Juvenile Law Reader

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"Rather than pinning down terms such as 'maturity' and 'sophistication' to a particular substantive definition, the court has articulated a standard and a process for making a determination of waiver that will be responsive to the science as it evolves." - Page 1

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Oregon Supreme Court Addresses Criteria for Waiving 12, 13, and 14-year-old children into Adult Criminal Court

By Caitlin Mitchell, YRJ Attorney

On May 26, 2016, the Oregon Supreme Court held that ORS 419C.349—the statute that dictates when 12, 13, and 14-year-old children may be tried in adult criminal court—requires the juvenile court to make a finding that the youth in question "possesses sufficient adult-like intellectual, social, and emotional capabilities to have an adult-like understanding of the significance of his or her conduct, including its wrongfulness and its consequences for * * * the victim * * *." *State v. J.C.N.-V.*, 359 Or 559, 597, __ P3d __ (2016). In a unanimous decision by Justice Martha L. Walters, the court reversed the decision of the Court of Appeals and remanded to the trial court for further consideration under the proper standard. *Id.* at 600.

Youth was 13 years old when he was alleged to have committed aggravated murder; he was subsequently waived into adult criminal court, where he was convicted and sentenced to life in prison with the possibility of parole

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in 30 years. The question at the heart of youth's case was the meaning of ORS 419C.349(3), which provides that a person under the age of 15 may be waived into adult court only if, at the time of the conduct, he or she "was of sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved." That statutory provision constitutes a threshold requirement for waiver, after which the juvenile court must weigh various discretionary factors to determine whether waiver is in the best interests of the youth and of society. ORS 419C.349(4).

Based in large part on evidence suggesting that the youth was of average sophistication and maturity for his age, the trial court determined that the threshold provision had been satisfied. The Court of Appeals affirmed, holding that the "sophistication and maturity" provision requires only an awareness of the physical nature and criminality of the conduct at issue—a test that generally has been considered sufficient to establish criminal capacity in the context of the insanity defense. The court determined that the legislature's intention in

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imposing a "sophistication and maturity" threshold was to exclude children who are significantly less sophisticated and mature than their peers, such as those who are developmentally delayed or extremely emotionally disturbed.

In rejecting the analysis of the Court of Appeals, the Oregon Supreme Court explained that the plain meaning of the terms "sophistication and maturity," "appreciate," and "nature and quality" all suggest a deeper and more complex understanding of the act in question, beyond the physical nature of an act and its wrongfulness. *Id.* at 576-78. As the court noted, that basic ability is not particular to adults, or even to older adolescents: "At a very young age, a child can know that she is holding a flame to a building, that the flame will burn the building and that burning a building is wrong." *Id.* at 578. The court determined that the meaning of the words "sophistication and maturity" also was informed by their use by the United States Supreme Court in *Kent v. United States*, 383 US 541 (1966). *Id.* at 581-85. In that case, the Court suggested that the decision to waive a juvenile into adult criminal court implicates the juvenile's due process rights, and that a juvenile court thus must conduct a full investigation of the youth's culpability and interests

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Youth, Rights & Justice

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before authorizing a waiver. The Court appended to its decision a set of criteria—which included "sophistication and maturity"—that juvenile courts in the District of Columbia had used in deciding whether or not waiver was permissible.

In analyzing the meaning of "sophistication and maturity" in ORS 419C.349(3), the Oregon Supreme Court thus relied on the meaning of that criterion in the *Kent* decision. It determined that the Supreme Court had contemplated that the juvenile court conduct "a fairly open and expansive examination of the mental, social and emotional development of the youth in question[,]" including a consideration of the "full panoply of a youth's capabilities that indicate 'maturity' and 'sophistication.'" *Id.* at 583. Those capabilities "would be the capabilities of normal adults that evidence heightened worldliness and discernment." They would include "adult-like traits that relate to traditional notions of blameworthiness beyond those necessary to establish criminal responsibility, such as capacities for premeditation and planning, impulse control, independent judgment, and a more hardened personality and outlook." *Id.* at 584. In sum: "[I]t is logical to understand the phrase as requiring an inquiry into the extent to which a juvenile's mental, social and emotional developmental capabilities indicate adult-like capabilities indicative of blameworthiness[,]" with regard to a youth's ability to appreciate the nature and quality of his or her conduct.

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The Oregon Supreme Court determined that it was not permitted to decide, as a matter of law, the capabilities that distinguish a typical adult from a typical youth. The statute instead requires the juvenile court to determine, as a factual matter, both the relevant adult capabilities and whether a youth possesses those capabilities to a sufficient extent. *Id.* at 589. Trial courts, the court explained, must answer those questions based both on the court's "own knowledge and assessment," and based on expert testimony and other evidence that the parties might offer.

J.C.N.-V. sets forth a more rigorous standard and a higher bar to waiver than what was previously articulated.

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For that reason and others, it resonates with the recent line of United States Supreme Court cases holding that adolescents are different from adults, and thus must be treated differently in terms of criminal culpability. *Miller v. Alabama*, 132 S Ct 2455 (2012) (mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates Eighth Amendment); *Graham v. Florida*, 130 S Ct 2011 (2010) (Eighth Amendment prohibits imposition of life without parole sentence on juvenile offender who did not commit homicide; state must give juvenile nonhomicide offender sentenced to life without parole a meaningful opportunity to obtain release); *Roper v. Simmons*, 125 S Ct 1183 (2005) (death penalty violates Eighth Amendment when applied to children). *J.C.N.-V.* feels similarly resonant with *J.D.B. v. North Carolina*, in which the Supreme Court held that the age of a child subjected to police questioning is relevant to the analysis of whether that child was in custody for the purposes of *Miranda* warnings. *J.D.B. v. North Carolina*, 131 S Ct 2394 (2011). As in those U.S. Supreme Court cases, the court in *J.C.N.-V.* suggests that it is appropriate for courts to rely on evidence from the fields of psychology, neuroscience, and social science to provide information as to how adolescents should be treated under the law. And as in those cases, the court in *J.C.V.-V.* gives courts—and by extension, practitioners—permission to consider the experiential knowledge that comes from knowing children in our own lives, and to apply that knowledge to the treatment of the children with whom we work. *J.D.B.*, 131 S Ct at 2403 ("A child's age * * * generates commonsense conclusions about behavior and perception. * * * Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.").

But while the U.S. Supreme Court in the cases cited above directly uses both scientific evidence and common-sense knowledge to reach specific legal conclusions about the differences between children and adults, *J.C.N.-V.* holds that it is the responsibility of trial courts to consider and apply such evidence in deciding whether waiver is appropriate in individual cases. The court thus invites practitioners to present expert testimony, likely in the fields of psychology, adolescent development, and neurobiology, to guide the court. Rather than pinning down terms such as "maturity" and "sophistication" to a particular substantive definition, the court has articulated a standard and a process for making a determination of waiver that will be responsive to the science as it evolves. It is up to practitioners to take up the invitation and bring expert testimony into the courtroom that will enable the trial court to make a just decision.●

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Update: S.B. 222 Task Force on Legal Representation in Childhood Dependency

By Adrian Smith, Task Force on Dependency Representation Administrator, Office of Governor Kate Brown

During 2015, the Legislature passed S.B. 222 creating the Task Force on Legal Representation in Childhood Dependency. The task force's Problem Statement illuminates the issues that led to the passage of S.B. 222:

> *Varied interpretations of Oregon's unlawful practice of law statute have led to increased requirements and, in turn, increased costs for DHS representation in some counties and increased workloads for DOJ attorneys. At the same time, inadequate financial support and difficult decisions about public safety have caused some DAs to withdraw*

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from their role representing the State in initial dependency proceedings. In response to these developments, the Legislature has recognized these challenges and mitigated the risk of unlawful practice of law by DHS case workers through Oregon Laws 2014 Chapter 106 (H.B. 4156). Also recognizing the importance of meaningful parent representation, the Legislature has supported pilot projects allowing OPDS to implement national best practices in two Oregon counties. The sunset of H.B. 4156 and the recent start of the pilot projects are the impetus for this task force. The task force is charged to assess the current state of legal representation in Juvenile Court dependency cases and recommend a model for legal representation that will improve outcomes for and fulfill the State's responsibility to provide justice for Oregon children and families.
(A copy of the problem statement is available at: http://www.oregon.gov/gov/policy/Pages/LRCD.aspx)

The 18-member task force held its first meeting in October 2015. The task force is comprised of 18 members, they include:

Legislative Representatives	Individuals appointed by the Chief Justice	Individuals appointed by the Governor	Individuals appointed by the Attorney General
Senator Jeff Kruse *(District 1)*	Justice David Brewer *(Oregon Supreme Court)*, who was elected chair	Clyde Saiki *(Director, Department of Human Services)*	Fred Boss *(Deputy Attorney General, Department of Justice)*
Senator Floyd Prozanski *(District 4)*	Judge Daniel Murphy *(Presiding Judge Linn County)*	Mimi Laver *(Director, Legal Education, American Bar Association Center on Children and the Law)*	Joanne Southey *(Attorney in Charge, Child Advocacy Section, Department of Justice)*
Representative Duane Stark *(District 4)*	Judge Patricia Crain, *(Jackson County)*	District Attorney Rod Underhill *(Multnomah County)*	
Representative Kathleen Taylor *(District 41)*	Lynn Travis *(Program director, CASA for Children of Multnomah, Washington and Columbia Counties)*	District Attorney Matt Shirtcliff *(Baker County)*	
	Leola McKenzie *(Juvenile and Family Court Programs Division Director, Oregon Judicial Department)*	Nancy Cozine *(Executive Director, Office of Public Defense Services)*	
		Valerie Colas *(Deputy Defender, Office of Public Defense Services)*	
		Angela Sherbo *(Supervising Attorney, Youth, Rights & Justice)*	

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The task force is staffed by Addie Smith in the Office of Governor Kate Brown.

The overall mandate of this task force is to provide recommendations on (1) A model of representation for children, parents, DHS, and the state in dependency cases; and (2) the resources necessary to support this model. The task force has also been asked to assess a small set of additional challenges facing the dependency representation system in Oregon.

To date, the task force has had eight meetings. Five of these meetings were held in Marion County and the remaining three meetings where held in Multnomah, Linn, and Jackson Counties where task force members had lunch with local practitioners, observed dependency court, and learned about the local practice. A special thanks to the local practitioners who joined the task force for these meetings and shared their experiences.

Topics covered at these task force meetings included: national best practices; differences in practice between and among the 36 counties in Oregon; obstacles in Oregon to effective representation for children, parents, and the government; current system costs; and current system outcomes. Presenters included national experts, law professors, parent mentors, foster youth, child welfare workers, district attorneys and deputy district attorneys, defense consortium attorneys, assistant attorneys general, and members of the judiciary.

The task force also established five subcommittees to address the discrete issues raised by S.B. 222 including: crossover cases, performance standards, quality assurance/continuous quality improvement, and the unlawful practice of law. A final subcommittee has been convened to assess potential new and alternative models for systems representation. During the course of the first seven meetings, all five of the task force subcommittees met, completed their work, and reported their findings. The Unlawful Practice of Law, Crossover Case, Performance Standards, and Quality Assurance Subcommittees submitted reports which are now being reviewed and discussed by the larger task force. In order to ensure that the subcommittee reports reflect the model recommendations, the task force will wait to modify and formally adopt the subcommittee reports until after a vote on the model recommendations.

The fifth subcommittee, the Alternative Models Subcommittee, provided investigative support to the task force on potential models, but did not submit a formal report or recommendation for adoption. Instead this subcommittee presented a summary of its findings to the task force as a tool to help guide in the decisions about which models of representation to recommend. To compile this summary, the Alternative Models Subcommittee first reviewed the literature and identified and prioritized what attributes are necessary for a quality model of dependency representation. The attributes identified by the literature, experts, expert practitioners, and the subcommittee were:

State/Agency	***Parent/Child***
*Attorney Availability	Attorney Availability*
*Consistency	Consistency*
*Cost-effective/Cost-efficient	Manageable Caseload*
*Outcome-Oriented	Outcome-Oriented Practice*
Comprehensive	Continuity
Continuity	Cost-effective/Cost-Efficient
Local Community Connection	Local Community Connection
Manageable Caseload	Multidisciplinary Representation
Objectivity	Duration of Representation (incl. pre-petition)
	Scope of Representation

*Identified Priority Attributes

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After identifying these attributes, the subcommittee then examined and adapted various models used by other states and recommended by national experts to the Oregon system. The models for parents and children crafted and reviewed were: a public defender/public agency model; models where contract attorneys are compensated based on billable hours or number of cases carried; a statewide expansion of the workload model or Parent and Child Representation Pilot currently used in Linn, Yamhill, and Columbia counties; and a hybrid model that included small regional public defender/public agencies and a workload model for contract attorneys. The models for government representation crafted and reviewed included: a DHS in-house model, a DOJ flat-fee/block grant model, a model where district attorneys and DOJ both represented the agency, and a model that provides additional funding and support for the current system. The task force then priced each model, and ranked their fidelity to each attribute of a quality system on a scale of high (3), medium (2), and low (1). The Workload and Public Defender Models ranked the highest for parent and child representation while the in-house and DOJ block grant models ranked highest for state and agency representation. The Alternative Models Subcommittee summary was presented to the task force in May and this information will be considered, clarified, and discussed over the next month.

At the June meeting, the task force will determine whether any of the models presented should be modified before being recommended, whether an additional model should be crafted for recommendation, or whether the models reviewed by the subcommittee should be recommended as presented. The task force's final meeting will be in July when it will finalize its report to the Legislature. This report will include the recommendations for legislation and may include recommendations for administrative policy changes, changes to court rules, and changes to dependency practice. For detailed information about the work of the task force, the materials distributed at meetings, any of the reports mentioned in this article or the dates of upcoming meetings please visit the task force website. ●

Bearing the Burden of HB 4074

By Mark McKechnie, MSW, YRJ Executive Director

The Oregon Legislature passed HB 2320 in 2015 and a clean-up bill, HB 4074, in 2016 which substantially changed Oregon's policy on sex offender registration for juveniles. For two decades, Oregon was one of a handful of states that imposed mandatory, lifetime registration for juveniles adjudicated for a sex offense. (This was limited to felony offenses by legislation passed in 2011.) Readers who want a detailed summary of the legislation should consult the Spring 2016 Juvenile Law Reader.

This change is important in light of the substantial scientific evidence that juvenile registration fails to fulfill its one and only statutory purpose, which is, "to assist law enforcement agencies in preventing future sex offenses." ORS 163A.045

The new legislation allows the court to determine, near the end of jurisdiction in the case, whether registration is necessary and appropriate for each youth offender. The challenge for the attorneys who represent them is that the burden is on the youth offender:

> 163A.030(7) (b) "The person who is the subject of the hearing has the burden of proving by clear and convincing evidence that the person is rehabilitated and does not pose a threat to the safety of the public. If the court finds that the person has not met the burden of proof, the court shall enter an order requiring the person to report as a sex offender under ORS 163A.025."

While the statute places the legal burden on the youth, practitioners should be aware that re-offense rates of youth with a sex offense history are much lower than re-offense rates of other youth or adult offenders, and no research study has found registration laws to be effective at preventing future offenses by juvenile registrants. Practitioners who represent juvenile clients in the new registration hearings should be aware of the substantial scientific research on the efficacy of juvenile sex offender registration as it relates to public safety.

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The Oregon Youth Authority tracks three-year felony re-offense rates for youth released from close custody. The recidivism rate of youth adjudicated of sex offenses is one-third that of youth adjudicated of other person felonies within the state of Oregon. Numbers can fluctuate from year to year due to the small number of offenders with a sex offense adjudication. The numbers tracked annually range from 52 to 82 youth offenders released from OYA facilities, and the three-year recidivism rates from 2007 to 2012 range from 0.0% to 8.1% (which represents five individuals). For more information, see: https://www.oregon.gov/oya/docs/RecidivismFY01-FY14.pdf

Nationally, researchers who have done substantial work regarding juvenile registries and recidivism include Dr. Elizabeth LeTourneau, Director of the Johns Hopkins University Moore Center for the Prevention of Child Sexual Abuse, and Dr. Michael Caldwell of the University of Wisconsin.

Dr. LeTourneau testified to the Joint Interim Committee on Judiciary of the Oregon Legislature in September 2013 and submitted an affidavit summarizing her research. It began by summarizing research findings across numerous states:

> "As detailed below, strong and empirically rigorous evidence indicates:
>
> (A) Sexual recidivism rates for youth who sexually offend are low.
>
> (B) Sexual recidivism risk for youth who sexually offend is similar to that of other delinquent youth.
>
> (C) Registration of juveniles fails, in any way, to improve community safety. [Emphasis added.]
>
> (D) Registration is associated with unintended and impactful consequences on the adjudication of youth."

The affidavit can be accessed online here: https://olis.leg.state.or.us/liz/2013I1/Downloads/CommitteeMeetingDocument/30407

According to the affidavit, there are more than 30 published studies on recidivism rates for youth who had sexually offended. The affidavit cites the findings in South Carolina, which had a rate of new convictions of 2.5%. Some studies measure new arrests and some new convictions or adjudications. Regardless of the measurement, the studies show a range of recidivism between 1% to 15%, with most studies finding re-offense rates between 2% and 7%. By contrast, recidivism rates for youth offenders adjudicated of property or person felony crimes in Oregon ranges between 20% and 35%, over three years post-release.

A substantial study in Wisconsin looked at offense rates after five years of youth offenders who were originally adjudicated of a sex offense and those adjudicated of a serious non-sex offense. All of the youth in the study were tracked for five years after they were released from secure custody. The likelihood of committing future sex offenses was roughly the same between the two groups:

> Seventeen (17) out of 232, or 6.8%, of juvenile sex offenders committed a new sex offense within five years, compared to 101 out of 1,780, or 5.7%, of previous non-sexual offenders who committed a sex offense within five years. The difference in offending sexually between the two groups was not statistically significant. (Caldwell, 2007)

Photo by Carol Von Canon CC By 2.0

The findings of the Caldwell study and others point to an important factor in considering the ability of the registry to protect the public or to protect children specifically: the vast majority of offenses are not committed by someone on the registry.

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Looking at youth offenders alone, the Caldwell study shows that the number of future sex offenders from the non-sex offender group was nearly six times greater than the number of recidivists from the original juvenile sex offender group.

One of the largest studies in terms of population size to examine this issue is the "Watched Pot" study. Study authors Sandler, Freeman and Socia (2008) used data from New York state involving 170,000 arrests for sexual offenses over 20 years (1986-2006). Half-way through the study period, New York enacted laws to require the registration of sex offenders. The study found that the overwhelming majority of arrests were of offenders who were not registered (or who would not have been required to register during the years prior to the registry law).

Offenders who did not have any previous registerable sex offense conviction accounted for 95.88% of all new sex offense arrests, meaning that registered offenders accounted for less than 5% of all new registerable sex crimes. The proportion of offenses committed by previously convicted offenders did not change significantly after the registry law was enacted in New York.

In terms of protecting children, specifically, the authors note that registration provides no value in achieving this goal because "93% of child sexual abuse victims knew their abuser (34.3% were family members and 58.7% were acquaintances)." (p. 298)

Based upon the study's findings, the authors concluded that "focusing attention and resources on the small number of known, registered sex offenders detracts attention from the more common types of sexual offenses that occur, leaving people vulnerable to sexual abuse and creating a false sense of security." (Caldwell, 2008, 299)

While the youth who are subject to possible registration under the changes made by HB 4074 and HB 2320 bear the legal burden to establish that he or she "is rehabilitated and does not pose a threat to the safety of the public," attorneys for these youth should also remind the court that the vast majority of youth do not re-offend. In addition, because the only purpose of the registry is "to assist law enforcement agencies in preventing future sex offenses," the true "burden" of registration on the youth and their families will outweigh any potential benefit to public safety in the vast majority of cases.

Photo by Allan McLuckie CC By 2.0

Those who believe in the efficacy of registry laws often say that it is 'better to be safe than sorry.' However, registration of youth offenders has not been found to protect the public, even in the instances of the very few offenders who may pose a higher risk to reoffend. Requiring juveniles to register will be ineffective at best, and will more often be counter-productive, because the number of registered offenders who do not reoffend is many times greater than the number who do, and the number of new offenses committed by individuals who are not registered greatly outnumbers the small percentage of offenses committed by those who are registered.

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Useful resources for preparing for juvenile registry hearings:

Caldwell, Michael F. (2007) Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders. Published in the Journal Sex Abuse http://www.njjn.org/uploads/digital-library/resource_557.pdf

Affidavit of Elizabeth J. Letourneau, Ph.D., Moore Center for the Prevention of Child Sexual Abuse, Johns Hopkins Bloomberg School of Public Health, Submitted to the Oregon House and Senate Judiciary Committees at the public hearing on September 18, 2013. https://olis.leg.state.or.us/liz/2013I1/Downloads/CommitteeMeetingDocument/30407

LeTourneau (2009) Does Sex Offender Registration and Notification Work with Juveniles? https://olis.leg.state.or.us/liz/2013I1/Downloads/CommitteeMeetingDocument/30406

Human Rights Watch (2013) Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US http://www.hrw.org/node/115179

Jeffrey C. Sandler, Naomi J. Freeman, and Kelly M. Socia (2008) DOES A WATCHED POT BOIL? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law, Psychology, Public Policy, and Law, Vol. 14, No. 4, 284–302 http://ilvoices.com/uploads/2/8/6/6/2866695/63-sandler-freeman-socia-2008.pdf or http://www.rethinking.org.nz/images/newsletter%20PDF/Issue%2078/C%2002%20watchedpot.pdf

Oregon Criminal Defense Lawyers Association, 2015 House Bill 2320: Juvenile Sex Offender Registration Changes (2015), https://www.ocdla.org/cart/detail_newocdla.cfm?i=1634. ●

An Interview with Katharine English, the Author of *Salvation*.

I recently had the opportunity to interview my long-time friend Katharine English about her newly published memoir, Salvation – A Judge's Memoir of a Mormon Childhood. What follows is a brief summary of the book and Judge English's answers to the questions I could not help but ask.

– Julie H. McFarlane, YRJ Supervising Attorney

Summary: In her memoir, Katharine English, an Oregon family and juvenile court referee and judge, sets out on a road trip to journey through her childhood in Salt Lake City, Utah. Throughout this journey, with literary grace and humor, English reveals her dark and shocking secrets, and uncovers the forces that have influenced who she's become—a family and juvenile court judge.

"Protection from harm." This is the original Greek definition of "salvation." As English grows up, salvation drifts farther and farther away from her reality. Rebellion creeps into her life to compensate. Only a misunderstanding enables her escape.

English relives family dysfunction, religious devotion, and personal defiance, to answer some of life's most universal questions:

How do our childhood experiences impact the adults we eventually become?

What do we take, and what do we discard from our childhood?

How can we learn to forgive?

Where can we turn to find authentic love and protection?

English takes us through her tumultuous past and traces the many faces of her journey to protect herself, and eventually others, from harm. A tribute to parenting challenges, religious complications, and forgiving the wrongs committed to us during childhood, this memoir is ultimately a testament to the true meaning of salvation.

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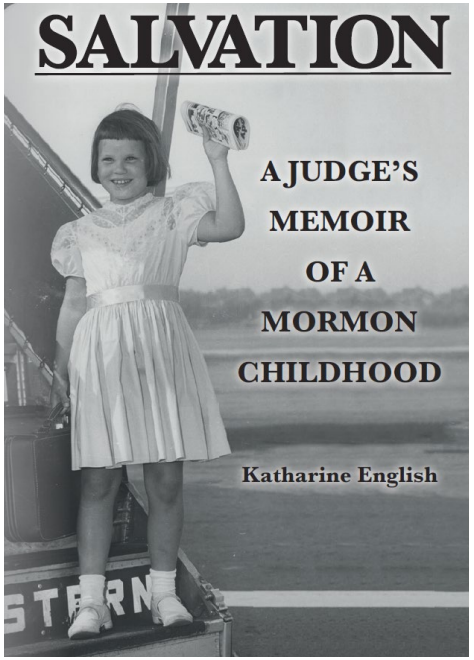

Book cover

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What led you to writing this book?

After I retired from the bench, I entered a master's program in creative writing. I began to study and write memoir, fascinated by the way our lives play out, and the lessons we learn from ours and other people's experiences. So I began to write about the events that had most impacted my judicial life.

What events were those?

I had been sitting on the bench in Juvenile Court for ten years. I realized that I was beginning to show irritation, and sometimes anger, toward the attorneys and social workers who appeared before me seemingly unprepared. My necessary calm judicial temperament was fast failing me. I wanted to quit, fearing that I was no longer suited for the job. But I couldn't. Something held me. I decided to take some time off and return to my place of birth - Salt Lake City, Utah - to revisit my childhood in an effort to discover if something there had been the origin of both my anger and my inability to leave my job. The trip made a profound difference in my life, and I decided to write about it.

What did you find out?

I knew that I was hiding two secrets in my adult life and that in re-visiting my childhood I would have to recall and analyze both. I went to Salt Lake believing that I would gather evidence to convict my mother, father, and the Mormon Church of all of the damage they had done to me, which I believed to be the origin of my anger. The trip turned out very differently, resulting in an important and lasting change in my life.

What was your childhood like?

I was the descendant of a famous Mormon pioneer polygamist leader and of prominent aristocratic Mormon grandparents. My mother was a see-saw Mormon and my father a Southern Baptist. The household was violent and chaotic. I found both refuge and confusion in the Church, and by escaping into my imagination, my writing, and the stage. After my father left, the house sizzled with my mother's anger, alcoholism, and physical and verbal abuse. For a year I lived with my father in Birmingham, Alabama, in a peculiarly abusive family, just before the civil rights movement exploded.

Didn't a children's services agency intervene?

No. And, oddly, I am so grateful that they didn't. Because my four siblings and I would certainly have been removed from the home, and I believe that would have been far more damaging to each of us. Regardless of the abuse, some of it quite shocking, we loved our parents, and were very bonded to each other, and attached to our homes and schools. Neither of our parents would have been capable of complying with a mass of required services. Both worked very hard, my mother at multiple jobs, and they had few financial or emotional resources.

Are you saying you believe children should be left in abusive homes?

I think the damage done to children by removal from their homes, subsequent shelter placement in stranger care, and then usually in yet another stranger's care, causes damage that may not be immediately visible, but that is far more wounding than remaining at home, even with alcoholic or drug-using parents, even as victims of physical abuse. The harm of removal must be set against the harm of remaining in the home, and given much more weight than it is now. Of course there are exceptions when a child is in dire danger of deathly harm, but I am convinced that in-home services for the majority of child abuse cases

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would be far more effective in the long run and are, in fact, in the best interests of the children.

Some people assert that in-home services have been tried and have failed.

I'm not talking about offering parenting classes and a psych evaluation. I'm talking about a new philosophy aimed at never removing children unless in extremely dangerous crises and then only to other family or community members. I'm talking about the social worker, lawyers, parents, children, and community members, hammering out an immediate and evolving plan together to give real help to the family on a daily basis. Ongoing agency-supported parenting and support groups with childcare provided. Daily two-hour visits for whatever is needed - housekeeping training, discussion of sexual abuse issues, accessing affordable or free services, involving members of families, churches, and social workers working as allies. We have so many creative and well-meaning people working in this system that a new structure can be developed to replace the same system that has been repeated over and over since the 17th century, a system that has failed.

Is that what you would have wanted as a child?

Oh, yes. In every chapter of my book, a reader will be able to see how early intervention, aimed at keeping our family together, could have helped prevent the crises that developed later. Removing me from my home, even in Alabama, where so much happened, would have devastated me forever after. I only succeeded as a teacher and a lawyer because I knew what "home" was, I had parents who loved me, however abusively, a grandmother and Sunday school teacher who liked me unconditionally, and I had a bond with my siblings that was never broken. I dearly wish someone had come into the home early on, helped my mother calm down and quit drinking, stopped the abuse my father rendered, and encouraged our family to heal itself. But removal? Never.

Who should read your book?

(Laugh) Whoever wants to, I suppose. There's a secondary message to religious organizations about how children perceive the lessons they are taught, but I would hope the primary message is for all of us who work with children and families about the true needs of children and how to meet them.

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ABOUT THE AUTHOR

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English practiced law at English and Metcalf, served on Portland's family court bench for fourteen years, and was chief judge of the Confederated Tribes of Grand Ronde for seven years. Throughout her career, she was a faculty member of the National Council of Family and Juvenile Court Judges.

English has traveled the United States, teaching and speaking on a wide range of subjects to judges, lawyers, child service agency workers, and volunteer advocates. Raised by a Mormon mother and Southern Baptist father, and provided with her professional experience in court, she has a uniquely broad perspective on factors that help children rise from the destructive forces in their lives.

LINK TO BOOK

Find *Salvation* by Katharine English on Amazon.com. ●

Juvenile Law Resource Center

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CASE SUMMARIES

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

Dept. of Human Services v. T.M.B, 276 Or App 641 (2016)

On March 2, 2016, the Court of Appeals issued an opinion in Dept. of Human Services v. T.M.B, 276 Or App 641, in which the Court affirmed the juvenile court's denial of mother's motions to set aside the termination of her parental rights to her children B and A.

After the permanency plan was changed to adoption for both children, DHS filed TPR petitions and, for each petition, served mother with a summons and petition which provided that if mother failed to appear for a proceeding on the petition, the juvenile court would terminate her parental rights in her absence and without further notice.

The trial was set for March 31, 2015 at 9:00 am. Mother planned to fly from Arizona, where she lived, to Oregon for the trial, but did not appear for the trial as scheduled. The court postponed the proceedings for two hours. Mother's attorney reported that mother emailed him at 12:34 am on March 31, confirmed her flight had arrived, and that she would be coming to the attorney's office to meet before trial. Mother's attorney reported no contact with mother since mother's email despite repeated attempts to reach mother. The juvenile court conducted the termination trial in mother's absence; mother's attorney participated and cross-examined the one witness at the trial. Mother's attorney did not object to the court's authority to proceed in mother's absence; that issue was raised for the first time on appeal and rejected as unpreserved.

Later on March 31, 2015, mother's attorney presented motions to set aside the TPR judgments, pursuant to ORS 419B.923(1), asserting good cause because mother believed the trial started on April 1, 2015. The juvenile court denied the motions based on mother's inconsistent statements regarding her belief of the trial date, the postponement of the trial for two hours in order to give mother time to appear, and the many attempts made to contact mother the day of trial.

On appeal, mother argues her nonappearance was due to excusable neglect as permitted by ORS 419B.923(1)(b). The Court of Appeals examined the facts in this case and distinguished this case from *DHS v. G.R.*, 224 Or App 133(2008) and *DHS v. K.M.P*, 251 Or App 268 (2012). In the latter cases, the Court of Appeals reversed the denial of a parent's motion to set aside a termination judgment based on excusable neglect, holding that uncontroverted evidence supported the conclusion of a reasonable, good faith mistake as the cause of the nonappearance. In this case, the Court concluded

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that mother provided contradictory information regarding the reason for her nonappearance and therefore the record does not establish, as a matter of law, that mother made a good faith mistake regarding her court date.

Dept. of Human Services v. T.L., 358 Or 679 (2016)

On March 3, 2016, the Oregon Supreme Court issued an opinion in Dept. of Human Services v. T.L., 358 Or 679 (2016) which reversed the decision of the Court of Appeals and permits inadequate assistance claims to be raised in the first instance on direct appeal.

The question presented to the OSC is whether a parent can raise a claim of inadequate assistance of counsel for the first time on direct appeal from permanency hearing judgments changing the plan from reunification to APPLA and guardianship. The OSC concluded that:

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1. When counsel has been appointed in a permanency proceeding and a change of plan from return to parent to guardianship or APPLA is ordered, counsel must also have been adequate, with adequacy determined using a standard of fundamental fairness. *See State ex rel Juv. Dept. v. Geist*, 97 Or App 10 (1989), *aff'd*, 310 Or 176 (1990).

2. ORS 419B.923 does not require inadequate assistance claims to be first raised at the trial court; instead, the claim may be raised in the first instance on direct appeal.

3. If, in the first instance on direct appeal, a party identifies an inadequate assistance of counsel claim, and "if further development of an evidentiary record would be necessary to determine whether inadequate assistance was rendered or whether the party suffered cognizable prejudice as a consequence, then the party should seek relief under ORS 419B.923" so that parties have an opportunity to make a record as to the inadequacy of trial counsel.

4. If a party asserting inadequate assistance on direct appeal fails to utilize ORS 419B.923 to develop an evidentiary record, and the Court of Appeals determines the record insufficient to warrant relief, the Court of Appeals may affirm without prejudice or remand for an evidentiary hearing under ORS 419B.923.

Note: This lengthy opinion is worth reading for its analysis of how *Geist* and ORS 419B.923 relate. The OSC refines the principles established in *Geist* and provides practical direction on how to raise inadequate assistance claims.

Dept. of Human Services v. K.V., 276 Or App 782 (2016)

On March 9, 2016, the Court of Appeals issued an opinion in Dept. of Human Services v. K.V., 276 Or App 782, in which the Court affirmed the juvenile court's judgment establishing jurisdiction as to father over his child A. The jurisdictional petition contained three allegations against father: 1. Father is likely

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to fail to protect A from mother, 2. Father's alcohol use interferes with his ability to safely parent A, and 3. Father subjected mother and A to domestic violence. The juvenile court found each allegation proven by a preponderance of the evidence. On appeal, father argued the evidence presented to the trial court was insufficient to establish, at the time of trial, a risk of serious loss or injury to A that was likely to be realized if A were in father's care.

Regarding the first allegation, failure to protect, father argued the evidence at the time of trial was speculative given that mother and father had been living separately since mother injured another child, S, and had no contact in the seven months before the jurisdictional trial. The Court of Appeals found that a current separation does not alone alleviate the risk that father will fail to protect A and there is no other evidence in the record indicating father had taken steps (such as legal custody, restraining order, or requiring supervised visitation with A) to protect A from abuse by mother. The Court, commenting that there was no dispute that mother's abuse of S indicates that she is a risk of harm to A, found a nexus because if father failed to protect A from mother, it would place A at risk of serious loss or injury.

Regarding the second allegation, alcohol use, father argued that a completed substance abuse assessment demonstrated that father did not need treatment and that DHS failed to prove a nexus between alcohol use and a current risk of harm to A. The Court noted that the substance abuse assessment was not made a part of the record, and that evidence in the record supported the juvenile court's finding that father was still abusing alcohol and in need of treatment. And, the juvenile court's implicit finding, that father's alcohol abuse was likely to lead to future domestic violence, was permissible given evidence of father's history of violent behavior.

Regarding the third allegation, domestic violence, father argued that DHS presented no evidence that father had engaged in violent behavior beyond an isolated incident which led to a harassment conviction and also failed to prove a nexus between domestic violence by father and a current risk of harm to A. The Court, relying on the record, affirmed the juvenile court's conclusion that the violent behavior was not isolated, that father's anger management class was not sufficient to address father's behaviors, and that there was a nexus between father's behavior and a current of harm risk to A.

When considering the totality of the circumstances, the Court found the juvenile court's findings legally sufficient to support juvenile court jurisdiction and affirmed the juvenile court judgment.

Dept. of Human Services v. K.M.J., 276 Or App 823 (2016)

On March 9, 2016, the Court of Appeals issued an opinion in Dept. of Human Services v. K.M.J., 276 Or App 823, in which the Court reversed a termination of parental rights judgment as to mother and remanded the proceeding to the juvenile court. The issue on appeal was whether the court was authorized by statute to terminate mother's parental rights. The Court of Appeals concluded that the juvenile court made a legal error, the error is plain error, and the Court exercised its discretion to correct the error.

A brief summary of the undisputed facts follows. On July 15, 2013, the state filed TPR petitions and on October 18, 2013, mother was served with a summons in Idaho. The summons directed mother to file a written answer within 30 days and informed mother that failure to file a written answer or appear at any subsequent court-ordered proceeding may result in the court proceeding in her absence. Mother filed a

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timely written denial and the court issued a "notice of trial" stating that the TPR trial was set for March 6 and 7, 2014. In February 2014, mother sent letters to her attorney, DHS, and the court indicating that she was aware of trial, unable to attend due to living out of state and not having transportation, and had no phone. Mother's attorney moved to withdraw saying he had no contact with mother for months and the court denied that motion.

Mother failed to appear at the TPR trial and mother's attorney did not object to the court proceeding with the TPR trial and confirmed that his office sent mother notice of the time of trial.

On appeal, mother argued that the court did not give notice as required by ORS 419B.820. DHS concedes that the "notice of trial" did not comply with 419B.820, but argues mother had actual notice of the trial, that mother's argument was not preserved, and that the Court should not exercise discretion to correct the error due to the competing interest of the parties and the gravity of the error.

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The Court disagreed with DHS, finding mother's interest in a fundamentally fair TPR proceeding outweighs the state's interests.

Note: The dissent, which discusses the relationship between the arguments made in mother's motion to set aside under ORS 419B.923 and the appeal, is worth reading.

Dept. of Human Services v. B.P., 277 Or App 23 (2016)

On March 16, 2016, the Court of Appeals issued an opinion in **Dept. of Human Services v. B.P., 277 Or App 23 (2016)**, in which the Court reversed the juvenile court's jurisdictional determination with respect to father over his daughter M. The jurisdictional bases, found by a Judge in a trial, were: 1. Father neglected M by failing to ensure that she regularly attended school, 2. Father failed to properly groom M, and 3. Father allowed M to have unsupervised visits with mother under circumstances inconsistent with a previously entered visitation order. DHS conceded that the evidence was legally insufficient to demonstrate M's conditions or circumstances, at the time of the hearing, demonstrated a reasonable likelihood of harm to M's welfare and the Court reversed.

The majority of this opinion relates to the determination of the appealability of the jurisdictional judgment. The complexity of this determination is due to the interplay of Referee and Judicial orders and judgments from October 2014, when a Judge heard father's jurisdictional trial and issued an order establishing jurisdiction to January 29, 2015 when a Referee, acting as a Pro Tem Judge, entered a document titled "Judgment Establishing Dependency Jurisdiction as to Both Parents" and "Judgment of Disposition".

Commentary: For practitioners in Multnomah, Washington, Marion, and other counties where juvenile

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court referees are utilized, the opinion in its entirety is helpful. Generally applicable key takeways are:

- ORS 419A.205(1) describes the judgements which are appealable. A judgment must also comply with the statutes in ORS chapter 18 that govern judgments generally (see ORS 18.005(8) defining judgment as being reflected in a "judgment document" and ORS 18.005(9) defining a "judgment document" as a writing in the form provided by ORS 18.038 that incorporates a court's judgment. ORS 18.038(4)(c) requires a judgment document to include "[t]he signature of the judge rendering the judgment."
- For hearings held before a juvenile court referee, parties have a right to a rehearing before a judge. ORS 419A.150(3) and (7). Unless a rehearing is requested within 10 days following the entry of the referee's order, the order will become a final and nonappealable order. ORS 419A.150(4).
- Proponents of the jurisdictional petition should seek a jurisdictional judgement when the determination regarding jurisdiction is made. Jurisdiction is a child-specific determination and the juvenile code does not contemplate one jurisdictional judgment for each parent. *Dept. of Human Services v. W. A. C.*, 263 Or App 382, 328 P3d 769 (2014).

Dept. of Human Services v. R.W., 277 Or App 23 (2016)

On March 16, 2016, the Court of Appeals issued an opinion in **Dept. of Human Services v. R.W., 277 Or App 23 (2016)**, in which the Court reversed and remanded a dispositional judgment due to the trial court's error in finding DHS made reasonable efforts.

In this case, DHS removed child N from father's home and placed her in substitute care on December 31, 2014 and a dependency petition was filed on January 2, 2015. On that date, DHS met with father who refused services and did not sign ROIs. On April 1, 2015 jurisdiction was established over N after the court found father subjected N to verbal, physical and emotional abuse and that his mental health problems interfered with his ability to safely parent. The dispositional hearing was set for mid-May. Two days before the dispositional hearing, Father contacted DHS, asked for referrals, and signed a ROI. DHS made the referral on the same day as the dispositional hearing.

At the hearing, Father argued DHS failed to make reasonable efforts because DHS had not issued any referrals until the day of the dispositional hearing, five months after the removal. The court expressed its concerns as well, and DHS responded that referrals could not be submitted without ROIs, that the ROI request was supposed to go through the attorney, and that DHS had not requested an ROI from father's attorney. On the dispositional judgement, the court checked the box indicating reasonable efforts had been made.

On appeal, father argues the court erred in making a reasonable efforts determination. Father conceded he initially refused services, but argued that DHS failure to offer services thereafter, particularly after jurisdiction was established, was unreasonable. The Court of Appeals agreed, finding that father's initial lack of interest and failure to engage and the child's desire not to visit father were not sufficient to find DHS failure to provide services reasonable. The Court held that a parent's unwillingness to engage is not, by itself, a circumstance that legally excuses DHS from making reasonable efforts. (*See* ORS 419B.350(5)(a)-(c)

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for examples which exempt DHS from making reasonable reunification efforts).

The Court, citing to *Cf. Dept. of Human Services v. N. S.*, 246 Or App 341, 350, 265 P3d 792 (2011), rev den, 351 Or 586 (2012), stated "in determining whether DHS made reasonable efforts, we consider a parent's lack of cooperation, but we evaluate such lack of cooperation within the context of DHS's conduct and the case circumstances."

In this case, DHS demonstrated no evidence that it made subsequent attempts to provide or even offer services to father, DHS did not explain why a referral required an ROI, and, even after jurisdiction was established, failed to attempt to engage with father. "The lack of action by DHS is significant in this case, given the prolonged period of time between the removal date and the dispositional hearing, a total of five and one-half months."

Dept. of Human Services v. M.M., 277 Or App 120 (2016)

On March 23, 2016, the Court of Appeals issued an opinion in **Dept. of Human Services v. M.M., 277 Or App 120 (2016)**, in which the Court reversed the juvenile court's jurisdictional and dispositional judgments over infant B. The crux of the opinion relates to father's arguments, that the evidence in the record was insufficient to allow the juvenile court to determine that his substance abuse and mental health issues posed a risk of serious loss or harm to B that was likely to be realized if B were returned to father's care.

The Court found the evidence insufficient to warrant jurisdiction for two reasons: first, it was out of date—it concerned circumstances which occurred about a year before trial and circumstances had changed significantly since that date and second, the undisputed fact that father was diagnosed with PTSD was not tied to any risk of harm to B.

At the close of the trial, the court found father's mental health and substance abuse issues intertwined with father's codependent relationship with mother, who had a long-standing substance abuse problem. The facts supporting jurisdiction were: father's codependent relationship with mother and his willingness to share his prescription drugs with her, father's suicide attempt (and one-time misuse of prescription drugs) which occurred four months before B was born and about a year before the trial, and the undisputed fact that father has PTSD as a result of military service. However, by the time the trial concluded and a judgment was entered, father and mother had been separated for nearly a year. The Court concluded that the singular suicide attempt and prior co-dependent relationship did not allow an inference that father's mental health presented a **current threat** of harm to B. (emphasis added)

Regarding father's PTSD, the juvenile court found no evidence it had been

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treated and therefore concluded father's PTSD would pose a risk of harm to B. However, on appeal father argued there is no evidence the PTSD was untreated and there was evidence in the record to support father received some treatment after B's birth and did not suffer from PTSD symptoms which would create a risk of harm to B.

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Comment: At trial, the DHS caseworker testified that father's attempt to "use power and control over her" could be a symptom of PTSD. The Court of Appeals rejected this argument, saying that a use of "power and control" with a caseworker does not evidence a risk of harm to B. (*See FN 4).* The Court also confirmed that, at the time of father's suicide attempt, he was suffering from problems which would then pose a risk to B if he had been in father's care. However, given the passage of time and no additional evidence of mental instability, the father's suicide attempt was not alone sufficient to warrant jurisdiction.

Dept. of Human Services v. J.V.-G., 277 Or App 201 (2016)

On March 30, 2016, the Court of Appeals issued an opinion in **Dept. of Human Services v. J.V.-G., 277 Or App 201 (2016)**, in which the Court vacated the juvenile court's denial of father's motion to dismiss because the juvenile court erred in admitting an exhibit that was inadmissible hearsay.

The background facts and case history are described in the opinion; for summary purposes, a limited portion is described below.

In July 2015, the court held a three-day contested permanency hearing on father's motion to change the plan from adoption to reunification. Before the hearing, father filed a motion to dismiss jurisdiction and requested that the court bifurcate the hearing on the motion to dismiss and the permanency hearing and cited different evidentiary standards as the basis for this request. The juvenile court acknowledged the different evidentiary standards, proceeded with the permanency hearing, allowed parties to submit written responses to the motion to dismiss and addressed father's motion to dismiss at a later date.

At the permanency hearing, the state offered an exhibit which contained a DIF report (which contained written observations made by the DIF worker who did not testify at the hearing). Father did not object and the juvenile court denied father's motion to change the plan.

The court then considered Father's motion to dismiss. Father objected to the admissibility of the DIF report on hearsay grounds. The juvenile court overruled father's objection, admitted the report, adopted its findings made in connection with the permanency plan and denied father's motion to dismiss. Father argued that the DIF report contained inadmissible hearsay. The Court of Appeals agreed that the DIF report was inadmissible under OEC 802 and then examined whether the juvenile court's error was harmless. A judgment will be affirmed despite evidentiary error if there is "little likelihood that the particular error affected the * ** verdict[.]" State v. Davis, 336 Or 19, 32, 77 P3d 1111 (2003).

Because it was unclear whether the juvenile court would have reached the same conclusions on the motion to dismiss (whether, under the totality of the circumstances, the conditions that were originally found to endanger the child persist) without the DIF report, the Court of Appeals could not find the error harmless and vacated and remanded the case to the trial court for reconsideration of father's motion to dismiss in light of the applicable evidentiary rule.

Comment:

Because jurisdiction must be proven by competent evidence, it is important that hearings on motions to dismiss are separated from other post-dispositional proceedings.

DHS did not argue, at trial or on appeal, that the DIF report was not hearsay or was admissible with an exception to the hearsay rule. If offering hearsay testimony, consider how it may be admissible as either non-hearsay or under an exception.

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State v. J.G.G., 278 OR App 184 (2016)

On May 11, 2016, the Court of Appeals issued an opinion in delinquency case **State v. J.G.G., 278 Or App 184 (2016)**, in which the Court affirmed the juvenile court's dispositional determination that the youth violated the terms of his probation.

In this case, a term of youth's probation was "The youth offender shall maintain a curfew of 4 PM to 5 AM on weekdays and 4 PM to 5 AM on weekends until otherwise directed by the Court." At the PV hearing, a neighbor testified that youth was riding his scooter outside at around 10:20 PM and the court found youth in violation of his probation.

On appeal the youth argued that the court erred as a matter of law because the court did not interpret "curfew" within the definition of the juvenile code (ORS 419C.680) or by subjecting youth to an unconstitutionally vague order. The state argued the order isn't appealable because the PV disposition did not adversely affect the youth since no sanctions were imposed and because the issues weren't preserved.

The Court, examining the delinquency code statutory scheme, found the juvenile court order appealable because the finding of a probation violation could result in more stringent requirements or liberty restrictions in the future.

However, because the appellate challenges to the juvenile court's ruling were not preserved, the Court affirmed.

Dept. of Human Services v. K.A.H., 278 Or App 284 (2016)

On May 11, 2016, the Court of Appeals issued an opinion in **Dept. of Human Services v. K.A.H., 278 Or App 284 (2016)**, in which the Court reversed and remanded the juvenile court's judgment asserting jurisdiction over mother's child A.

This is a shaken baby/abusive head trauma case. Six month old A was brought to the emergency room in Pendleton and later transferred to Dornbecher in Portland for further examination. Mother reported A's injuries were due to a fall. Dr. Valvano, treating physician at Dornbecher and director of the hospital's suspected-child-abuse program, concluded that the reported fall, as described by A's parents does not explain the scope of A's medical findings and that A's injuries had a "high association with abusive head trauma." A was also found to have a rib fracture "characteristic of physical abuse." Based on Valvano's assessment, DHS took A into protective custody and filed a petition alleging unexplained physical injury to A.

At trial, mother sought to exclude any evidence of SBS/AHT. The

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court denied mother's motion. DHS filed a motion to allow Volvano to testify at the jurisdictional hearing telephonically under ORS 45.400 because it would be inconvenient and difficult to arrange hospital coverage. Mother argued that she could not effectively cross-examine Volvano by phone and, ORS 45.400(3)(b) required in-person testimony because the testimony would be determinative of the case. The juvenile court granted the motion for telephonic testimony and, at the close of trial, asserted jurisdiction over A "based on the unexplained injuries [and] the credible testimony of Dr. Valvano concerning the head injury and the rib injury."

On appeal, mother argues the juvenile court erred in allowing the use of SBS/AHT evidence which fails the *Brown/O'Key* standard for admissibility of scientific evidence, and that ORS 45.400 required Valvano to testify in person.

The Court does not reach a conclusion about admissibility of SBS/AHT evidence, but, in FN 1, recognizes mother presented evidence on appeal that was not first presented to the juvenile court and remimnds mother that, on remand, she should make challenges to the evidence to the juvenile court.

In this case, it was undisputed that Valvano's testimony was outcome-determinative. The Court, citing to ORS 45.400(3)(b) confirmed that, "if a witness's testimony will be outcome-determinative, the opposing party has a right to face-to-face cross-examination, period."

In person cross-examination is necessary witness's testimony will be determinative of the outcome, when in-person assessment of a witness's credibility is critical, and when the absence of in-person testimony will result in substantial prejudice. ORS 45.400(3)(a), (b) & (f). The statute demonstrates the legislature's determination that in-person testimony may be crucial to the fundamental fairness of trial proceedings in these circumstances. And mother has shown how she was prejudiced by her inability to effectively cross-examine Volvano. As a result, reversal and remand is required.

Comment: The issue of admissibility of shaken baby syndrome or abusive head trauma evidence is still an open question. See FN 1 for a reminder about raising *Brown/O'Key* challenges to the juvenile court.

Dept. of Human Services v. C.M.E., 278 Or App 297 (2016)

On May 11, 2016, the Court of Appeals issued an opinion in **Dept. of Human Services v. C.M.E., 278 Or App 297 (2016)**, in which the Court affirmed the juvenile court's order changing the permanency plan for M from reunification to adoption.

The detailed facts are described in the opinion, a summary follows. DHS removed M from mothers care at birth in 2007 due to mental health and substance abuse. Mother successfully engaged in services, M was returned, and the case closed in 2010. Mother maintained a close relationship with foster parents. In May 2014, jurisdiction was once again established due to mother's significant mental health problems and inability to benefit from services. At the December 2014 permanency hearing, M and CASA requested a change in plan to adoption. The court found no reasonable efforts for the first 7 months of the case, declined to change the plan and scheduled a subsequent permanency hearing for November 2015. At the request of M's attorney, a permanency hearing was held in August 2015.

At the August permanency hearing, DHS testified that despite ongoing concerns about Mother's ability to

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care for herself and M, mother had made sufficient progress such that DHS could implement a comprehensive safety plan to allow mother to parent independently in her home with a support network of family and service providers. Mother's service providers raised concerns that mother was incapable of safely parenting M. M, who was 8 years old, expressed his desire to remain with foster parents. The court, relying on the testimony of service providers and the length of time M had been in care, changed the plan to adoption and found no compelling reason that a TPR petition should not be filed.

On appeal, mother argued that the juvenile court erred in concluding that, despite reasonable efforts, mother had not made sufficient progress to make it possible for M to safely return home (ORS 491B.476(2)(a)), mother's progress in services and bond with M are a compelling reason not to change the permanency plan (ORS 419B.498(2)(b)), and DHS earlier failure to make reasonable efforts is a reason to forego the change in plan (ORS 419B.498(2)(c)).

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First, the Court determined, based on a review of the record, that the evidence was sufficient to support the court's conclusion that mother had not made sufficient progress.

Next, Court declined to decide whether the bond between a parent and child can serve as a compelling reason to decline to pursue termination and instead determined that, in this case, the evidence is legally sufficient to support a determination that the bond was not a compelling reason.

Last, the Court determined that, although DHS efforts were not reasonable during one time period of the case, this does not establish that the overall efforts, including later efforts were unreasonable.

Consequently, the Court found the juvenile court did not err when it changed the permanency plan to adoption and affirmed the decision of the juvenile court.

Comment: The opinion also references in-home safety plans and the *A.R.S.* holding that the ability to parent a child independently is not a legal requirement for finding sufficient progress. The court distinguishes this case from the *A.R.S.* line of cases saying "we have generally applied that rule to situations where the parent had access to live-in parenting support or permanent, alternative living arrangements." *See Dept. of Human Services v. A. R. S.*, 249 Or App 603, 605-06, 278 P3d 91 (2012).

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Dept. of Human Services v. K.G.A.B., 278 OR App 391 (2016)

On May 18, 2016, the Court of Appeals issued an opinion in Dept. of Human Services v. K.G.A.B., 278 Or App 391 (2016), in which the Court affirmed the juvenile court's judgment terminating mother's parental rights to her daughter after a hearing conducted in mother's absence. The issue in this case is whether DHS failed to properly serve the TPR petition and summons when it used service by publication in a Deschutes County newspaper when DHS had information that mother was located in Florida.

In December 2014, DHS filed a TPR petition and after unsuccessful attempts to personally serve mother, it filed a motion requesting authorization to serve by publication in a newspaper with general circulation in Deschutes County. DHS' affidavit in support of the motion indicated that DHS had made a number of unsuccessful efforts to locate a valid address for mother, and that mother had posted on Facebook (FB) that she resided in the bend area. DHS omitted information that mother's FB page also contained a reference to mother being in Florida. The court granted DHS' motion for service by publication.

On appeal, Mother argues service by publication in Deschutes County was inadequate given the information DHS possessed about mother's presence in Florida.

Under ORS 419B.824(6), the validity of an order authorizing service has two components: 1. Whether service by publication is properly authorized and 2. Whether the manner of service by publication is properly authorized. Mother's argument centered on whether the manner was proper given the information DHS had relating to mother's whereabouts. According to 419B.824(6)(c), if DHS "knows of a specific location other than the county where the action is commenced where publication might reasonably result in actual notice," then the department must "so state in the affidavit" accompanying the motion for service by publication, "and the court may order publication in a comparable manner at such location in addition to, or in lieu of, publication in the county where the action is commenced."

In this case, the Court found nothing in the record support's mother's characterization as to to what DHS "knew." "The only evidence about DHS's knowledge regarding mother's location is the description in the affidavit and in the caseworker's testimony of what the paralegal saw when she looked at mother's Facebook page. The evidence did not establish that the Facebook page indicated mother resided in Florida or even that she would be there for any length of time."

The trial court found that the information DHS possessed regarding mother's location was too tenuous for DHS to understand Florida to be a "location that might reasonably result in actual notice" to mother. The Court affirmed the trial court's determination that the DHS affidavit was sufficient. And the Court concluded that publication solely in Deschutes county was reasonably calculated to reach mother given Deschutes county had jurisdiction over the child, the last two hearings, including the permanency hearing held three months ago, were held in Deschutes county, mother's last known address was in Deschutes county, and mother reported on her FB page that she still lived in Deschutes county. Under all of the circumstances, the evidence of mother's presence in Florida is too tenuous to conclude publication in Florida was also required.

Dept. of Human Services v. A.E.R., 278 Or App 399 (2016)

On May 18, 2016, the Court of Appeals issued an opinion in Dept. of Human Services v. A.E.R., 278 Or

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App 399 (2016), in which the Court reversed and remanded the juvenile court's judgment changing the permanency plan for children J, E and G from reunification to adoption. The issue in this case is whether the juvenile court denied father's statutory right to "participate in hearings," ORS 419B.875(2)(c), when it conducted the final day of a permanency hearing in father's absence, despite the fact that father, who was incarcerated, had secured an order to be transported to the hearing.

Father was incarcerated at the time of jurisdiction and remained incarcerated throughout the pendency of the permanency hearing which began on August 20, 2015. He opposed the change in plan and argued DHS failed to make reasonable efforts to reunify the family. Father testified during the first two days of the PH and stated that he sent letters to his children from prison which were deemed inappropriate by the DHS caseworker and therefore not delivered. DHS did not offer testimony by the caseworker who was no longer the caseworker at the time of the hearing. Father's counsel sought a continuance to examine the caseworker's file because DHS did not disclose copies of father's letters to the children. The court granted additional time to the parties to obtain the evidence and set a final date for the third day of the hearing: September 16, 2015 with the understanding that father and mother intended to subpoena DHS to produce the records and subpoena the caseworker (who was no longer with the agency) to testify. In the weeks between day 2 and 3 of the PH, father issued a subpoena for the records but the court heard and granted a motion to quash the subpoena.

Father obtained a transport order in advance of the September 16, 2015 PH, but when the date arrived had not been transported and the court was unable to arrange telephonic appearance. Father's attorney objected because she needed to consult with father about evidence and possibly introduce evidence through him regarding reasonable efforts. (*See* State ex rel Juv. Dept. v. Williams, 2014 Or App 496 (2006), regarding reasonable efforts and incarcerated parents.) The court directed the parties to continue in Father's absence, did not consider the letters that father attempted to send to his children, and changed the permanency plan to adoption.

Under the circumstances of this case, the Court concluded father's right to participate in the hearing included the right to consult with counsel and complete the presentation of his evidence. The juvenile court's decision to proceed in father's absence was an error that substantially affected his rights because the court's decision to change the plan relied, in part, on the fact that the caseworker reasonably denied communication between father and his children. Therefore, reversal is required. (Note that the Court considers the materiality of the evidence and the necessity of father's presence *in this case* and distinguishes it from a situation in which the court rejected additional testimony from father on evidentiary or procedural grounds).

Dept. of Human Services v. J.D.H., 278 Or App 427 (2016)

On May 18, 2016, the Court of Appeals issued an opinion in Dept. of Human Services v. J.D.H. , 278 Or App 427 (2016), in which the Court affirmed permanency hearing judgments continuing jurisdiction and a permanency plan of APPLA to Indian children A and J. Mother, father, A and J all appeal. Mother and father argued jurisdiction should be dismissed as void due to noncompliance with ICWA, Father argued if dismissal is not required, the case must be remanded for instructions for the juvenile court to make an active efforts determination, and A and J contend that the juvenile court erred in determining compelling

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reasons (ORS 419BB.76(5)(f)) precluded changing the permanency plan from APPLA to adoption.

The Court found the juvenile court did not error in denying the parents' motion to dismiss because the record did not substantiate the basis of the motions, that at the time of jurisdiction the court knew or had reason to know an Indian child was involved. In this case, DHS had been working with mother in 2004 regarding A and another child R, had documentation from the tribe that mother is a "documented descendant" but does not meet requirement for tribal membership and that mother's children are not Karuk Tribal members and do not qualify for ICWA. In 2011, A and J came into protective custody, DHS noted prior Karuk affiliation and asked mother to complete ICWA forms. Mother refused to do so. At the jurisdictional hearing on May 9, 2011, the issue of ICWA applicability was not raised and the dispositional judgements did not mention ICWA. In June, parents completed ICWA forms and indicated no native ancestry. In May 2012, mother received an enrollment card from the Karuk Tribe and did not notify DHS of that fact. At the first PH in June 2012, no party mentioned ICWA. At that time the Court changed the plan to APPLA noting adoption not appropriate because of each child's attachment to parents and siblings. In October 2013, the Karuk Tribe notified DHS that A and J were "enrolled descendent tribal members" and, from that time forward A and J were regarded by DHS as Indian children subject to ICWA.

On June 18, 2014 mother filed motions to dismiss based on noncompliance with ICWA. This motion coincided with the third PH which occurred on June 18, 2014. In the permanency judgements, the court stated that ICWA applied to the proceedings, deferred a decision on the motion to dismiss, and continued the APPLA plan.

On August 22, 2014 the court held the PH which yielded the judgments which are the subject of this appeal. The court denied the motions to dismiss because the record established this was not an ICWA case prior to late 2013, a reasonable efforts standard was appropriately applied. The court continued the APPLA plan explaining that the tribal expert did reported that the "Tribe did not express an opinion on adoption. Therefore, the Court is unable to ascertain the Tribe's position on DHS's request."

The Court of Appeals, reviewing the totality of the circumstances, found the juvenile court did not error in denying the motion to dismiss, that because ICWA did not apply at the time of the placement decision in May 2011 or change to APPLA in June 2012, the juvenile court was not required to make an active efforts determination, and the juvenile court's decision to defer the change in plan to adoption pending express input from the tribe was not erroneous.

Comments: The Court of Appeals frequently referred to Mother's role in providing (or failing to provide) information regarding ICWA applicability to DHS. *See* FN 15, "Although parents, as the parties invoking ICWA, had the burden of prima facie proof as to ICWA's applicability, see *Hofmann*, 176 Or App at 314-15, they presented no evidence that mother was eligible for Karuk tribal membership at any time before May 2012.

The Court also describes the renewal of the APPLA permanency plan as not "effecting a foster placement" requiring an active efforts determination. (*See* p 442 and FN 17).

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Compliance with the Americans with Disabilities Act in Child Dependency Cases

By Caitlin Mitchell, YRJ Attorney

National estimates indicate that at least 8.4 million parents with disabilities have children under the age of eighteen living in the home. Martin Guggenheim and Vivek S. Sankaran eds., *Representing Parents in Child Welfare Cases* 253 (2015). Disability can assume a wide range of forms that have equally wide-ranging effects on a person's functioning. Yet as a population, disabled parents are disproportionately likely to have child welfare involvement and to suffer termination of parental rights. *Id.* at 254. Researchers have estimated that 40 to 75 percent of mothers with mental illness lose custody of one or more of their children, a rate substantially higher than for non-mentally-ill mothers; another study estimated that 80 percent of parents with intellectual disabilities have lost parental rights to a child. *Id.*

There is a widespread belief that people with disabilities—particularly those with psychiatric and cognitive disabilities—are largely beyond help, with devastating results for parents:

> "Many caseworkers and other professionals, including psychologists who perform evaluations of parents in CPS cases, believe that a mental illness or, especially, a cognitive disability, cannot be changed, so no amount of treatment or support would allow the parent to provide adequate care for a child. Faced with this assumption, caseworkers are not motivated to engage in careful service planning with these parents, and psychologists are less likely to develop detailed treatment recommendations to address identified problems." *Id.* at 255.

Most jurisdictions lack specialized standards or protocol for working with parents who are cognitively impaired or have other disabilities that affect learning and communication. Smith, *Fit Through Unfairness: The Termination of Parental Rights Due to a Parent's Mental Challenges*, 5 Charlotte L Rev 377, 401 (2014). This creates a serious challenge for judges, attorneys, and caseworkers, who are themselves unlikely to have training and experience in working with these populations.

The Americans with Disabilities Act (ADA), along with the literature regarding its application, is a crucial tool that professionals can use in ensuring that the rights of disabled parents are protected. Title II of the Americans with Disabilities Act prohibits discrimination by public entities that are run or funded by state and local governments. 42 U.S.C. sec 12131 *et seq*. It mandates that "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

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entity, or be subjected to discrimination by any such entity." *Id.* at sec 12132. Public entities thus must make "reasonable modifications" in policies, practices, or procedures, unless the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. sec 35.130(b)(7). As a public entity that is run or funded by the state, the Oregon Department of Human Services (DHS) is covered by the ADA.

Under federal law, a person is defined as having a disability if he or she (a) has a physical or mental impairment that substantially limits one or more major life activities; (b) has a record of such impairment; or (c) is regarded as having such an impairment. Americans with Disabilities Act, 42 U.S.C. sec 12102, 12131(2) (1990), amended by Pub. L. No. 110-325 (2008). A person is protected under the ADA if he or she has a disability that substantially limits a life activity when the condition is in an active state, even if the condition is not evident or does not limit a life activity at all times. 42 U.S.C. sec 12102.

As most relevant for our purposes, the ADA requires that the Department of Human Services make reasonable accommodations—which may include specially-tailored evaluations, services, and providers, as well as adjustments in manner of communication—that will provide disabled parents with the same opportunity that non-disabled parents have to ameliorate the bases of jurisdiction and reunify with their children.[1] The bar for reunification need not be lowered; rather, services must be adapted to meet the needs of the parent. *In re Hicks/Brown*, No. 328870, 2016 WL 1650104 (Mich Ct App Apr 26, 2016) (internal citations omitted).

A recent case in Massachusetts brought the issue of discrimination against parents with disabilities into the public spotlight. In that case, the Department of Justice determined that the Massachusetts Department of Children and Families (DCF) had violated the ADA rights of Sara Gordon, a 21-year-old developmentally disabled mother, when it removed her 2-day old infant from her care and subsequently sought to terminate her rights. DOJ Letter (January 29, 2015), *available at* http://www.ada.gov/ma_docf_lof.pdf. In its public letter, the DOJ explained that DCF had acted on discriminatory stereotypes about Ms. Gordon's disability, denying Ms. Gordon the opportunity to benefit from services due to an unfounded assumption that she lacked the ability to learn how to safely care for her child. Ms. Gordon's extended family had come together to present a family-supported parenting plan, in which the child would be placed with Ms. Gordon and her parents in their home; yet the department had rejected that plan, although it did not identify any current safety concerns with the extended family. The ADA, the DOJ explained, prohibits "the denial of opportunities to benefit from services" and "the failure to reasonably modify policies and procedures"; relatedly, it prohibits the state from removing children simply because a disabled parent cannot care for a child independently.

The requirements imposed by the ADA support and enhance existing agency requirements under Oregon Law. Oregon law is clear that no parental condition or conduct is *per se* jurisdictional, and that reasonable efforts are required except under specific circumstances enumerated by ORS 419B.340(5)(a). *Dept. of Human Services v. Williams*, 204 Or App 496, 504-08, 130 P3d 801 (2006) (trial court erred in finding that reasonable efforts were not required due to the father's incarceration). While the "reasonable efforts" standard is fact-specific, case law provides guidance as to what is "reasonable" when a parent's disability forms a basis of jurisdiction. For example, in *State ex rel. Dept of Human Services v. E.K.*, 230 Or App 63, 73, 214 P3d 58 (2009), DHS referred a mentally ill mother to a counseling program that taught parenting skills, and provided family therapy, in-home services, and regular visitation with the children. Case law suggests—and common sense confirms—that "reasonable efforts" for a disabled parent requires the department to assist the parent in learning how to manage his or her disability, whether through therapy, hands-on parenting instruction, medication, or some other technique, so that it does not

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interfere with safe parenting. As in all cases, the department's efforts may include working with the parent to identify natural or community supports that will allow the parent to care for the child with assistance. *Dept. of Human Services v. Smith*, 338 Or 58, 86, 106 P3d 627 (2005) (no requirement that parent care for child independently).

One of the ADA's most "basic requirement[s]" is that a covered entity must evaluate a person with disabilities on an "individualized basis." *PGA Tour, Inc. v Martin*, 532 US 661, 690 (2001). That requirement is also contained in Oregon law: Even when there is not a disability at play, the specific content of the "reasonable efforts" requirement is "dependent on the unique circumstances of [the] particular case[.]" *Williams* at 507. In other words, what is "reasonable" flows from an individualized assessment of a parent's strengths, needs, and circumstances, and that assessment is, in itself, part of the reasonable efforts that DHS must make. The department's policies and procedures implement that legal requirement by mandating a Protective Capacities Assessment (PCA)—a detailed, individualized assessment of the parent's strengths and weaknesses—that must be completed within 30 days subject to exception. Managing Child Safety Ver 2 Section 5, 1. Thus, in cases involving a parent with a disability, it may be crucial for the agency to obtain an evaluation from a specially-qualified professional, who can speak with accuracy and without bias about the parent's strengths, and about the specific services and methods of communication that will enable the parent to succeed.

As a professional community, it is crucial that we become familiar with the requirements of

the Americans with Disabilities Act, so that we can ensure that disabled parents are treated fairly and given a meaningful chance to reunify with their children. For further information and resources, please consult the following sources:

- Martin Guggenheim and Vivek S. Sankaran eds., *Representing Parents in Child Welfare Cases* 253 - 268 (2015)
- U.S. Department of Justice, *Protecting the Rights of Parents and Prospective Parents with Disabilities*, available at http://www.ada.gov/doj_hhs_ta/child_welfare_ta.html
- Open Letter from U.S. Department of Justice (January 29, 2015), *available at* http://www.ada.gov/ma_docf_lof.pdf
- National Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* (2012), *available at* https://www.ncd.gov/publications/2012/Sep272012
- *In re Hicks/Brown*, No. 328870, 2016 WL 1650104 (Mich Ct App Apr 26, 2016)

[1]Courts across the country have held that the ADA requires state child welfare agencies to make "reasonable accommodations" to work with disabled parents as part of their reasonable or active efforts requirements. See, e.g., In re Hicks/Brown, No. 328870, 2016 WL 1650104 (Mich Ct App Apr 26, 2016) (providing a detailed examination of the ADA's requirements in child protection proceedings); C.W. v. State, 23 P3d 52, 55 (Alaska 2001) (if state had duty to provide services to remedy parent's alcoholism, it also had the duty under the ADA to provide services in a manner that accommodated his disability); In re Antony B., 54 Conn App 463, 473, 735 A2d 893 (1999) (ADA applies to reunification services and programs; department's failure to take parent's mental health condition into consideration would violate both the ADA and reasonable efforts requirement).●

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BOOK REVIEW

Representing Parents in Child Welfare Cases: Advice and Guidance for Family Defenders

Martin Guggenheim and Vivek S. Sankaran, eds.

Review By Holly Telerant, Deputy Defender, Juvenile Appellate Section, Office of Public Defense Services

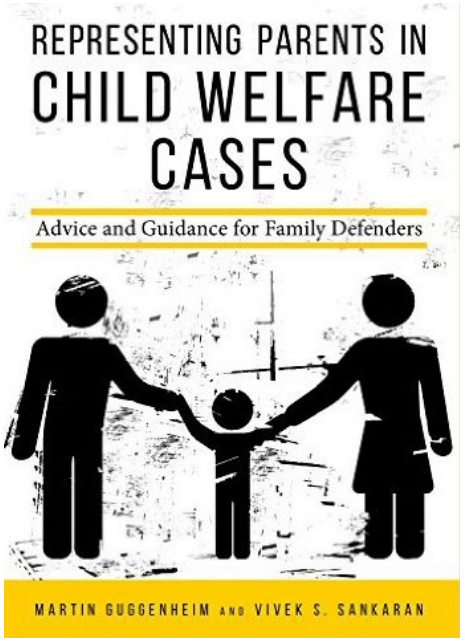
The defense of parents against state child welfare agencies in juvenile dependency proceedings is changing, not only in Oregon, but across the country. With greater recognition that the interventions of child welfare agencies often cause more harm than good, that government interference into the private lives of poor people and people of color takes place at a disproportionate rate, and that the interests of parents and children are aligned because family preservation leads to the best outcomes for all involved— there has been an increasingly organized effort to elevate the practice of parent defense.

As part of that effort, the ABA Center on Children and the Law established a National Project to Improve Representation for Parents, which is the driving force behind this book. The editors observe that, although individual advocates have been fighting for parent's rights in obscurity for decades, "this book is the field's coming out statement: we exist and we do important work."

The goals of the publication are two-fold: to help create a cultural shift in parent representation and to help lawyers win. To those ends, the authors provide a comprehensive handbook that reads like a combination between a trial-practice guide and an inspirational juvenile law CLE, with the best juvenile law practitioners from around the country providing stories, advice, and encouragement in their respective areas of expertise.

Each chapter is written by a different author and addresses a discrete topic or stage of litigation. Because the authors come from different states, the focus is not on substantive law, but on the strategies and overarching themes that transcend the differences among state child welfare systems. The volume includes an overview of the history of child welfare law in the United States and a discussion about avenues for systematic reform. There are also nuts-and-bolts chapters that contain tips for challenging removal, shortening foster care stays, expanding visitation, and effectively advocating for return home or other relief at each stage of the case, in or out of court. Other chapters focus on effective advocacy and legal considerations for particular clients, such as incarcerated parents, parents who live in another state or country, parents with disabilities, or parents with children protected by the Indian Child Welfare Act (ICWA). The book also includes detailed addenda, such as guidelines for increasing the quality of parental visitation that were developed by the Center for Family Representation and successfully implemented in New York City.

Like all good legal guides, this book is made up of 80 percent perspiration and 20 percent inspiration. Both practical and theoretical, it would be a good primer for attorneys or judges



who are new to this practice, or a handy reference guide for those who have been in the trenches for a while and need to pick up a new legal topic or want to invigorate their practice. It is a strongly recommended addition to any defense office's library or any solo practitioner's bookshelf. For all involved in this changing system, this guide provides an effective dose of instruction and inspiration, reminding us about the importance of doing this work well—for our clients, for the families involved, and for the welfare of our society as a whole. ●

Raising the Bar with Comprehensive Juvenile Indigent Defense Contracts

Issue Brief by National Juvenile Defender Center

ISSUE

Quality legal representation informed by social science research and best practices is integral to ensuring the fair administration of justice in the juvenile delinquency system.[1] The importance of a youth's access to knowledgeable, well-resourced juvenile indigent defense counsel cannot be overstated.[2] The prevalence of low-bid,[3] flat-fee[4] contracting schemes for court-appointed and contract juvenile indigent defense counsel undermines the provision of quality representation by encouraging contract attorneys to provide minimal time, effort, and resources to their juvenile cases to maximize profits.[5] The development and implementation of comprehensive juvenile indigent defense contracts is crucial to regulating and ensuring the provision of quality representation for youth in the juvenile delinquency system.

Juvenile defenders have an ethical obligation to provide competent, diligent, and zealous advocacy to protect the young client's procedural and substantive rights throughout the entire scope of representation—starting at the earliest stage possible and continuing until the client is discharged from the system.[6] Aside from knowledge of criminal and juvenile law, the legal representation of youth in the delinquency context requires a complex set of specialized skills, including familiarity with juvenile court procedure, practice standards, and case law; the ability to communicate complex legal principles to young clients; familiarity with a wide range of appropriate rehabilitative services and programs; an understanding of the growing body of research in adolescent development; and the ability to monitor progress after disposition. Given the landscape of juvenile indigent defense delivery systems and the overall lack of access to quality representation in the juvenile delinquency context, there is an overwhelming need to develop comprehensive juvenile indigent defense contracts that recognize juvenile defense as a specialized practice, reinforce the Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems (Ten Core Principles)[7] and the ethical responsibilities underlying the Role of Counsel in Delinquency Court (Role of Counsel),[8] incorporate critical social science research, and embody the National Juvenile Defense Standards.[9]

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NATIONAL SNAPSHOT

Every state in the nation utilizes contract counsel to some extent to deliver juvenile defense services to indigent youth. Although some states have a statewide public defense/juvenile indigent defense delivery system, a majority of states use hybrid systems funded

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by counties and/or localities that independently choose their methods of providing counsel for indigent respondents. These methods often include contracting with individuals or independent entities to provide representation. Even those jurisdictions with statewide systems rely on appointed or contract counsel to handle conflict cases and/or to represent the overflow of cases that the state public defender offices otherwise do not have the capacity to handle. An evolving body of research, beginning with A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings[10] and NJDC's subsequent assessments of 21 state indigent defense systems, calls attention to the systemic deficiencies that create inadequacies in the representation of youth by appointed counsel.[11]

WORKING INNOVATIONS

There is no "one size fits all" approach to raising the bar for juvenile indigent defense contract counsel to ensure quality representation. The sampling of working innovations included below illustrates a multitude of ways that juvenile defenders have approached and addressed this issue via contracts, with hopes to ignite and enable juvenile defenders across the country to advance reform in their respective jurisdictions.

Washington State

Under the MacArthur Models for Change Juvenile Indigent Defense Action Network (JIDAN), TeamChild in Washington State led a working group comprised of representatives from the juvenile defense bar and law school faculty who worked with the State Office of Public Defense to develop a model juvenile indigent defense contract that could be tailored to suit the varying needs of the more than 30 Washington county defense services systems. This model contract sought to enhance the quality of juvenile defense representation and expand the scope of representation to include legal needs of youth reintegrating into their communities. This work came about in response to the Washington Supreme Court ruling on an ineffective assistance of counsel claim in State v. A.N.J.[12] that, along with other recent cases raising ineffective assistance of counsel, led the court to adopt mandatory Standards for Indigent Defense[13] and promulgate new court rules requiring counsel to certify compliance with the Standards before appointment.[14] The model contract incorporated the Ten Core Principles and included provisions establishing juvenile-specific training requirements for attorneys accepting appointments in juvenile court; mandate a caseload cap of 250 cases yearly; provide for adequate supervision; and allow for post-disposition representation. Currently, TeamChild is updating the existing model contract to reflect the recent implementation of the Standards by the Washington Supreme Court and the publication of NJDC's National Juvenile Defense Standards. TeamChild will continue to encourage counties to utilize the new contract to enhance the quality and scope of representation and plans to distribute the model contract nationally with the intention that it will be adapted and implemented in other jurisdictions across the country.

California

The California JIDAN team researched contracts for appointed counsel in the state and provided recommendations for improving them. To initiate this endeavor, the JIDAN team first identified critical elements of delinquency representation derived from the Ten Core Principles, statutory requirements, constitutional case law, rules of professional conduct, and practice standards. Then, the Youth Law Center (part of the California JIDAN team) sent requests under the Public Records Act[15] to the county administrative officers and juvenile court judges in the state's 58 counties seeking contracts and other documents describing the terms of employment and compensation for appointed counsel in delinquency cases. Once the team received the contracts, members assessed whether and how the contracts handled ethical obligations specific to delinquency cases; how the contracts defined the scope of representation, including whether the contracts contained specific provisions recognizing the right

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to representation prior to the initial court hearing (early stage representation) and post-dispositional (post-sentencing) representation as required by California law; whether the contracts required prior experience, training, or both as a condition of appointment; whether the method of compensation adequately covered the elements of competent representation or otherwise discouraged counsel from obtaining investigators, experts, and consultants to aid representation; and whether the contracts included meaningful provisions establishing oversight and quality assurance.[16] The team summarized and published its findings with recommendations in a law review article.[17] Ultimately, the work of JIDAN team members on this issue sparked an intense discussion and review of panel attorney contracts in California.[18]

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Massachusetts

In Massachusetts, the Youth Advocacy Division (YAD) of the Committee for Public Counsel Services (CPCS), in addition to regular public defender appointments, provides support and supervision to private panel attorneys handling delinquency and youthful offender cases in each of the state's twelve counties. To contract with the state, private attorneys must comply with rigorous CPCS Performance Standards, annual caseload limits, continuing legal education requirements, supervision, and oversight, among other requirements. All private counsel seeking to serve on the juvenile panel must be selected by a county-wide bar advocate program and obtain an initial juvenile delinquency certification, which requires at least one year of high-quality district court or comparable trial experience and eight hours of juvenile-specific training within twelve months of applying to serve on the panel. To maintain certification, juvenile delinquency panel attorneys are required to complete eight hours of juvenile-specific CLEs per year. New panel attorneys are assigned a local "resource attorney," who serves as a mentor to less experienced attorneys through the county bar advocate program, during their probation period. In addition to facilitating this mentorship program, CPCS contracts with private attorneys to serve as Juvenile Supervising Attorneys (JSAs) in each county. These JSAs supervise all of the private juvenile delinquency and youthful offender attorneys in their county while providing leadership, technical assistance, coaching, and support. In this supervisory role, the JSAs are responsible for reviewing cases, monitoring court appearances, and handling complaints from the judiciary, clients, etc., regarding the representation of private counsel. JSAs also serve as liaisons between appointed counsel, courts, judges, CPCS, the Department of Youth Services, and other agencies.

Colorado

In the wake of NJDC's Colorado Juvenile Indigent Defense Assessment,[19] the state's Office of Alternate Defense Counsel (ADC) recognized the need to make changes to its juvenile indigent defense contracting system to embrace the practice as a specialty and ensure the provision of quality representation by juvenile delinquency contract counsel. To revamp its approach, ADC created a Contract Juvenile Defense Coordinator position staffed by an experienced attorney who oversees and coordinates all of the contract attorneys that handle juvenile delinquency cases, serves as a resource attorney by providing training and technical assistance, and actively participates in the contracting process. In addition to the Contract Juvenile Defense Coordinator, ADC designated specific contract attorneys to handle juvenile appeals. To uplift the

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practice, ADC established a separate process for contracting with juvenile delinquency counsel that requires applicants to have previous experience and show a demonstrated commitment to and genuine interest in juvenile defense practice. During the renewal period, each contract attorney is reevaluated to ensure that he or she is competent and committed to providing quality juvenile delinquency representation. All juvenile defense contract counsel are encouraged to obtain a copy of the juvenile defense practice manual that was developed by ADC and the Colorado Juvenile Defender Coalition (CJDC), to attend an annual juvenile defense conference hosted by ADC in partnership with CJDC, and to engage in regular juvenile-specific training. To keep contract counsel abreast of changes and emerging issues pertaining to juvenile law and juvenile defense practice, ADC hosts juvenile-specific roundtables and disseminates periodic juvenile law and practice updates. Currently, ADC is working to establish regional points of contact throughout the state to allow for greater oversight and quality assurance on the ground.

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RECOMMENDATIONS

Regardless of how juvenile indigent defense services are delivered, every child should have access to knowledgeable, well-resourced defense counsel that will zealously advocate on his or her behalf. In an effort to ensure that appointed counsel and contract delivery systems are adequately serving young clients, NJDC recommends that interested stakeholders:

1. Organize a working group to evaluate juvenile indigent defense contracts;

2. Develop comprehensive juvenile indigent defense contracts that, at a minimum, include provisions addressing:

• Ethical Obligations and Role of Juvenile Defense Counsel: Contracts should require counsel to demonstrate that they possess or are committed to obtaining the specialized skill set that juvenile indigent defense requires. Contracts should clearly distinguish delinquency practice from criminal, dependency, and any other legal practice by specifying that counsel must (1) zealously represent the juvenile client's expressed interests; (2) actively engage in the adversarial process by vigorously asserting the juvenile client's statutory and constitutional rights; and (3) provide representation that assures holistic treatment in consultation with experts and others, in accordance with the rehabilitative purpose of the juvenile delinquency system.[20]

• Scope of Representation: Contracts should clearly define the scope of representation contemplated under the agreement on the front end and the back end of the case—providing for early stage and post-disposition representation—and clearly outline the duties of counsel with respect to the different stages of representation.[21]

• Qualifications of Juvenile Defense Counsel: Contracts should require relevant experience or a demonstrated interest in juvenile defense while remaining sufficiently flexible to allow promising attorneys who are otherwise capable of providing diligent and competent representation with additional training and supervision to do so. Contracts also should provide more stringent requirements for counsel to take on more serious and complex juvenile cases.[22]

• Training/Certification Requirements: Contracts should implement training requirements specific to juvenile defense and

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modeled after the Juvenile Training Immersion Program (JTIP)[23] before counsel can be appointed. These requirements should insist on certification that mandates counsel to engage in ongoing training to keep pace with current developments in juvenile law and practice.[24]

• **Appropriate Rate/Methodology of Compensation:** Contracts should establish an appropriate rate and methodology of compensation that adequately takes into account the time, amount of work, and complexity of work required to provide competent representation in each individual juvenile delinquency case.[25]

• **Supervision/Quality Assurance:** Contracts should include mechanisms for quality assurance and oversight for both individual attorneys and the appointed counsel system itself that institute periodic evaluations and sufficiently describe the nature of these evaluations; establish a process for addressing deficient performance; regulate caseload and workload by setting limits; and establish a reporting mechanism for complaints or constructive feedback.[26]

CONCLUSION

The development of comprehensive juvenile indigent defense contracts and the implementation of innovative strategies that appreciate these recommendations for such contracts will demonstrate a step in the right direction towards uniformity and raising the bar to ensure youth access to knowledgeable, well-resourced juvenile indigent defense counsel.

[1] See Robin Walker Sterling et al., Nat'l Juvenile Defender Ctr., Role of Juvenile Defense Counsel in Delinquency Court (2009), http://www.njdc.info/pdf/njdc_role_of_counsel_book.pdf [hereinafter Role of Counsel].

[2] See Nat'l Juvenile Defender Ctr. & Nat'l Legal Aid and Defender Ass 'n, Ten Core Principles for Providing Quality Delinquency Repr esentation Through Public Defense Delivery Systems (2008), http://www.njdc.info/pdf/10_Core_Principles_2008.pdf [hereinafter Ten Core Principles].

[3] In a low-bid system, individual attorneys or entities submit bids to handle a certain percentage (or all) of a jurisdiction's juvenile cases, and the individual/entity with the lowest bid wins.

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[4] In a flat-fee system, individual attorneys or entities receive a set nominal amount for assuming the representation for each case or client depending on the jurisdiction (e.g., $300 per case or per client).

[5] See Cyn Yamashiro, Tarek Azzam, & Igor Himmelfarb, Kids, Counsel and Costs: An Empirical Study of Indigent Defense Services in the Los Angeles Juvenile Delinquency Courts, Crim. L. Bull. (forthcoming) (Loyola-LA Legal Studies, Paper No. 2013-9), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2222376##; Sue Burrell, Contracts for Appointed Counsel in Juvenile Delinquency Cases: Defining Expectations, 16 U.C. Davis J. Juv. L. & Pol'y 314 (2012).

[6] Nat'l Juvenile Defender Ctr., National Juvenile Defense Standardsrdsrds R 1.1 (2012) [hereinafter Nat'l Juv. Def. Stdsds.]

[7] See Ten Core Principles, supra note 2.

[8] See Role of Counsel, supra note 1.

[9] See Nat'l Juv. Def. Stds ., supra note 6.

[10] See Am. Bar Ass 'n Juvenile Justice Ctr. et al., A Call for Justice: An Ass ess ment of Acc ess to Counsel and Quality of Repr esentation in Delinquency Proceedings (1995).

[11] For detained information about NJDC's assessment work, visit http://www.njdc.info/assessments.php#.

[12] State v. A.N.J., 225 P.3d 956 (Wash. 2010) (en banc). In this case, a juvenile was prejudiced by ineffective assistance of counsel, where the contract attorney spent between 35 to 90 minutes total with the juvenile client before the plea hearing and did not adequately explain the consequences of the plea, including whether the client would have to register as a sex offender and whether the conviction could be sealed; did no independent investigation; did not carefully review the plea agreement; and did not consult with experts. The client argued that the contract in Grant County created an incentive for attorneys to refrain from expending resources to investigate their cases or consult with experts.

[13] See Public Defense Improvement Program, Wash. State Office of Pub. Def., http://www.opd.wa.gov/index.php/standards (last visited Oct. 6, 2014).

[14] Wash. Juv. Ct. R. 9.2 ("Before appointing a lawyer for an indigent person or at the first appearance of the lawyer in the case, the court shall require the lawyer to certify to the court that he or she complies with the applicable Standards for Indigent Defense Services to be approved by the Supreme Court.").

[15] Cal. Gov't Code § 6250 et seq. (West 2011).

[16] Burrell, supra note 6, at 326-27.

[17] See Burrell, supra note 5.

[18] See Yamashiro et al., supra note 5.

[19] See Nat'l Juvenile Defender Ctr., Colorado: An Ass ess ment of Acc ess to Counsel and Quality of Repr esentation in Juvenile Delinquency Proceedings (2012).

[20] Burrell, supra note 5, at 333-35; see Nat'l Juv. Def. Stds ., supra note 6; Role of Counsel, supra note 1.

[21] Burrell, supra note 5, at 336-39.

[22] Id. at 344-46.

[23] JTIP is a dynamic 40-lesson trial advocacy and training program for juvenile defense attorneys that aims to elevate the practice of juvenile law and is structured to help defenders meet their obligations at every stage of the delinquency system.

[24] Burrell, supra note 5, at 333-35.

[25] Id. at 352-64.

[26] Id. at 364-66.

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CASE SUMMARY

By By Christa Obold-Eshleman, YRJ Attorney

State v. J.G.G., 278 Or App 184 (2016)

Youth appealed from an order finding that he had violated a term of probation that read: "The youth offender shall maintain a curfew of 4 PM to 5 AM weekdays and 4 PM to 5 AM weekends until otherwise directed by the Court or the [probation officer]." Youth was seen one day riding his scooter outside of his home at around 10:20 p.m. Youth argued that his mother had been adequately supervising him, so it was not a violation of his probation.

The state argued that the order was not appealable because no sanction had been given to the youth for the violation, so the order did not "adversely affect" the youth under ORS 419A.205(1)(d). The court held that a finding that a youth violated his probation is appealable regardless of any current sanction resulting from the finding of violation. This is so because ORS 419C.411(3)(e) "specifically provides for a possible adverse effect: that having a probation violation on youth's record could adversely affect any future dispositions made by the juvenile court." 278 Or App at 186.

The court went on to find that the substantive arguments made on appeal that 1) the curfew term of probation should be interpreted by reference to ORS 419C.680 (curfew law), and 2) that the probation term was unconstitutionally vague, were not adequately preserved by trial counsel's argument that the curfew term of the order needed to be clarified. The court, therefore, affirmed. ●

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