
Juvenile Law Reader

Youth, Rights & Justice

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"Adolescent immaturities in the prefrontal cortex and the basal ganglia can lead to an increase in risk-taking behaviors . . . "

Also in this issue: A Conversation with Julie McFarlane, YRJ Founder and Supervising Attorney Emeritus, see Page 9; Book Reviews, see Page 24.

What We Now Know About The Adolescent Brain

By Anne-Marie Smith, Ph.D.

This past decade has been ripe with significant U.S. Supreme Court decisions relevant to the sentencing for serious crimes by juvenile offenders. This wave began with *Roper v. Simmons* (2005) in which the death penalty for juveniles was prohibited. In *Graham v. Florida* (2010), the Court banned life without parole for juvenile non-homicide crimes. Then in *Miller v. Alabama* (2012), the U.S. Supreme Court barred mandatory sentences of life without parole in juvenile homicide cases. The Miller decision still allowed for the

possibility of a life without parole sentence in juvenile homicide cases for the exceptionally rare cases in which "irreparable corruption" is supported. Miller was recently applied retroactively in *Montgomery v. Louisiana* (2016), which now requires the resentencing for many people convicted as juveniles and are currently serving mandatory sentences of life without parole.

These decisions put forth by the U.S. Supreme Court were based in large part upon the empirical research in the areas of developmental psychology and neuroscience, which indicates that juvenile brains and adult brains are significantly distinguished by a lack of developmental maturity in the former. In turn, this research

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offers significant mitigation for the culpability of juvenile offenders, which subsequently impacts the suitability of adult sentences for juveniles.

The Miller decision outlined five separate characteristics of juvenile immaturity which should be considered relevant for mitigation of a youth's responsibility for homicide. Scott, Grisso, Levick, & Steinberg (2016) referred to these factors as 'decisional,' 'dependency,' 'offense context,' 'rehabilitation potential,' and 'legal competency.'

The 'decisional' factor describes adolescents' increased propensity for risk-taking, sensation-seeking, impulsivity, and poor judgment. The 'dependency' factor refers to the fact that youth have a substantially lower ability to avoid negative influences in their lives (family and peer influences), and are dependent upon others for their needs. The 'offense specific' factor refers to the potential interaction between the high level of dependency and the increased risk-taking nature of youth to the adolescent's involvement in the homicide. 'Rehabilitation potential'



describes the greater potential for change in adolescents (versus adults) given that they have not yet fully developed. 'Legal competency' refers to adolescents' generally lesser ability to make decisions during their arrest and adjudication.

The "irreparable corruption" exception is most significantly related to the factor of rehabilitation potential. Montgomery argued that, "children who commit even heinous crimes are capable of change." It is not clear yet how the Miller criteria might be used for developmental mitigation in alternative sentences (other than life without possibility of parole). Grisso & Kavanaugh (2016) argue that even measures of

psychopathy are likely to be of little utility in determining "irreparable corruption" in youth. There is no evidence that psychopathic traits, as measured in adolescence, lead to unchangeable psychopathic traits as adults (DeMatteo, Edens, & Hart, 2010; Vincent, Kimonis, & Clark, 2016). With regard to being able to identify intractable criminogenic traits ("irreparable corruption") in adolescents, Grisso & Kavanaugh concluded, "... developmental and clinical science offers little to assist the state in identifying such youths and a great deal that defense counsel can use to challenge such efforts" (p. 240).

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It has been widely recognized in societies across the world that the period of adolescence is characterized by defiance, sensation seeking, and strong emotional displays. However, relatively recent research, based on neuroscientific studies, has begun to provide actual evidence of the adolescent brain immaturities which can affect decision-making. Advances in neuroimaging techniques, including the MRI, the functional MRI (fMRI), and diffusion tensor imaging, have provided the ability for researchers to quantify



developmental changes in both brain structure and function (Luna & Wright, 2016).

Adolescence is a period in which there is stronger inclination for sensation seeking and risk taking. Sensation seeking is defined by the pursuit of thrills, adventure, and experience, susceptibility to boredom, and disinhibition. Risk-taking behaviors are characterized by having a high perceived reward value, but known potential negative consequences, which tend to be underweighted in order to seek sensation (Luna & Wright, 2016). Adolescents are particularly susceptible to risk taking due to a heightened sensitivity to the potential rewards of the risk taking behavior, as well as to the increased vulnerability to peer pressure at this time (Gardner & Steinberg, 2005). Risk taking involves decision making and planning, which is a newly acquired ability in adolescents and is similar to adult abilities, but this is still in the context of an immature impulse control and heightened sensitivity to the potential rewards (Luna & Wright, 2016). Developmental theories suggest that the reward cognitive process and the control

cognitive process have different developmental trajectories which results in an imbalance between an immature executive system and a heightened motivational system during the period of adolescence.

Executive functioning involves the various processes that form the basis for voluntary and planned behavior (as opposed to reflexive and automatic behaviors). The prefrontal cortex plays a significant role in executive function because of its strong connectivity with other parts of the brain. It has the ability to influence signaling across the brain and particularly in regions that generate responses (Diamond, 2013). Motivation refers to the reward processes and the related emotional processes which enhance specific responses that increase the sensation of pleasure, energy, and desire. Motivation is connected to the striatum in the limbic system and is influenced most strongly by the neurotransmitter dopamine.

In looking at brain structure, there are two main tissue components – gray matter and white matter. Gray matter consists of the cell bodies and unmyelinated axons of
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neurons, dendrites, glial cells, and capillaries. Gray matter surrounds the outer layer of the brain and is associated with processing and cognition. White matter contains myelinated axons of neuron cells and glial cells, and its function is to coordinate communication between different parts of the brain. During adolescence, there are critical changes to both gray and white matter, including synaptic pruning, myelination, and neurotransmitter availability. These changes impact the range of control of behaviors which relate to the limitations in adolescent decision making abilities (Luna & Wright, 2016).

In gray matter, processing of information occurs in the synaptic connections between neurons. The synaptic connections grow in the first two years of life. Then during childhood and adolescence, the synaptic connections that are not used are pruned (eliminated), while those connections used repeatedly remain active. Synaptic pruning is a process which speeds up brain process and supports specialization of synaptic connections to the environmental demands of the



person. MRIs show a reduction in the thickness of gray matter in the cortex that is seen over the course of adolescence. Different areas of the brain reach adult levels of development at different times. For example, earlier postmortem research describes full development of the visual cortex is seen by age 7, the auditory cortex by age 10, and the prefrontal cortex by age 16 (Huttenlocher & Dabholkar, 1997). However, more recent postmortem research, with improved methodologies and substantially larger sample sizes, indicates that synaptic pruning in the prefrontal cortex

actually continues throughout the second decade of life, into young adulthood (Petanjek et al., 2011). MRI studies have shown that brain regions that have high integration, including the prefrontal cortex, as well as posterior brain regions, have not yet reached adult levels of pruning while still in adolescence. These regions of the brain, including the superior temporal cortex (which supports social cognitive processes) and the basal ganglia in the subcortical region (involved with motivation) show a protracted development during the period of adolescence (Gogtay et al., 2004). Luna & Wright (2016)

posit that the continued maturation of cortical and subcortical regions during adolescence indicates the presence of significant immaturities that are highly relevant to decision making, particularly in highly emotional situations.

In white matter, myelination is the development and thickening of tracts which results in a significant speed of communication among neurons and improved prefrontal executive control of behavior (Goldman-Rakic, Chafee, & Friedman, 1993). Recent research examining white matter changes during development mostly involve diffusion tensor imaging. Longitudinal studies have shown a significant period of growth of white matter integrity during childhood and adolescence, and main white matter tracts reaching adult development by adolescence (Simmonds et al., 2014). However, white matter is still maturing as it reaches gray matter levels in the cortical and subcortical areas, and reaches mature levels of adulthood in the second decade of life. The final white matter tracts to mature are in the prefrontal executive

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regions dealing with emotional (cingulum) and socioemotional (uncinated fasciculus) processing. These studies show continued development in adolescence with limitations specific to emotional processing, which continues to strengthen in adulthood (Luna & Wright, 2016). There are significant differences between female and male adolescents with regard to developmental trajectory in both white matter and gray matter, in that male adolescents have a longer trajectory of development and persistent immaturities throughout adolescence as compared to female adolescents (Lenroot, et al., 2007; Asato et al., 2010; Simmonds et al., 2014).

In summary, all of the brain structures are present even during childhood. However, the process of specialization and refinement does not complete until adulthood. Because gray matter regions are not fully pruned, they are slower and less accurate, and have less capacity to process complex executive function demands. In white matter, tracts that have under-developed myelination results in a decreased ability (compared to adult levels)

to integrate information across brain regions, resulting in slower responses from the prefrontal cortex. Adolescent immaturities in the prefrontal cortex and the basal ganglia can lead to an increase in risk-taking behaviors (Luna & Wright, 2016). Pull quote for cover

In addition to looking at brain structure in adolescence, it is critical to examine the role of neurochemical changes during this period. During puberty, the brain releases increased levels of hormones, as well as an increase in the key neurotransmitter dopamine. Dopamine is a strong influence on motivation, learning, memory, cognition, emotion, and reward processing (Cools, 2008; Schultz, 2002). The increase in dopamine during adolescence significantly impacts an adolescent's desire to pursue novel situations and rewards in spite of the associated significant risks. Dopamine then decreases in adulthood, which corresponds behaviorally with a decline in risk-taking behaviors (Deakin, Aitken, Robbins, & Sahakian, 2004). And because dopamine is also associated with adaptable learning, Luna & Wright (2016) and others suggest that adolescents are particularly amenable to learning, reward-based



feedback, and reinforcement, and therefore may be more responsive to treatment and rehabilitation programs than adults.

The executive function of inhibition is also crucial to consider in adolescent behavior. Inhibitory control is the ability to voluntarily suppress enticing or reflexive responses. Inhibitory control is present in early infancy (Amso & Johnson, 2005). However, it continues to develop and improve throughout childhood and adolescence, and becomes consistent and fully mature during adulthood. fMRI studies have found unique immaturities in the ability to inhibit responses in adolescents compared with adults.

In particular, studies suggest that teenagers have a decreased ability to monitor their responses and to integrate information about errors to influence their own behavior (Luna & Wright, 2016).

The ability for the brain to integrate information across regions is critical for the control of behavior. One study found that adolescence prefrontal connectivity influencing other brain regions during an inhibitory task was present in adolescents, as with adults, but with fewer functional connections and weaker connections than in those of adults (Hwang, Velanova, & Luna, 2010).

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Although there is some evidence for a linear increase in brain connectivity as one ages, encephalographic studies show that there is a period of destabilization of integration in adolescence during which time there is a reorganization of networks (Uhlhaas et al., 2009). Some more fully developed aspects of executive functioning may allow the adolescent to engage in complex planning of behavior, but immaturities may undermine this ability to consistently and efficiently use these functions, particularly in decision making processes (Luna & Wright, 2016).

Studies show that while adolescents do not differ from adults in risk assessment and appraisal (Reyna & Brainerd, 2011; Steinberg, 2004), adolescents have a limited ability to readily integrate this information in actual situations in which the competing process of adolescent risk-taking is involved. The propensity of adolescents to be ready to obtain rewards, combined with the hyperactivity of the reward system, leads to a greater likelihood of impulsive sensation seeking. (Luna & Wright, 2016).

With respect to socioemotional cognition, adolescence is a period of increased socialization with peers over family relationships. fMRI studies show that adolescents have significantly more difficulties than adults in interpreting the intentions of others and in processing social rejection (Gunther Moor, van Leijenhorst, Rombouts, Crone, & Van der Molen, 2010). Studies have also shown that teenagers are more reactive to social threat cues because of the greater activation to emotional stimuli in the limbic regions, particularly in male adolescents (Dreyfuss et al., 2014), and a weakened connectivity between the prefrontal cortex region and the amygdala, which processes emotional information (Somerville, Jones, & Casey, 2010).

Given all of this developmental research, it is important to be cognizant of the fact that neurocognitive science provides descriptive and correlational data, which does not prove causation. Additionally, they are looking at tendencies of adolescents as a whole, rather than any one individual adolescent. Courts tend to make decisions based on the



particular adolescent in question, and it is quite rare to have brain imaging data available for any one particular adolescent. Additionally, adolescents of racial minorities compromise the vast majority of juvenile homicide offenders. As Grisso & Kavanaugh (2016) caution, "...many of our validated assessment tools for developmental and clinical features of adolescents have been challenged regarding their validity when applied to racial and ethnic minority youth" (p. 241). Caution is also recommended in applying brain-based research studies which are largely based upon normal segments of the

adolescent population, and not necessarily those adolescents with mental illness, developmental delays, or traumatic developmental histories. It is likely that these mentally ill youth will have even greater brain functional deficits than other adolescents when compared to the adult brain function.

In returning to the issue of culpability for adolescent behavior, we know that adolescents are more prone to being driven by short-term rewards, have a predisposition for risk-taking behaviors, and are

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more impacted by the social and emotional cognitive demands of peer pressure.

However, Luna & Wright (2016) caution us that this should not be interpreted to provide evidence for the absolution of all responsibility, especially in light of the fact that most adolescents do not commit crimes, but rather, “the key issue is that the act may have been due, in part, to brain immaturities that enhance risk taking, and that at a later time in life, the decision would not have been made” (p. 108). In short, would this adolescent have made the same decision with their adult brain? This issue, along with the available supporting research, is at the crux of the flurry of Supreme Court decisions related to adolescent sentencing. Additionally, with respect to the “irreparable corruption” issue, it appears that research has shown a greater amenability to treatment for teenagers as compared to their adult counterparts.

Again, although adolescent brain research is still in its relative infancy and provides only correlational and not causal links, this developing area of research already

provides compelling evidence of the differences between the immaturities of the adolescent brain and the fully developed adult brain.

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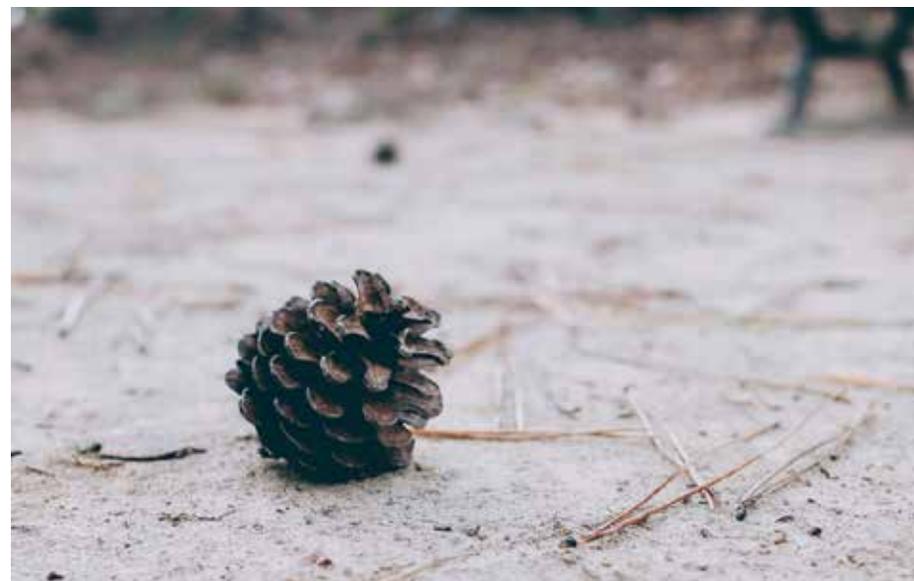
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A Conversation with Julie McFarlane, YRJ Founder and Supervising Attorney Emeritus.

As Told by Lisa Kay, YRJ Supervising Attorney

I had the pleasure of working with Julie McFarlane for nearly 20 years. Continuing this work without her leadership seems like a daunting task. As her retirement drew near this past year, I asked her to share her advice for continuing the work of the law firm she helped to found. Her recommendations can apply to anyone working in juvenile law.

Make an Annual New Year's Resolution to Read *In re Gault*

Each January, Julie would make a New Year's resolution to read *In re Gault*, 387 U.S. 1 (1967) as a means of reaffirming her commitment to the representation of juveniles. Of course, she states that it doesn't have to be *In re Gault* that you read. You should read a case that inspires you to do your best work. For years and years, *In re Gault* was the only Supreme Court case

to read. For much of her career, there was usually only one Oregon appellate juvenile case reported every year. Now practitioners have several to choose from.

Persevere

Two highlights in Julie's impressive



40 year legal career are the outcomes of *D.B. v. Tewksbury*, 545 F.Supp. 896 (1982) and *Gary H. v. Hegstrom*, 831 F.2d 1430 (1987). In *D.B. v. Tewksbury*, the plaintiffs achieved a landmark ruling that prohibited confining juveniles in adult jails because such practices violate the due

process clause of the Fourteenth Amendment. *Gary H. v. Hegstrom* challenged the conditions and treatment of juveniles at MacLaren School for Boys.

In 1984, after 10 years of investigation and litigation, a Federal District Court ruled that

the isolation practices at MacLaren were unconstitutional. The Ninth Circuit confirmed the decision in 1987. Julie describes the litigation of the *Gary H.* case as an endurance contest. Doing what is right and just is not easy; one must persevere.

Sleep

The mystery of how Julie was able to accomplish so much during her impressive career: she hardly slept. During law school and for the first ten years of practice, Julie slept about three hours a night. The resulting negative impacts on her health led Julie to make concerted efforts to sleep more. She worked up to six hours a night for the remainder of her career. While Julie doesn't recommend that practitioners burn the midnight oil as she did, we can aspire to replicate her passion for juvenile law practice.

Be Honest, Forthright and Kind

Julie holds firm that honesty and forthrightness are the hallmarks of professional courtesy. The duty to be honest and forthright does not grant permission to be mean. While opposing counsel might not like how someone else's client has behaved, that frustration should never be taken out on the client's attorney when that attorney is doing his or her job well in representing the client.

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Become a Foster Parent

One of the best ways to become a good dependency lawyer is by being a foster parent. As a foster parent, you are able to truly see how difficult and heart wrenching foster care is from the perspective of children.

Julie has fostered 11 children, many with whom she has maintained lasting relationships. Though she has significant concerns about the child welfare system's focus on foster care as the primary intervention for children and families in need, she also believes that state child welfare leaders have abandoned foster care.

When Julie was a foster parent, the director of DHS would attend the annual foster parent conference and speak about the need for recruitment and improvements to foster care. The director would enlist foster parents in recruitment and improvement efforts. Julie recalls being given cards and flyers to distribute to friends, family and local churches. She also recalls seeing billboards advertising for foster parents with phone numbers

for interested applicants to call. DHS has abandoned these efforts.

Take Care of Yourself

Practice in juvenile court can be tiring and emotionally draining. Julie advises that every juvenile practitioner should engage in self-care and take moments to put down the law. Julie's bi-monthly massages allowed her to recharge, and reading romance novels gave her a needed (albeit brief) mental break from the demands of juvenile law.

Read the Entire Juvenile Code in One Sitting

Once a year, Julie reads the entire juvenile code in one sitting. Reading it from first to last page results in a more comprehensive understanding of juvenile law. With each reading in a new year, Julie rediscovered forgotten provisions and developed fresh perspectives on how other provisions apply.

Of course, the juvenile code also changes. Although Julie religiously reviewed the legislative bills that revised the juvenile code over the years, she cautions that a

piecemealed reading doesn't permit the best understanding because the provisions must be read together.

Research, Write, Print and Repeat

Law school presentations by self-represented women in divorce proceedings left a lasting impression of the injustices experienced by individuals without access to information or counsel. Dissatisfaction with those experiences of injustice inspired Julie and fellow law students to write the first self-help divorce booklet in Oregon. The booklet proved so informative, useful and empowering that it was distained by the establishment.

Throughout her career, Julie has similarly sought to empower juveniles and parents with information. When Julie began her legal career, juvenile law practice was in its infancy. As a law clerk at legal aid, she had just as much experience in juvenile law as the practicing attorneys.

Julie advises that when an issue presents itself, the first thing attorneys should do is research, and the second thing they should

do is write something. Julie used writing as a means to make sense of all the information she gathered. Once the ideas coalesce, it's time to share the information with others. Julie has researched, written and produced countless publications for attorneys, judges and clients. With these publications she leaves not only a legacy of information but also the legacy of a roadmap for empowerment.

Cook

No article about Julie would be complete without mention of her fabulous cooking. YRJ attorneys take turns providing lunch for weekly case meetings. The weeks that Julie brought lunch were always very well attended. Julie used delicious food to bring people together.

Because of the demands of practicing in juvenile court, Julie believes it's best done with the support of fellow practitioners. While we can't all be culinary greats like Julie, we can support one another.

Juvenile Law Resource Center

JLRC Contact Information

Natalie O'Neil at Natalie.o@youthrightsjustice.org 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 JLRCWorkgroup@youthrightsjustice.org and please include your name, telephone number, county and brief description of your legal question.



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Update from December CLE on New ICWA Regulations

On December 14, 2016, YRJ hosted a CLE featuring Kate Fort, of the Indian Child Welfare Act (ICWA) Appellate Clinic in the Indian Law and Policy Center at Michigan State University School of Law, and Matt Newman, of the Native American Rights Fund, both national experts and lead attorneys for the [ICWA Defense Project](#). They, along with YRJ staff attorney, Addie Smith, in her previous role at the National Indian Child Welfare Association, worked extensively with national and federal partners to create and promote new federal administrative rules that encourage the uniform application of ICWA nationwide.

The December CLE walked participants through the [ICWA Regulations](#), effective December 12, 2016, and discussed the

corresponding [ICWA Guidelines](#), released and effective December 12, 2016. Presenters highlighted the various practice changes necessary in light of the new rules, and facilitated a lively discussion that incorporated the policies, practice, and case law of Oregon throughout. The CLE was well received by juvenile law and Indian law practitioners alike. “This was a great training and CLE to make available in Oregon to juvenile law practitioners to say the least. Much appreciated!” said Diane Henkels, Chair, of the OSB Indian Law Section.

According to [DHS](#), in 2015, Oregon had a total of 581 ICWA-eligible children in out-of-home care over the course of the year, and 63 ICWA-eligible children with in-home service plans at any point in time. Presenters at the CLE reminded juvenile law practitioners that leading child welfare organizations have labelled [ICWA the “gold standard” for child welfare practice](#). The presenters

encouraged practitioners to familiarize themselves with the new regulations and integrate them into their practice as soon as possible.

If you have questions about ICWA, its application in a case, or the new regulations and guidelines, feel free to reach out to the JLRC for consultation: JLRCWorkgroup@youthrightsjustice.org.



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CASE SUMMARIES

By Amy S. Miller, Deputy General Counsel, Office of Public Defense Services

Dept. of Human Services v. C. P., 281 Or App 10 (2016)

On September 14, 2016, the Court of Appeals issued an opinion in [Dept. of Human Services v. C. P., 281 Or App 10 \(2016\)](#) in which the Court affirmed the juvenile court's denial of father's motion—post permanency hearing and change in plan to adoption—to dismiss jurisdiction over his two children.

In 2012, jurisdiction was established based on domestic violence, father's criminal activity, parents' substance abuse, mother's mental health, and parents' inability to overcome parenting deficits despite prior

services. At the permanency hearing in September 2014, father was in custody as a result of a domestic violence incident with mother. He agreed to a change in permanency plans away from reunification but disagreed with DHS that the plans should be adoption. Father proposed guardianship with grandfather (PGF) as guardian and the court changed the plans to adoption.

After the permanency hearing, father filed motions to dismiss arguing that PGF was willing and able to care for the children. Citing to [Dept. of Human Services v. A. L., 268 Or App 391 \(2015\)](#), father argued he had executed a “delegation of parental authority” to PGF and, as a result, there was no need for jurisdiction. The hearing on father's motions focused on PGF's suitability as a caregiver and the application of A.L. The court, after reviewing the evidence, denied the motions because of concerns that the father's plan to delegate parental

authority would not alleviate ongoing safety risks because of PGF's boundary issues with parents and that the delegation was revocable by father at any time. The court distinguished this case from the one in A.L. where grandparents were caring for children prior to jurisdiction. On appeal, the Court revisited its findings in [Dept. of Human Services v. T. L., 279 Or App 673 \(2016\)](#):

- (1) that evidence of a relative's ability to care for the children in order to mitigate risks to the children is generally relevant to a court's decision on a motion to dismiss and
- (2) the burden of proof on a motion to dismiss after the permanency plan has changed from reunification is on the parent to show, by a preponderance of the evidence, that the factual bases for jurisdiction no longer persist and do not pose a current risk of harm likely to be realized.

In this case, the Court found the juvenile court did consider evidence as to whether PGF's care would ameliorate the bases for jurisdiction and the evidence was sufficient to permit the court to determine that DHS carried the burden of proof to continue jurisdiction. Although this case was decided pre-T.L., the failure to apply the burden-shifting scheme was inconsequential since this proceeding was more favorable to father than the burden shifting scheme articulated in T.L.

“Given that parents' inability to safely parent the children was undisputed, evidence that grandfather would have difficulty protecting the children from the risks posed by parents if the juvenile court dismissed jurisdiction was sufficient to support the juvenile court's determination that the children would be at a current risk of harm from the original jurisdictional bases. Accordingly, the court did not err by denying father's motions.”

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Dept. of Human Services v. M. U. L., 281 Or App 120 (2016)

On September 14, 2016, the Court of Appeals issued an opinion in [Dept. of Human Services v. M. U. L., 281 Or App 120 \(2016\)](#) in which the Court vacated and remanded the juvenile court's TPR judgment as to mother for further proceedings on the issue of inadequate assistance of counsel.

This case was on remand to the Court of Appeals from the Supreme Court for reconsideration in light of [Dept. of Human Services v. T. L., 358 Or 679 \(2016\)](#). Prior to T.L., the Court affirmed the judgment terminating mother's parental rights and declined to consider mother's inadequate assistance of counsel claim reasoning that the claim was unpreserved and couldn't be raised in the first instance on appeal.

The Supreme Court's holding in T.L., that an inadequate assistance claim in a dependency case may be raised for the first time on direct appeal, requires revisiting mother's inadequate assistance claim.

In this case, mother was appointed a GAL on October 25, 2013 after the circuit court found mother unfit to proceed in her criminal matters and committed her to OSH. While at OSH, Mother was diagnosed with schizophrenia and prescribed stabilizing medications. Mother's attorney objected to the appointment of the GAL. By December, mother had stabilized and on December 20, the court held a hearing to determine whether to continue the GAL appointment. DHS supported the continued appointment, mother's attorney did not object, and the court continued the appointment. At the TPR trial in February, the GAL appointment continued despite evidence that mother had been discharged from OSH 3 days before trial, had been determined able to aid and assist,



and mother was stable at the time of trial. Neither mother nor her attorney objected to the continued appointment of the GAL during the trial.

“A parent asserting the inadequacy of counsel has the burden of proving both that counsel was inadequate and that the inadequate representation prejudiced the parent.” [State v. N. L., 237 Or App 133, 142, \(2010\)](#). In TPR proceedings, the test is whether the proceeding was “fundamentally

fair” as used in federal due process cases. *State ex rel Juv. Dept. v. Geist, 310 Or 176 (1990)*.

In this case, mother relies on ORS 419B.237(2)(a) which requires the juvenile court to terminate the GAL, upon request by a party or the parent's attorney, if the court finds the parent no longer lacks substantial capacity to understand the nature and consequences of the proceeding or give direction to the parent's attorney. She also relies on *Continued on next page »*

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ORS 419B.234(5) which requires the parent's attorney to inquire at every critical stage as to whether the parent's competence has changed and, if appropriate, shall request removal of the GAL.

Mother argues her attorney provided inadequate assistance by failing to request removal of the GAL and mother argues that if her attorney had made the request, the court would have been required to remove the GAL because mother no longer lacked substantial capacity.

The Court agrees with mother's statutory analysis and concludes that if the failure of mother's attorney to request the removal led to the continuation of the GAL against mother's wishes, then that failure may impede on the fundamental fairness of the proceeding. Consequently, mother has a colorable claim of inadequate assistance of counsel.

Because the Court was unable to resolve the merits of mother claim on the existing record, the appropriate remedy is to remand for an evidentiary hearing under ORS 419B.923 on mother's inadequate assistance claim. The Court points to facts not in the record but relevant to mother's claim such as evidence of the content of communications between mother and her counsel and the manner in which the juvenile court would have resolved a request for removal of the GAL if that request had been made.

The TPR judgment is vacated. "If the trial court determines that mother received inadequate assistance of counsel, it shall order a new termination trial; otherwise, the court shall reinstate the judgment terminating mother's parental rights."

Dept. of Human Services v. B. P., 281 Or App 218 (2016)

On September 21, 2016, the Court of Appeals issued an opinion in [Dept. of Human Services v. B. P., 281 Or App 218 \(2016\)](#) in which the Court affirmed a 2015 jurisdictional judgment and termination of parental rights judgment over father's child M. The foundation of father's argument was that the 2015 jurisdictional judgment and TPR judgment are invalid as a matter of law because both flow from a 2014 jurisdictional judgment which had since been reversed on appeal. ([Dept. of Human Services v. B. P., 277 Or App 23 \(2016\)](#))

The complex procedural history is as follows: In 2014, the court established jurisdiction over M due to mother's admission to mental health issues and, after a trial, educational neglect by father. Father appealed the 2014 jurisdictional judgment arguing an insufficient basis for jurisdiction.

On May 1, 2015, the juvenile court

changed the permanency plan to adoption and DHS filed a TPR petition on June 2, 2015. On July 17, 2015, DHS filed a second dependency petition regarding father only and alleged residential instability, abandonment, neglect, inability to meet M's special needs, and father's failure to maintain contact with DHS. The petition also alleged that M was dependent for care and support from DHS because "father has not engaged in services designed to reunite him with his child, and the child requires foster care placement." At the 2015 jurisdictional trial, father argued that there was an ongoing appeal of the 2014 judgment which, if reversed, undercut the allegations in the 2015 petition. On October 15, 2015 the court asserted jurisdiction over M based on the 2015 petition and, on November 24, 2015, held a permanency hearing and continued the plan of adoption established at the May 1, 2015 permanency hearing.

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On July 30, 2015 father was present for the initial appearance on the TPR petition. However, father failed to follow the court's order to appear at a call date after being notified of his obligation to appear and that nonappearance could result in a default. On December 10, 2015, over the objection of father's attorney, the juvenile court permitted DHS to present a prima facie case in father's absence.

On March 16, 2016, the Court of Appeals reversed the 2014 jurisdictional judgment. On appeal, Father argued the juvenile court lacked the authority to terminate father's parental rights because the TPR petition (and prior permanency hearing judgment and order) were based on the now-reversed 2014 jurisdictional judgment. Father also argued the 2015 jurisdictional judgment, which pertained solely to father, was invalid as a matter of law because it failed to consider mother's fitness to parent.



DHS and M argued that father waived his right to appeal the TPR judgment when he did not appear for call. The Court disagreed, determined that father did appear, as required by his initial summons, to deny the allegations against him. The Court distinguished this case from [State ex rel Juv. Dept. v. Jenkins, 209 Or App 637 \(2007\)](#) and found that the default judgment in this case was appealable because

father had personally appeared to answer the petition at an earlier date. The Court found father's second argument, failure to consider the fitness of both parents in the 2015 jurisdictional judgment, unpreserved. The Court disagreed with father and determined that the allegations in the TPR judgment were based on both the 2014 and 2015 jurisdictional judgments. Furthermore, the May 1, 2015 permanency judgment which

changed the plan to adoption was continued in a separate permanency order on November 24, 2015 which was after the 2015 jurisdictional judgment. "Thus, father's argument that the termination petition, or the underlying permanency plan of adoption, was based solely on the 2014 jurisdictional judgment, which is now reversed, is unavailing and does not provide a basis for us to reverse the TPR judgment on appeal."

Dept. of Human Services v. S. C. T., 281 Or App 246 (2016)

On September 21, 2016, the Court of Appeals issued an opinion in [Dept. of Human Services v. S.C.T., 281 Or App 246 \(2016\)](#) in which the Court affirmed the jurisdictional judgment which was a default entered after parents failed to appear at a mandatory appearance "call" date. *Continued on next page »*

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In this case, parents were served with a summons and jurisdictional petition and directed, by summons, to appear in person on January 22, 2015 to admit or deny the allegations contained in the petition.

Parents appeared in person at the initial appearance, but the matter was continued a number of times. Parents appeared in person in five other times but, after being ordered to appear personally at call and trial dates, failed to appear at call on December 3, 2015. DHS presented its prima facie case, and a juvenile court referee found jurisdiction. Mother sought a rehearing before a judge pursuant to ORS 419A.150.

However, parents failed to appear and DHS again presented its prima facie case. Parents' attorneys sought to make evidentiary objections during the proceeding; DHS objected and the court, citing to ORS 419B.815 determined that parents were not able to appear

through counsel. However, parents' attorneys were permitted to make their record and, at the close of the hearing, jurisdiction was established.

On appeal, parents argue they were denied a right to participate in the hearing through their attorneys while DHS contends that parents' absence amounts to a waiver of appealability because ORS 19.245(2) prohibits an appeal from a "judgment given for want of an answer". The Court concluded that the parents had answered the petition by personally responding on January 22, 2015 in order to admit or deny the allegations of the petition and appeared five additional times due to continuances. Therefore, the judgment is appealable.

On the central issue, whether parents may appear through counsel when the summons requires personal appearance, the Court determined that "parents' attorneys cannot save parents from the legal effect of parents' absence by acting for parents to challenge the evidence

presented." Parents' attorneys may attend, request a continuance, and offer explanation for nonappearance. However, "the attorney does not provide a parent an opportunity to appear sub rosa to make objections while the parent is in violation of the court's order to attend personally."

Dept. of Human Services v. Z. E. W., 281 Or App 394 (2016)

On October 5, 2016, the Court of Appeals issued an opinion in [Dept. of Human Services v. Z. E. W., 281 Or App 394 \(2016\)](#) in which the Court reversed and remanded the juvenile court's jurisdictional orders with instructions to terminate the wardship.

In March 2014, the juvenile court asserted jurisdiction over father's two children based on allegations that father, who lived in California, did not have legal custody and failed to obtain it. (Allegations

as to mother included mental health and substance abuse). At the permanency hearing, father moved to dismiss jurisdiction asserting that the adjudicated bases for jurisdiction did not provide grounds for continued jurisdiction. The court denied father's motion because father had been declined as a placement through ICPC. Father appealed and the Court of Appeals agreed with father and reversed the denial of the motion to dismiss. (See [Dept. of Human Services v. Z. E. W., 276 Or App 463 \(2016\)](#))

While the first case was on appeal, DHS filed an amended petition alleging that the ICPC denial served as a basis for jurisdiction. The court established jurisdiction over father's objection. Father appealed, arguing that "that the juvenile court erred by asserting jurisdiction over the children because the record does not contain sufficient evidence to establish that the children's conditions or circumstances were

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“such as to endanger [their] welfare.”
ORS 419B.100(1)(c) DHS conceded
that the juvenile court erred.

The Court of Appeals agreed with
father holding “the fact that father
has not been approved as an ICPC
placement is not, in and of itself, a
basis for asserting jurisdiction over
the children.”

Dept. of Human Services v. S. R. R., 281 Or App 619 (2016)

On October 12, 2016, the Court
of Appeals issued an opinion in
[Dept. of Human Services v. S. R. R.,
281 Or App 619 \(2016\)](#) in which the
Court reversed the juvenile court’s
judgment which awarded custody
of a youth, who was already a ward
but had not been adjudicated in a
delinquency proceeding, to OYA.
The Court agreed with the child,
state and DHS, that the court does

not have authority to grant OYA
custody when the youth had not
been adjudicated delinquent. See
also [State v. S. R. R., 281 Or App
621](#)

Dept. of Human Services v. P. A., 281 Or App 476 (2016)

On October 12, 2016, the Court
of Appeals issued an opinion in
[Dept. of Human Services v. P. A.,
281 Or App 476 \(2016\)](#) in which
the Court reversed the part of the
juvenile court’s permanency hearing
judgment which ordered DHS to
reverse a “founded disposition”
for child abuse and reinstate the
certification of the child K’s foster
parents. On appeal, DHS argued
that a founded disposition of a CPS
assessment and an order revoking or
denying a foster home certification
are administrative actions under the
APA that the juvenile court erred
when it ordered DHS to change



the disposition and recertify the
foster parents. The Court agreed
with DHS and held that the juvenile
dependency proceeding is separate
from the administrative actions that
the juvenile court ordered changed.

Dept. of Human Services v. S. M. S., 281 Or App 720 (2016)

On October 19, 2016, the Court of
Appeals issued an opinion in [Dept.
of Human Services v. S. M. S., 281
Or App 720 \(2016\)](#) in which the
Court dismissed father’s appeal as

moot. In this case, father appealed
the jurisdictional judgment as to
his daughter K. While the appeal
was pending, the juvenile court
dismissed jurisdiction. DHS moved
to dismiss the appeal as moot and
father opposed dismissal arguing
that the appeal is not moot because
the jurisdictional judgment may have
collateral effects on father’s ability
to volunteer in his other children’s
schools or coach youth sports.

Ordinarily, termination of wardship
and the juvenile court’s jurisdiction
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renders an appeal from the underlying jurisdictional judgment moot. Collateral consequences may prevent mootness, but the asserted consequence “must have a significant probability of actually occurring; a speculative or merely possible effect is not enough.” Oregon School Activities v. Board of Education, 244 Or App 506, 510, 260 P3d 735 (2011).

In this case, father does not argue that the judgment has produced adverse effects and does not provide evidence that adverse effects are likely to occur. In addition, the Court “relies heavily” on the confidentiality provisions of the juvenile code as further support for the speculative nature of father’s argument. Because father has not established a significant probability of collateral consequences arising from the jurisdictional judgment, the appeal is dismissed as moot.

Dept. of Human Services v. C. M. R., 281 Or App 886 (2016)

On October 26, 2016, the Court of Appeals issued an opinion in Dept. of Human Services v. C. M. R., 281 Or App 886 (2016) in which the Court reversed the juvenile court’s combined judgment of jurisdiction and disposition as to the child R. The juvenile court entered the judgment after a hearing where mother was not present and had not been properly served.

On appeal, mother argued the court erred in establishing jurisdiction without proper service. DHS conceded that mother was not served and the agency did not comply with the diligent efforts to locate requirement of ORS 410B.914 which would have entitled the court to proceed without service. Therefore, the juvenile court erred and the judgment must be reversed.

Dept. of Human Services v. K. C. F., 282 Or App 12 (2016)

On November 2, 2016, the Court of Appeals issued an opinion in [Dept. of Human Services v. K. C. F., 282 Or App 12 \(2016\)](#) in which the Court reversed the juvenile court’s judgment of jurisdiction as to the children A and B who were ages 11 years and 18 months at the time of the jurisdictional hearing.

On appeal, the parents and the children argued that the evidence is insufficient to support the juvenile court’s determination that there is a current risk of harm. The relevant facts follow. DHS filed a dependency petition on November 13, 2014. The petition alleged domestic violence and substance abuse as to father and that mother needed assistance from DHS and the court to protect the children from

the DV and that mother did not have legal custody. After the filing of the petition, DHS worked with the family. Father moved out of the home and stopped drinking and smoking marijuana.

Six weeks later, mother expressed concern to the DHS worker that the “forced separation” of father being out of the home was harmful to the family and urged a prompt resolution. DHS responded by filing an amended petition adding an allegation that mother fails to understand the emotional damage and safety risk posed by father and failed to take protective action.

At the trial, the DHS worker testified that the DV allegation was based on father’s threats of violence and the impact on the children’s

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emotional health. DHS conceded there was no physical abuse, but testified that it would not be safe for father to return to the home and that domestic abuse is harmful to children. Father testified he had been clean and sober for over two months, regularly attends D&A counseling and takes weekly UAs. He admitted arguing with mother in front of the children but denied any physical abuse of mother other than an incident eight or nine years

earlier when he pinned mother down in the bed. Mother testified that she did not think father would hurt her or her children. The older child A testified that she did not believe father would hurt her or her mother. The juvenile court took jurisdiction on all allegations and noted that A seemed close to her parents but that did not exclude the possibility of an effect of witnessing abuse. A had developed a “safety plan” in the event she needed to leave home because of her parents conflicts.

The court was concerned that A was parentified and mature for her age. In support of jurisdiction, the state contends that evidence of past DV and threats of violence in front of the children, a lack of treatment by father to address DV, and both parents’ denial of the adverse impact of this conduct on the children are sufficient.

The Court of Appeals disagreed, finding the evidence legally insufficient to find a serious risk of harm to the children. Although there is evidence of emotional abuse of mother by father and that the parents’ conflict has affected the children, there is no evidence of a present risk of serious harm reasonably likely to occur.

Dept. of Human Services v. P. R. H., 282 Or App 201 (2016)

On November 9, 2016, the Court of Appeals issued an opinion in [Dept. of Human Services v. P. R. H., 282](#)

[Or App 201 \(2016\)](#) in which the Court reversed the juvenile court’s jurisdictional judgment. On appeal, father argued that DHS failed to prove a current risk of harm by clear and convincing evidence as required by ICWA.

The jurisdictional petition alleged that mother and father failed to maintain a safe environment because they exposed the child to the production of marijuana and that another child suffered a serious nonaccidental injury in father’s care. The court found the nonaccidental injury allegation as to mother unproven because father had caused the injuries and mother responded appropriately. DHS concedes on appeal that the record in this case is insufficient to support jurisdiction because parents’ past involvement in marijuana production does not create a current risk of harm. The Court agreed, accepted DHS’ concession and reversed the judgment.

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Dept. of Human Services v. M. L. B., 282 Or App 203 (2016)

On November 9, 2016, the Court of Appeals issued an opinion in [Dept. of Human Services v. M. L. B., 282 Or App 203 \(2016\)](#) in which the Court affirmed the juvenile court's judgment terminating mother's parental rights. Mother did not appear at her termination trial, but argued that the judgment must be reversed on her behalf because her attorney "mounted no defense on her behalf, which rendered his assistance inadequate."

The Court, citing to [Dept. of Human Services v. S.C.T., 281 Or App 246 \(2016\)](#) confirmed that ORS 419B.815(8) prohibited mother's attorney from appearing in the trial on mother's behalf. "Because mother's attorney was statutorily prohibited from presenting a defense

at the trial, he was not inadequate for failing to do so."

Dept. of Human Services v. K. C., 282 Or App 448 (2016)

On November 30, 2016, the Court of Appeals issued an opinion in [Dept. of Human Services v. K. C., 282 Or App 448 \(2016\)](#) in which the court reversed the juvenile court's jurisdictional judgment over K, a newborn child, due to insufficient evidence. In this case, K was removed from parents care at the hospital and placed into foster care. DHS filed a dependency petition alleging father's mental health, substance abuse, lack of parenting skills, and failure to ameliorate safety concerns regarding his older child who is still in foster care and mother's mental health, lack of parenting skills, and failure to ameliorate safety concerns regarding her older child who is still in foster care. Parents had executed a power

of attorney which granted some parental authority to grandfather. DHS had not certified grandfather as a placement resource and did not believe grandfather would put in place the restrictions needed to keep K safe from mother who was living in grandfather's home.

At the jurisdictional trial, DHS presented testimony from a number of providers and caseworkers. Dr. Sweet, who had evaluated mother in 2014 and father in 2015 described parents' significant mental health issues but acknowledged he had not met with either parent in several months. The DHS SSA testified that parents functioned adequately during visits and had made some progress but not enough to eliminate safety concerns. Grandfather's DHS certifier testified that grandfather had been denied certification in December 2015 because, among other reasons, mother was living in the home. Parents were not seeking to be a resource for K, but argued that the court could not take

jurisdiction based on its speculative belief of what would happen if K were placed with grandfather. The court asserted jurisdiction and noted that it was relying on information presented at a prior hearing to conclude that grandfather might leave K alone with mother because grandfather didn't appreciate the significance of mother's challenges. The Court of Appeals agreed with parents. Jurisdiction requires DHS to present evidence which permits a determination that, absent juvenile court jurisdiction, the child's circumstances pose a nonspeculative risk of serious loss or injury reasonably likely to be realized. It cannot be based on speculation that a parent's past problems persist at the time of the hearing. Additionally, parents' inability to parent independently at the time of the trial is, standing alone, insufficient. *See Dept. of Human Services v. M. Q., 253 Or App 776 (2012) and Dept. of Human* *Continued on next page »*

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« continued from previous *Services v. B. L. J.*, 246 Or App 767 (2011). “In other words, when DHS seeks to establish that jurisdiction is warranted because of the parents’ inability to parent on their own, DHS must also establish that the parents will, in fact, be parenting on their own, or that, for some other reason, the parents’ deficits pose a current risk of harm to the child under the child’s actual circumstances.”

In this case, DHS presented insufficient evidence to support a finding as to parents’ circumstances at the time of the hearing and how the parents’ conduct would pose a risk to K under K’s circumstances. In addition, DHS’s concern that grandfather would not keep K safe is “mere speculation.” “Accordingly, DHS failed to carry its burden to demonstrate that, in the totality of K’s circumstances, parents’ risk-causing conduct posed a current risk of serious loss or injury.”

***Dept. of Human Services v. B. J. J.*, 282 Or App 488 (2016)**

On November 30, 2016, the Court of Appeals issued an opinion in [Dept. of Human Services v. B. J. J.](#), 282 Or App 488 (2016) in which the Court, on de novo review, reversed and remanded the juvenile court’s TPR judgments as to Father’s three sons, EM, EJ and X. DHS failed to prove by clear and convincing evidence that father’s conditions or conduct are seriously detrimental to his children. Mother’s case was also reversed and remanded, see [Dept. of Human Services v. L. D. K.](#), 282 Or App 510 (2016).

This case began when the children were taken into protective custody after medical examinations of the younger twins, EM and EJ, revealed fractures believed to indicate child abuse. It was later determined the fractures were birth defects, but in

November 2013 both parents made jurisdictional admissions. Father admitted he lacked suitable housing. DHS filed additional petitions in July 2014 alleging that the children need specialized medical treatment father is unable to provide, father has anger and mental health issues which interfere with his ability to safely parent the children, and that father has been offered services to address his ability to safely parent and has been unable to remedy his problems. Father was defaulted on these allegations in October 2014.

In December 2014, the plan changed to adoption. Shortly thereafter father resumed visiting the children after about 6 months of failing to do so. The TPR petition alleged domestic violence, lack of a suitable living situation, failure to present a viable plan for return, failure to learn safe parenting skills, mental health, neglect, lack of effort to adjust conditions or circumstances, *Continued on next page »*



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and failure to make a lasting adjustment after services were offered. At the TPR trial, DHS presented evidence focused on the theme that father was angry and potentially abusive, including toward DHS, which limited the agency's efforts to provide effective services. The trial court found the state proved termination based on father's failure to present a viable plan for return, failure to learn safe parenting skills, mental health, neglect and failure to make a lasting adjustment after services were offered. Father appeals, arguing lack of sufficient evidence. The legal standard for TPR requires, at the time of trial:

1. the parent has engaged in conduct or is characterized by a condition that is seriously detrimental to the child,
2. integration of the child into the parent's care is improbable within a reasonable time due to conduct or conditions not likely to change and

3. Termination is in the best interests of the child. Present unfitness is required, past unfitness is insufficient.

In this case, DHS failed to prove a nexus between father's mental health/anger issues and his parenting. DHS failed to prove that father's mental health/anger issues have ever manifested in domestic violence or in the harm or risk of harm that justifies termination. DHS also failed to prove that father's mental health/anger will result in physical discipline that is seriously detrimental. There is evidence of father's use of physical discipline and father threatening physical discipline at a visit, but even if not a preferred parenting style, there is no evidence that this creates a condition seriously detrimental to the children. DHS failed to prove unfitness based on neglect. Father had been visiting his children and been making efforts to work with parenting coaches for the 6 months

before the trial. DHS failed to prove unfitness based on lack of a viable plan. Evidence in the record indicates father's current housing would be minimally adequate and although father has a limited understanding of the children's medical needs, DHS did not prove that those needs, while significant, are beyond father's ability to monitor without DHS support. DHS failed to prove Father's failure to make a lasting adjustment.

The Court considers the circumstances of this case, including DHS's failure to prove the other allegations and father's lack of cooperation with DHS which started when falsely accused of physical abuse of the twins. Lack of cooperation with DHS should not serve as an independent basis on which to terminate parental rights.

In summary, DHS has not proved by clear and convincing evidence that father is presently unfit.

Dept. of Human Services v. L. D. K., 282 Or App 510 (2016)

On November 30, 2016, the Court of Appeals issued an opinion in [Dept. of Human Services v. L. D. K., 282 Or App 510 \(2016\)](#) in which the Court, on de novo review, reversed and remanded the juvenile court's TPR judgments as to mother's six children. DHS failed to prove by clear and convincing evidence any of the alleged bases for termination. Father's case was also reversed and remanded, see [Dept. of Human Services v. B. J. J., 282 Or App 488 \(2016\)](#). The facts in mother's case are similar to father's case. Three of mother's six children have BJ as the father, the father to the other three, CB, stipulated to termination. All six children were removed from mother in May 2013. Mother admitted to a substance abuse problem which

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formed the basis for jurisdiction. Later in the case, DHS added jurisdictional allegations related to mother's mental health. At the TPR trial, DHS presented evidence of father BJ's anger issues and mother's deference to BJ as a disciplinary figure, mother's inability to control all six children during visits, and mother's failure to complete DBT.

The Court of Appeals concluded DHS did not prove any allegations by clear and convincing evidence. Mother had been clean for two years and there is no evidence of physical or emotional neglect of the children. Because DHS failed to prove BJ's physical discipline or lack of parenting skills are seriously detrimental to his children, DHS failed to prove that mother's relationship with BJ and her deference to him is seriously detrimental to any of the six children. The record also reflects that mother's parenting skills, while less than ideal, are not so deficient



that they are seriously detrimental and would pose the type of risk necessary to justify termination of parental rights. Last, DHS failed to prove that mother failed to present a viable plan for return. At the time of trial, mother and father had clean and well-kept housing and, although the children have some special needs, mother was willing to engage with parenting coaches. In conclusion, DHS' evidence was insufficient to prove any of the alleged bases for termination.

Dept. of Human Services v. J. C. S., 282 Or App 624 (2016)

On November 30, 2016, the Court of Appeals issued an opinion in [Dept. of Human Services v. J. C. S., 282 Or App 624 \(2016\)](#) in which the Court affirmed the trial court's assertion of jurisdiction over child S. In July 2015, the court asserted jurisdiction over S after determining that father was incarcerated and unavailable as a custodial resource. In April 2016, the court asserted jurisdiction on the additional basis of father's domestic violence. Mother is deceased.

On appeal, father challenges the 2016 judgment, arguing that the court erred because there was not expert testimony presented as required by ICWA. No foster care placement may be ordered in the absence of a determination, supported by clear and convincing

evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 USC Sec. 1912(e). Father did not preserve his argument below, but he argues he was not required to do so under 25 USC Sec. 1914. In this case, DHS argued that the jurisdictional hearing was not a "foster care placement" within the meaning of ICWA because S had already been removed from father's care earlier in the proceeding and therefore father was required to preserve his claim and DHS was not required to present expert testimony.

The Court agreed with DHS, finding that the "significant shift in legal rights" that occurs when the court first asserts jurisdiction was not present in this case.



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BOOK REVIEWS

The Neglected Transition: Building a Relational Home for Children Entering Foster Care

by Monique Mitchell (2016)

Report by Addie Smith, YRJ Attorney

Dr. Monique Mitchell's *The Neglected Transition: Building a Relational Home for Children Entering Foster Care* is not another dry book filled with statistics and research on children in foster care. In this short but powerful book, Dr. Mitchell weaves the real experiences of children entering foster care together with research on loss and ambiguity to form a "How To" guide for practitioners. The basis of the book is a framework that practitioners can use to buffer children already struggling with significant trauma, from the trauma of removal.

The author describes the book as being written from a bottom-up,



child-centered, strengths-based, emic (insider's) perspective. It is based on the information she gathered from an in-depth study of 20 non-kinship foster care children, her participation on various youth advisory boards, and the reports of youth participants in other research studies. Too often, Dr. Mitchell notes, children's experiences of removal and placement result in feelings of loss and ambiguity that go unrecognized and unattended to by the adults in a child's life. This perpetuates trauma and stands in the way of healing.

Each phase in the removal and placement process, Dr. Mitchell explains, gives rise to new risks for loss and ambiguity when it

compromises a child's understanding of the world and their place in it. In other words, during removal and placement, a child's understanding of the who, what, where, when, why, and how of their existence is variously challenged, leaving them with feelings of loss and ambiguity.

The Neglected Transition explores each phase in the removal process and the loss and ambiguity it can create chapter-by-chapter: chapter one focuses on the experience of being removed from your home of origin (Why do I have to leave?); chapter two, the transfer between home and foster home (What is foster care?); chapter three, introduction to the new home (Where are you taking me?); chapter

four, introduction to the new caregivers (Who are these people?); chapter five, the adjustment to a child's sense of self that arises in a new environment (How about me?); and the final chapter, chapter six, describes the importance applying the lessons learned from each chapter to create a "relational home" that supports foster children's healing (When can I go home?).

The framework may be academic and theoretical, but the content of the book is practical, approachable, and applicable in everyday practice. The book's step-by-step instruction helps adults and experts enfranchise foster children's experiences of loss and ambiguity throughout the removal and placement process. These efforts, in turn, Dr. Mitchell reminds, will prevent unnecessary trauma and facilitate healing. The general tool the author provides is a blueprint on how to C.A.R.E. for foster children. It requires adults and practitioners to always:

- Communicate with foster children effectively;
- Affirm foster children's strengths, potential, and worth;

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- Recognize and acknowledge the needs, experiences, and aspirations that are significant to foster children; and
- Ensure that foster children's needs of safety, permanency and well-being are met.

Appendix A of the book provides definitions, value statements, and value actions to help a practitioner know when and how to apply this blueprint in his or her everyday work. In addition, this blueprint is applied throughout the book (and thus throughout the process of removal and placement). Specific "healing suggestions" in the form of text boxes that incorporate the C.A.R.E model stand next to narratives of children's experiences at each phase of the removal and placement process. The book also offers a compendium of these healing suggestions shared throughout in a C.A.R.E. Checklist found in its Appendix C.

Most compelling and thought provoking, however, is the main narrative which consists of the first-person experiences and real-time advice from children that guides the

reader through an insider's tour of the removal and placement process. Dr. Mitchell has collated the statements, stories, and insight from dozens of children and youth into a cohesive and comprehensive tutorial for even the most experienced among us. The role of a practitioner in a foster child's experience of trauma or healing is hard to ignore when repeatedly identified in the form of advice offered by foster children themselves.

In addition to offering practical tips and tricks on how to better enfranchise and heal the children we work with, this book serves as an important reminder that what we don't do can have just as much of an impact on the children we serve as what we do.



The Teenage Brain: A Neuroscientist's Survival Guide to Raising Adolescents and Young Adults

by Frances E. Jensen, MD, with Amy Ellis Nutt (2015)

Report by Nancy Cozine, Executive Director, Office of Public Defense Services

Advocates, service providers, and decision-makers, like many parents, can be easily frustrated by the seemingly senseless behavior of teens. Dr. Jensen is the mother of two boys, and a Neurologist. Through her work studying the brain as a specialist in epilepsy, she developed a detailed understanding of brain development and functionality, and became a natural resource for other parents and professionals in her community who were confused by the behavior of kids. In her book, written with Washington Post science writer Amy Ellis Nutt, Dr. Jensen explains the brain research that underlies the complex behaviors typical of teenagers. Written primarily for parents, guardians, and educators, it is also a valuable resource for those

in the legal profession who regularly work with kids and families. Whether your practice focuses on dependency, delinquency, criminal, or family law, understanding the way children develop is essential to improving case outcomes.

The Teenage Brain starts with chapters that address each component of the developing brain, then moves into straightforward examples demonstrating how under-developed pathways can lead to poor decision-making in specific situations. The book offers very practical approaches and solutions to managing, or responding to, teen behavior. Most importantly, it helps readers understand why a clearly hazardous choice makes perfect sense in the mind of a teenager; even a smart teenager!

Chapter 16 is devoted to a discussion of crime and punishment, as it relates to juveniles. The authors start the chapter with a compelling example of one youth sentenced to life without the possibility of parole. They also explore the history of the treatment

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and punishment of children, coming back, full-circle, to our country's continuing struggle to adopt appropriate responses to violence perpetrated by children. Dr. Jenson explains why she joined sixteen others in signing an amicus brief in *Graham v. Florida*, to explain why juveniles should be held to a different standard, and her later contributions to briefs in *Jackson v. Hobbs*, and *Roper v. Alabama*.

While the book is primarily intended to inform adults who want to help teens improve the way they navigate the world, the discussion of Dr. Jenson's efforts to change our juvenile justice system is invaluable. This, along with the explanations of teen behavior and the brain functions behind their choices, make the book useful beyond the narrow purpose of parenting and teaching. Indeed, the book has influenced not only the way I talk with my own teens, but also my view of what can be done to improve our juvenile justice system, and our communities.

If more adults take the time to read this book, and engage with

children – their own and others' – perhaps we could figure out a way to reduce our ever-growing school-to-prison pipeline, and the constant devaluation of our country's greatest resource - the young humans who hold our future in their hands.

“HOW POVERTY AFFECTS THE BRAIN”

<http://www.newsweek.com/2016/09/02/how-poverty-affects-brains-493239.html>

Newsweek published this article by Erika Hayasaki in August.

Its premise: “Early results show a troubling trend: kids who grow up with higher levels of violence as a backdrop in their lives, based on MRI scans, have weaker real-time neural connections and interaction in parts of the brain involved in awareness, judgment, and ethical and emotional processing . . . there is a direct connection between the body's stress-response system and brain development. And being poor is inherently stressful.”

CASE SUMMARIES

By Amy S. Miller, Deputy General Counsel, Office of Public Defense Services

State v. S. R. R., 281 Or App 621 (2016)

On October 12, 2016, the Court of Appeals issued an opinion in [State v. S. R. R., 281 Or App 621](#) in which the Court dismissed the appeal as moot. In this case, a youth, who was already a ward of the juvenile court, was charged with Assault 3. The court found the youth unfit to proceed in the delinquency case and entered judgements in both proceedings placing the youth in OYA custody. The youth appealed the judgments in both the delinquency case and the dependency case ([Dept. of Human Services v. S. R. R., 281 Or App 619 \(2016\)](#)) and the state conceded that the court lacked authority to grant custody to OYA. The Court determined this appeal moot given its holding in [Dept. of Human Services v. S. R. R., 281 Or App 619](#)

(2016) in which the Court agrees with DHS and the state that there is no authority to commit the youth to OYA because the youth was not adjudicated delinquent.

State v. D. J., 281 Or App 730 (2016)

On October 19, 2016, the Court of Appeals issued an opinion in [State v. D. J., 281 Or App 730 \(2016\)](#) in which the Court affirmed the juvenile court's order which approved youth's placement in OYA custody. The issue in this case is what is required to satisfy ORS 419C.626(3)(a) which requires the court “enter findings of fact” that “specifically state *** [w]hy continued out-of-home placement is necessary as opposed to * ** another placement.”

The facts are as follows: In 2011, youth was found to be in the jurisdiction of the juvenile court based on acts which, if he were an adult, would constitute sex abuse I. Youth was committed to OYA custody, was placed in three out-of-home community placements, and

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was removed from each placement for failure to complete treatment. Youth was placed in a YCF and learned he would be moved to treatment in Portland which is far from his home in Jackson county. Youth sought review of OYA's placement and argued he should be permitted to live with his grandmother.

After the hearing which included several witnesses, the court issued a written order approving of the OYA placement. The order contained a number of factual findings including that community safety is at-risk if the youth is placed in an at-home placement, that youth would not be suitable for community supervision, and that he would not be appropriate for treatment by the only juvenile sex offender therapist in the county where the grandmother resides.

On appeal, youth argued the court erred because the court failed to specifically state why out of home placement is necessary and that "some degree of inference is required" to connect the

court's findings to the statutory requirements. The Court of Appeals agreed with youth, that express findings are required to indicate why continuing the out-of-home placement is necessary, but determined that the juvenile court's findings are sufficient. First, the court's finding regarding community safety fully explains why it is necessary to reject placement with grandmother. Second, the finding that community supervision is not appropriate explains why placement with grandmother was rejected. Last, the finding that the only therapist in the county would be unable to treat the youth explains why placement with grandmother was rejected. "Thus, the juvenile court satisfied its obligation under ORS 419C.626(3)(a) to make findings that specifically state "why" it ordered youth to continue in the out-of-home placement and permit this court to determine, through meaningful appellate review, that the disposition was "necessary.""

State v. J. J.-M., 282 Or App 459 (2016)

On November 30, 2016, the Court

of Appeals issued an opinion in [State v. J. J.-M., 282 Or App 459 \(2016\)](#), in which the Court affirmed the juvenile court's judgment denying youth's motion to set aside its jurisdictional determination due to ineffective assistance of counsel. Youth, also a ward of the juvenile court, moved to a new foster home. While youth was at school, foster mother unpacked youth's belongings, found a water bottle containing marijuana and money, and called the sheriff's office and the DHS worker. A detective and DHS came to the home and conducted an additional search which yielded a water bottle filled with marijuana and capsules and the wallet and birth certificate of foster parent's recently deceased father (including a driver's license and social security card). Additional searches recovered a total of 66 grams of marijuana. Youth was charged with unlawful possession of marijuana, unlawful delivery of marijuana, and 4 counts of ID theft. At trial, the court found youth within its jurisdiction on all counts.

Later, represented by a different attorney, youth filed a motion to set aside the jurisdictional judgment

alleging inadequate assistance of counsel because trial counsel failed to conduct an adequate and effective investigation. The court denied youth's motion.

On appeal, youth argued the court erred in finding that he had not been denied adequate assistance of counsel. The constitutional standard for ineffective assistance of counsel in juvenile cases is the same as those for post-conviction relief. Youth must prove both prongs of this standard: counsel failed to exercise reasonable professional skill and judgment and that he suffered prejudice as a result. Reasonableness is evaluated "from counsel's perspective at the time of the alleged error and in light of all the circumstances; the post-conviction court's standard of review is a highly deferential one." Prejudice is "whether there was some likelihood—'more than mere possibility, but less than probability'—of a different outcome of the trial in the absence of the errors that counsel made."

In this case, youth argues his attorney failed to: 1. conduct an
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effective investigation, 2. conduct a polygraph, 3. hire a handwriting expert, 4. interview and call witnesses and 5. request disclosure of exculpatory evidence from the DDA. The Court examined each allegation and determined that youth failed to present evidence which satisfied the constitutional standard for inadequate assistance of counsel.

SAVE THE DATE

**ABA 5th National Parent
Attorney Conference**
*Valuing Dignity & Respect for All
Families*

April 25-26, 2017
Tyson's Corner, Virginia

ABA 17th National Conference on
Children and the Law
April 27-28, 2017
Tyson's Corner Virginia

http://www.americanbar.org/groups/child_law/2017-conferences.html

Save the Date for these YRJ Special Events

50th Anniversary of *In re Gault* YRJ Luncheon and CLE

Monday, May 15, 2017 • Portland Hilton Hotel
12 Noon: Luncheon • 2 pm to 4 pm: CLE

Speaker: Dr. Emily R.D. Murphy

Dr. Murphy teaches Law & Neuroscience at UCLA. She earned her A.B. magna cum laude in Psychology from Harvard University, her Ph.D. in Behavioral Neuroscience and Psychopharmacology from the University of Cambridge, Trinity College, as a Gates Cambridge Scholar, and her J.D. from Stanford Law School, where she received the Gerald Gunther Prizes in Constitutional Litigation and Professional Responsibility.

The 9th Annual Wine & Chocolate Gala *justice is sweet*

Thursday, November 9, 2017 • Portland Hilton Hotel
5:30 pm to 9:00 pm

More details on these YRJ events to come.

For more info now: Janeen.O@youthrightsjustice.org, 503.232.2540 x231