{2020 and 2021}

LEGISLATIVE AND CASE UPDATE

Washington Association of Child Advocate Programs

October 25, 2021

Attorney Morgan O. Chaput | Child Advocate Program of Pierce County

AGENDA

- Legislative Update (2020 and 2021)
- Supreme Court Personnel Changes (2020)
- Supreme and Appellate Court Decisions (2020 and 2021)

LEGISLATIVE UPDATE

HB 2525: FAMILY CONNECTIONS PROGRAM

- The Family Connections Program
  - Two pilot programs – one east, one west
  - Encourages in-person meetings between biological parents and foster parents
    - When safe to do so
    - When foster parents agree
  - Signed by Governor Inslee 3/18/20
    - Governor vetoed funding
    - Also, COVID

SB 6423: REPORTING CHILD ABUSE & NEGLECT

- Modifies the mandatory reporting language as follows:
  - "Except as provided in RCW 26.44.030(11), upon receipt of a report ~~concerning the possible occurrence of~~ alleging that child abuse or neglect has occurred, the law enforcement agency of the department must investigate. . . "

- Also modifies the law such that a person who, in good faith, makes a report or testifies shall be immune from any civil or criminal liability
- See also *Wrigley v. State*

HB 1219 : ATTORNEYS FOR KIDS

- State-paid attorneys through Office of Civil Legal Aid (OCLA) for all children, ages 8 and older
- Implemented in 6 waves, by county (July 2022 – January 2027)
  - July 2022: 3 Counties
  - January 2023: 8 Counties
  - January 2024: 15 Counties
  - January 2025: 20 Counties
  - January 2026: 30 Counties
  - January 2027: Full statewide implementation
- Prioritization on counties that have no current practice of appointing attorneys or have "a significant prevalence of racial disproportionality or disparities in the number of dependent children compared to the population"

HB 1219 : ATTORNEYS FOR KIDS CONTINUED

- Right to counsel for all children ages 8-17 alleged or adjudicated as dependent
  - Assigned at or before the initial shelter care hearing
  - Children ages 8 – 17 in existing dependencies who do not already have attorneys will be appointed one
- Right to counsel for all children ages 0-17 upon the filing of a termination
  - Children ages 0-7 who don't have an attorney in the dependency will be assigned one when the termination is filed
  - Children ages 8-17 who have an attorney in the dependency will continue to have the same attorney for the termination

HB 1194: PARENT CHILD VISITATION

- First visit must occur within 72 hours of the child "being delivered to DCYF custody," unless the Court finds that "extraordinary circumstances require delay."
- If the first visit is in person, it must be supervised
- Visitation can be limited only where necessary to ensure a child's safety, health, or welfare
- Visitation cannot be limited based on a parent's failure to comply with services
- Visits are to be unsupervised "unless the presence or threat of danger to the child requires the constant presence of an adult to ensure the safety of the child."

HB 1194: PARENT CHILD VISITATION, CONTINUED

- At each hearing (including the 30-day shelter care hearing) throughout the dependency, the presumption reverts back to all visits being unsupervised, unless a party provides evidence to the Court 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 non-reasonable efforts finding
- Lack of visitation providers will not excuse this failure

HB 1227: KEEPING FAMILIES TOGETHER

- Effective date: 7/1/2023
- Dependency petition
  - ICWA – Adds "reason to know" or "may be" standard to identify Indian children
  - Must include names and addresses of caregivers (if known)
  - Must include
    - "A clear and specific statement as to the harm that will occur if the child remains in the care of the parent/caregiver" and
    - "The facts that support that conclusion"

HB 1227: KEEPING FAMILIES TOGETHER, CONTINUED

- Hospital holds:
  - Burden of proof is now probable cause "that detaining the child is necessary to prevent imminent physical harm to the child due to abuse or neglect. . . and that the child would be seriously injured or could not be taken into custody if it were necessary to first obtain a court order."
  - Hospital hold can only last 72 hours; CPS may detain the child for 72 hours until the Court assumes custody
- Law Enforcement holds:
  - Burden of proof is now probable cause "that detaining the child is necessary to prevent imminent physical harm to the child due to abuse or neglect" and "there is insufficient time to serve the parents with a dependency petition and hold a hearing prior to removal."

HB 1227: KEEPING FAMILIES TOGETHER, CONTINUED

- Law Enforcement pickups
  - Petition must include corroborating evidence (more than just allegations) that establishes that removal is necessary to prevent imminent physical harm AND that removal prior to a 72-hour hearing is necessary to prevent imminent physical harm
- Shelter Care
  - Shelter care hearings may occur prior to removal
  - The Court must find that "removal of the child is necessary to prevent imminent physical harm due to child abuse or neglect, including that which results from sexual abuse, sexual exploitation, or a pattern of severe neglect"
  - AND "it is contrary to the welfare of the child to be returned home"
  - AND "any imminent physical harm outweighs the harm the child will experience as a result of removal."

HB 1227: KEEPING FAMILIES TOGETHER, CONTINUED

- If all of that is true, the Court shall consider whether preventative services could avoid removal and, if the parents agree to participate in those services, the Court shall place the child with the parent
- Evidence must show a causal relationship between the conditions in the home and imminent physical harm to the child
  - The following do not, by themselves, constitute imminent physical harm:
    - Poverty
    - Age of the parent
    - Single parenthood
    - Substance use
    - Crowded or inadequate housing
    - Mental illness
    - Prenatal drug or alcohol exposure
    - Disability or special needs of a parent or child
    - Nonconforming social behavior

HB 1227: KEEPING FAMILIES TOGETHER, CONTINUED

- Placement
  - Relatives and suitable others are still preferred if a child can’t return home
  - Foster care can only be used when there is no suitable relative capable of ensuring the basic safety of the child or if such placement would hinder reunification
  - The court should inquire whether there are any relatives or suitable others willing to care for the child
    - Lack of a background check, uncertainty about adoption, the relative’s disbelief about a parent’s inability to care for a child (so long as they comply with the ordered parent-child contact), or whether the relative could meet the requirements of a licensed foster home ARE NOT reasons to deny placement
    - Great weight given to parent preference
    - If a relative is found later, attachment to current foster parents IS NOT a factor in placement with relative

HB 1227: KEEPING FAMILIES TOGETHER, CONTINUED

- If the Court orders foster care, DCYF must report about the "location" of the proposed foster placement
- The Court shall inquire about:
  - Whether the proposed foster home is the least restrictive environment
  - If the child can stay in the same school and what is needed for educational stability
  - If siblings will be placed together and what sibling visitation will promote the child's wellbeing
  - If the location of the foster placement will impede parent-child visitation
- The Court may order DCYF to:
  - Find a less restrictive placement
  - Place the child closer to a parent, home, or school
  - Place the child with siblings
  - Take other action to "ensure the child's health, safety, and well-being"

SB 5184: SCHOOL BUILDING FOSTER CARE CONTACT

- In addition to having a district point of contact for all dependent children, each *school building* must have a point of contact for all dependent children

SB 5151: CHILD SPECIFIC FOSTER CARE LICENSE FOR RELATIVES

- Creates a “child-specific” foster care license for a relative to become a foster parent for a specific child or sibling group so that they may receive federal foster care payments while the child is in their care

SUPREME COURT PERSONNEL CHANGES

JUSTICE RAQUEL MONTOYA-LEWIS

- Previously Whatcom County Superior Court, Lummi Nation, Nooksack Indian Tribe, and Upper Skagit Indian Tribe
- Extensive work in child welfare and juvenile justice
- Enrolled member of Pueblo of Isleta and descendant of Laguna Indian Tribe (New Mexico)
- Sworn January 2020

JUSTICE G. HELEN WHITENER

- Previously Pierce County Superior Court, Board of Industrial Insurance Appeals
- Extensive work in diversity, inclusion, and equity
- Immigrant (Trinidad), LGBTQ, Disabled
- Sworn April 2020

SUPREME AND APPELLATE COURT DECISIONS

WASHINGTON APPELLATE COURTS

COURT OF APPEALS DECISIONS – DIV I

- *Dependency of S.M.M.* (2/18/2020)
  - Absent finding of good cause, the Court must appoint a Guardian ad Litem
  - General designation of a CASA program that does not result in any actual representation of a child's interest does not satisfy RCW 13.34.100
- *Dependency of E.J.M.* → REVERSED by Supreme Court (2/24/2020)
- *Dependency of A.N.G.* (3/23/2020)
  - Parent's due process rights were violated when a judge failed to recuse himself from the termination trial when he had been the AAG seeking termination of the parent's rights in prior dependencies
  - There was no indication that the conflict was raised with the parent directly

COURT OF APPEALS DECISIONS – DIV I, CONTINUED

- *Dependency of W.W.S.* (3/30/2020)
  - Court lacked authority to order DCYF to assign a new social worker
  - Court abused its discretion when it ordered a UA and there was no reliable evidence in the record that there was a substance abuse issue
  - A GAL has "party like" rights in Superior Court and can seek review to enforce those rights
- *In re Dependency of J.D.P. and J.D.P.* (6/1/2021)
  - Evidence of sibling relationships may be relevant in a termination case, but those sibling relationships are more properly addressed during dependency, placement, and adoption
- *In re Dependency of J.C.* (7/19/2021)
  - Specific telephonic and videoconference (Zoom) protocols and procedures do not necessarily deprive a parent of a meaningful opportunity to be heard in a termination trial

COURT OF APPEALS DECISIONS – DIV II

- *Parental Rights of D.J.S.* (1/28/2020)
  - ICWA and WICWA require active efforts to provide services to prevent the breakup of a Native American Family
    - Active efforts means more than just making referrals
  - Court should enter a finding whether exerting active efforts under ICWA would have prevented termination or would have been futile
- *Welfare of T.P.* (2/25/2020)
  - RCW 13.34.065(1)(a) requires a shelter care hearing to be conducted within 72 hours of a child's removal
  - A shelter care hearing may be continued only when, for good cause, *a parent* makes the request for a continuance

COURT OF APPEALS DECISIONS – DIV III

- *In re Matter of the Dependency of C.R.O'F.* (8/24/2021)
  - A juvenile court must permit a person to pursue a de facto parentage action if the person's sworn statement in support of the motion presents a prima facie case that they are a de facto parent

SUPREME COURT DECISIONS

WRIGLEY V. STATE | 1/23/2020

- A report predicting future abuse, absent evidence of current or past conduct of abuse or neglect, does not invoke the duty to investigate under former RCW 26.44.050
- SB6423 was a direct result of this decision

PARENTAL RIGHTS TO D.H. | 6/4/2020

- DCYF must offer and provide all ordered and necessary services, reasonably available, and capable of correcting the identified parental deficiencies in the foreseeable future
  - The record supports that DCYF identified Mother's specific needs and provided services tailored to those needs

IN RE WELFARE OF M.B. | 7/23/20

- Termination trials must use fundamentally fair procedures that satisfy due process of law
- A parent must have the opportunity to actively consult with his or her counsel during the trial
  - To point out inconsistencies in the State's case
  - To give their attorney information to counter the State's presentation
- There are workarounds available when a parent is not present in person
  - Breaks between witnesses for attorney-client consultation
  - Client review of transcripts before cross-examination

IN RE DEPENDENCY OF Z. J.G. | 9/3/2020

- "A trial court has 'reason to know' that a child is an Indian child when a participant in the proceeding indicates that a child has tribal heritage."
  - Any indication of tribal heritage is sufficient to satisfy the standard
- The reason to know standard covers situations where tribal membership is in question, but is a possibility
- Final determination of whether a child is an Indian child must then be done by the tribe itself, after it has been formally notified of the proceedings
- *At any point in the proceeding, if there is indication that a child has tribal heritage, the child must be treated as an Indian child until the tribe(s) make a determination that the child is NOT an Indian child*

IN RE DEPENDENCY OF A.M-S. | 10/22/20

- Under statute, parents have use immunity from any statements they make in a psychological evaluation
  - What they say in that evaluation cannot be used to further prosecution of criminal charges against them
- If a prosecuting attorney objects to a parent being granted additional immunity, the Court doesn't have authority to grant additional immunity beyond what is in the statute

IN RE DEPENDENCY OF A.L.K. | 12/24/2020

- A parent’s refusal to participate in services doesn’t relieve DCYF of its statutory obligation to provide active efforts
- There is a different between (voluntary) pre-dependency services and (Court-Ordered) post-dependency services
  - Prior to a finding of dependency, a parent’s declination to engage in voluntary services cannot be used as evidence that the Department has engaged in active efforts
- Active efforts requires more than just creating a case plan and handing out referrals
- DCYF must affirmatively assist a parent and “when a parent fails to engage in satisfactorily with the caseworker, the caseworker must still try to engage the parent”

IN RE DEPENDENCY OF E.M. | 4/15/2021

- Supreme Court reverses Division I of the Court of Appeals
- A private attorney can represent a child in dependency proceeding without first obtaining Court approval
- Attorney is not required to seek appointment from the Court when either
  - The child has the capacity to consent to the attorney client relationship or
  - The representation is impliedly authorized under the RPCs
    - Child's health, safety, or a financial interest is "at risk";
    - Child is unable to establish a client-lawyer relationship;
    - Attorney must believe that the person has no other lawyer, agent, or other representation; *and*
    - Attorney must take legal action only to the extent reasonably necessary to maintain status quo or otherwise avoid imminent and irreparable harm
- Of note: No GAL or Advocate ("other representation") assigned in this case

IN RE TERMINATION OF PARENTAL RIGHTS TO M.A.S.C. | *5/20/2021*

- Where DCYF has reason to believe that a parent may have an intellectual disability, it must make reasonable efforts to ascertain whether the 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
  - Court indicates that an assessment of intellectual disabilities by a professional is required; DCYF cannot just rely on the Social Worker's assessment from working with the parent
- DCYF must then tailor its offer of services in accordance with the current professional guidelines to ensure that the offer is reasonably understood to <u>this</u> parent
- DCYF has to prove that it understandably offered the services; it cannot shift the burden to the parent to prove that they didn't understand

IN RE DEPENDENCY OF G.J.A. | 6/24/2021

- DCYF failed to provide active efforts when it provided untimely referrals and only passively engaged with Mother
- The trial court was wrong to speculate that, even had DCYF done more, Mother would not have been responsive
  - ICWA requires DCYF to demonstrate that its efforts were *in fact* unsuccessful before it can be relieved of its duty to provide active efforts
- Active efforts must be thorough, timely, consistent, and culturally appropriate
- Tribal resources are limited – A tribe's lack of response or involvement in a dependency cannot be a reason to relieve DCYF of its responsibilities
- ICWA/WICWA requires meaningful engagement with a Native family
  - The nature of the Department's required actions will vary from case to case

IN RE K.D. | 7/22/2021

- On appeal, dependency cases should be titled "In the Matter of the Welfare of K.D."
- The child's name should be initials
- The child's birthdate should be removed
- Parents should not be named (either by initials or full name) in the case title

QUESTIONS

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