

## Delinquency and DSS Custody – Take Two

Have you ever been deeply enmeshed in a project, thought it was done, and when you returned with fresh eyes realized that you missed something important? That has happened for me when, for example, I painted the walls of my son's bedroom only to walk in the next day with fresh eyes and realize that I should have painted the trim as well. And then it happened again as I was working on a chapter in the forthcoming Juvenile Justice Reinvestment Act Implementation Guide and realized that there is an amendment contained in the Juvenile Justice Reinvestment Act (JJRA), that will take effect on December 1, 2019, that changes one piece of the recently released Juvenile Law Bulletin, [Delinquency and DSS Custody without Abuse, Neglect, or Dependency: How Does that Work?](#). The change limits the court's authority to order DSS custody as a component of a delinquency disposition, allowing this disposition only for juveniles under the age of 18. This limiting language creates a clear age boundary for an initial order of disposition to DSS custody in a delinquency case. However, questions remain regarding the capacity for a juvenile to remain in DSS custody pursuant to a delinquency dispositional order after turning 18.

### Options for DSS Custody Post-JJRA

The Bulletin details three potential pathways for a juvenile to be ordered into DSS custody via a delinquency matter—nonsecure custody, disposition, and guardianship. The JJRA did not make changes to the nonsecure custody provisions or the guardianship provisions as described in the Bulletin. However, [§16D.4.\(g\)](#) of the JJRA alters [§7B-2506\(1\)](#) of the Juvenile Code, the section of law that provides dispositional alternatives in delinquency matters. The change will take effect when the bulk of the JJRA becomes effective on December 1, 2019. At that time, the court's capacity to order a juvenile adjudicated delinquent into DSS custody as a component of the juvenile's disposition will be limited to juveniles under the age of 18.

### So What?

As discussed in the Bulletin, once the JJRA takes effect juvenile jurisdiction for youth adjudicated delinquent for an offense committed at age 16 will continue until that juvenile reaches age 19 (unless terminated earlier by the court) and for juveniles adjudicated delinquent for offenses committed at age 17, jurisdiction will continue until age 20 (unless terminated earlier by the court). This is a departure from the existing construct for juvenile jurisdiction for youth who are adjudicated delinquent for offenses committed under the age of 16. For these younger youth, both before and after implementation of the JJRA, jurisdiction generally extends only to age 18 unless terminated earlier by the court (with some longer periods of jurisdiction only for youth adjudicated delinquent for very serious felony offenses and who are committed to a Youth Development Center). Under this construct for younger youth, any disposition that includes DSS custody will automatically terminate at age 18 when juvenile jurisdiction must terminate.

The older population of youth who will fall under juvenile jurisdiction following JJRA implementation

creates a new over-18 group of juveniles who can continue to be under the jurisdiction of the juvenile court and subject to community-based court-ordered dispositional alternatives. DSS custody is one of those dispositional alternatives. While the court clearly will not be allowed to issue an initial order of disposition to DSS custody for juveniles who are age 18 or over, question remains as to whether a juvenile who was ordered into DSS custody under the age of 18 as part of a delinquency disposition can remain in DSS custody after turning 18.

### **Why the Question Remains**

As explained in a revised version of the Bulletin, posted on July 19<sup>th</sup>:

The age limit on the dispositional option of DSS custody contained in the JJRA applies to two other dispositional options as well. It includes placing the juvenile in the custody of a parent, guardian, custodian, relative, private agency offering placement services, or some other suitable person and ordering supervision of the juvenile in his or her own home by DSS, a juvenile court counselor, or other personnel as may be available to the court. The intent of the new age limit is unclear because not all of these dispositional options involve a change in custody. If the action of being placed in the custody of another was intended to last only until age 18 under this amendment, then inclusion of court-ordered in-home supervision by an outside entity would seem to be misplaced. Absent clear statutory intent, the question remains as to whether a juvenile who is placed in DSS custody prior to age 18 and who remains under juvenile jurisdiction at age 18 and/or 19 can continue in DSS custody.

### **Can Youth Remain in Foster Care After Turning 18?**

My colleague, Sara DePasquale, is the resident expert on foster care here at the School of Government. In the bulletin, she outlines the only current mechanism for youth to remain in foster care after turning 18 as follows:

If a juvenile who is placed in foster care, including through a delinquency disposition, remains in care when he or she turns 18, the juvenile, now a young adult, can continue to receive foster care services until age 21 by *voluntarily* participating in North Carolina's Foster Care 18?21 program. This extended foster care benefit is available for those juveniles who (1) have been adjudicated delinquent, (2) were placed in foster care as a delinquency disposition, (3) age out of foster care upon turning 18, and (4) meet statutory eligibility criteria. That young adult's participation in North Carolina's extended foster care program requires the execution of a voluntary placement agreement (VPA) between the eligible young adult and a county DSS and at least one judicial review of that VPA. That judicial review is not part of the delinquency proceeding but instead involves a new case file and new juvenile file number.

This use of a VPA to continue a juvenile age 18 or older in foster care is different from a court-ordered delinquency disposition that requires DSS placement. A court-ordered population of youth between the ages of 18 and 20 in the foster care system would new to that system.

Inconsistency between existing law regarding the allowable use of foster care and caselaw regarding age of emancipation only further confuses this question. As explained in the Bulletin:

The definition of “foster care” expressly allows for “the continuing provision of the essentials of daily living on a 24-hour basis for . . . delinquent *children* (emphasis added) . . .” “Child” in the context of the law governing the provision of foster care is defined as any *unemancipated* individual under the age of 21. However, the [North Carolina Supreme Court has held](#) that “[t]he age of emancipation is precisely fixed – eighteen.” It is therefore unclear how a juvenile between the ages of 18 and 20 could ever be unemancipated, triggering eligibility under the definition of child for foster care purposes.

### **Possible Courses of Action**

There does not seem to be a clear legal answer as to whether a juvenile adjudicated delinquent and placed in DSS custody prior to turning 18 can remain in foster care after turning 18 pursuant to the delinquency dispositional order. The revised Bulletin provides the following potential courses of action in the face of this uncertainty:

(1) the court could place a time limit on the portion of the disposition placing the juvenile in DSS custody so that custody will terminate at age 18 or (2) DSS could file a motion to modify the delinquency disposition prior to the juvenile’s 18th birthday to seek a disposition stating that DSS will no longer have custody of the juvenile after the juvenile reaches the age of majority. However, the juvenile may still voluntarily choose to participate in the Foster Care 18?21 program if the DSS custody order terminates upon the juvenile’s 18th birthday (and not before). It is critical that any court order placing the juvenile into DSS custody remain in effect on the juvenile’s 18th birthday in order for the juvenile to be eligible to opt into the Foster Care 18?21 program.

It is also possible that a juvenile who is approaching his or her 18th birthday and automatic emancipation will seek a modification of a dispositional order that places him or her in DSS custody to state that DSS custody will end upon his or her turning 18.

While I never did go back and paint the trim in my son’s bedroom, Sara and I did revise the Bulletin to accurately reflect the option of DSS custody as a dispositional option following JJRA implementation. If you downloaded the original Bulletin, please replace it with the [revised version](#).

The substantive revisions begin on page 44.