

Caselaw Update 2023: Ups, Downs, and Twisty-Turns

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ACTIVE EFFORTS/ICWA: *In the Matter of the Dependency of R.D., 532 P.3d 201 (2023)*

- ▶ Active efforts requirement not met simply because parent is uninterested or because active efforts would be futile.
- ▶ Active efforts are not efforts or services that are designed to obtain information for the State.
- ▶ QEW Richard England's declaration did not establish active efforts requirement; statements were unsubstantiated and conclusory.
- ▶ QEW's expectation that Indian parent find within herself the wherewithal to overcome her resistance to services "r[an] contrary to the expectations of ICWA and WICWA."

Up, Down, or Twisty-Turn?



- ✓ Push back on those active efforts findings!
- ✓ Examine QEW declarations! Don't stipulate to declarations that appear to simply adopt the Department's narrative.

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

- ▶ Plain language of RCW 13.34.030 does not require reasonable efforts finding prior to determining dependency.
- ▶ Disposition statute, RCW 13.34.130, specifically requires Department to prove its reasonable efforts.
- ▶ HB 1227 amendments do not explicitly require reasonable efforts finding prior to dependency finding; amendments only require court to consider Department's reasonable efforts at a *hearing* pursuant to RCW 13.34.110.

Up, Down, or Twisty-Turn?



- ✓ Make robust arguments on reasonable efforts at disposition hearing!
- ✓ No reasonable efforts finding = child cannot be placed out of the home.

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

- ▶ Department's concerns that Black father was aggressive, erratic, and uncooperative catered to stereotypical perception of a loud, Black man.
- ▶ Trial court's failure to confront possible racial bias in child dependency system was error.
- ▶ Responsibility of every member of legal community to work together to eradicate racism.

Up, Down, or Twisty-Turn?



- ✓ Examine whether/how race equity issues have impacted client/case plan.
- ✓ Raise race equity issues at every opportunity.
- ✓ Use experts.

PROCEDURAL ISSUES: *In the Matter of the Dependency of B.B.B., No. 84266-8-1 (2023)*

- ▶ RCW 13.34.065(7): “No child may be placed in shelter care for longer than thirty days without an ORDER, signed by the judge, authorizing continued shelter care.”
- ▶ Statute does not require a HEARING be held every 30 days.
- ▶ No notice or hearing requirement for an order authorizing continued shelter care when no amendments requested.
- ▶ Statute does not require subsequent hearings every 30 days (although subsequent hearings are not prohibited).

Up, Down, or Twisty-Turn?



- ✓ Visits supervised?
Note additional shelter care hearing!
- ✓ Require Department to overcome presumption in favor of unsupervised visits!

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

- ▶ ER 703 and ER 705: Expert may share hearsay facts supporting an expert opinion to explain how expert arrived at opinion, but judge cannot rely on that hearsay as substantive evidence.
- ▶ Appellate standard for determining harmless error: “materially affected” 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.’”
- ▶ Taint of improperly relied-upon hearsay affected court’s view of all admissible evidence.

Up, Down, or Twisty-Turn?



- ✓ Object to hearsay offered as basis for expert's opinion!
- ✓ Take good notes: what is court admitting as substantive evidence? As evidence for another purpose?

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

- ▶ At trial, parent may invoke her Fifth Amendment right to remain silent in response to questions that may incriminate her.
- ▶ If parent invokes, trial court may draw a negative inference.
- ▶ Fifth Amendment right prohibiting use of silence as evidence does not apply to civil cases – including dependency and termination cases.
- ▶ Evidence OTHER THAN the parent's invocation/negative inference must be admitted to establish trial court's findings and conclusions.

Up, Down, or Twisty-Turn?



- ✓ Advise client consequences of invoking Fifth Amendment!
- ✓ Require Department to “prove up” allegation at issue.
- ✓ Object to finding based solely on client’s invocation of Fifth Amendment right.

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

- ▶ UA incident report (from UA collection site) satisfied business records exception.
- ▶ “Although 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.”
- ▶ Court distinguished *J.M.* (psych eval); *Wicker* (fingerprint test); *Hines* (police report).

Up, Down, or Twisty-Turn?



- ✓ Distinguish evidence from record admitted in this case – was record prepared by someone with training/expertise? Are contents opinion? Does record compare to records distinguished by court?

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

- ▶ Parent whose rights have been terminated does not have a statutory or constitutional right to open adoption agreement.
- ▶ Open adoption is not, in itself, an alternative to involuntary termination.
- ▶ Courts do not have equitable powers to recognize a right to open adoption following involuntary termination. Statute outlines how a parent may enter into an open adoption agreement, so there is no “statutory gap.”

Up, Down, or Twisty-Turn?



- ✓ Discuss open adoption and voluntary relinquishment prior to termination trial.
- ✓ Alternative to termination? Title 13 Guardianship, Title 11 Guardianship

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

- ▶ Court is 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.”
- ▶ Court found that trial court did not have necessary information about current professional guidelines with which to compare the communication parent actually received.
- ▶ Distinction between tailoring of communications, which is relevant to whether services are offered expressly and understandably, and tailoring of services.

Up, Down, or Twisty-Turn?



- ✓ Use experts to help determine whether offer of services was properly tailored.
- ✓ Inquire whether social workers, service providers, etc. have appropriate training and expertise to work with client and meet client's specific needs.

DUTY TO DESTROY RECORDS/STATUTORY DAMAGES: *Carter v. State*, 526 P.3d 874 (2023)

- ▶ RCW 26.44.031(2)(b): requires Department to destroy records of unfounded CPS investigations after six years of completing investigation, as long as no intervening founded finding.
- ▶ Statute entitles parent to injunctive relief if Department violates statute.
- ▶ Statute does not contain an implied cause of action for monetary damages.

Up, Down, or Twisty-Turn?



- ✓ Request Department destroy records of unfounded findings that qualify under RCW 26.44.031 (2) (b).
- ✓ If Department does not comply, request injunction preventing Department from using records in dependency case.