2017),** consolidated with ***Dept. of Human Services v. T.J.D.J.,* 285 Or App 503, 393 P3d 1207, *rev allowed,* 361 Or 885, 403 P3d 762 (2017).**

By Addie Smith, YRJ Attorney

In this case, governed by the Indian Child Welfare Act (ICWA), children had been returned to mother but remained in DHS custody. They were then removed from her 18 months later after she relapsed. Six weeks after the removal proceeding, the court held a review hearing where children (and one of the fathers) requested that the court find that active efforts to reunify the family had not been made. Over the children's request, the court entered a judgment continuing DHS custody and children's foster care placement and finding that active efforts had been made. Children appealed.

The Court of Appeals held that an erroneous finding of active efforts did not "adversely affect" children's rights, as required for appeal under its ORS 419A.200 jurisprudence, and dismissed the appeal. Children petitioned the Oregon Supreme Court for review, which was granted.

Children argue that two statutes govern appealability—ORS 419A.200 and ORS 419A.205. Children further argue that the rules of statutory construction, including the context of general civil appellate statutes, and the legislative history establish that ORS 419A.200 governs "who" can appeal, and ORS 419A.205 governs "which judgments" can be appealed. There is no dispute that children, as parties to the case under ORS 419B.875, can appeal. The question that remains is whether the judgment was appealable under ORS 419A.205(1).

ORS 419B.205(1)(d) states that any "final order adversely affecting the rights or duties of a party and made in a proceeding after a judgment including, but not limited to, a final order under ORS 419B.449" can be appealed. The judgment that children appealed was issued pursuant to an ORS 419B.449 hearing. It was, therefore, appealable under the plain language of ORS 419A.205(1)(d), because "including, but not limited to" is a signal that the list to follow is an inventory of examples of the general term preceding the phrase.

Children also argued that under either ORS 419A.200 or ORS 419A.205 the plain language of "adversely affected" means "producing an effect in opposition to" or "acting against the interests." In this case, the judgment produced an effect in opposition to children's state and federal rights to active efforts, their constitutional right to family unity, and numerous other statutory rights. Those statutory rights include: the right to an investigation of services that could allow their return home, the right to the maintenance of a reunification permanency plan, the right to forestall filing of a TPR petition, and the ability to contest a TPR or guardianship placement on the basis that active efforts had not been consistently provided.

Finally, children argued that the court also erred under ICWA. ICWA creates a dependency process similar to, but distinct from, state

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law that must be followed when a case involves an Indian child. It requires that children be removed and placed on an emergency basis pursuant to the requirements of a 25 USC section 1922 emergency removal proceeding, and that the only way for a state court to continue the foster care placement after the emergency has subsided is to initiate a foster care placement proceeding (which includes numerous procedural protections). In this case, having removed the children on an emergency basis at the hearing six weeks prior, the court was required to provide the protections of an ICWA foster care placement proceeding at the review hearing if it intended to continue children's foster care placement. Because the court failed to find the requisite protections had been provided when it made an erroneously active efforts finding and failed to take the testimony of a qualified expert witness, 25 USC section 1914 permits the children to "petition" the Supreme Court to "invalidate" their foster care placement action. Any barriers to that action (such as the rules of preservation or appealability under ORS 419A.200 or 419A.205), children argue, are preempted by this federal law.

***Dept. of Human Services v. S.J.M.*, 283 Or App 367, 388 P3d 417, *rev allowed*, 361 Or 350, 393 P3d 1175 (2017) (*S.J.M.* I)**

***Dept. of Human Services v. S.J.M.*, 283 Or App 592, 388 P3d 1199, *rev allowed,* 361 Or 350, 393 P3d 1175 (2017) (*S.J.M.* II)**

By Juvenile Appellate Section, Office of Public Defense Services

In *S.J.M.* I, the Department of Human Services (the department) became involved with mother and father after a report that father had physically abused A's half-brother L, mother's son from a previous relationship. The department removed L, placed him with his aunt, and petitioned the juvenile court to assert dependency jurisdiction as a result of those circumstances. Thereafter, mother gave birth to A. The department filed a petition requesting that the court assert jurisdiction, but allowed A to remain in mother's care. And the juvenile court asserted jurisdiction over A on the grounds that: (1) mother lacked parenting skills to safely parent A; (2) mother had failed to protect A's half-sibling, L, from further abuse, despite being aware that father had physically abused him; (3) father had physically abused L; (4) father lacked the parenting skills to safely parent A; and (5) father suffered from a mental-health condition that interfered with his ability to parent.

The court then ordered mother and father to engage in services that included parenting training and counseling and to obtain psychological evaluations. Sometime thereafter, mother violated the terms of the safety plan and the department removed A from mother's care.

At the subsequent permanency hearing, the department moved the court to change A's permanency plan from reunification to adoption. Parents objected, arguing that they had made progress toward ameliorating the bases for the court's jurisdiction. In addition, parents requested that the court continue the plan as reunification because A could return to their care within a reasonable period of time with further services. The juvenile court disagreed with parents; it determined that, despite the department's reasonable efforts, parents had failed to make sufficient progress and that there did not exist a compelling reason to forgo implementing a permanency plan of adoption. The court entered a judgment changing A's permanency plan to adoption. Parents appealed.

On appeal, parents renewed their arguments. The Court of Appeals rejected parents' arguments that the juvenile court erred in concluding that their progress had been insufficient to address the bases for jurisdiction to allow A to safely return home.

The Court of Appeals then addressed mother's argument that the juvenile court erred in changing A's permanency plan to adoption, because there were compelling reasons that filing a petition for termination of parental rights would not be in A's best interest. The Court of Appeals held that proof of the existence or nonexistence of a "compelling reason" to forgo a plan of adoption is a necessary predicate to the court's authority to change a child's permanency plan to adoption:

> "We turn, finally, to mother's contention that the juvenile court erred in changing the permanency plan for A to adoption, because there were compelling reasons that filing a petition for termination of parental rights would not be

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in A's best interests. *See* ORS 419B.498(2)(b). As noted earlier, when a court determines at a permanency hearing that the case plan should be adoption, ORS 419B.476(5)(d) requires the court to enter an order that includes 'the court's determination of whether one of the circumstances in ORS 419B.498(2) is applicable.'

"*****

"Mother's contention relies on the premise that ORS 419B.476(5)(d) and ORS 419B.498(2)(b) operate together to limit the juvenile court's authority to change a permanency plan to adoption. *** And, according to mother, even though the permanency judgment in her case reflects the juvenile court's ruling as to 'whether one of the circumstances in ORS 419B.498(2) [was] applicable'—and states its determination that none were—the record does not support that determination.

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"Although the juvenile court explicitly determined that A could not be returned within a reasonable period of time—and concomitantly, that there was no compelling reason for DHS to defer filing for termination—*there is insufficient evidence in the record to support those rulings.* For example, there is nothing to suggest that A's anticipated stay in substitute care would be unacceptably long given her age, the time that she already spent in foster care, or her unique permanency needs. ***"

S.J.M. I, 283 Or App at 382-93 (emphasis added). The court reiterated and underscored that holding in the companion case, *S.J.M.* II, and reversed the permanency judgment at issue in A's half-brother's case for similar reasons. *See* 283 Or App at 592-93, 600 ("*** [T]he record is devoid of evidence connecting [the child's] circumstances or needs to a desirable permanency timeline or to any projected timeline for mother to become a safe resource for [the child].").

The department petitioned for review in both cases, and the Supreme Court allowed review. On review, the department framed the issue as follows: At a permanency hearing at which a party has proposed changing a child's permanency plan from reunification to adoption, does the party advocating for the change of plan to adoption have the burden to disprove the existence of a compelling reason.

The department argued that the Court of Appeals was incorrect because it had to prove only that, despite its reasonable efforts toward reunification, the parent's progress was insufficient to allow the child to return home. In essence, the department asserted that the permanency statute and its reference to ORS 419B.498(2) create a rebuttable evidentiary presumption that adoption is in a child's best interest if the child cannot return to the parent by the time of the permanency hearing.

Mother argued that contrary to the department's contention that the burden to produce evidence about whether a compelling reason exists shifts to the party opposing adoption, the text, context, and legislative history of ORS 419B.476(5) demonstrate that it is for the court to determine which permanency plan is the most appropriate for the particular child at issue. The permanency hearing statute requires that the court engage in a detailed factual and legal analysis in which it must determine whether the department efforts have been reasonable, parents' progress has been insufficient, and there does not exist a compelling reason to forgo implementing a plan of adoption. For the court to engage in this analysis, ORS 419B.476(5) and ORS 419B.498(2) provide that the burden remains on the department to provide a case plan that accurately details the circumstances of the child and parent for the court to make its permanency determinations.

***Dept. of Human Services v. T.J.D.J.*, 285 Or App 503, 393 P3d 1207, *rev allowed,* 361 Or 885, 403 P3d 762 (2017),** consolidated with ***Dept. of Human Services v. A.B.B.,* 285 Or App 409, 396 P3d 306, *rev allowed*, 361 Or 885, 403 P3d 767 (2017)**

By Juvenile Appellate Section, Office of Public Defense Services

The juvenile court entered a judgment after a review hearing at which father and his Indian child moved the juvenile court to rule that the department's efforts to reunify them did not qualify as active. The juvenile court declined to do so and,

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instead, ruled to the contrary, that is, that the department's reunification efforts were active. It then entered review judgments memorializing that ruling, among others.

Father appealed from those judgments, pursuant, in part, to ORS 419A.200(1), which confers standing to appeal a juvenile court judgment on any person "whose rights or duties are adversely affected" by the judgment. Relying on its holdings in *State ex rel Juv. Dept. v. Vockrodt*, 147 Or App 4, 934 P2d 620 (1997) and *Dept. of Human Services v. A.D.D.B.*, 278 Or App 503, 375 P3d 575, *rev den*, 360 Or 237 (2016), the Court of Appeals dismissed father's appeal. In the Court of Appeals' view, the review judgments did not "adversely affect" father's "rights or duties" because they "merely continued the status quo of the wardship" and did "not deny a request for affirmative relief."

Father petitioned the Oregon Supreme Court to review the Court of Appeals' decision dismissing his appeal, and the court allowed review. On review, father argues that juvenile dependency jurisdiction affects a significant but temporary interference into the constitutionally-protected parent-child relationship and, a parent is adversely affected by any judgment in which the juvenile court continues that interference. Second, father argues that a parent is adversely affected by a judgment in which the court rules that the department's reunification efforts have been legally sufficient, i.e., "active" or "reasonable." Father argues that the court's determination that the department's reunification efforts have been legally sufficient diminishes the possibility that the department will modify its provision of services in any meaningful way and serves as a necessary predicate to heightened state interference through a change of permanency plan away from reunification and institution of termination of parental rights proceedings.

New OPDS Executive Director

Lane Borg has been selected as the new Executive Director of OPDS, effective January 2, 2018.

Lane brings more than 30 years of experience in public defense. He has worked with the legislature, served on the Criminal Justice Task Force, and has been a member of the policy team for Justice Reinvestment. Lane has a passion for public defense, and is inspired by the opportunity and challenge of leading OPDS. Please join with Commission members in welcoming him as the next OPDS Executive Director.