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2023 Caselaw Update
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Active Efforts/ICWA

***In the Matter of the Dependency of R.D.*, 532 P.3d 201 (July 11, 2023):**

In this case, R.D. was removed from her mother's care based primarily upon allegations of substance abuse. At the dependency fact-finding, the Department social worker admitted to having limited interaction and no in-person contact with the mother. The court admitted the mother's chemical dependency assessment into evidence, over the objection of mother's counsel and without a testifying witness. The court also admitted a declaration from Richard England, a purported ICWA expert, without objection from the mother. Mr. England had reviewed the case documents and had spoken with the child's placement; however, he had no contact with the mother. Mr. England opined that the Department had made active efforts, basing his opinion solely on the reports of the Department. The court established dependency, entered a disposition order placing R.D. out of the home, and ordered remedial services.

On appeal, Court agreed with the mother that the chemical assessment was inadmissible hearsay and rejected the Department's argument that the assessment was admissible as a statement of a party opponent, a statement for purposes of medical diagnosis or treatment, or as a basis for the social worker's expert opinion. However, the Court concluded that the admission of the chemical dependency assessment was harmless error and did not reverse the dependency order on this basis.

However, the Court concluded that the Department did not satisfy its obligation to make active efforts, as required by ICWA and WICWA. The Court pointed out that the active efforts requirement is not fulfilled simply because a parent is uninterested or that efforts would be futile. The Court found that the CPS social worker's contacts with the mother did not qualify as active efforts, in that the contacts were limited and were designed to *obtain information for the State*, not to *provide remedial services* for the mother. The Court found that the Department was required to tailor its efforts to help the mother overcome her barriers to reunification with R.D. Moreover, the Court found that Richard England's declaration was unhelpful in establishing that active efforts were made. The Court found Mr. England's declaration to be unsubstantiated and conclusory; in particular, the Court took issue with Mr. England's expectation that the mother find within herself the wherewithal to overcome her resistance to services.

In holding that the Department did not provide active efforts, the court remanded the case to the trial court to order a return of R.D. to the care of the mother unless the Department could establish that doing so would subject R.D. to substantial and immediate danger or threat of danger.

Reasonable Efforts

***In re Welfare of C.M.*, No 56970-1-II (August 15, 2023):**

In this matter, the father appealed the entry of an order of dependency, arguing that the court was required to consider the Department's reasonable efforts to prevent out-of-home placement prior to a finding of dependency. On appeal, the Court analyzed the plain language defining a dependent child in RCW 13.34.060(6) and found that this statute says nothing about a reasonable efforts finding being required prior to the entry of an order of dependency. In contrast, the Court indicated that the disposition statute, RCW 13.34.130, requires the Department to prove its reasonable efforts. The Court rejected the father's argument that the statutory amendments under HB 1227 requires the court to consider reasonable efforts prior to finding a dependency, noting that the amendments only require the court to consider the Department's reasonable efforts at a *hearing* pursuant to RCW 13.34.110 (which addresses both dependency and disposition), and that "nowhere in the newly enacted statute did the legislature explicitly require a reasonable efforts finding prior to… entering a dependency finding." The Court also rejected the parent's public policy argument that a reasonable efforts inquiry should inform the court's dependency inquiry, finding that such a public policy argument is more properly addressed to the legislature.

Race/Race Equity

***Matter of Dependency of Q.S.*, 22 Wn. App. 2d 586 (June 7, 2022):**

In this case, the father, who is Black, had grown up in the foster care system, and had suffered significant abuse, including sexual abuse, while in the Department's care. At trial, the Department's position was that the father was aggressive, erratic, and uncooperative with the Department. However, the father testified that his resistance to the Department resulted from his experience as a Black man interacting with a system of authority, as well as from his own experience being raised in the care of the Department. The father also presented expert witness testimony from a representative of the NAACP, who testified that implicit bias had played a role in the Department's request to remove the children from the father's care. The trial court largely disregarded the testimony of the expert witness, found that the father "perseverates on racial injustice and is preoccupied with the racial makeup of those around him," and granted the Department's petition.

On appeal, the Court of Appeals reversed. The Court of Appeals held that the State's concerns regarding the father's anger catered to the stereotypical perception of a loud, Black man. The Court of Appeals cited to the 2020 Washington Supreme Court open letter to the state judiciary and legal community and detailed the overrepresentation of Black children in foster care, the worse outcomes for Black children in the dependency system, and the responsibility of every member of the legal community to "work together to eradicate racism." The Court of Appeals held that the trial court erred when it "never confronted the possible racial bias in the child dependency system. Instead, the superior court asked the NAACP representative if she was explicitly biased when she observed racism against African Americans in the system."

Procedural Issues

***In the Matter of the Dependency of B.B.B.*, No. 84266-8-I (August 14, 2023):**

In this case, the child was placed in shelter care. By the time of the third continuing shelter care hearing, the mother's visitation was unsupervised. At that third shelter care hearing, the court entered an order and directed the parties to brief the issue of "whether a parent is entitled to an additional shelter care hearing every 30 days when one 30-day Shelter Care Hearing has already occurred and the parent's visits are unsupervised." At the fourth shelter care hearing, the court denied the mother's request to set another 30-day shelter care hearing, relying primarily upon a pending Local Juvenile Court Rule, and noted that the mother's request for continued 30-day shelter care hearings was "a waste of judicial resources not contemplated by the statute."

The parent sought discretionary review, which was granted. The Court found that while the statute requires that an *order* must be entered every 30 days to maintain a child in shelter care, the statute does not require that a *hearing* be held every 30 days while a child is in shelter care. The Court found that while the language of RCW 13.34.065(7) allows for shelter care orders to be amended at any time with notice and a hearing, the language does not include any notice or hearing requirement for an order authorizing continued shelter care when there is no amendment requested. The Court found that "although a party may request amendment to an order for continued shelter care… if there are no requested amendments, the statute does not require a hearing, nor subsequent hearings every thirty days." The Court concluded by holding that, while RCW 13.34.065(7)(a)(i) does not require continuing shelter care hearings every 30 days, it also does not prohibit courts from holding such hearings.

Evidentiary Issues

***In the Matter of the Dependency of A.C.*, 1 Wn.3d 186 (March 9, 2023):**

In this dependency trial, the court established dependency upon several grounds, many of which relied heavily upon improperly admitted hearsay testimony. The Court of Appeals affirmed the dependency, holding that the trial court erred by relying upon hearsay evidence, but also holding that the error was harmless because the remaining evidence supported dependency.

The Supreme Court reversed. The Supreme Court acknowledged that, pursuant ER 703 and 705, an expert may share the hearsay facts supporting an expert opinion to explain how he or she reached that opinion. However, a judge cannot rely on that hearsay as substantive evidence, and when a judge does so, it is error. The Supreme Court determined that the correct appellate standard for determining whether the error was harmless is the "materially affected" standard of review. Under this standard, "[a]n erroneous admission of evidence 'is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been *materially affected* had the error not occurred.'" The Supreme Court noted that while there is a low burden of proof in dependency cases, dependency still implicates fundamental parental rights and "must be approached with due solemnity." The Supreme Court found that the trial court was not entitled to rely upon hearsay beyond its limited purpose, and the taint of the improperly relied on hearsay affected the court's view of all the admissible evidence. The weight of that reliance, within reasonable probabilities, materially affected the outcome of the

hearing, and the Supreme Court cannot presume the judge, acting as fact finder, disregarded the inadmissible hearsay.

***In re Dependency of A.M.F.*, 23 Wn.App.2d 135 (March 30, 2023):**

In this matter, at her termination trial, a parent invoked her Fifth Amendment right to silence in response to questions regarding the last time she had used illegal drugs, and the court warned the parent it might draw a negative inference from the parent's silence. At the conclusion of the trial, the court drew a negative inference, made adverse findings regarding the parent's drug use, and terminated the parent's rights.

On appeal, the Court of Appeals held that while a parent has the right to invoke her Fifth Amendment right to silence in response to questions that may incriminate her, the trier of fact in a civil case may draw a negative inference from the parent's invocation of the right to remain silent, relying upon *Ikeda v. Curtis*, 43 Wn.2d 449 (1953). The Fifth Amendment prohibits a trier of fact *in a criminal case* from using a defendant's invocation of the right to silence as evidence against the defendant. The Supreme Court pointed out that whether the Fifth Amendment applies does not turn on whether the liberty interests at stake, such as the right to parent, are significant. Instead, by its plain terms, the Fifth Amendment applies only to criminal cases.

However, the Supreme Court also held that the Fifth Amendment does not allow the State to meet its evidentiary burden in a civil case based *solely on an assertion of the right to remain silent*. Instead, the State must provide other, admissible evidence supporting the adverse finding against the parent.

***In the Matter of the Welfare of M.R.*, 200 Wn.2d 363 (October 13, 2022):**

In this matter, at the father's termination trial, the Department moved to admit a UA incident report that stated that the father had failed to provide a UA sample and that the father was seen struggling with a UA device. The Department did not call the witness who observed the father at the UA collection center; rather, the Department called the Director of the UA collection site to testify as a records custodian. The trial court admitted the UA incident report over the objection of the father, finding the report satisfied the business records hearsay exception.

On appeal, the Supreme Court held that the UA incident report satisfied the business records exception. Specifically, the Court found: (1) the UA incident report was a record: a report written on the collection site's incident form; (2) the report was of an event: the father's visit to the collection site where the staff member observed a UA device and the father failed to provide a UA sample; (3) the custodian of the incident records, the Director, testified that such records are kept in the regular course of the collection site's business; (4) the report was created shortly after the incident: within 24 hours of the failed UA test; and (5) the report was based on the staff member's personal knowledge, and there was no evidence that the staff member had any motive to falsify the incident report or that other factors called into doubt the source, method, or time of its preparation. In particular, the Court found that "[a]lthough personal observations are subjective to a degree, that does not disqualify the incident report from admission under the business records exception; pure, mechanical objectivity is not a requisite under RCW 5.45.020." The Court distinguished the report in this matter from the type of reports admitted in *In re Welfare of J.M.* (psychological evaluation, requiring testimony involving "observation, analysis, and professional judgment"), *State v. Wicker* (fingerprint test, requiring opinion

testimony), and *State v. Hines* (police report, which should allow defendant opportunity to challenge officers' conclusions based on use of skill, judgment, and discretion).

Open Adoption

***In the Matter of the Dependency of A.N.C.*, 24 Wn. App. 2d 408 (November 21, 2022):**

In this case, a mother appealed the termination of the parental rights to her three children. On appeal, the mother argued that the trial court failed to recognize and exercise its equitable power to order the parties to undertake post-trial efforts to reach an open adoption agreement before entering a final termination order. The Court of Appeals held that the trial court had no basis to exercise any equitable powers because the mother does not have a statutory or constitutional right to an open adoption agreement. The Court of Appeals acknowledges that due process protects a parent's right to voluntarily relinquish their parental rights in certain circumstances; however, the Court held that open adoption is not itself an alternative to involuntary termination, and therefore, open adoption is not protected by due process.

The mother also asserts that the trial court should use its equitable powers to recognize a right to open adoption and, then, enforce that right. However, the Court rejected that argument. The Court held that although courts have equitable powers, these exist to allow remedies where the legislature has not spoken, or has spoken only incompletely, through statute. Here, the open adoption statute specifically outlines how a parent may enter into an open adoption agreement upon termination of their parental rights, and therefore there is no "statutory gap" into which equity may flow.

Finally, the mother asserts that the Department's practices and policies regarding open adoption agreements violate the children's equal protection rights. The Court rejected this argument as well, finding that the mother does not have standing to bring this claim on behalf of her child – because her rights have been terminated.

Developmental Disabilities

***In the Matter of the Welfare of D.H. and A.K.*, 25 Wn.App.2d 502 (January 24, 2023):**

In this case, the mother was diagnosed in 2017 with a developmental disability. The Department-selected psychologist, Dr. Steve Tutty, recommended certain services be provided to the mother, but did not make recommendations about how best to communicate with the mother when offering the services. The Department's social workers and service providers were either not trained, or not sufficiently trained, in special education or and were not trained in the current guidelines for disability-friendly communication. The Department made limited efforts to work with the mother to assist her in accessing services through DDA, and also made limited efforts in communicating about the services available to the mother through DDA. The Department provided the mother with a "generic" packet of "general" housing resources in the mother's area, as was the social worker's practice "generally." At trial, Dr. Tutty did not testify as to what the current professional guidelines were for working with individuals with intellectual disabilities. Dr. Tutty testified that his 2017 report contained recommendations on how to tailor services to the mother's intellectual needs, and testified that it would take "guidance and considerable practice and… a lot of structure and cues" for the mother to understand how to solve new problems as her children developed.

The trial court concluded that services had been tailored to the mother's disability, but made no finding as to how that tailoring was accomplished. The trial court made no finding as to what professional guidelines were relevant to the mother's disability or how those guidelines informed the Department's offer of services. The trial court concluded that the mother was not amenable to treatment by virtue of the clinical and parenting deficits identified that have not improved over time, and that the mother's cognitive and executive functioning impairments made it difficult for the mother to meaningfully benefit from any services.

However, on appeal, the Court found that it was required to view the evidence as would an *objective observer who is aware of… current professional guidelines for communicating with people who have similar disabilities.* The Court found that the trial court did not have the necessary information about the current professional guidelines with which to compare the communication that the mother actually received. Further, the trial court did not have sufficient evidence to conclude that the communications from the Department to the mother were sufficiently tailored to the mother's disability. The Court found that "[t]roublingly, it appears that [the mother] was judged negatively for the hallmark features of her disability that should have been accounted for by tailoring communications to suit her needs." The Court distinguished the tailoring of *communications*, which was relevant to whether services are offered *expressly and understandably*, from the tailoring of *services.* Because the Court held that the *offer* of services was not sufficiently tailored, the Court did not reach the question of whether the services themselves was sufficiently tailored.

Duty to Destroy Records/Statutory Damages

***Carter v. State, by and through DSHS*, 526 P.3d 874 (April 4, 2023)**

In this matter, following trial, two parents successfully defeated a dependency petition that included information from prior unfounded allegations. The dependency trial court also concluded that the Department had violated RCW 26.44.031(2)(b), which requires it to destroy records concerning unfounded CPS investigations after six years of completion of the investigation. The parents then filed suit, arguing that the Department failed to destroy records of unfounded findings in violation of RCW 26.44.031, and seeking damages and injunctive relief. The Department conceded that the parents were entitled to an order requiring destruction of the records, but opposed any order on damages or injunctive relief. The trial court entered an order requiring destruction of the relevant records, but granted the Department's motion for summary judgment on the issues of damages and injunctive relief.

On appeal, the parents argued the Court should find an implied cause of action for monetary damages under RCW 26.44.031(5)(a). However, the Court held that while the statute created an explicit cause of action for injunctive relief in order to enforce the Department's obligation to destroy records, the statute did not contain an implied cause of cause for monetary damages. The Court indicated that the statute's specific remedy of injunctive relief demonstrated that the legislature did not intend the statute to imply any other remedy, and that a cause of action could not be implied against the legislature's intent.