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"The administration's actions this year are not the first time that the United States has used the power of the federal government to sanction policies that separate families."

President Trump's Family Separation Policy

A Brief Review of the Historical Context

By Addie Smith, YRJ Attorney

The Zero Tolerance Policy and Its Effects

In April of this year, President Donald Trump instituted a new "zero tolerance" immigration policy.[1] As part of that policy, the administration began to detain all adults who entered the country pending prosecutions.[2] Because children cannot be kept in adult detention facilities, this resulted in the forced separation of immigrant families at the border.[3] Although President Trump and his administration believed that this policy would deter immigration to the United States, recent studies show that this type of action has little effect.[4] Ultimately, in the wake of this policy change, thousands of families were ripped apart, hundreds of parents were deported alone, and children, some as young as 18 months, were scattered in shelters across the country.[5] Advocacy organizations and invested professionals from across the political spectrum have decried this policy, citing research that clearly demonstrates that family separation can inflict significant trauma on a child.[6]

After weeks of pressure, on June 20, 2018, the President signed an executive order halting this practice.[7] As of mid-October 2018, 245 children who had been separated from their

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parents had still not been reunited (175 of these children, after consultation with their deported parents, decided to stay in the United States alone and seek release to a sponsor while they pursue potential asylum claims, while 125 were still actively seeking reunification with their parents).[8] Nevertheless, in October 2018, the Washington Post reported that the administration was considering instituting a new policy, which would offer parents a binary choice: families could either remain in detention with their children for months or years while awaiting an immigration trial, or parents could allow their children to go to government shelters and ask other relatives to take custody of them.[9]

Historical Government Sanctioned Practices Separating Families

The administration's actions this year are not the first time that the United States has used the power of the federal government to sanction policies that separate families. The magnitude of this current-day practice is best understood in the context of that history.

Some of the first instances of family separation were based on practices embedded in the slave trade. Slave owners could divide families by selling off a parent or a child for any number of reasons, including to pay off a debt, create equal inheritances, or simply out of spite, to punish enslaved parents. Heather Williams, a professor of Africana Studies at the University of Pennsylvania, has directly compared the experiences of enslaved parents and children to those who were separated at the border. She recounted stories of mothers begging slave traders to let them keep their children, and of an enslaved child who would not stop crying after being separated from his parents, "much like the eight-minute audio of the sobbing immigrant children" at a detention facility that went viral after being published on ProPublica in June.[10] Henry Fernandez, a senior fellow at the Center for American Progress, also noted that after the end of the Civil War formerly enslaved people were left to find family members on their own. Fernandez compared this to Trump's separation policy, because in both

instances, the federal government "had no strategy to ever bring these families back together."[11] Perhaps the most disturbing similarity, however, was Trump administration spokeswoman Sarah Huckabee Sanders and Attorney General Jeff Session's use of a Bible passage, Romans 13 ("obey the laws of the government"), to justify the policy leading to family separation. That same passage was used frequently before the Civil War to justify slavery, to urge slave hunters to return runaway slaves, and to take slave children away from their mothers.[12]

The federal government's efforts to assimilate American Indian and Alaska Native (AI/AN) children—first through the use of boarding schools and then through the Indian Adoption Project and misuse of child welfare systems—also led to mass separation of children from their parents. Determining that removing children from their families and thus their culture was the most

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effective way to assimilate an entire population of people, the Federal government began developing the first state-run boarding schools in the mid-1800s. Authorities forced or coerced parents into sending their children to these schools, which were run like military camps; expressing ties to family and culture were forbidden and punished.

During one of the darkest periods of American history—Japanese Internment in the 1940s—parents were often separated from their children when fathers were given hasty relocation orders and forced labor contracts, or when parents and children were arrested at different times and placed in different camps. As noted by Simeon Man, an assistant professor of history at the University of California, San Diego, these actions—like those of the Trump Administration—used the military "to warehouse people in a time of emergency in the name of national security." Both actions were "framed as benevolent acts in which the US government is providing care for the people."[13]

The Role of the Child Welfare System

From the mid-1850s through the early part of the 20th century, aid groups in New York city "rescued" more than one hundred thousand orphaned children from the streets (in fact, many of these children were actually stolen from unsuspecting parents) and transported them on "orphan trains" to the west.[14] The majority of the children transported were Catholic and Irish, Italian, or Eastern European, and were placed in middle class Protestant homes. The purpose of the orphan trains was both to "protect" immigrant children from the squalor of urban poverty and to cleanse them of their parents' "race" and religion.[15] (After decades of this program, the Catholic community in New York began its own Orphan Trains and transported young Catholic children to live in Catholic homes out west). As Professor of Modern Theology at Kent University, Gordon Lynch notes:

> "These initiatives continued just as ideas of the sacred emotional ties between parent and child were becoming more pervasive in society [and the law]. However, state sanctioned policies of family separation, usually delivered by leading charities and religious organizations, operated on the basis that such sacred bonds need not be respected for certain types of parents. These extended far beyond cases of child cruelty to judgments made about the stability of a parent based on their ethnicity, class, lifestyle or marital status."[16]

Although federally-run Indian boarding schools remained in place until the 1970s, the main tactic for the assimilation of AI/AN children shifted in the middle of the twentieth century. In the 1950s and 1960s, the Child Welfare League of America in conjunction with the Children's Bureau initiated the Indian Adoption Project, which sought to place AI/AN children in white homes in the erroneous belief that this would improve their circumstances. The sentiments of the Indian Adoption Project led state and federal child welfare systems to begin systemically removing AI/AN children from their parents' care—citing flimsy and often biased claims of abuse and neglect—and placing them in non-native homes. In the 1970s, studies showed that one in four

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AI/AN children had been separated from their parents and 85% of them had been placed in non-Native homes. Clifford Trafzer, a history professor at the University of California, compares these practices to the current Administration's immigration policies, expressing concern that the Administration's actions are likely to strip children of the rich cultures they are bringing to the United States.[17]

In addition to looking back, the President's immigration policy has also brought national attention to the present child welfare system and its role in separating thousands of families each year. One former foster youth poignantly reminded Time magazine readers of this fact in her August 2, 2018 article titled, "I was in Foster Care. Family Separation isn't Just a Problem at the Border." In her piece she cautions:

> "It's shameful just how many children our country unnecessarily removes from their families and places in foster care, a problem that extends well beyond the current and extreme example of the families unjustly ripped apart at our border. Many children in the broader foster care system — particularly children of color — are separated from their families when preventive services could help their parents overcome the challenges, often poverty-related, that lead to their removal."[18]

Its important to understand that Trump's actions are not an isolated incident, but are a contemporary example in a long and significant history of government actions in which the state has failed to respect the integrity of marginalized families and has, in fact, taken active efforts to dismantle them. This serves as a reminder to all of us who work in the child welfare system that part of our mission should be to support and empower families—especially families that are marginalized or stigmatized—so as to avoid repeating the mistakes of our country's past, and indeed, present policy decisions.

Footnotes

[1] Presidential Memorandum for the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Health and Human Services, and the Secretary of Homeland Security, April 6, 2018, available at https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-secretary-defense-attorney-general-secretary-health-human-services-secretary-homeland-security/

[2] Ryan Devereaux, *The U.S. Has Taken More than 3,700 Children from their Parents—and Has No Plan For Returning Them*, The Intercept (June 19, 2018), https://theintercept.com/2018/06/19/children-separated-from-parents-family-separation-immigration/

[3] Chris Cillizza, *The Remarkable History of the Family Separation Crisis*, CNN (June 18, 2018), https://www.cnn.com/2018/06/18/politics/donald-trump-immigration-policies-q-and-a/index.html

[4] Tom K. Wong, Do Family Separation and Detention Deter Immigration, Center for American Progress (July 24, 2018) https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/

[5] Cora, Currier, *Prosecuting Parents—and Separating Families—was Meant to Deter Migration, Signed Memo Confirms*, The Intercept, (Sept. 25, 2018), https://theintercept.com/2018/09/25/family-separation-border-crossings-zero-tolerance/

[6] Statement's from The American Academy of Pediatrics, https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx; The American Medical Association, https://www.ama-assn.org/ama-urges-administration-withdraw-zero-tolerance-policy; the American Psychological Association, the United Nation's Human Rights Office, https://www.apa.org/advocacy/immigration/separating-families-letter.pdf.

[7] Executive Order, Affording Congress an Opportunity to Address Family Separation, June 20, 2018, https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/

[8] American Civil Liberties Union, *Family Separation by the Numbers* (last visited Nov 11, 2018), available at https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation

[9] Nick Mirrof, Trump Administration Weighs New Family Separation, *The Washington Post* (Oct. 12, 2018) https://wapo.st/2pNOhrG?tid=ss_mail&utm_term=.1843552a68d5

[10] Harmeet Kaur, *Actually the US Has a Long History of Separating Families*, CNN (June 24, 2018) https://www.cnn.com/2018/06/24/us/us-long-history-of-separating-families-trnd/index.html; to hear the audio mentioned: Ginger Thompson, *Listen to Children Who've Just been Separated from Their Parents at the Border*, ProPublica (June 18, 2018), https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy

[11] Kaur, *supra* n 10.

[12] Russell Contreras, *Other Times in History When the U.S. Separated Families*, The Chicago Tribune (June 20, 2018), https://www.chicagotribune.com/news/nationworld/ct-family-separation-history-20180620-story.html

[13] Kuar, *supra* note 10.

[14] James Herbert Williams, Child Separation and Families Divided: America's History of Separating Children from Their Parents, 42 Social Work Research 141, 142-43 (2018)

[15] *Id.*

[16] Gordon Lynch, *Children Have been Separated from their Families for Generations – why Trump's Policy was Different*, The Conversation (June 24, 2018), https://theconversation.com/children-have-been-separated-from-their-families-for-generations-why-trumps-policy-was-different-98587

[17] *Kuar, supra* n 10.

[18] Sherry Lachman, *I was in Foster Care. Family Separation Isn't Just a Problem at the Border* (August 2, 2018), http://time.com/5355313/immigration-children-family-separation/

View from the Bench

By Morgan Wren Long, Multnomah County Circuit Court Family and Juvenile Referee

How long have you been on the juvenile law bench?

A little over a year. Prior to becoming a referee, I was a sole practitioner for several years and most of my practice was in juvenile law. I had the pleasure to practice predominantly in Multnomah and Washington Counties.

What has surprised you most since joining the juvenile law bench?

So many things have surprised me, it's difficult to narrow it down to just one! I've been pleasantly surprised by the fierce dedication and passion that my fellow judicial officers have towards keeping children safe and improving the process to reunify families when possible. I've been surprised by how much emotional and vicarious trauma there continues to be, even when I'm no longer meeting with clients in crisis one-on-one or communicating with them outside of the courtroom. I've been surprised by how much work is done by judicial officers and their staff behind the scenes to keep a courtroom running. I've been humbly surprised by how much there is to learn, and yet how satisfying and rewarding it is to sit in this chair and do this work.

If you could change one thing, what would it be?

I would get more resources to offer to the children and families we serve. It is brutally unfair to see clear need and not be able to give it because there simply aren't the resources available. We need more inpatient treatment facilities, more visitation resources, more psychologists willing to do thorough evaluations quickly for parents and children, more judicial officers to ensure that cases are heard in a timely manner, lower caseloads for attorneys so that more time can be spent on each case, more culturally diverse services to offer to our community, more foster homes willing to take sibling groups or children with high needs, more housing opportunities—the list goes on forever. If I could wave my magic wand, there would be the appropriate services promptly for those families willing to engage, there would be robust visitation supervisors to keep children closely connected to their parents while in substitute care, and there would be a way for families who are otherwise doing well to secure safe housing quickly.

What practices do you observe (and encourage others to emulate) from the most effective lawyers?

Be prepared! It is painfully obvious when an attorney hasn't read the discovery, hasn't met with their client, or hasn't thought through their arguments. Your client deserves more than a warm body sitting next to them. They deserve someone who is thoroughly prepared to advocate for them. When a parent's rights to their children are at stake, it is unacceptable to strive to be anything less than an excellent attorney.

Practice self-care! Vicarious trauma is a harsh reality for everyone involved in the juvenile law system, and it can be extremely damaging to all of us. It is vitally important to keep appropriate boundaries with clients, to have a life outside of work, and to know when it's time for a break or when you need help. Recognize when you start experiencing compassion fatigue and take steps to address it. You cannot be a good advocate for someone else when you are running yourself ragged.

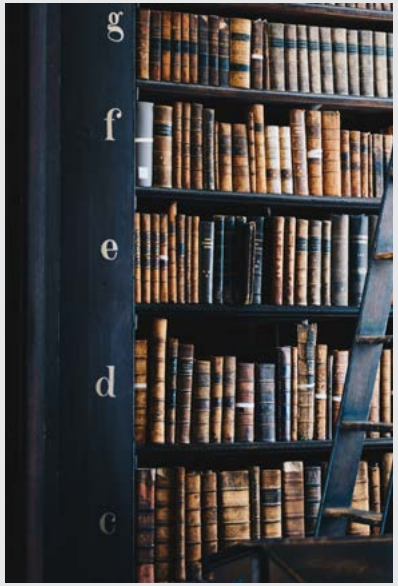
Be respectful! This includes the Court, other attorneys, court staff, parents, children, juvenile court counselors, caseworkers, witnesses—everyone! The parents who come into the courtroom are humans who deserve basic dignity and respect, no matter what condition their family or life may be in at the moment. Practice compassion towards everyone. Even when you don't agree with what a caseworker or another attorney is doing, respect the fact that they are doing a job and don't deserve to be ridiculed or demeaned. Everyone involved in this system is over-worked, underpaid, and experiencing vicarious trauma from handling this type of work. No one enters juvenile law for the fame and glory, we enter it because we care and want to make a difference. Remember the golden rule at all times and treat others as you would like to be treated.

Juvenile Law Resource Center

JLRC Contact Information

Alison Roblin is the contact person for trainings and other JLRC services.

To receive a call back within two business days from a JLRC attorney for advice, email the workgroup and please include your name, telephone number, county, and brief description of your legal question.



CASE SUMMARIES

By Matt Steven, YRJ Attorney, and Christa Obold Eshleman, YRJ Supervising Attorney

Dependency

Oregon Supreme Court

Dept. of Human Servs. v. S. J. M., 364 Or 37, ___ P3d ___ (2018)

Procedural History

Mother appealed the juvenile court's judgment changing the permanency plan to adoption and permitting the filing of a petition to terminate her parental rights. The Court of Appeals reversed, holding that DHS failed to successfully "disprove the existence of a compelling reason" not to file the petition under ORS 419B.498(2). DHS successfully petitioned the Supreme Court for review.

Oregon Supreme Court Decision

The Supreme Court noted that neither party contested the juvenile court's "initial determinations" that changed the permanency plan to adoption under ORS 419B.476. The Court, thus, addressed only the issue of which party bears the burden of determining whether there was a compelling reason not to proceed with a petition to terminate parental rights under the "defense" offered by ORS 419B.476(5)(d) and ORS 419B.498(2).

The Supreme Court reversed the Court of Appeals opinion, holding that it is the parents' burden to make that showing when invoking the "escape clause" of ORS 419B.498(2):

> "Because DHS met its burden to show that the requirements in ORS 419B.476 for changing the permanency plans away from reunification had been met, it was parents' burden, as the parties seeking to invoke the escape clause, to show that there was a 'compelling reason' under ORS 419B.498(2) for DHS not to proceed with petitions to terminate parental rights."

Determining that sufficient evidence supported the juvenile court's conclusions, including that no compelling reason existed under ORS 419B.498(2), the Supreme Court affirmed the judgment of the juvenile court.

Concurrence by Chief Justice Walters

Chief Justice Walters wrote a concurrence to emphasize the narrowness of the decision, which did not address the standard under ORS 419B.476 for the initial determination "that reunification is not the appropriate plan and that the permanency plan for the child should be adoption." The Chief Justice specifically articulated her view that if the juvenile court makes a finding under ORS 419B.476(4)(c) that "further efforts will make safe reunification possible within a reasonable time, it has no choice but to order parents to participate in and make progress in those efforts and continue the plan of reunification." The Chief Justice took issue with

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contrary statements made by the Court of Appeals in *Dept. of Human Services v. D. L. H.*, 251 Or App 787, 805-806, 284 P3d 1233, *adh'd to as modified on recons*, 253 Or App 600, 292 P3d 565 (2012), *rev den*, 353 Or 445 (2013).

Review Granted by the Oregon Supreme Court

Dept. of Human Services v. T. M. D., 292 Or App 119 (2018) rev allowed, 363 Or 677 (2018). See case summary in Issue 2 of the 2018 Juvenile Law Reader.

Oregon Court of Appeals

Dept. of Human Services v. M. T. P., 294 Or App 208 (Sept. 26, 2018)

In *Dept. of Human Services v. M. T. P.*, 294 Or App 208, ___ P3d ___ (2018) (en banc), the majority affirmed the juvenile court judgment changing the permanency plan from reunification to adoption. Five judges dissented.

Background

Father appealed a permanency judgment changing the plan to adoption for his child. He argued that the availability of a guardian, which would preserve Father's bond with his high-needs child, was a compelling reason that it would be in the child's best interests to forgo filing a termination of parental rights petition under ORS 419B.476(5)(d) and 419B.498(2), and instead to change the permanent plan to guardianship.

The juvenile court had determined that no compelling reason existed under ORS 419B.498(2), after hearing evidence from DHS of concerns about the proposed guardian's ability to do what DHS felt necessary to keep the child safe, and evidence from the proposed guardian to the contrary.

Majority Opinion by Judge Devore

The Court of Appeals assumed without deciding, as it had several times previously, that a documented attachment between parent and child may be a compelling reason to conclude that a termination petition would not be in a child's best interests. The Court of Appeals held:

> "Taken together, the record provides sufficient evidence to support the court's conclusion that there was not a 'compelling reason' to determine that a termination petition was not in C's best interests. That is, the proposed guardianship, which presumably was offered to preserve C's relationship with father, was not better suited to meet C's health and safety needs, when father will be imprisoned until at least July 2022 and when, at this moment, C needs to bond and form healthy attachments to a long-term caregiver. The proposed guardianship was not better suited to meet C's needs, given the parents' lack of progress, the reasonable efforts of DHS, the 'paramount concerns' for C's health and safety, and his extended time in foster care."

The Court of Appeals ultimately held that the juvenile court had made its required finding under ORS 419B.476(5)(d) that no compelling reason existed for an alternative plan, and that there was sufficient evidence from which the juvenile court could conclude that the plan should change to adoption.

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Dissent by Judge Ortega, joined by Chief Judge Egan, and Judges Lagesen, James, and Aoyagi

Judge Ortega wrote for the five dissenting judges, arguing that "the majority's construction functionally presumes that adoption—that is, the termination of parental rights of a child's birth parents—is the best plan for every child, and misplaces the burden of proving otherwise on father." The dissent cited *Dept of Human Services v. S. J. M.*, 283 Or. App. at 392, 388 P.3d 417, *rev allowed* 361 Or 350 (2017); and *Dept. of Human Services v. J. M. T. M.*, 290 Or. App. 635, 638, 415 P.3d 1154 (2018) for the proposition that the proponent of the change in plan to adoption bears the burden to prove under ORS 419B.498(2)(b) that no compelling reason existed to forgo termination of parental rights, including proving that no other plan is better for the child. The dissent wrote, "a child's attachment to a parent is the very definition of a compelling reason" to require a "meaningful examination" of whether the child's attachment to Father and relatives constitutes a reason not to pursue adoption.

The dissent concluded: "The court did not engage in the necessary meaningful inquiry to support its determination, and DHS did not present legally sufficient evidence—under circumstances where C is strongly attached to father, who is temporarily unable to function as a custodial resource, and to other family members—that another plan such as a guardianship would not be better suited to meet C's health and safety needs than terminating father's parental rights."

Editors' note: A case relied upon by the dissent, S. J. M.*, has subsequently been reversed by the Oregon Supreme Court. See case summary herein.*

Dept. of Human Services v. T. L. B., 294 Or App 514 (Oct. 24, 2018)

In *Dept. of Human Services v. T. L. B.*, 294 Or App 514, ___ P3d ___ (2018), the Court of Appeals affirmed a judgment terminating the mother's parental rights. Mother appealed a judgment terminating her parental rights to the youngest of her nine children, none of whom were in her care at the time of the termination trial. Mother 1) challenged the sufficiency of the evidence of her unfitness, and 2) argued that adoption was not in the best interests of the child because she and the child were bonded and had successful supervised visits which would end were the child adopted.

The court reviewed Mother's history of exposing the child to domestic violence, and Mother's own history of domestically violent relationships spanning "virtually her entire adulthood." Mother also had a diagnosis of dependent personality disorder, and despite the "reasonable and protracted" efforts of DHS, was not making adequate progress. The court found that although Mother had achieved a relatively brief period of stability at the time of the termination trial, that her inability to have a "genuine understanding of her parenting role" and her history of saying one thing and doing another constituted clear and convincing evidence that she was unfit.

The Court of Appeals began its best interests analysis by noting that the inquiry is "child-centered." As such, an "undifferentiated assertion" by a professional "that a given child requires permanency as soon as possible provides no child-specific information; it therefore will not satisfy DHS's burden to prove that termination is in a particular child's best interests." 294 Or App at 533.

In her argument that adoption was not in the child's best interests, Mother relied upon the Court of Appeals decision in *Dept. of Human Services v. M. P.- P.*, 272 Or. App. 502, 356 P.3d 1135 (2015) which held that where there is "overwhelming evidence regarding the child's strong attachment to his mother," including the fact that separation with his Mother would "cause the child to mourn his loss in an extended manner." Under the circumstances of that case, there was

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not clear and convincing evidence that termination would be in a child's best interests.

The Court of Appeals distinguished *M. P.- P.* in several ways. In the present case, the expert testimony did not suggest that termination would have "dramatic and long-lasting consequences" on the child; there were two experts advocating for permanency in the form of adoption, because the child was two years old, which is within the optimal age for it. The Court also relied on the testimony of one of the witnesses who had linked Mother's long-lasting parenting deficits to the child's permanency needs and held that "there is no reason that we must consider [child's] circumstances in a vacuum, without considering the voluminous evidence of mother's progress—or lack thereof." The Court affirmed.

Dept. of Human Services v. C. A. M., 294 Or App 605 (Oct. 31, 2018)

In *Dept. of Human Services v. C. A. M.*, 294 Or App 605, ___ P3d ___ (2018), the Court of Appeals affirmed a jurisdictional judgment. Mother appealed from the judgment taking jurisdiction over her child when the child's twin had died of undetermined causes while sleeping by the Father, after Father had caused non-accidental injuries to the deceased twin prior to her death. Mother argued: 1) that there was insufficient evidence for the finding that "mother knew or should have known about the risks that father posed to the twins;" and 2) that the evidence was not legally sufficient for the determination of risk of harm. There was evidence that Father had significant anger management problems that would manifest in verbal abuse, and Father had an assault conviction as well. Mother repeatedly reported being "conflicted" in her opinion of whether Father was being harmful to the children or not.

The Court of Appeals held that the evidence that Mother knew of Father's anger issues due to his 2007 investigation of the abuse of another infant, his 2010 assault conviction, and his inappropriate expressions of anger toward or around the twins, and Mother's failure to separate from Father, was sufficient for the juvenile court's findings that Mother knew or should have known of the risks, and would likely fail to protect the surviving twin in the future.

The court distinguished the finding here that Mother "*is* unable or unwilling to fully appreciate the risks posed by father, and that, as a result, mother will not recognize or respond appropriately to situations in which M is endangered," *id.* at 618, from the proposition in *Dept. of Human Services v. J. M.*, 260 Or. App. 261, 317 P.3d 402 (2013), that a court could not reasonably infer merely from a parent's personal opinions that a parent would be unable or unwilling to comply with a directive not to use corporal punishment.

The Court of Appeals also addressed DHS's argument that the appeal was moot because the trial court had found that the risks pertaining to Mother had been ameliorated at a review hearing taking place during the pendency of the appeal and had dismissed jurisdiction. The Court of Appeals rejected DHS' contentions that there were no further practical effects on the rights of the parties, pointing out that 1) DHS' success in the pending case make it more likely that DHS will initiate proceedings in the future; and 2) that the social stigma against Mother, including the knowledge by service providers of the court's findings, was significant.

The Court of Appeals affirmed the judgment of jurisdiction.

Dept. of Human Services v. T. L. M. H., 294 Or App 749 (Nov. 7, 2018)

In *Dept. of Human Services v. T. L. M. H.*, 294 Or App 749, ___ P3d ___ (2018), the Court of Appeals reversed a judgment terminating Mother's parental rights to her seven-year-old son. Mother argued that

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DHS failed to prove that termination was in child's best interests "in view of his strong attachments to both mother and his sister." Child also opposed termination. Under *de novo* review, the Court of Appeals agreed with Mother and reversed the judgment.

The Court of Appeals found that the record fell short of showing that it is "highly probable that termination of mother's parental rights is in [child]'s best interest" in two ways. First, the evidence was that child "is strongly bonded to his mother and older sister," there was no history of abuse of the child, and a psychologist had opined that ongoing appropriate contact with Mother and Sister would be best for child.

Second, the record contained virtually no evidence about other viable potential permanency plans for child, nor how those plans would preserve the child's attachments in the best interest of child. The Court of Appeals also noted the lack of evidence about "whether severance of mother's relationship with [child], notwithstanding their attachment, might be necessary to ensure that mother does not undermine the efforts of [child]'s primary caregivers to provide him the type of stable and permanent home that [child] needs."

The Court concluded, "the juvenile code demands a persuasive factual showing that termination of parental rights to a particular child is in that child's best interest," rejecting DHS' argument that it can be generally assumed that adoption is the only permanent plan available to achieve permanency.

Dept. of Human Services v. M. F., 294 Or App 688 (Nov. 7, 2018)

In *Dept. of Human Services v. M. F.*, 294 Or App 688, ___ P3d ___ (2018), the Court of Appeals reversed a jurisdictional judgment. Father appealed the judgment taking jurisdiction over his child on the bases that he did not have a custody order to protect child from her unfit mother, and that he could not adequately care for child's high needs without the aid of the court.

In 2015, while in Father's physical care, then two-year-old child had been found outside unsupervised in the parking lot. Father added child proof locks to the doors. After child was with Father for about a month, Mother arrived with police officers to take child back. Because Father had not yet even established paternity, he relinquished the child. He did not check in with Mother or other relatives to keep tabs on child for two years, explaining that he was afraid that Mother would be abusive to him if he were to contact her.

By the time of the jurisdictional trial, it was established that child suffered from autism, pica, and developmental delays such that she required constant supervision. Father had significant experience as a caregiver for disabled people, including some with pica and autism, but he had not fully engaged with DHS' directives to pursue services.

The Court of Appeals found that the events of 2015 "is insufficient to support a determination that child *currently* would be at risk if returned to father's care. Nor does Father's failure to take child to early-intervention services during that month speak meaningfully to how he would now care for her, given his more recent inquiries into educational and other support services available to her."

Father's lack of inquiry for over two years was also not jurisdictional because Father had been informed by DHS that Mother was fit, the court had dismissed jurisdiction over her, and as of his last inquiry he was informed that Mother and child were living in a residential treatment facility.

As for Father's lack of engagement with DHS, at least where Father has "actively sought out information about his child's disabilities and the services available to her, and *** asserts that he will provide child with round-the-clock care," the Court of

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Appeals found that "evidence that father has taken a less-than-optimal approach to working with DHS and service providers does not equate to proof that it is reasonably likely that child will suffer harm if returned to his care."

Regarding Father's ability to protect child from Mother, the Court explained, "[t]his record includes no evidence that mother is currently in a position to insist that father deliver child to her; nor does it include any evidence that she is likely to make such a demand or that father would be unable to resist it."

The Court of Appeals emphasized the necessity of creating a record about the current circumstances of the child, and repeatedly cautioned against being "overly focused on the past and not the present" in conducting the conditions and circumstances analysis.

Dept. of Human Services v. A.F., 295 Or App 69 (Nov. 21, 2018)

In *Dept. of Human Services v. A.F.*, 295 Or App 69, __P3d __ (2018), the Court of Appeals affirmed a dispositional judgment requiring mother to submit to a psychological evaluation. On appeal, mother argued that the court exceeded its authority under ORS 419B.337(2) because there was no rational relationship between a psychological evaluation and the jurisdictional bases that mother had "exposed the child to unsafe and unsanitary living conditions," had "left the child with unsafe caregivers," and had "an alcohol and/or drug problem." The Court of Appeals did not consider mother's alternative argument that ORS 419B.387 did not allow the evaluation order, because the argument was not raised in the opening brief.

The Court of Appeals affirmed the order, reasoning that "rational relationship" requirement is a "low threshold," and does not require a mental health allegation. "[I]f there is reason to believe (based on the evidence) that a parent might not be able to ameliorate an existing basis for jurisdiction without mental health services, then ordering a psychological evaluation is rationally related to the jurisdictional bases." The court noted, "A case worker's summary assertion that an evaluation would be helpful to DHS is not enough in and of itself to establish a rational relationship, nor is such a statement necessary when other evidence establishes a rational relationship."

The Court of Appeals concluded that on the facts of this case, mother's neglect of the child and slow engagement in services could be caused by a mental health issue, so "it was rational for the juvenile court to order an evaluation to obtain information about mother's mental health."

Dept. of Human Services v. R. A. H., 295 Or App 273, __P3d__ (2018)

In this *per curiam* opinion, the Court of Appeals held:

> "the record does not contain evidence sufficient to support a finding that father's marijuana use, combined with the established jurisdictional bases, exacerbates the risk posed by those established bases. *State ex rel Juv Dept v. N. W.*, 232 Or App 101, 111, 221 P3d 174 (2009), *rev den*, 348 Or 291 (2010).
>
> "Accordingly, we reverse and remand the jurisdictional judgment for entry of a judgment omitting the allegation that '[t]he father's substance abuse impairs his judgment and ability to safely parent the child' as a basis for jurisdiction."

K. A. B. v. A. J., 294 Or App 789, __P3d__ (2018)

In this *per curiam* opinion, the Court of Appeals affirmed the juvenile court's order vacating a guardianship. It did not address the guardian's argument that the juvenile court's findings about the guardian's performance were unsupported by

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the evidence and did not satisfy ORS 419B.398. Rather, the court held: "Because guardian has not challenged the separate determination that the basis for the juvenile court's jurisdiction has ceased to exist—a determination that requires that the court terminate the wardship and vacate the guardianship [under *Dept. of Human Services v. J. C.*, 289 Or App 19, 407 P3d 969 (2017), *rev allowed*, 362 Or 389 (2018)]—we affirm."

Editors' note: J. C. remains under advisement in the Oregon Supreme Court.

Dept. of Human Services v. S.S., 294 Or App 786, __P3d__ (2018)

In this *per curiam* opinion, the Court of Appeals agreed with mother and DHS that the juvenile court lacked subject matter jurisdiction under the UCCJEA. The Court of Appeals noted that although the issue had not been raised in the juvenile court, it was appropriate for the Court of Appeals to consider it, because the issue of subject matter jurisdiction may be raised at any time.

Delinquency

State v. J. S. W., 295 Or App 420, ___ P3d ___ (2018)

In this appeal of the denial of youth's motion to set aside his 1995 sex offense adjudication, the Court of Appeals affirmed, holding that youth had failed to prove that his adjudication should be set aside for invalid waiver of counsel and involuntary plea.

While unrepresented in 1995, then-fourteen-year-old youth admitted to sodomy and sexual abuse of a twelve-year-old. On his petition to make an admission, he had checked a box waiving counsel. About 20 years later, youth moved to set aside his adjudication, arguing that his waiver was invalid, and plea involuntary, because the court had failed to advise him of potential statutory defenses and the collateral consequences of lifetime sex offender registration. The juvenile court denied the motion.

Noting that youth was unable to produce a record of the colloquy with the court at his admission, the Court of Appeals first held that "[r]egardless, even under the Sixth Amendment, a court would not be obligated to "advise [youth] that waiving the assistance of counsel in deciding whether to plead guilty entails the risk that a via¬ble defense will be overlooked before it could accept youth's plea[.]"

The court next addressed youth's argument that lifetime sex offender registration is analogous to deportation, such that the holding of *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 175 L Ed 2d 284 (2010), should apply. In *Padilla*, the United States Supreme Court required that defendants be informed whether deportation is a possible consequence of a guilty plea. Likewise, youth argued that he had a right to be informed of the consequence of lifetime sex offender registration prior to pleading.

The Court of Appeals held that "even assuming that *Padilla* would require an attorney or a juvenile court today to advise a youth that a plea to a particular charge may require registration as a sex offender, *Padilla* (a 2010 decision) cannot be applied retroactively under the circumstances of this case and thus would not have required an attorney, or a court, to advise youth in 1995 that his plea could result in mandatory registration as a sex offender." Because of this, youth would not be "entitled to its application as a matter of right." The court declined to address the question of whether a juvenile court may have discretion under authority of ORS 419C.610 to vacate a conviction that became final prior to *Padilla*.

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Juvenile Law Resource Center

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Matter of C. C. W., 294 Or App 701, __ P3d __ (2018)

In this appeal from a jurisdictional judgment finding youth had committed the act of Criminal Mischief in the Second Degree, youth argued that former jeopardy barred the finding because he had previously had a judgment entered against him for the same act, constituting Criminal Mischief in the Third Degree. The State argued that the prior finding was a mistake which could have been corrected with an amended judgment.

Youth was charged with Criminal Mischief in the Second Degree. After trial, the juvenile court orally ruled that Youth was within its jurisdiction only for the lesser included offense of Criminal Mischief in the Third Degree. After a break, the court stated that the court had made a legal error and that youth was actually responsible for Second Degree Criminal Mischief. Youth objected, citing double jeopardy. The court set a further hearing on the matter, but nonetheless entered a judgment finding the youth within the court's jurisdiction for Third Degree Criminal Mischief. At a subsequent hearing, the court decided that it had the authority to amend the finding to Criminal Mischief in the Second Degree and entered an amended judgment to that effect.

The Court of Appeals reasoned that the entry of the judgment for the lesser offense was the equivalent of acquitting Youth of the greater offense, and ruled that under the Federal and Oregon Constitutions, former jeopardy barred any further prosecution on the same underlying offense, just as it would had youth been acquitted outright.

Answering a dispute about the point at which a juvenile court order is considered final, the Court of Appeals held that such an order is final when the juvenile court commits it to writing and enters it as a judgment. From that point on, the interest in finality supersedes any conflicting or ambiguous information in the record.

State v. F. R.- S., 294 Or App 656, __ P3d __ (2018)

In this case, the Court of Appeals reversed the juvenile court's judgment finding youth within the jurisdiction of the court for the act of possessing methamphetamine. Youth argued that the evidence was insufficient as a matter of law where the only evidence lawfully admitted was conclusory testimony by police officers that a pipe containing a white powdery residue found in youth's car had the appearance of "amphetamine or something similar to that," and the officer's testimony that youth acknowledged that his fingerprints would be found on the pipe.

Relying on Oregon Supreme Court precedent that methamphetamine is not a "self-identifying" substance, noting that it could have been cocaine, heroin, or even a harmless white substance, the Court of Appeals ruled that the lower court had erred by stacking inferences to the point of speculation. Specifically, it does not logically follow that youth's acknowledgment to having handled the pipe implies that the pipe contains methamphetamine. The Court of Appeals rejected a similar inferential leap that because the pipe was a "meth pipe" it must have contained methamphetamine.

State v. P. T., 295 Or App 205, ___ P3d ___ (2018)

In this case, the Court of Appeals affirmed the juvenile court's order

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denying expunction of records of youth's offense. Youth appealed the juvenile court's judgment denying his request for expunction after he had successfully completed probation and had his delinquency petition set aside. The juvenile court concluded that it lacked authority to order expunction due to ORS 419A.260(1)(d)(J) (prohibiting expunction for certain enumerated offenses, including youth's offense). Youth argued that because the jurisdictional judgment had been set aside, he was not a person "found" to be within the court's jurisdiction for the purposes of the expunction statute, and therefore the offense-specific exclusion would no longer present a barrier to expunction.

The Court of Appeals examined the expunction statute, reasoning that the statutory language "found" was in the past tense, which "carries a distinctly retrospective and completed-act focus," and concluded that it was the "historical event in which the juvenile court found a person to be within the court's jurisdiction" that satisfied the definition. Whether the judgment was set aside is immaterial to that analysis. The Court also noted that in other similar statutes, the legislature had provided for post-judgment relief, which implied an intent not to permit relief where none was expressly provided for.

Resources

Governor Brown's proposed budget was released on November 28, 2018.
Governor's Budget

The Governor's Child Welfare Policy Agenda was published on September 12, 2018 by Governor Brown and Rosa Kline, Human Services Policy Advisor.
Governor's Child Welfare Policy Agenda: Protecting Children, Supporting Families and Ending the Cycle of Poverty

The Governor's Children's Agenda was also published on September 12, 2018.
Governor's Children's Agenda: Pathways Out of Poverty for Children to Achieve Their Full Potential

Late-breaking Oregon Supreme Court News

The Oregon Supreme Court denied the state's petition for review in *State v. S.-Q. K.*, 292 Or App 836, __P3d __ (2018), *adh'd to as modified by State v. S.-Q. K.*, 294 Or App 184, __P3d __(2018). For more information, see the article in the Fall 2018 Juvenile Law Reader, "Court of Appeals Determines Double Jeopardy Applies to Probation Violations in Juvenile Cases."

Save the Date

OSB Charlie and the Juvenile Law Factory: Avoiding the Conveyor Belt
February 1, 2019
Oregon State Bar, Tigard

OCDLA Juvenile Law Conference
April 12-13, 2019
Agate Beach Inn, Newport