Juvenile Law Reader

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"Families should plan in advance for what will happen to the children, in case of parental unavailability."

Advising Undocumented Parent Clients

By Christa Obold Eshleman, YRJ Attorney

Families with non-U.S. citizen parents or children face unique hazards which could lead to life upheaval and separation of family members. In a change from the Obama administration, under the Trump administration, Immigration and Customs Enforcement (ICE) priorities for enforcement actions now encompass anyone with any allegation of criminal activity, as well as any undocumented person.[1] Attorneys representing immigrants should consider the intersection of juvenile cases with immigration issues.[2] One concrete way in which attorneys can aid immigrant clients is to advise their clients about ways to be prepared for the possibility of ICE contact, detention, deportation, and/or separation of parents and children.

1. Prevention

There are steps that immigrants can take to avoid ICE detention, which are detailed in publications of various organizations.[3] For example, to the extent possible, non-U.S. citizens should stay away from people who have criminal charges or convictions, to avoid being in the vicinity when ICE may come looking for another person. Second, attorneys should consider the threat of ICE enforcement actions at courthouses, and advise clients accordingly.

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Motions to waive appearance, or for telephonic testimony, may be helpful. Third, immigrants should carry, on their person, evidence of having been in the United States for more than two years, to avoid being subjected to expedited expulsion procedures without due process. Fourth, other than providing their name, people should exercise their right to remain silent if approached by ICE. Fifth, if actually detained, parents who are caregivers for children should inform ICE officers that the parents need to care for their children, because discretionary release for that purpose is an option. If the parent will not be released, they should ask to make a phone call to make arrangements for the children.

2. Emergency Family Plans

Families should plan in advance for what will happen to the children, in case of parental unavailability. Under Oregon case law, the existence of a safe family plan will contravene an attempt by DHS to place the children in foster care. This is so, because for dependency jurisdiction to attach, the totality of the circumstances, including the existence of a caregiver designated by the parents, must demonstrate a risk of harm to the child. *Dept. of Human Services v. A.B.*, 271 Or App 354, 350 P3d 558 (2015). A family plan may be safe even if the designated caregivers cannot be certified as foster parents under DHS regulations.[4] *Dept. of Human Services v. A.L.*, 268 Or App 391, 341 P3d 174 (2015). Even after jurisdiction is established, or the permanent plan is changed away from reunification, a proposed family plan may form the basis for a motion to dismiss, if its implementation would signify: "there is no reasonable likelihood of harm to the child's welfare in the absence of dependency jurisdiction." *Dept. of Human Services v. T.L.*, 279 Or App 673, 685, 379 P3d 741 (2016).

Under ORS 109.056, parents may execute a power of attorney to designate a caregiver for their children in case of parental unavailability. The delegation of parental rights can commence upon the occurrence of a specified event, such as detention of a parent.[5] The Oregon Law Center and Latino Network have created an Oregon-specific guide for immigrant family preparedness planning, which includes sample forms.[6] The guide also includes tips on other documents that families should collect, such as birth certificates and passports. Writing down important information and phone numbers in a central location, as well as memorizing important phone numbers, are other steps that families can take.

Reviewing this information with immigrant clients and assisting parents with drafting powers of attorney for their children are ways that attorneys can help families be prepared for the possibility of ICE detention and prevent the specter of children being placed in stranger foster care.

For more information or questions about immigrant family preparedness planning, contact Christa Obold Eshleman.

[1] See, e.g., "New Trump Deportation Rules Allow Far More Expulsions," New York Times

[2] The American Bar Association has produced a helpful "Quick Guide to Federal Child Welfare and Immigration Law"

[3] See, for example, materials from Immigrant Defense Project; "Know Your Rights –Your Rights in Oregon," ACLU Oregon

[4] An undocumented person may be certified as a DHS foster parent if he or she is a relative of the child. OAR 413-200-0306.

[5] ORS 127.005(2).

[6] "Protect Your Family: Information for Families in Oregon to Plan for Time of Unavailability," Oregon Law Center and Latino Network

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Queries regarding contributed articles can be addressed to the editorial board.

Legislature Passes New Policies Amid Budget Challenges

By Mark McKechnie, YRJ Executive Director

In spite of a daunting budget shortfall, the 2017 Oregon Legislature has advanced substantial policy changes related to youth and juvenile law. This summary is not intended to be exhaustive but to highlight some of the more substantial pieces of legislation that will be of interest to attorneys who represent children, youth and parents and to other juvenile court stakeholders. Most of the bills listed below have passed the Oregon Legislature or are making substantial progress toward passage. The futures of bills that carry a substantial fiscal cost to the state general fund are difficult to predict at this time. The Legislature is currently considering multiple revenue options to narrow the budget shortfall, but it is unclear which will be enacted or how much of the shortfall will be offset with new revenue. See the accompanying article from OPDS Executive Director Nancy Cozine for more information on the public defense budget.

More information on each bill, including the status and history, can be found on the Oregon Legislative Information System (OLIS) website.

Child Welfare

SB 20 updates references to the federal education law, the Every Student Succeeds Act (ESSA). The bill includes changes to ORS 339.133, which stipulate that an individual between the ages of four and 21 and who is placed in foster care is considered a resident of the student's school district of origin and should continue attending the school and district of origin unless the juvenile court finds that it is not in the best interests of the individual. School district of origin is defined as the district where the individual was a resident before being placed into foster care or before the foster placement was changed. Likewise, school of origin is defined as the school the individual attended before being placed into foster care or before the foster placement of the individual changed. The bill contains other provisions related to the implementation of ESSA, as well. The Senate Committee on Education passed the bill out of committee in April and it was referred to Ways and Means.

SB 2216 Enrolled was signed by Governor Brown and becomes effective January 1, 2018. The bill was created and promoted by the Oregon Foster Youth Connection. SB 2216 requires

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the Oregon Department of Human Services to adopt rules outlining the rights of siblings in Oregon's foster care system. Rights include the right to be placed together whenever it is safe and appropriate to do so; to maintain contact with siblings both in and out of substitute care, including electronic and telephone contact; to be provided transportation and the opportunity to visit siblings in person when they are placed apart; and to ensure contact after permanency, including guardianship and adoption is achieved. The bill requires DHS to provide written notice to children in substitute care of these sibling rights.

HB 2345 A was drafted to reflect the recommendations of the Governor's Taskforce on Legal Representation in Childhood Dependency, which was created by SB 222 in 2015. The bill passed the House Judiciary Committee on a unanimous vote on March 14th and was referred to the Joint Committee on Ways and Means. Action on the bill is unlikely to occur until the Legislature addresses the budget shortfall estimated to be $1.4 billion, as of this writing. Passage would require substantial increases in funding for parent and child representation and for representation of the Department of Human Services by the Department of Justice. According to the Judiciary Staff Measure Summary: "House Bill 2345-A is the recommendation of the Task Force. The measure requires the Department of Justice (DOJ) to represent DHS in all parts of a dependency proceeding and to do so for a flat rate. Additionally, the measure creates performance standards and caseload caps for attorneys and requires a coordinated data program to determine effective programs and problem areas. HB 2345-A expands the Parent-Child Representation Program, currently in operation in three counties, making it statewide by January 1, 2022. DHS, DOJ, and Office of Public Defender Services (OPDS) must report back to the Legislature on the implementation and outcomes of the programs." The report and other information from the Taskforce can be found online.

SB 830 would modify the definition of "current caretaker" for the purposes of identifying prospective adoptive parents or determining when DHS has moved or proposes moving a child from a placement with a current caretaker. It changes the definition in ORS 419A.004 from a substitute care provider who has "cared for the ward, or at least one sibling of the ward, for at least the immediately prior 12 consecutive months…" to a substitute care provider who has provided care for 12 cumulative months. The bill passed both the Senate and House unanimously.

SB 131 Enrolled was introduced at the request of the Attorney General. It amends ORS 45.400 to allow any party to make a motion for remote location testimony (replacing the old term, telephone testimony) in civil matters and matters under ORS 419B, juvenile dependency cases. The bill indicates that the court may grant the motion upon a showing of good cause and describes a number of factors to establish good cause. SB 131 EN was passed by the Oregon Senate and House and now awaits the Governor's signature.

SB 719 A creates a process for obtaining extreme risk protection order prohibiting a person from possessing deadly weapon when court finds that person presents risk in near future, including imminent risk of suicide, or causing injury to another person. The bill permits service upon attorney or party in juvenile dependency proceeding by electronic mail or electronic service through court's electronic filing system. The bill is currently in the House Rules Committee after passing the Oregon Senate on a mostly party-line vote of 17-11.

Juvenile Delinquency/ Criminal Law

SB 82 was introduced at the request of the Governor's Office on behalf of the Oregon Youth Authority.

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The bill would prohibit the use of isolation (also referred to as solitary confinement) as a form of punishment. Previous policies on the use of isolation have been unclear and led to confusion. The bill clarifies and places current OYA policies in statute. The bill has passed both houses unanimously and awaits the Governor's signature. Once signed, the new law will have an effective date of January 1, 2018.

SB 846 prohibits the use of physical restraints in juvenile court proceedings on a youth, youth offender or young person, "unless the court finds that the use of restraints is necessary due to an immediate and serious risk of dangerous or disruptive behavior and there are no less restrictive alternatives that will alleviate the immediate and serious risk of dangerous or disruptive behavior." The bill also prohibits the use of physical restraints during transport of "youth, youth offender, young person, ward or child by the Department of Human Services, the Oregon Health Authority or an agent of the department or authority," unless "restraints are necessary due to an immediate and serious risk of dangerous or disruptive behavior and there are no less restrictive alternatives that will alleviate the immediate and serious risk of dangerous or disruptive behavior." If restraints are to be used, only staff who have received appropriate training may implement them. A plan and justification for the use of restraints by DHS or OHA or their agents must be documented, and restraints may not be used as punishment or for the convenience of the DHS, OHA or contracted staff. The bill passed the Senate and House unanimously and now awaits the Governor's signature.

SB 2251 Enrolled was signed by Governor Brown and will become effective January 1, 2018. The new law states that "under no circumstances may a person under 18 years of age be incarcerated in a Department of Corrections institution."

HB 2579 Enrolled "Authorizes Oregon Youth Authority to provide reentry support and services, for specified period of time, to person who completes Department of Corrections incarceration sentence while in physical custody of authority." Governor Brown signed the new law, which will be effective January 1, 2018.

SB 2616 B was drafted by the

Oregon Criminal Defense Lawyers Association to address the issue of juvenile defendants being encouraged or allowed in some instances to waive their right to counsel. The bill removes language indicating that the youth or family request that counsel be appointed. Instead, the new language says that the court "shall appoint counsel to represent the youth at all stages of the proceeding if the offense alleged in the petition is classified as a crime. HB 2616-B, Section 1, Subsection (1)(a)(A). The bill was amended in the House and again in the Senate. The most recent amendments by the Senate Committee on Judiciary prohibit the waiver of counsel by youth who are under the age of 16. For youth who are 16 or older and subject to a petition in the juvenile court under ORS 419C.005, the court may not accept a waiver of counsel unless the youth has met with and been advised regarding the right to counsel by counsel and the written waiver request must be signed by the youth and the youth's counsel. Finally, the court would be required to hold a hearing on the record where the youth's counsel appears. The court may not accept the waiver except when the court "finds that the wavier was knowingly,

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intelligently and voluntarily made and not unduly influenced by the interests of others, including the interest of the youth's parents or guardians." HB 2616-B, Section 1, Subsection (2)(a)(D). These provisions do not apply to a youth entering a formal accountability agreement under ORS 419C.230. This bill is awaiting a third reading (floor vote) in the Oregon Senate at the time of this writing. HB 2616 A previously passed the Oregon House on a unanimous vote, but the House will need to vote to concur with the B-Engrossed version after the Senate vote in order for the bill to be sent to the Governor for her signature into law.

HB 3242 B would require custodial interview conducted by a peace officer in a law enforcement facility to be electronically recorded if the interview is conducted with a person under 18 years of age in connection with an investigation or an allegation that the person committed an offense that would constitute a felony. The B-Engrossed version was passed by the Senate Judiciary Committee on May 30th. The bill will be scheduled for a vote on the Senate floor and, if passed, it will be sent back to the House for concurrence with the amendments adopted by the Senate.

Education

SB 263 B was drafted by Disability Rights Oregon to limit practices of school districts that have required them to participate in abbreviated school day programs. The bill specifies a process for districts to follow when considering an abbreviated school day program and requires review of the program each school term. The bill specifies that students have a presumptive right to receive the same number of hours of instruction or educational services as other students who are in the same grade within the same school. The bill was amended and passed out of the House Education Committee on May 26th. It will receive a vote on the House floor and then, if passed, return to the Senate for a vote to concur with the House amended version of the bill.

Public Defense/Other

HB 2561 A "Directs Public Defense Services Commission to adopt policies providing for compensation of appointed counsel at rate commensurate with compensation of equivalent position within office of district attorney." The bill was passed unanimously by the House Committee on Judiciary on March 20th and referred to the Joint Committee on Ways and Means. According to the fiscal analysis OPDS had not yet estimated the cost to achieve parity for non-attorney staff working for public defense contractors. The cost of parity for attorneys was estimated to be $19.8M for the 2017-19 biennium and $26.4M for the 2019-21 biennium.

OPDS Budget Update

By Nancy Cozine, Executive Director, Office of Public Defense Services

On April 27, OPDS participated in a hearing before the Joint Ways and Means Subcommittee on Public Safety. This hearing focused on the need for additional funding for representation in juvenile dependency cases, for both the agency and parents and children. You can watch the hearing online. While it was encouraging to see this important topic once again before the legislature, funding discussions remain challenging.

The Ways and Means Co-Chairs released their target reduction lists

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to balance the budget within the existing level of resources. The judicial branch, including the PDSC budget, can be found on page 11.

The adjustments to the PDSC budget include both good news, and challenges. The good news is that the Co-Chairs applied an increase to reflect caseload growth over the last several years. This was a positive and critical adjustment. The challenge is that the total amount available for contracting after cuts will leave the agency with a budget gap at the end of the biennium. And if the budget is approved as currently proposed, it is not likely that the PDSC would be in a position to approve any increases in case rates. Rather, the Commission will need to spend time discussing how to manage the budget shortfall should caseload filings and other expenditures continue at current levels.

The May Revenue Forecast, shed additional light on the state budget, and while things look a bit improved, it was not enough to radically change our current posture. Please know that we are continuing to work with the legislature and others to ensure sufficient funding for the next biennium. With input from our agency, OCDLA, courts, and others, legislators understand and appreciate the critical importance of your work. The challenge now is translating that into the preservation of resources, if not real advances, for public defense funding, even in a time of budget stress.

If you have an interest in talking to your legislator, or if you are interested in presenting information to the PDSC, please contact Nancy Cozine, OPDS Executive Director, or Mark McKechnie, YRJ Executive Director.

A View from the Bench

Thoughts at the End of the Journey

By Lisa Fithian-Barrett, retired Multnomah County Juvenile Court Referree

How long have you been a judge on the juvenile law bench?

I was a Juvenile Court Hearings Referee in Multnomah County from December 1997 to May 2017.

What has surprised you most since joining the juvenile bench?

First was the very pleasant discovery that I had joined a dedicated and committed judiciary in our county and across the state. The judges who choose this work have a clear commitment to the core values and principles of juvenile court. There is a profound dedication to work consistently toward improving practice and being part of a system that serves children and families well

Second was how much I had to learn to be an effective judicial officer,

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both about the law and about how to manage the courtroom, the docket and the volume of work in a manner that provided attorneys and litigants with a fair and humane forum.

If you could change one thing, what would it be?

Court-appointed attorneys would have smaller caseloads to allow them to have the time this work needs.

What practices do you observe (and encourage others to emulate) from the most effective lawyers?

Be honest and trustworthy with everyone. Your reputation will follow you throughout your career and judges learn quickly who they can trust and who they cannot. Judges share that information with their colleagues. You do yourself and your current and future clients a great favor by being above reproach.

Treat ***all*** people with respect and dignity. Being a parent or child in this system is terrifying and confusing. Working as a professional in this system is emotionally draining for all, including judges, caseworkers, and other attorneys. The vast majority of those who choose to work in this arena do so because they care about people and want to be part of positive change. A zealous advocate can also be calm and kind.

Learn about and ***practice*** trauma informed skills. Be aware of the room and your client's history and don't be shy about taking steps to make the courthouse and courtroom experience as safe as possible.

Be a strong advocate. Know more about your case than anyone else. Know what your client wants and work toward that goal both in and out of the courtroom. In the juvenile arena, often the most important work of a lawyer happens outside the courthouse.

Learn about and address Implicit Bias. Learn to recognize your own prejudices and expectations and strive to limit their impact on your interactions with others.

Educate yourself in the non-legal areas critical to juvenile court work such as child development, tools used by evaluators, and evidence based treatment modalities.

It has been an honor and a privilege to have a career doing work I love that makes a difference in people's lives. I am so lucky to have been surrounded by professionals who care deeply about the work, about the families we serve and about improving this critically important system.

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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 Amy S. Miller, Deputy General Counsel, Office of Public Defense Services

Dept. of Human Services v. M.S., 284 Or App 604 (2017)

On March 29, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. M. S.*, 284 Or App 604 (2017), in which the Court affirmed the juvenile court's permanency judgment continuing the plan of reunification. At the time of the permanency hearing, mother had made significant progress toward being able to safely parent her child M. However, mother's relationships with DHS were extremely volatile. For example, during two supervised visits, the police had to be called because mother refused to release M to DHS staff. One incident led to her arrest for assault.

At the time of the permanency hearing, mother was not yet fully in control of her emotional condition which prevented a safe return. However, if mother's positive progress continued, M may have been able to return home in as little as six months. The record did not contain information on how the waiting may have affected M.

The permanency judgment indicated that DHS had made reasonable efforts, but at the time of the hearing mother had not made sufficient progress for M to be returned to her care. The court found that further efforts will make it possible for M to be safely returned within a reasonable time.

On appeal, M argues legal insufficiency because, absent evidence that would permit the court to find M could be returned within a reasonable time, the court was required to change to plan away from reunification.

Mother, relying on ORS 419B.476 and the holding in S. J. M., argued that the court had to be able to find affirmatively that there were "'no compelling reasons not to file a termination petition,' and, in particular, that M could not be returned to mother 'within a reasonable time' given M's specific needs."

The Court of Appeals agreed with mother. The proponent of the change in permanency plan must prove that there are no compelling reasons to forego the filing of the TPR. In this case, M needed to prove that M could not be returned to mother within a reasonable time, given M's individual needs and circumstances.

Dept. of Human Services v. R. J. J., 284 Or App 615 (2017)

On March 29, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. R. J. J.*, 284 Or App 615 (2017), in which the Court affirmed the juvenile court's judgment terminating father's parental rights. On appeal, father challenged the court's determination that the TPR was in the best interests of the children because the children's adoptive parents will likely sever contact between the children and

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their grandmother which will be detrimental to the children's well-being.

The court, on *de novo* review, affirmed the judgment and found termination to be in the children's best interests.

Dept. of Human Services v. C. P., 285 Or App 371 (2017)

On May 10, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. C. P.*, 285 Or App 371 (2017), in which the Court affirmed the juvenile court's TPR judgment as to father's daughter and son. Father raises two issues on appeal: 1. That the juvenile court erred as excluding as irrelevant, evidence father offered of the children's paternal grandfather as a potential guardian and 2. That DHS failed to prove every element required for termination.

Father's argument, that grandfather should be the guardian, was raised at the September 2014 PH in which the court changed the plan to adoption. In February 2015, father moved to dismiss jurisdiction, asserting that grandfather's ability to care for the children eliminated the need for juvenile court jurisdiction. The juvenile court denied this motion based on testimony from a therapist who had assessed grandfather and from the DHS worker about grandfather's inability to set healthy boundaries with the parents.

At the TPR trial, the juvenile court excluded parts of the record from the motion to dismiss proceedings. Father argued that evidence of grandfather's fitness as a guardian was relevant to the best interests finding required to prove TPR and should be admitted. The juvenile court permitted father to make an offer of proof.

The Court of Appeals found the evidence presented by father regarding grandfather as a potential guardian relevant to whether TPR is in the child's best interests. "As a general matter, when a parent opposes termination on the ground that it is not in a child's best interest

because severing the parent's legal connection to the child will be detrimental to the child, evidence of an alternative to termination that will preserve that legal connection is relevant to whether termination is in the child's best interest." Therefore, the juvenile court erred in excluding the evidence. The Court notes that the evidence about grandfather is relevant to the best interest determination because it suggests a way for the children to maintain a legal connection to father, but that the juvenile court was not assessing the evidence for the purpose of making a placement decision.

However, on *de novo* review, the Court determined DHS established the requirements for terminating father's parental rights on the basis of unfitness, ORS 419B.504. After reviewing the record, the Court found father's long-standing and intractable personality disorder supported a high probability that father will not be able to safety parent the children. He had not

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completed services and DHS estimated it would take 9 months to complete them after he is released from custody, 11 additional months after the TPR trial. The children spent most of their lives in care, are not strongly bonded to father, are adoptable, the adoptive resource will adopt both children, and both children have an immediate need for permanency. Grandfather's difficulty in maintaining healthy boundaries indicates it is unlikely he would be able to protect the children from the harms posed by father.

Dept. of Human Services v. A. B. B., 285 Or App 409 (2017)

On May 10, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. A. B. B.*, 285 Or App 409 (2017) in which the Court dismissed the appeal because the judgment at issue was not appealable. In this ICWA case, children argued that the juvenile court erred when it determined, at a review hearing, that DHS made active efforts (see ORS 419B.340(1))to reunify the family. Children argue that the evidence is legally insufficient to support an active efforts finding.

The issue in this case is whether the review judgment is appealable. A review judgment or order issued under ORS 419B.449 is appealable if the "rights or duties" of the appealing party are "adversely affected." A judgment that "merely continues the status quo" of the wardship and does not deny a request for affirmative relief raised by the appealing party at the review hearing does not adversely affect the rights of duties of the appealing party.

In this case, the review judgments maintain the existing conditions of the wardship. The children did not make any motions for affirmative relief that were denied at the hearing. Although the children expressed concern at DHS lack of efforts and argued for increased efforts, the children did not request that the court order particular services or actions by DHS. In addition, the court was sympathetic and, although it didn't order any particular actions, it stated that it expected DHS to engage in more extensive planning with mother and explore how to facilitate contact with father.

Under these circumstances, the judgments do not adversely affect the rights or duties of the children. Therefore, the review judgments at issue are not appealable.

Note: The Court cites to *State ex rel. Juv. Dept. v. Vockrodt*, 147 Or App 4 (1997) as illustrative of whether a review hearing judgment is not appealable. In that case, the court concluded that a mother was not adversely affected by a review judgment where (1) the judgment merely had the effect of continuing the conditions of the wardship; and (2) the juvenile court had granted all the affirmative relief that the mother had requested at the review hearing (i.e., a hearing on DHS's reasonable efforts to reunify the family and an order to continue the child in therapy). Although the review judgment contained a determination that "reasonable efforts had been made to eliminate the need for continued removal of the child from mother's home," and the mother contested that determination, the Court rejected the mother's contention that the judgment sufficiently affected her rights to permit an appeal under ORS 419A.200(1).

Dept. of Human Services v. M. K., 285 Or App 448 (2017)

On May 10, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. M. K.*, 285 Or App 448 (2017) in which the Court affirmed the juvenile court's permanency judgment that changed the plan for mother's children from reunification to guardianship with paternal grandparents (PGPs).

This case is interesting because the children refused to visit or have contact with mother and mother argued DHS failed to make reasonable efforts to facilitate therapeutic visitation.

The relevant facts are as follows: mother and father are the married

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parents of E and J, ages 16 and 10 at the time of the PH. The parents have a substantial and severe DV history with arguments occurring daily, often in the childrens' presence and including physical and verbal altercations. Mother had filed numerous restraining orders over the years but "invariably allowed father to return to the home." Jurisdiction was established on July 20, 2015 based on domestic violence. The children were placed with PGPs where they wish to remain.

Shortly after jurisdiction, the caseworker provided supervised visits. However, in August 2015 the worker stopped the visits because the children had immense anger toward mother and refused to visit her. There have been no visits since August 2015.

Mother engaged in services and, at the time of the PH, had completed substance abuse treatment, DV classes, and attempted to divorce father. She requested therapeutic visits with the children, but they refused. At the permanency hearing, both children testified they were afraid to return to mother, they didn't believe mother's report that she separated from father, and that, even if they met mother in a therapeutic setting, mother would seek to manipulate J as she had done in the past by promising him things if he returned to her.

The proponent of the change in the permanency plan must prove by a preponderance of the evidence "that (1) [DHS] made reasonable efforts to make it possible for the child to be reunified with his or her parent and (2) notwithstanding those efforts, the parent's progress was insufficient to make reunification possible." In this case, there is uncontroverted evidence that DHS provided DV classes, substance abuse assessments, MH counseling for the children, visitation until the children refused. DHS repeatedly attempted to establish therapeutic visitation with mother, but the children always adamantly refused to meet with mother. At the PH, parties discussed two possible options for therapeutic visitation: force the children to engage or give mother the opportunity to write letters which, according to the children's MH therapist, could eventually lead to the children agreeing to visit.

The Court found sufficient evidence in the record to permit a finding that the children would suffer harm if they were forced into visiting mother and the juvenile court did not error in considering this harm. Mother offered no evidence countering the children's expressed fears or DHS perspective that forced visits would be harmful. It was not unreasonable for DHS to decline to pursue the letter-writing option because the children were so strongly opposed to contact, the children's therapist testified that the letter writing process could take months, and the court found mother still minimizing the effects of DV on the children. In summary, DHS made reasonable efforts to facilitate reunification.

Mother argued 1. she made sufficient progress and 2. that the court should not rely on the children's alienation from mother as one of the grounds for changing the plan because it was outside of the jurisdictional bases. The Court found mother's second argument unpreserved. The Court found that even though mother had completed the required programs and shown progress, she had not made sufficient progress so that the children can safely return home.

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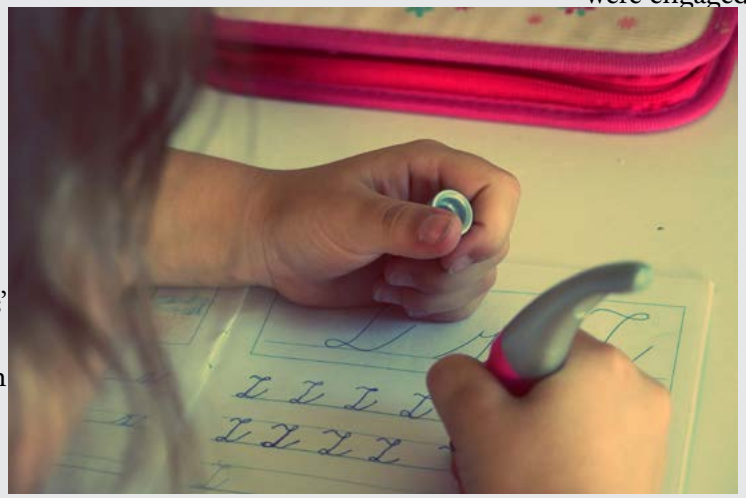
Mother continued to minimize the impact of DV on her children, there was some evidence father was living with mother again, and mother had a long history of allowing father back into the home even with restraining orders in place.

Dept. of Human Services v. M. D. P., 285 Or App 707 (2017)

On May 24, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. M. D. P.*, 285 Or App 707 (2017) in which the Court affirmed the juvenile court's permanency judgment that changed the plan for parents' two children, R and M, from reunification to guardianship with paternal grandmother.

Jurisdiction was established in October 2014 based on parents' admissions to a chaotic lifestyle and residential instability which impacted their ability to safely parent, that father had exposed the children to "domestic discord" and that mother was subjected to "domestic discord" by father and unable or unwilling to protect the children. Parents were ordered to complete DV counseling, complete a psychological evaluation and follow recommendations, complete parent training, and maintain stable and safe housing.

Between October 2014 and summer 2015, parents moved between residences and made little progress in services. Mother's psychological evaluation recommended DV services and substance abuse treatment. In June 2015, mother gave birth to J and moved into inpatient substance abuse treatment. Father's psychological evaluation recommended substance abuse treatment and batterer's intervention. In June 2015, after a criminal conviction for assault 2, father began a residential substance abuse program.



At the October 2015 permanency hearing, the court continued the permanency plan of reunification and allowed parents 120 days to engage in necessary services.

At the March 2016 permanency hearing, parents had completed or were engaged in all court-ordered services. They were employed, moving into a house, and had been co-parenting baby J for two months. The other children, R and M, had spent the past 18 months in grandmother's care. Both entered care with developmental issues; both had made significant progress in grandmother's care and were developing normally. The court changed the plan to guardianship.

On appeal, parents argued that the preponderance of the evidence does not support the juvenile court's conclusion that their progress was insufficient which is required to change the permanency plan away from reunification under ORS 419B.476(2)(a). The Court of Appeals acknowledged the progress parents made and that, at the time of the permanency hearing, parents had engaged in all required services. However, "what matters under ORS 419B.476(2)(a) is whether the parent has made sufficient progress, as a result of those services or otherwise, to overcome the concerns that gave rise to juvenile court jurisdiction." See *Dept. of Human Services v. S. J. M.*, 283 Or App 367 (2017).

In this case, there is evidence in the record that supports the court's conclusion that parents had not made sufficient progress for reunification because they had not

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ameliorated the jurisdictional bases of domestic discord and residential instability. Mother had not completed substance abuse treatment and left residential treatment against clinical recommendations. Although at the time of the hearing she had been sober for 6 months, she had not completed substance abuse treatment which was, according to her psychological evaluation "essential" to safely parenting the children. In addition, mother's psychological evaluation and substance abuse treatment provider noted mother's lack of honesty, lack of self-awareness, and lack of interest or ability to make lasting change. Father also failed to comply with recommendations from his psychological evaluation; he had yet to complete batters intervention or substance abuse treatment.

Mother also argued that the fact that parents were caring for baby J was dispositive and therefore the other children could be safely returned. The Court disagreed, holding that the "sufficient progress" inquiry is focused particularly on the ward at issue, with the ward's health and safety as the paramount concerns.

In summary, there is sufficient evidence in the record to support the juvenile court's conclusion that the parents had not made sufficient progress for reunification at the time of the permanency hearing. "[G]iven the family's history and the assessments of those who observed and evaluated them, additional stability and improvements were necessary for reunification."

Dept. of Human Services v. V. I. M., 285 Or App 744 (2017)

This *per curiam* opinion affirms juvenile court jurisdiction but removes one allegation from the judgment. DHS conceded that the evidence presented at trial was legally insufficient to prove that mother had a substance abuse problem that posed a current risk of harm to her children at the time of the dependency trial and the court affirmed the juvenile court's assertion of jurisdiction based on mother's mental health.

Dept. of Human Services v. J. R. D., 286 Or App 55 (2017)

On June 7, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. J. R. D.*, 286 Or App 55 (2017) in which the Court reversed and remanded the juvenile court's jurisdictional judgment. This case addresses the question of scope of a judicial rehearing of a referee's decision under ORS 419A.150(3).

In this case, mother failed to appear at a pretrial conference under ORS 419B.815(2)(b) after being properly summoned. The juvenile court referee permitted DHS to proceed with a *prima facie* case, mother was defaulted, and jurisdiction was established as to mother's child D. Note that, according to mother's attorney, mother was on her way to court, had run out of gas, and was available to appear by phone. The juvenile court referee refused to allow telephonic appearance.

Mother sought a rehearing under ORS 419A.150 and argued that she was entitled to a full jurisdictional hearing before a judge, including the right to present evidence. The state argued that mother, by her nonappearance, had waived her right to present evidence. The juvenile court judge agreed with the state, found that "there was no reasonable excuse for Mother's absence," and concluded that because mother did not appear in person she lost the right to present evidence. Furthermore, the juvenile court judge determined that, even if mother had not waived her right to present evidence, the court had discretion to allow the presentation of additional evidence and, in this case, declined to exercise that discretion.

The Court of Appeals agreed with mother. A rehearing of a referee's decision is a new proceeding, as if it had been originally commenced before the juvenile court. A party to a rehearing of a referee's decision may present additional evidence during that rehearing before the juvenile court. In this case, the juvenile court erred in denying mother the opportunity to present additional evidence.

Juvenile Injustice: Charging Youth as Adults is Ineffective, Biased, and Harmful

"As a society... do we want young people to be left to a specific, certain fate in prison... or do we want a process of education, a process of healing, a process of insight to support them to understand how they got there, a process of growth? What do we want?"

-Malachi, charged as an adult at 15

[This is the Executive Summary from a February 2017 report on Juvenile Injustice. It is reprinted here with the permission of Human Impact Partners in Oakland, California. The full report can be read here.]

In all 50 states, youth under age 18 can be tried in adult criminal court through various types of juvenile transfer laws. In California, youth as young as 14 can be tried as adults at the discretion of a juvenile court judge. When young people are transferred out of the juvenile system, they are more likely to be convicted and typically receive harsher sentences than youth who remain in juvenile court charged with similar crimes.[1] [2]

This practice undermines the purpose of the juvenile court system, pursues punishment rather than rehabilitation, and conflicts with what we know from developmental science. Furthermore, laws that allow youth to be tried as adults reflect and reinforce the racial inequities that characterize the justice system in United States.

In this report, we review the process that unfolds when a young person is tried as an adult in California and evaluate the health and equity impacts of charging youth as adults. Our findings indicate that:

The Justice System is Biased Against Youth of Color

Youth of color are overrepresented at every stage of the juvenile court system.[3] Rampant racial inequities are evident in the way youth of color are disciplined in school,[4] policed and arrested, detained, sentenced, and incarcerated.[5] These inequities persist even after controlling for variables like offense severity and prior criminal record.[6] Research shows that youth of color receive harsher sentences than White youth charged with similar offenses.[7]

Youth of color are more likely to be tried as adults than White youth, even when being charged with similar crimes. In California in 2015, 88% of juveniles tried as adults were youth of color.[8]

"Tough on Crime" Laws Criminalize Youth and are Ineffective

Research shows that "tough on crime" policy shifts during the 1980s and 1990s have negatively impacted youth, families, and communities of color. These laws were fueled by high-profile criminal cases involving youth, sensationalized coverage of system-involved youth by the media, and crusading politicians who warned that juvenile "super-

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Homies 4 Justice interns rally with the Justice Reinvestment Coalition for the creation of 1,400 county jobs for individuals involved in the criminal justice system. The Alameda County Board of Supervisors successfully passed a resolution in June 2016 to create the Alameda County Re-Entry Hiring Program. Homies 4 Justice is a 9-week summer internship program run by Communities United for Restorative Youth Justice, to train young adults (ages 14 to 20) to become community leaders and agents of change.

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predators" posed a significant threat to public safety. The general sentiment– not based on research or data– across the political spectrum was that treatment approaches and rehabilitation attempts did not work.

However, time has shown that harshly punishing youth by trying them in the adult system has failed as an effective deterrent. Several large-scale studies have found higher recidivism rates among juveniles tried and sentenced in adult court than among youth charged with similar offenses in juvenile court.[2, 9]

The Adult Court System Ignores the Environmental Factors that Affect Adolescent Behavior

When someone is charged in adult court, they are either found guilty or innocent– and they receive a punishment if they are found guilty. By contrast, the juvenile court system (at least in theory) is meant to focus on reasons for the youth's behavior rather than just their guilt or innocence. A juvenile court judge is responsible for reviewing that youth's case with their family, community, and future development in mind.

The following environmental factors affect youth behavior and are more likely to be ignored in the adult court system:

Community disinvestment affects youth development and behavior. In low-income communities and communities of color, there are clear indicators of disinvestment rooted in historical trends and contemporary policies– including poor quality housing, under-resourced schools, scarce and low-paying jobs, and omnipresent police. These policies and their consequences marginalize communities, and the lack of opportunity influences young peoples' physical health and outlook on life. Growing up in these neighborhoods puts children at risk for behavior considered "deviant" and antisocial.

Poverty creates stress. Poverty prevents families from providing material needs and often reduces parents' presence in their children's lives. This can lead youth to take on a parental role in the family. This role switching, known as parentification, can impact a young person's life outlook and sense of self. It can force them to make hard choices and even engage in compromising behaviors. Youth that grow up in affluent households are protected from having to make these hard

choices– and from being criminalized for their behavior when they act out.

Childhood traumas can have long-term effects. Research shows that there is a strong link between childhood trauma (for example physical or emotional abuse or witnessing violence in the community) and a variety of physical and mental health outcomes, including disruptive behavior, antisocial behavior, psychosis, and mood disorders. System-involved youth are likely to have lived through Adverse Childhood Experiences (ACEs).

Youth do not make decisions like adults. It is common and normal for youth to engage in risky behaviors that may negatively impact their health. In fact, our brains reward us for these risky behaviors when we are adolescents. Research shows that this phenomenon has an important developmental function: these early risk-taking experiences prepare us for adulthood, leading us to be more willing to take on important new challenges later in life, such as starting a job or leaving home. Charging youth as adults directly ignores this science of adolescent development.

Incarceration Undermines Youth Health and Well-Being

When we lock up young people, they are more likely to be exposed to

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extreme violence, fall prey to abuse, and suffer from illness. High rates of violence, unchecked gang activity, and overcrowding persist in Division of Juvenile Justice facilities where many youth sentenced as adults start their incarceration. Fights frequently erupt in facility dayrooms and school areas.

Even if young people manage to escape direct physical abuse in juvenile or adult facilities, exposure and proximity to violence can be harmful in and of itself. Research suggests that exposure to violence can lead to issues with development in youth.

Families of Incarcerated Youth Experience Negative Impacts

Parents and family members of system-involved youth are systematically excluded from the adult court process– they are not given meaningful opportunities to help determine what happens to their children. The inability to participate fully while their loved one is going through the system can be mentally and emotionally harmful to families.

In addition, contact with the justice system often entails exorbitant expenses that can worsen family poverty. The economic burden of legal fees, court costs, restitution payments, and visitation expenses can have disastrous and long-lasting financial consequences for families.

Solutions Exist

1. Eliminate the practice of charging youth as adults under any circumstance.

2. Require that system professionals undergo additional hands-on training and coaching by formerly incarcerated people and local community organizations on topics such as youth development, community history, trauma, implicit bias, institutional and structural racism, and the structural causes of crime.

3. Implement community-oriented and problem-oriented policing according to promising practices, with primary aims of improving community safety and reducing contact between youth and law enforcement.

4. Implement school and community-based restorative and transformative justice approaches focused on healing as an alternative to the court system for most youth.

5. Research and pilot viable alternatives to sentencing for youth who commit serious crimes.

6. Ensure support for families as they navigate the justice system– especially investing in peer mentoring strategies that link families and formerly incarcerated people.

7. Increase inter-agency collaboration.

8. Increase funding for quality and culturally appropriate wrap-around services for youth and their families, including programs that connect youth to traditional practices of community building and healing.

9. Change school funding and education policy to provide quality and culturally appropriate education in all communities and ensure equitable distribution of educational resources and opportunities.

10. Implement justice reinvestment strategies and other forms of investment in low-income communities of color to expand opportunity for youth of color and their families.

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Making Sense of the New Indian Child Welfare Act Administrative Policies

By Addie Smith, YRJ Attorney

In the wake of cases like *Adoptive Couple v. Baby Girl*, 570 US __, 133 S Ct 2552, 186 L Ed 2d 729 (2013) and *Oglala Sioux Tribe v. Van Hunnik*, Order, No 12-5020-JLV (March 30, 3015, D.S.D) there has been a nationwide effort to clarify how the Indian Child Welfare Act (ICWA), a law which has not been amended or updated since 1978, applies in present day child custody proceedings.

ICWA provides "minimum federal standards" for child custody cases involving Indian Children. 25 USC § 1902. Beyond the text of the statute itself, courts rely on two additional authorities in their interpretation and application of the federal statute. The first source of authority are federal regulations, issued by the Bureau of Indian Affairs pursuant to 25 USC § 1952. These regulations went through the full notice and comment process, and are, considered to be a binding interpretation of the federal law. 81 Fed. Reg. 38778, 39782. The second source of authority are the Bureau of Indian Affairs Guidelines, which are treated by courts as persuasive authority. See *Quinn v. Walters,* 320 Or. 233, 262, 881 P.2d 795 (1994) (finding that, although 1979 BIA Guidelines are not binding on the court, they provide essential guidance to a state's proper application of ICWA).

Where Oregon law and policy provide *higher* standards or greater protections, Oregon law and policy apply in lieu of federal ICWA law and policy. 25 USC § 1922. Like federal regulations, state rules (OARs) are binding. See *Harsh Inv. Corp. v. State by and through State Housing Div.,* 88 Or App 151; 744 P.2d 588 (1987) (when an agency has the authority to adopt rules and does so "the rule [becomes] as binding as if the legislature itself had acted"). Other state guidance, such as the DHS procedural manual and the OJD active efforts guide cited above, may provide the court with persuasive authority or may be binding. See ORS 183.310 (defining rule as "any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency.") but see *Procedure Manual, Chapter 1 Section 1, Purpose 1 (2008)* ("This manual provides *guidance* for all [DHS] child welfare professionals. *** IT does not supersede federal or state administrative rules or laws." (emphasis added)); Oregon Judicial Department, *Active Efforts Principles and Expectations* 1 ("The following *guidelines* are offered for use by courts, DHS staff and local CRBs in evaluating whether active efforts have been made in ICWA cases" (emphasis added)).

Because both federal and state rulemaking processes are iterative by law, the result has been a confusing series of new guidance and rules. The charts below provide an overview of federal and state administrative policies related to ICWA along with the effective dates of each policy.

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Federal Policy Changes	Effective as of:	No longer effective as of:
1979 Guidelines *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 FR 67584 (1979).	November 26, 1979	February 25, 2015
2015 Guidelines *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 FR 10146 (2015).	February 25, 2015	December 12, 2016
2016 Regulations *Indian Child Welfare Act Proceedings*, 25 CFR 38778 (2016).	December 12, 2016	Still in effect
2016 Guidelines Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act (2016)*	December 12, 2016	Still in effect
For more information on the federal ICWA administrative policy, visit the Bureau of Indian Affairs website.		
State Policy Changes	**Effective as of:**	**No longer effective as of:**
Active Efforts Judicial Guide *Oregon Judicial Department, Active Efforts Principles and Expectations* (2010)	Revised July 7, 2010	No further revisions
DHS ICWA Related Procedures Department of Human Services, *Child Welfare Procedure Manual, Chapter 1 Section 8, Indian Child Welfare and Working with Indian Families* (2008)	June 4, 2007	Still in effect
ICWA Related OARs Placement of Indian Children OAR 413-115-0000 *et seq.*	December 29, 1995 and January 1, 2001 depending on the rule (see document).	February 7, 2017
2017 Temporary ICWA Related OARs *Application of the Indian Child Welfare Act (ICWA)*, OAR 413-115-0000 *et seq.*	February 7, 2017	August 5, 2017*
*DHS has provided public notice that it seeks to make permanent the 2017 Temporary ICWA Related OARs. **Public Hearing:** June 21, 2017 **Deadline for Public Comment:** June 28, 2017, 5pm **DHS Contact:** Amie Fender		
For more information on state ICWA related administrative policy visit the Department of Human Service Office of Tribal Affairs website.		

Save the Date:

NCJFCJ 80th Annual Conference
July 16-19, 2017
Grand Hyatt / Washington D.C.
Online Information

NACC 40th National Child Welfare, Juvenile & Family Law Conference
August 9-12, 2017
The Roosevelt / New Orleans, Louisiana
Online Information

2017 Juvenile Defender Leadership Summit
October 20-22, 2017
Albuquerque, New Mexico
Online Information