A Life Deferred

THE ODYSSEY OF BLANCA CATT

Mark Kramer

By Mark Kramer

A few days before her 19th birthday, Blanca Catt sat in my office, looking for help. She and her adoptive mother had just laid out an incredible story of the bind Blanca was in and the dilemma facing her and her family. Though she grew up in Oregon and had been adopted by Oregonians, the government had deemed Mexican-born Blanca to be an illegal alien. If she wanted to become a U.S. citizen she had to leave her home and her family and go back to Mexico for an extended period of time. They looked to me for help. What could I do?

Blanca's story

Blanca Isabel Salazar–Ruiz was born in Mexico in October 1990. After her birth, Blanca's parents returned to work in the United States as undocumented workers, leaving her and her younger sisters (Nayeli and Oyuki) to be raised by her paternal grandmother. Her birth father had legal status. Her birth mother did not. When Blanca was three, she was smuggled into the U.S. by her family. Once here with her parents, she was repeatedly and brutally beaten and burned by her mother. Blanca still has physical scars on her chest — scald burns. In 1994, Oregon's Department of Human Services (DHS) received a hotline call about the abuse. Blanca and her siblings were taken into foster care. Blanca's birth mother was charged with and ultimately pled guilty to felony criminal mistreatment in the first degree for the abuse of Blanca.

In December 1995, when Blanca was five, she and her two sisters were placed in the foster home of Darren and Lisa Catt. Her sister Nayeli returned with her birth father to Mexico in June 1996. In October 1996, the parental rights of Blanca and Oyuki's parents were terminated and the Catts prepared to adopt Blanca and Oyuki. Oyuki, having been born in the U.S. was already a citizen. Blanca, however, being born in Mexico and smuggled into this country illegally, had no status.

At first, DHS promised to adjust Blanca's status to citizenship before the adoption. Blanca qualified for the adjustment, as a special immigrant juvenile, because she was an abused child in long–term foster care. DHS submitted the adjustment papers to the Justice Department but the filing was defective. DHS had not submitted the proper documentation to demonstrate Blanca's special immigrant status. The documents were returned without processing and DHS never attempted to correct and resubmit the paperwork.

No worries, DHS told the Catts. Proceed with the adoption, DHS said, Blanca would become a citizen automatically once the adoption was done. It was this representation by DHS, repeatedly made to the Catts, that became the key to Blanca's immigration and legal odyssey to follow.

The Catts adopted Blanca and Oyuki in May 1999. It was a joyous occasion. Based on DHS's promises, everyone assumed Blanca was now a citizen. The Catts never thought to get proof of Blanca's citizenship. Why bother? Blanca had been adopted by U.S. citizens. If there was any doubt, it vanished when, in 2000 or 2001 Blanca's mother Lisa Catt, a social service worker, connected with Blanca's prior DHS caseworker, on an unrelated matter. They got to talking about Blanca. The caseworker noted the enactment of the Child Citizenship Act of 2000 (CCA) and reaffirmed to Lisa that if Blanca needed proof of her citizenship that her adoption decree and new

birth certificate would be sufficient evidence under the CCA.

Life went on. Blanca's parents divorced, but she remained close to both. She became the all American teenager, bright, social and athletic. She recovered, in large part, from the physical and emotional abuse by her mother. At age 15, Blanca returned to Mexico for a church sponsored service project carrying only her new birth certificate and school ID card. She entered Mexico two times and returned to the U.S. without a hitch. Border officials never questioned her status.

At 16, like most teenagers, Blanca wanted to drive. She applied for a learner's permit, but the DMV insisted upon a valid Social Security card with her legal adopted name on it. Blanca had a valid Social Security card, but it was in her birth name. No problem Blanca and Lisa thought. They went to the Social Security Administration with the adoption decree and new birth certificate seeking a new Social Security card. Social Security wanted proof of citizenship. Still no problem Blanca and Lisa thought. It was just a matter of paperwork. Lisa Catt dutifully filed the paperwork with USCIS (U.S. Citizenship and Immigration Services) to obtain proof of Blanca's citizenship.

In August 2007, USCIS replied, denying the application because Blanca had been smuggled illegally into the country by her birth parents and DHS had never adjusted her status. She was not a citizen after all! Blanca and Lisa were told she had to first become a permanent resident (get a green card). This letter and the August 2007 date would later became crucial as the legal drama developed. But Blanca and her mother were not thinking about a lawsuit, much less the statue of limitations or the statute of ultimate repose. They just wanted to get Blanca's driver's permit and a green card. Again, not knowing any better, they thought it was a matter of paperwork.

In November 2007, Lisa filed a petition for alien resident, the first step in seeking a green card for Blanca. Almost a year later, in September 2008, Blanca and Lisa receive acknowledgment from USCIS that the petition had been received and approved. They believed the bureaucratic train was on the right track and that it was just a matter of time before she got her green card.

That October, Blanca had her 18th birthday. Blanca and Lisa had no idea of the significance of this date and the ramifications it would have.

In the spring of 2009, USCIS requested more information. Still just another stop on the bureaucratic train to a green card.

In May 2009, Blanca graduated from high school. She wanted to join the Navy or attend college, but because she had no status she could do neither. The waiting game continued.

In July, Blanca and her mother received approval for Lisa to sponsor Blanca as an immigrant. More paperwork and more filing fees and more waiting.

On September 16, 2009, Blanca's mother completed the additional paperwork and paid the visa fees and was asked to complete more immigration paperwork. Frustrated by the delays, Lisa consulted with some immigration attorneys about the delays. What the Catts found out shocked them both — because Blanca was over 18 years old and still considered an "illegal alien" by the U.S., she would have to leave the U.S. for three years and then seek her adjustment from Mexico. If she waited until her 19th birthday in three weeks, she would have to leave the U.S. for ten years and then apply.

Blanca and Lisa hired immigration attorney Jennifer Rottman to seek alternatives to Blanca having to leave the country. Rottman suggested it might be possible for Blanca to obtain limited and provisional status under a U visa, which is available for victims of domestic vio-

See A Life Deferred p 12

lence. Blanca, who spoke no Spanish and had only returned to Mexico once after she was smuggled into the U.S., decided to stay in this country without status and pursue a U visa.

The legal battle is joined

In early October 2009, just a few days before Blanca's 19th birthday Blanca and Lisa came to see me and explained their remarkable story. They faced a dilemma. Blanca would pursue the U visa, but if one was not granted, then the young woman could very well be forced to leave her parents, her home and her adopted country. My mind exploded with red flags. Who to sue? DHS? Blanca's juvenile court attorney? The Catts' adoption attorney? All of them? When to sue? What about the tort claims notice? Blanca was going to turn 19 in just a few days. Did that have any significance? Who would I represent? Blanca? Lisa? Both? Should I assert negligence? A civil rights claim? Reckless infliction of emotional distress (Was that even recognized in Oregon?) Just thinking about this made my head spin.

But there they were, a mother and child in distress facing an uncertain future and seeking some measure of justice and accountability. Earlier, I had successfully filed (and settled) cases against DHS for negligence. I knew how difficult and frustrating it was to take on a case against DHS, how costly it could be with an outcome that was at best uncertain and could take years to resolve.

And so, I thought: Can this case be won? What would a win look like and how long would it take? Had I had the time to reflect, perhaps I would have just sent Lisa and Blanca on their way. But here it was, six days before Blanca's 19th birthday. I took a quick look at ORS 12.060 and remembered that the time for filing a claim for a minor could be tolled for up to five years, but for not later than age 19. If something was going to be done, it would have to be done quickly. It outraged me that Blanca might be in legal limbo for ten years in Mexico or that she would have to live an underground life in the United State indefinitely because DHS had screwed up. I decided to take the case.

Now I had to cobble together and file a complaint in less than a week and to address a dizzying set of questions. I decided to narrow the claim to negligence knowing how difficult it is to hold a state agency accountable under 42 USC §1983 absent intentional or reckless behavior. The more difficult question was who to sue. Just keep it neat and clean and sue DHS and the caseworkers? Or should I sue the attorneys for Blanca and the Catts in the juvenile court and adoption court cases? Shouldn't they have monitored DHS? Shouldn't they have ensured that Blanca gained her citizenship or received a green card, when she was still eligible here in the U.S.? Given the time pressure and because I really didn't know what the attorneys knew or did, I named them as defendants as well.

In the days before *Clarke v. OHSU*, 343 Or 581 (2007), under the Oregon Tort Claims Act (OTCA) a claim against individual state workers meant that the suit would be against the public body only (ORS 30.265)(1)). But *Clarke* changed the legal landscape and permitted suits against individual defendants to proceed where the tort claims damages cap denied victims their constitutional rights under Article I, §17 of the Oregon constitution. So I sued the caseworkers as well.

I claimed negligence for DHS's pre–adoption conduct as well as for the misrepresentation made by the DHS caseworker in 2000.

Narrowing the field

Blanca's juvenile court and parents' adoption attorneys had a legal duty to ensure that Blanca became at least a permanent resident, if not a citizen when she was adopted. However, fairly early on in the discovery process, I discovered that both attorneys had relied upon DHS's representations and case plan that Blanca would become a citizen upon (if not prior to) her adoption. Counsel for the attorney defendants quickly filed a motion to dismiss the attorney clients. At that point, feeling comfortable that the attorneys would later testify that they relied upon DHS, and figuring that it would be easier to focus on the state defendants with one attorney rather than three attorneys, I struck the attorney defendants.

Through the looking glass

When I explained the case to my non-lawyer friends, it seemed simple. If DHS had promised to Blanca and her parents that she would become a citizen upon adoption and if as a result of those representations, Blanca was not only not a citizen but would have to leave the country for ten years to adjust her status, DHS should pay. I explained to them that the merits of the case might never be addressed because of the timeliness issues, pecifically the tort claims notice (TCN), the statute of limitations (SOL) and the statute of ultimate repose (SOUR). Of course, their eyes glazed over in boredom and disbelief. But these issues turned out to be critical.

The over-arching issue was when did Blanca and Lisa have sufficient information to put them on notice that DHS and the prior lawyers might have committed a tort (an actionable injury)? This crucial date would then determine whether a TCN was timely filed, and whether the case was timely filed under the SOL and the SOUR.

I was confronting a three-headed monster — TCN, SOL and SOUR.

In a normal case against a public entity, a plaintiff must file a TCN with 180 days of the discovery of the injury (ORS 30.275). However, as a result of my prior case against DHS on behalf of a minor, I helped amend the TCN statute to waive the need for the notice when the

claim is brought by a minor, against DHS, for acts that occurred when the minor was in DHS care. At least for Blanca, for her pre–adoption claims, I thought I would be safe. I knew I would still have to confront the issue as to the claims of Blanca's mother, Lisa.

If I survived the TCN challenge, I knew I would then have to deal with the SOL, which here required that the case be filed within two years of the discovery date of the injury. ORS 12.110.

Both sides agreed that the "discovery" rule was applicable to the TCN and SOL issues. The discovery rule was cogently articulated in the case of *Cole v. Sunnyside Marketplace*, LLC, 212 Or App 509, 519 (2007) rev. den. 344 Or 558 (2008):

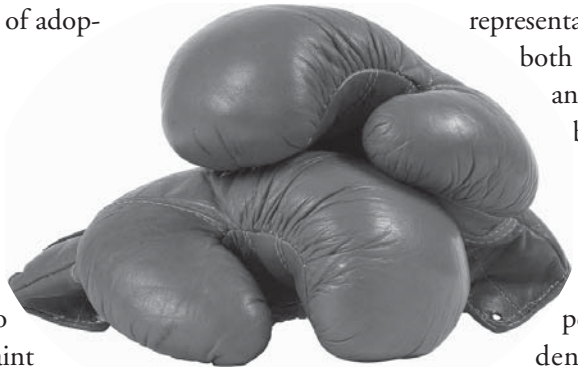
> the plaintiff knows or, in the exercise of reasonable care should know, facts that would make an objectively reasonable person aware of a substantial possibility that all three of the following elements exist: an injury occurred, the injury harmed one or more of the plaintiff's legally protected interests, and the defendant is the responsible party.

If somehow I were to survive the TCN and SOL challenges, I would still have to confront the SOUR. ORS 12.115(1) provides, "In no event shall any action for negligent injury to personal property of another be commenced more than ten years from the date of the act or omission complained of."

Going back to basics, I knew that the following dates were critical.

- May 1999 — When Blanca was adopted and was no longer a ward of the state.
- Year 2000 — When Blanca's mother was told by the DHS caseworker that Blanca would be a citizen under the Child Citizenship Act of 2000 (CCA) based upon her adoption decree and birth certificate.
- August 2007 — When Blanca's mom received a letter from the government informing her that Blanca had never become a citizen.
- September 2009 — When Blanca and her mother first became aware of the requirement that Blanca leave the country for three years (until she was age 19) or ten years after she became 19 before seeking to adjust her status
- October 7, 2009 — When I filed the complaint and the TCN.

The case boiled down to whether Lisa and Blanca knew or should have known of their "actionable injury" based upon the August 2007 letter, or later in September 2009 when they became aware of the consequences of Blanca becoming neither a permanent resident nor a citizen at the time of adoption.



Round 1 — We won!

After I removed the attorney defendants, Oregon moved to dismiss the complaint under ORCP 21 for failure to state a claim. They alleged that the case and the TCN had not been filed timely and that the alleged claims occurred more than ten years before the filing of the complaint. After extensive briefing, the case came before Judge Jerome LaBarre and he surprised both sides by ruling that the state's challenge was not properly brought under ORCP 21. He said it should be brought after discovery was completed, as a motion for summary judgment.

This was not expected, but a win is a win so we went onto the next round.

Round 2 — We lost

Several months later, after we completed discovery, Oregon refashioned its motion and filed for summary judgment. The case came before Pro Tem Judge Charles Corrigan. Oregon argued strongly that August 2007 was the key date and that since the complaint was not filed until October 2009, the case was untimely both under the SOL and TCN. As a back–up, they argued that the SOUR barred the pre–adoption claims.

I obtained an affidavit from an immigration attorney expert who said DHS could have fixed its mistake had it notified Blanca and the Catts before she became 18. The expert also said it would not have been reasonable for a layperson to understand the consequences of the August 2007 notice of noncitizenship. Lisa Catt filed an affidavit stating that she had no idea of the consequences of the letter of noncitizenship until she consulted with counsel in September 2009, that she relied upon the representations of DHS both pre–adoption and in 2000 and believed it was just a matter of time and paperwork to make Blanca a permanent resident and later a citizen.

In Judge Corrigan's first decision, he granted summary judgment for defendants, finding that by virtue of the August 2007 letter "***Plaintiffs discovered that Defendants were responsible for injuries that Plaintiffs had suffered, injuries significant both in number and nature that Plaintiffs had identified as such in their complaint."

It appeared that we lost.

Round 3 — We won!

Judge Corrigan didn't address the tolling for minors provided in ORS 12.160 in his decision, so I saw an opening. Under ORS 12.160, Blanca (but not her mother) had the benefit of the tolling provision allowing her to file her complaint until she became 19. We filed our complaint on October 7, 2009, one day before her 19th birthday. So I noted this to Judge Corrigan in the form of a mo-

See A Life Deferred p 14

tion for new trial and a motion for reconsideration. I argued that Blanca's pre-adoption and post-adoption complaints were timely, that as to her pre-adoption claims no tort claims notice was needed, and that as to her post-adoption claims the TCN was timely when filed in September 2009.

To his credit, Judge Corrigan recognized his error and partially reversed his prior decision. He ordered that summary judgment be denied as to Blanca's pre-adoption claims. So, it appeared we had survived after all and the case would proceed to trial on the critical issue of DHS' misrepresentations preceding the adoption.

Round 4 — We lost

Before the ink was dry on Judge Corrigan's partial reversal, he reconsidered his own opinion recalling that the state had relied not only on TCN and SOL but SOUR as well. He went on to rule that as to Blanca's claims, even if she survived the TCN and SOL issues, she could not survive the SOUR. The judge ruled that the essential claim was actionable within ten years of Blanca's May 1999 adoption, that SOUR applied and that the filing of the complaint in September 2009 was untimely, regardless of when the negligence was discovered. In other words, the discovery rule didn't apply to the SOUR and filing the complaint before Blanca was 19 didn't help with the SOUR. Again, we lost.

Good news: a reprieve

Along the way we received attention from local media. On August 3, 2010, *The Oregonian* published a prominent editorial supporting Blanca's case. The editors called for:

> [a] humanitarian exception to the immigration rules, allowing someone who has been a victim of her own biological parents, circumstance and/or bureaucracy and in Catt's case all three — to be fast tracked for U.S. citizenship. But in lieu of such a common sense approach it appears that Catt's best way forward is to apply for a special visa, sometimes granted to crime victims.

Within 24 hours of the editorial I had offers of assistance from the offices of U.S. Senator Wyden, Oregon Representative Blumenauer and Washington Representative Baird. I referred them to Blanca's immigration counsel. Within a couple of days, Blanca's U visa application, which apparently had been stalled, suddenly moved to the front of the line and Blanca was informed that her U visa would soon be granted.

Blanca's U visa did come through. It is a reprieve of sorts. She can stay in the U.S. and after three years can apply to be a permanent resident. Five years later she can apply to be a U.S. citizen. Maybe in a decade, this innocent victim of domestic violence and of a bungled government bureaucracy can become a citizen. But a U visa is limited. Blanca can work, but she cannot travel abroad. She can go to college, but is not eligible for any type of government subsidized financial aid, including student loans. She cannot vote and is not a citizen.

Blanca today

Blanca, now 20, has moved to Washington, obtained a job as a restaurant hostess and is more or less independent of her parents. She still wants to go to college to become a nurse or a dental hygienist, but, lacking the ability to obtain financial aid, is unable to do so at this time. Blanca is very grateful for getting the U visa, so at least she can work and does not have to worry about deportation.

The case goes on – issues on appeal

We have appealed Judge Corrigan's decision granting summary judgment. By the time this article is published the briefing on appeal will likely be complete. Beyond the basic argument that summary judgment was improper given the many factual issues in dispute, we will ask the Court of Appeals to wrestle with the following issues: What is the proper application of Oregon's discovery rule in a situation when a person does not discover the extent of his or her injury until after consultation with counsel? In other words, under the "objectively reasonably person" standard, when should Lisa and her mother have known about the existence of an actionable injury?

Should the application of SOUR be modified when the defendant had a "continuing and active duty" to Blanca after her adoption and into the ten year SOUR period? Judge Corrigan rejected our theory, citing *Little v. Wimmer,* 303 Or 580 (1987), that DHS, as Blanca's legal custodian, had misrepresented to her and her parents her citizenship status. We argued that DHS had a continuing duty to Blanca and Lisa to correct the negligence, at least until Blanca turned 18. Our expert stated that had DHS informed Blanca and her mother of its error and Blanca's position before Blanca became 18, then Blanca could have obtained a green card as a special immigrant juvenile.

Should Oregon recognize a "subsequent injury" exception to the strict application of SOUR? Other states, particularly Georgia, have recognized a "subsequent injury" exception to a statute of ultimate repose. This exception applies:

> ***in cases in which the patient's injury arising from the misdiagnosis occurs subsequently, generally when a relatively benign or treatable precursor condition, which is left untreated because of misdiagnosis, leads to development of a more debilitating or less treatable condition.

We argued that DHS's bungled citizenship application and subsequent misrepresentations were the initial injuries, which, if remedied before Blanca became 18, would have been relatively benign. Left unresolved, Blanca at age 18 became subject to the three year (then ten year) bars to adjustment of her status, but for the U visa.

Lessons learned

In the 16 months since I took on this case, I have been reminded of how gratifying it is to take on a huge challenge for a deserving client against huge odds. This is the place for the happy ending. It hasn't happened. Blanca Catt was saved from deportation but her life is in limbo. She is a young adult with dreams for the future, none of which she can start chasing. The U.S. legal system is a quagmire for her. She never knew the trouble she was in until she tried to move forward. Some day, I hope to have good news for her, "Blanca, your case has been resolved. You can become a U.S. citizen." It will be justice but justice delayed, at great expense to one promising life. Win or lose, we must continue to take on those causes that are just and compelling even when the challenge is great

Finally, Blanca's case opened my eyes to the tens of thousands of other innocent young people who face her predicament. A legislative remedy for Blanca and others like her was recently within reach. The U.S. House passed the Dream Act, also known as the Development, Relief and Education for Alien Minors Act on December 8, 2010 by a vote of 216 to 198. The bill then died in the Senate. The Dream Act would have provided a path to legal residency for students who came to the U.S. before the age of 15, have lived in the U.S. for at least five years and who can demonstrate good moral character since entry. Such students would qualify for conditional non-immigrant status upon acceptance to college, graduation from high school or being awarded a GED. Once granted, such students could apply for a second five year period after which they would be eligible for legal permanent residence status (a green card). For more information about the Dream Act and its reintroduction in the new congress, contact the National Immigration Law Center (www.nlic.org).

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