Live From Washington: Legislative and Case Law Update

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CASE LAW UPDATE

ICWA/WICWA Related Cases

***In re Dependency of Z.J.G.*, 196 Wn.2d 152 (2020) -Washington State Supreme Court**
"[A] court has 'reason to know' that a child is an Indian child when any participant in the proceeding indicates that the child has tribal heritage." An indication of tribal heritage is sufficient to satisfy the standard. "State courts cannot and should not attempt to determine tribal membership or eligibility. This is the province of each tribe, and we respect it."

***In re Dependency of A.L.-K.*, 196 Wn.2d 686 (2020) -Washington State Supreme Court**
In an appeal of a dependency and disposition order, the Supreme Court held that the Department had not made active efforts to help the parent access services, and that remand was warranted for a determination as to whether returning the child to the parent's care would subject the child to substantial and immediate danger or threat of danger pursuant to the improper removal standard under ICWA and WICWA.

***In re Dependency of G.J.A.*, 197 Wn.2d 868 (2021) -Washington State Supreme Court**
When a child is removed, the Department must demonstrate that it made active efforts to reunite the family, which must be, at a minimum, thorough, timely, consistent, culturally appropriate, and documented. It must prove that active efforts were *in fact* unsuccessful; the futility doctrine does not apply. At every hearing when the child is placed out of home, the dependency court must evaluate the Department's provision of active efforts and ensure this standard is met. The Department must meaningfully engage with the family; the nature of DCYF's required actions will vary from case to case. A tribe's lack of response or involvement does not relieve DCYF of its responsibilities.

***In re Dependency of J.M.W.*, 199 Wn.2d 837 (2022) -Washington State Supreme Court**
WICWA requires the State to prove it made active efforts to prevent the breakup of an Indian family *before* a child is brought into emergency foster care where the Department had prior contact with the family and reason to believe the child was at risk of physical damage or harm. Additionally, a trial court is required to make a finding on the record at a shelter care hearing that out-of-home placement is necessary to prevent imminent physical damage or harm and at an interim shelter care hearing.

***In re Dependency of A.W.*, 514 P.3d 769 (2022) -Washington State Court of Appeals**
A parent does not have a constitutional right to a hearing before a pick-up order is entered. Additionally, when DCYF has reason to believe that a child is an Indian child under ICWA and WICWA, the heightened removal standard applies to ex parte pick-up order requests. Because a Court must make the specific factual finding that removal is necessary to prevent imminent physical damage or harm to the Indian child, if DCYF is aware that there is reason to know that this is an Indian child, DCYF must inform the Court.

***Brackeen v. Haaland* (Supreme Court of the United States; argued Nov 9, 2022)**
In *Brackeen v. Haaland*, the Supreme Court is considering whether the Indian Child Welfare Act of 1978, and later regulations, are unconstitutional. The Quinault Indian Nation in Washington intervened as a defendant, and 497 tribes including the 28 other Washington tribes, and 22 states including Washington filed an amicus brief supporting the constitutionality of ICWA and implementing rules, and the sovereignty of tribes.

Racial Equity

***In re Dependency of K.W.*, 199 Wn.2d 131 (2022) - Washington State Supreme Court**
The Department removed this Black dependent legally free youth from his long-term relative placement and placed him in multiple different foster homes within a span of a few weeks. The youth asked the court to return him to his long-term relative placement, or to other relatives, but the court denied these motions, instead waiting to return the child to a relative until a Department adoption home study was complete. The Supreme Court held that for both children whose parental rights are intact and those who are legally free, RCW 13.34.130 governs placement and provides that when the child cannot be returned home, the court and the Department must first look to place the child with family members before looking to nonrelative placements. In determining an appropriate placement, the child's best interests are paramount. The Legislature has recognized that placement with relatives often serves the child's best interests, particularly when the child has existing relationships with relatives. "However, "the 'best interests of the child' standard is susceptible to class- and race-based biases [such as criminal history, immigration status, or prior involvement with child welfare agencies], and it is impermissible for the Department or dependency courts to rely on factors that serve as proxies for race in order to deny placements with bonded relatives." As a result, courts must give meaningful preference to relative placement options in a dependency proceeding.

***In re Dependency of Q.S.*, 22 Wn. App.2d 586 (2022) - Washington State Court of Appeals**
In this case, a father appealed a finding of dependency and placement of his children out of home. The father, who is Black, had grown up in the foster care system, and had suffered significant abuse, including sexual abuse, while in foster care. The Department's evidence at trial was that the father was physically aggressive toward his children, one of whom is on the autism spectrum, and uncooperative with health care providers and Department requests. The father testified that his resistance resulted from his experience as a Black man interacting with a system of authority, as well as from his own experience being raised in foster care. 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. During this testimony, the trial judge "asked the NAACP representative if she was explicitly biased when she observed racism against African Americans in the system[.]" Ultimately, the court found that the father frequently dysregulates and had not adequately engaged in therapy for his autistic child, as well as that the father "perseverates on racial injustice and is preoccupied with the racial makeup of those around him," and ultimately granted the dependency petition.

The Court of Appeals reversed the dependency order, agreeing with the father's expert that the State's concerns regarding the father's anger catered to the stereotypical perception of a loud, Black man and the trial court never confronted the possible racial bias in the dependency system. The Court held that there was insufficient evidence that the father constituted a danger of substantial damage to his children's development because the court did not identify the evidence it relied upon in making its finding. The Court cited to the 2020 Washington Supreme Court open letter to the state judiciary and legal community. The Court 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."

Rights of Parents

***In re Welfare of M.B.*, 195 Wn.2d 859 (2020) - Washington State Supreme Court**

In an appeal of a termination order, the Supreme Court held that an incarcerated parent does not have an absolute right to appear in person at termination of parental rights proceedings, but if an incarcerated parent is not present in person they must be given a meaningful opportunity to be heard and defend through alternative process. *See also In re Dependency of J.D.E.C.*, 18 Wn. App. 2d 414 (2021) and *In re Dependency of G.L.L.*, 20 Wn. App. 2d 425 (2021) (Division One decisions affirming termination orders entered following remote termination trials held using the Zoom videoconference platform).

***In re Dependency of M.A.S.C.*, 197 Wn.2d 685 (2021) - Washington State Supreme Court**

Where DCYF has reason to believe that a parent may have an intellectual disability, it must make reasonable efforts to ascertain whether that parent does in fact have a disability and, if so, how the disability could interfere with the parent's capacity to understand DCYF's offer of services. The court must place itself in the position of an objective observer and DCYF must provide evidence of tailoring its offer of services in accordance with the current professional guidelines to ensure that the offer is reasonably understandable to the parent based on the totality of the circumstances. DCYF must prove that it satisfied the termination elements; the parent is not required to prove DCYF's offers of services were not understandable.

***In re Dependency of T.P.*, 12 Wn.App.2d 538 (2020) - Washington State Court of Appeals**

The Court of Appeals found that the juvenile court violated RCW 13.34.065(1) when it continued the initial contested shelter care hearing to a date 22 days after the child was removed from her home. Dependency courts must hold initial shelter care hearings within the statutory time frame, which may only be continued on the *parent's* request for a continuance.

The Court found that the "error is not minimal because the 22 days of separation that occurred in this case constituted a substantial interference in the parent and child relationship."

***In re Dependency of L.C.S.*, 200 Wn.2d 91 (2022) - Washington State Supreme Court**

In this appeal of a shelter care order the juvenile had court ordered the child placed in shelter care and found that reasonable efforts as to the father did not need to be made due to the emergent circumstances of the case. The Supreme Court held that there is no exception to the reasonable efforts requirement, instead concluding that reasonable efforts must be made to place with both parents. In deciding whether the Department has made reasonable efforts as to the parents, courts should consider the facts and circumstances of each parent; the standard is flexible and entails the Department balancing family stability and child safety, often in a short amount of time. The Supreme Court outlined specific guidelines the court should consider when determining whether the Department has, in fact, made reasonable efforts, including making reasonable efforts findings on the record and individualizing findings for each parent; determining whether services are culturally appropriate, geographically accessible, meeting identified safety threats, and are tailored for any parents with developmental disabilities; and considering the harm of removal. Juvenile courts must make clear on the record what actions were taken to support a finding that the Department has met the reasonable efforts standard.

Evidentiary Issues

***In re Welfare of M.R.*, 200 Wn.2d 363 (2022) - Washington State Supreme Court**

In a termination appeal, the Supreme Court held that a drug rehabilitation and testing center incident report prepared by a staff member, in which he reported observing the father attempt to open a UA device, documented his request that the parent produce a legitimate sample, and request that the parent leave, was appropriately within the business record exception to the rule against admitting hearsay, when the staff member's observations did not rely upon skilled observation or analysis and when there was other indicia of reliability concerning the incident report's source of information, method, and time of preparation.

***In re Dependency of A.C.*, slip op. No. 10966-6 (2022) - Washington State Supreme Court**

In this appeal of an order of dependency, the Supreme Court held that the trial court erred in relying on inadmissible hearsay introduced as background for an expert's opinion, and that the materially affected standard applies. A trial court may reject a parent's version of events, but cannot rely on hearsay admitted for a limited purpose beyond its limited purpose. Where the weight of that reliance materially affects the outcome of the hearing, this is reversible error.

Procedural Issues

***In re Dependency of N.G.*, 199 Wn.2d 599 (2022) - Washington State Supreme Court**

The Supreme Court held that a decision of the trial court "substantially alters the status quo" warranting discretionary review under RAP 2.3(b)(2) when the trial court's ruling has an immediate effect outside the courtroom and does not merely alter the status of the litigation itself.

***In re Dependency of A.E.T.H.*, 9 Wn.App.2d 502 (2019) - Washington State Court of Appeals**
During a termination trial, the parents sought discovery sanctions against the Superior Court and others based upon misconduct by the VGAL and VGAL program. Following significant litigation, the Superior Court granted a recusal motion, but subsequently entered a final order terminating the parents' rights. On appeal, the court held that parents' due process rights to an impartial tribunal were violated when "[t]he Superior Court, its direct agents, and its own attorneys, all under the supervision of the judges repeatedly aligned with and literally became a party litigating this case against the parents…" The Court held that the judge lacked authority to enter the order terminating parents' rights following its recusal; it reversed and vacated the termination order, and remanded the matter for a trial in a different county.

LEGISLATIVE UPDATE

HB 1227 Keeping Family Together Act (2021; effective July1, 2023)
Makes fundamental changes to the removal and shelter care requirements. Raises the standard by which a court may enter an order directing a child be removed from the home to whether removal is required to prevent "imminent physical harm", and mandates that at the initial shelter care hearing, the court shall release a child to a parent unless the court finds that removal of the child is necessary to prevent imminent physical harm. The evidence must demonstrate a causal relationship between imminent physical harm to the child and the particular conditions in the home. Courts must consider whether the danger of imminent physical harm outweighs the harms of removal that a child will experience. Courts must also consider whether there are any prevention services, including housing assistance and other reasonably available services, that the family could participate in that would prevent or eliminate the need for removal. If the court decides removal is necessary to ensure child safety, placement with relatives and suitable other persons are prioritized. Finally, if the court places the child in foster care, it may inquire into whether the specific foster placement will meet the needs of the child, and may enter orders directing the Department to place the child in a foster care placement that will meet the child's needs, including ensuring the child's health, safety, and welfare.

SB 5151 Child-Specific Foster Care Licensing (2021)
Authorizes DCYF to issue child-specific foster family home licenses to a "relative" or "suitable person." *See also* WAC 110-148-1326 (rule exercising this authority).

HB 1194 Strengthening Family Time (2021)
A family's first visit must occur within 72 hours of a child's placement in DCYF's custody, unless the court finds extraordinary circumstances require delay. Visitation throughout the case must be unsupervised "unless the presence of threats of danger to the child requires the constant presence of an adult to ensure the safety of the child." At each hearing (and a continued shelter care hearing prior to finding of dependency), the presumption is that visitation reverts to unsupervised, unless a party provides a report to the court including evidence that removing the supervision or monitoring would create a risk to the child's safety. DCYF's failure to provide visits may result in a finding of no reasonable efforts to finalize the

permanency plan. A lack of visitation providers will not excuse DCYF's failure to provide visits.

HB 1219 Appointment of Counsel for Youth (2021)
For children aged 8 and older, courts must appoint counsel for children in the dependency case when a dependency petition is filed or before commencement of the shelter care hearing. For all children, no matter their age, when a termination petition is filed courts must appoint counsel to the child in their dependency and termination cases. Counsel for children in dependency proceedings are to be appointed on a phased-in county-by-county basis over a six-year period with full statewide implementation by January 1, 2027.

HB 1747 Supporting Relative Placements (2022)
Expands the good cause exception to the requirement that the court require DCYF to file a termination petition if a child is in out-of-home care for 15 of the last 22 months to include circumstances where DCYF has not yet met with the caregiver for the child to discuss guardianship as an alternative to adoption or the court has determined that guardianship is an appropriate permanent plan.

2023 Pending Legislation

HB 1580 System to Support Children in Crisis
Establishes a "rapid care team" with members from DCYF, HCA, OFM, DDA, and DSHS to help children in crisis who are spending time in hospitals with a medical need or experiencing placement instability. Would also establish a "Children and Youth Multisystem Care Coordinator" to work with children who are connected to multiple systems and in crisis – primarily for children in hospitals without a medical need. In certain circumstances, DCYF may be able to offer a VPA and work with this Care Coordinator on identifying services for the child and family.

HB 1405 Public Benefits
Prohibits DCYF from applying benefits, payments, or funds paid to, or on behalf of, a person in the care of the DCYF as reimbursement for the cost of care, and instead requires conservation of funds for the future use of the beneficiary. Requires DCYF to develop and implement a financial literacy training and provide the training to specified persons leaving the care of the DCYF.

SB 5256 Expanding Child Welfare Housing Assistance Program
Directs DCYF to administer the child welfare housing program, which is no longer a pilot program.

SB 5124 GAP funding
Creates a state-funded guardianship subsidy program for licensed (fictive kin) guardians if the child has been in that placement for 6 months and licensed for 6 consecutive months.