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## The Intersection of Juvenile Dependency Law and other parts of Family Law

*Note from the Editor*

We do not usually publish articles about dependency case law nor do we publish case notes here on dependency cases. The Juvenile Law Section publishes that information in their newsletter.

Increasingly however Juvenile Dependency case law, statutory law, and administrative law have a bearing on family law proceedings. We have published a few articles on subjects like intervention and consolidation. Because of the connections here we will include the occasional appellate decision on dependency law that family law attorneys and mediators should know about. We also welcome additional articles about juvenile dependency law such as this month's excellent article about DHS Abuse Assessments by Mark Kramer.

Family law practitioners need to be aware of how dependency law can affect their family law case. The law on these subjects is increasingly interrelated. We will try to keep you informed in this newsletter where juvenile dependency law should be drawn to the attention of family law attorneys, judges and mediators.

## Challenging DHS Abuse Assessments

*by Mark Kramer, Kramer & Associates*

Many of us are familiar with the role of the Department of Human Services (DHS) in juvenile court. Typically, DHS (by and through Child Protective Services (CPS) does an investigation. If DHS believes that abuse and or neglect (as defined in ORS 419B.100) is established, the agency will file a petition to establish wardship over a child. A child can be taken into protective custody, placed in foster care and ultimately become a ward of the court. If a parent does not address the circumstances which gave rise to the DHS intervention, their rights can be ultimately terminated and the child adopted or placed in a permanent guardianship. This article does not address that process. Rather, the focus here is on DHS abuse assessments which often activate and inform the juvenile court process but have independent and sometimes serious collateral consequences.

Here are some few examples of parents who have faced founded abuse assessments by DHS:

- A stepparent throws a peanut butter cup in the direction of her 13 year old teenage stepson, to get his attention but not to injure him. The peanut butter cup strikes his forehead and causes a bruise. There was no medical treatment obtained. The child was not removed from the home and the stepparent had no prior record of abuse or neglect.
- A father chases his 12 year old son down at a popular state park to prevent him from getting hit by a car or drowning in a nearby lake or just getting lost. The father tackles his son and restrains him. The son runs away again., The father chases him down and restrains him again. Picnickers notice the incidents and report the case to DHS. The child was not injured. The father had no prior record of abuse and his wife and babysitter (eyewitnesses to the incidents) reported to DHS that father's actions were protective in nature.
- A father tries to get his distracted 8 year old's son's attention by grabbing his chin. The son exclaimed, "You're choking me!". The father replied, "No, that is not choking. This is what choking is." The father then puts his hands gently around the son's neck but does not squeeze, to demonstrate what choking actually is. The son reports father to DHS. The son is not injured; no bruise is evident and the father had no history of abuse.

After DHS/CPS completes an investigation (which can take months after the initial report), they will issue an assessment as "founded", "unfounded" or "unable to determine" or "inconclusive." While a founded abuse assessment does not necessarily mean that a juvenile petition will be filed and does not mean that a child will be removed from his or her home, it can have serious consequences. In the recent case of *Cervantes v. DHS*, 295 Or App 691, 693-4 (2019) the Court discussed the implications of a sustained abuse assessment and cautioned that the process and procedure governing challenges to such assessments are only dimly understood (if at all).

*Like the order at issue in this case—which has substantial ramifications for petitioner's reputation and employment prospects—many agency orders issued outside of the contested case context often impose significant burdens on the liberty and property interests of Oregonians. Given those consequences, it would not be unreasonable for a person subject to such an order to look to Oregon statutes for the procedures governing judicial review of such orders*

*and hope to come away with an understanding of the process and a confidence that the process was designed to ensure fair, efficient, and economical means of securing judicial scrutiny of agency action.*

*That effort would be frustrating for most people. As it stands, the applicable procedure can't be found in the statutes or administrative rules in any clear way. Instead, they exist in the volumes of the Oregon Reports, the product of judicial decisions that attempt either (1) to define the role of the circuit court on judicial review under ORS 183.484 of an order other than a contested case or (2) to assess how the Oregon Rules of Civil Procedure come into play when a circuit court is reviewing the decision of an executive branch agency, rather than acting as a decision-maker itself in the first instance.*

A summary of the DHS assessment process is described in the Oregon State Bar Book - Juvenile Law and Dependency at paragraph 5.4-2:

*Once all the necessary safety-related information is gathered for completion of the CPS assessment, DHS will determine whether the allegation of abuse is founded, unfounded, or unable to be determined. OAR 413-015-1000. A determination that the allegation is founded means that "there is reasonable cause to believe that child abuse or neglect occurred." OAR 413-015-1000(2)(a). If "no evidence of child abuse or neglect was identified or disclosed" during the assessment, the allegation will be determined to be unfounded. OAR 413-015-1000(2)(b). An unable to determine determination means "there are some indications of child abuse or neglect, but there is insufficient data to conclude that there is reasonable cause to believe that child abuse or neglect occurred." OAR 413-015-1000(2) ( c ).*

*A person who DHS identifies as the perpetrator of a founded child-abuse allegation will be notified in writing of that determination. OAR 413-015-0470(1) ( c ). DHS has established an administrative process for review of founded dispositions on request of the identified perpetrator. OAR 413-010-0700 to 413-010-0750.*

If an assessment is not challenged or if it is challenged but not reversed the founded assessment will remain in a DHS central registry (ORS 419B.030(1)). That registry reflects the family's involvement with DHS and can inform subsequent investigations or interventions that the agency may have with the family. DHS will review this history to identify safety threats, or a history or pattern of abuse and this can determine whether a new investigation will be considered See OAR 413-015-0415(1)(b).

Beyond internal ramifications within DHS, ORS 419B.035 provides for disclosure of DHS investigation records to the Office of Child Care for certifying, registering or regulating child care facilities; the Office of Children's Advocate; and the Teacher Standards and Practice Commission for investigations conducted under ORS 342.176 involving children in grades K-12.

A founded assessment can result in a foster child being removed from a foster home, prevent a person from becoming a foster parent, from adopting a child, from running a child care facility. Beyond that, it might affect both employment and volunteer activities for organizations that work with children. Many programs that work with children will ask potential volunteers and employees in the application process whether they have ever been alleged to have committed child abuse. The applicant can choose to omit the information at his/her peril, or provide the information which will likely bar them from participation in the sports or children's program.

It is for these reasons that these assessments need to be taken seriously and, in the appropriate cases challenged.

For purposes of the assessment process, "child abuse" is defined in OAR 413-015-1015. This includes behaviors, conditions and other circumstances including:

(1) "Abuse":

(a) For purposes of screening a report of "abuse" of a child subject to ORS 419B.005, "abuse" means any of the following, except that "abuse" does not include reasonable discipline unless the discipline results in one of the conditions described in this subsection.

(A) Mental Injury. Any mental injury to a child, which includes only observable and substantial impairment of the child's mental or psychological ability to function caused by cruelty to the child, with due regard to the culture of the child.

(B) Neglect.

(I) Negligent treatment or maltreatment of a child, including, but not limited to, the failure to provide adequate food, clothing, shelter, or medical care that is likely to endanger the health or welfare of the child.

(ii) Buying or selling a person under 18 years of age as described in ORS 163.537.

(iii) Permitting a person under 18 years of age to enter or remain in or upon premises where methamphetamines are being manufactured.

(iv) Unlawful exposure to a controlled substance, as defined in ORS 475.005, or to the unlawful

manufacturing of a cannabinoid extract, as defined in ORS 475B.015, that subjects a child to a substantial risk of harm to the child's health or safety.

( C ) Physical Abuse. Any assault, as defined in ORS chapter 163, of a child and any physical injury to a child which has been caused by other than accidental means, including any injury which appears to be at variance with the explanation given for the injury.

(D) Sexual Abuse.

(I) Rape of a child, which includes, but is not limited to, rape, sodomy, unlawful sexual penetration and incest, as described in ORS chapter 163.

(ii) Sexual abuse, as described in ORS chapter 163.

(iii) Sexual exploitation, including, but not limited to:

(I) Contributing to the sexual delinquency of a minor, as defined in ORS chapter 163, and any other conduct which allows, employs, authorizes, permits, induces, or encourages a child to engage in the performing for people to observe or the photographing, filming, tape recording, or other exhibition which, in whole or in part, depicts sexual conduct or contact, as defined in ORS 167.002 or described in ORS 163.665 and 163.670, sexual abuse involving a child or rape of a child, but not including any conduct which is part of any investigation conducted pursuant to ORS 419B.020 or which is designed to serve educational or other legitimate purposes; and

(II) Allowing, permitting, encouraging, or hiring a child to engage in prostitution as described in ORS 167.007 or a commercial sex act as defined in ORS 163.266, to purchase sex with a minor as described in ORS 163.413 or to patronize a prostitute as described in ORS 167.008.

(E) Threat of harm to a child, which means subjecting a child to a substantial risk of harm to the child's health or welfare.

As noted above, once DHS concludes its investigation, the investigated individual will receive the assessment with the determination: "founded," "unfounded," or "unable to determine" or "inconclusive." A founded assessment (but not the other determinations) can be challenged at four levels:

1. At the Local DHS Office;

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The purpose of this Newsletter is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities. The opinions and recommendations expressed are the author's own and do not necessarily reflect the views of the Family Law Section or the Oregon State Bar.

Layout and technical assistance provided by Creative Services at the Oregon State Bar.

## Publication Deadlines

The following deadlines apply if a member wants an announcement or letter included in the newsletter.

Deadline	Issue
9-15-2019	October 2019
11-15-2019	December 2019
1-15-2020	February 2020
3-15-2020	April 2020
5-15-2019	June 2020

2. At the Central DHS Office;
3. Through a lawsuit under the Oregon Administrative Procedures Act (APA) (ORS 183.484); and
4. To the Court of Appeals and thereafter by petition for review to the Oregon Supreme Court.

The first two levels, Local Office and Central Office are essentially closed-door paper reviews by DHS. A person challenging the assessment can submit declarations, letters, exhibits, reference letters, etc. but has no right to know how those submissions are considered. At the conclusion of the Local Office or Central office Review process, the challenger will receive a letter with the DHS disposition and their rights to pursue the next level of appeal. Beware of the potential trap in meeting the deadlines for such challenges. At the Local Office, and at the Central Office Level, the appeal must be made within 30 days of receipt. However at the third level, a lawsuit under the APA, a petition must be filed within 60 days of mailing (which DHS concludes is service on an individual whether or not the person has received actual notice).

At a recent trial under the Oregon Administrative Procedures Act, one DHS official testified that the vast majority of challenges at the Local Office are sustained and that more than 87% of challenges at the Central office are sustained. Consequently, effective relief is likely only to be had by filing a law suit under the APA.

The law governing these challenges is sparse as noted by the *Cervantes* court. The controlling statute is ORS 183.484. A petitioner is entitled to ORCP discovery and likely depositions. Full discovery will usually require stipulating to a protective order to ensure that confidential records are not inappropriately disseminated. In preparing an APA case, it may be necessary to seek information beyond DHS. For example, that DHS relied upon a CARES investigation does not mean that DHS actually has all of the CARES materials. In a recent case I had to subpoena a CARES video of a child, under a protective order, because it was not in the DHS file.

ORS 183.484 does not provide a process or protocol for a trial. In a different context, in a contested case hearing (think challenging the denial of a liquor license for example) the agency has the burden of demonstrating why the person is denied an entitlement. However in an "other than contested case hearing" under ORS 183.184, it is not clear who has the burden. In a recent case, I argued, since the petitioner had no prior hearing, that under principles of due process, not to mention fundamental fairness, that DHS should have the burden of proof to demonstrate that the abuse allegation should be sustained. In that case, the judge reversed one

assessment and upheld a second assessment but did not rule on which party actually had the burden of proof.<sup>1</sup>

Under ORS 183.484, a court is to make a determination “as to the record as a whole, including evidence received at trial would permit a reasonable person to make the finding made by the agency.” The court can sustain the assessment, set aside the assessment or remand the assessment back to the agency. The court may also modify an order but only when the agency has erroneously interpreted a provision of law and the correct interpretation compels a particular result.

Although the standard is whether a reasonable person could make the finding made by the agency, a petitioner may produce additional evidence into the APA process, including witnesses at trial. Therefore, when making its decision, the trial court is evaluating not only the evidence the agency had at the initial level but subsequent evidence produced at trial. *Norden v. State, Water Resources Dept.*, 329 Or. 641 (2000)

In the case noted above, DHS argued that the “reasonable person” standard is met if the DHS evidence is sufficient to support a “reasonable suspicion of abuse.” Although that “reasonable suspicion” standard is discussed in case law, the trial court found that “reasonable suspicion” is insufficient to meet the statutory standard to support a “founded” determination of abuse. The agency’s evidence must support its findings to a probable cause standard.<sup>2</sup>

1 The parties agreed at the commencement of trial that the State would present its case first without deciding which party had the burden of proof.

2 Both petitioner and the agency have appealed the trial court’s decision.

ORS 183.497 provides for attorney fees if the court finds in favor of the petitioner and “determines that the state agency acted without a reasonable basis in fact or in law.” However the statute goes on to note that the court may deny attorney fees in whole or in part if the state agency “has proved that its action was substantially justified or that special circumstances exist that would make the allowance of all or part of the attorney fees unjust.” In any case, like in any other situation, as required by ORCP 68, be sure to plead you request for attorney fees and the statutory source for that request in the petition for review.

This article can no more than touch the surface of a very challenging process. Given the stakes involved to the accused, these challenges should and must be pursued with vigor and with thoroughness. Perhaps when a sufficient number of cases are litigated and a number of assessments are reversed, this will have a cautionary effect on the DHS assessment process.

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Mark Kramer, an attorney since 1981, is a principal in the Portland law firm of Kramer and Associates, where his practice concentrates on family law and civil rights with cases ranging from representation of children endangered by their public custodians to contested custody matters, grandparent and psychological parent rights. He holds his B.A. degree, with distinction, from Cornell University (1978) and his J.D. degree from Northeastern University School of Law (1981).

Mark is the lead plaintiff in *Kramer v. Lake Oswego*, 50 Or 422 (2019) where the Oregon Supreme Court recently upheld and validated Oregon’s public trust doctrine. He hopes to see you all on Oswego Lake very soon

## CASENOTES

### OREGON APPELLATE DECISIONS

August 2019 Edition, OSB Family Law Newsletter

Family Law Opinions: June 1 – July 31, 2019

Editor’s Note: these are brief summaries only. Readers should read the full opinion. A hyperlink is provided to the on-line opinion for each case.

### SUPREME COURT

No Supreme Court family law decisions during this period.

### OREGON COURT OF APPEALS

#### Spousal Support

*In the Matter of the Marriage of Debbie Dee CARD, Petitioner-Appellant, and Erick Eugene CARD, Respondent-Respondent*, 298 Or App 511 (2019)

Lincoln County Circuit Court, 17DR04752; A166512; Christopher Casebeer, Judge pro tempore.

Shorr, J. In this domestic relations case, wife appeals from a dissolution judgment entered by the trial court. She assigns error to (1) the trial court’s denial of her request for spousal maintenance support and (2) the court’s award of

three months of temporary predissolution support--to be used to make payments on the land-sale contract for the marital property--rather than the five months that she had requested.

Held: The trial court abused its discretion when it denied wife's request for maintenance support based on the court's incorrect conclusion that the marital property, which the court awarded to wife, was a substitute for spousal support and its unsupported finding that, by awarding wife the marital property, she was receiving all or nearly all of the marital assets. The trial court also abused its discretion in

offsetting wife's use of the marital property against husband's obligation to pay for the lien on the property. Award of spousal support reversed and remanded; otherwise affirmed. COA 07.17.19

### **Note on Opinions Reviewed:**

The Editor tries to include all the Family Law related decisions of the Oregon Appellate Courts in these Notes. Some cases do not have holdings that have precedent significance however they are included to insure none are missed.



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