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THE TRICKLE UP EFFECT: INCORPORATING AN UNDERSTANDING OF IMMIGRATION LAW AND POLICIES INTO BEST INTEREST ANALYSIS IN STATE CHILD WELFARE PROCEEDINGS

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Immigration law is an area of legal practice that requires an understanding of a complex, ever-changing landscape. With policies and laws widely changing, sometimes within the span of 280 characters, immigration attorneys have to be ready to address each crisis facing our nation's broken immigration system.¹ In the past eight weeks, the United States Supreme Court has decided that individuals being detained during deportation proceedings do not have the right to review of their detention status, and that parts of the Immigration and Nationality Act are unconstitutionally vague.² Additionally, in Arizona, those enrolled in the Deferred Action for Child Arrival Program, are no longer eligible for in-state tuition for state educational institutions.³ Within this unworkable immigration system are undocumented children who face deportation proceedings, and a fight for their lives in a system that they do not know or understand.⁴ These are the children of whom Professor Estin speaks in her piece, *Child Migrants and Child Welfare: Toward a Best Interests Approach*. They are the shadow children.

Professor Estin's presentation on March 22, 2018 at the *Global Studies Law Review Symposium* and subsequent paper call for inclusion of the best interests interest approach into representation for unaccompanied minors, borrowing and building on international treaties and state court law, suggesting that it will assist in the advocacy for children caught in this perilous position. I agree with Professor Estin that we need to borrow from

1 Politics aside, most people agree that the immigration system is broken and needs to be changed. One only need to turn on the news or search the internet to see the variety of fixes suggested—conservative, liberal, and somewhere in between.

2 See *Jennings v. Rodriguez*, 138 S. Ct. 830, 200 L.Ed. 2d 122 (2018); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

3 *Arizona ex rel. Brnovich v. Maricopa Cty. Comty. C. Dist. Bd.*, No.CV-17-0215-PR, 2018 WL 2016076 (Ariz. 2018)

4 352,587 youth are facing immigration deportation proceedings. *Juveniles – Immigration Court Deportation Proceedings*, TRAC Immigration, <http://trac.syr.edu/phptools/immigration/juvenile/> (last visited May 7, 2018).

other areas such as child welfare and family law to assist these youth. However, I wonder if an additional path to advocacy for these children could be pushing for a better understanding of immigration law and its impact on best interest in state child welfare proceedings. With greater exposure to the inner workings of the immigration system, attorneys, judges, case managers, and other court personnel involved in state child welfare proceedings, can become change agents, seeing how the system impacts the children and families that come before them. This new insight will educate state level stakeholders, further empowering them to push for change on the federal level, exponentially expanding the opportunities to make the changes suggested by Professor Estin.

This change in focus is something that may become a necessary reality as we face the unresolved matter of those enrolled in the Deferred Action for Child Arrivals Program (DACA). State benches and bars must be prepared to face the impact changes in policy will have on state child welfare courts if participants are deported. DACA is estimated to impact about 690,000 immigrants in the United States.⁵ With the future of the program unknown, there is the potential for mass deportations. As these families face an uncertain future, parents are being forced to prepare for separation from their children, and despite best made plans, inevitably some of their children will come into care because of a parent's detention by ICE.⁶ Our courts will be forced to better address the complexities of working with families and children who are involved in the immigration system.

In this paper I will briefly frame the argument by first identifying the children and families in the state court systems that create the opportunity for state court actors to learn more about the federal immigration system. I will then look at one specific area where best interest analysis requires an understanding of federal immigration law—the push for permanency. I will conclude with a discussion about how this approach moves from the state to federal level.

Professor Estin presented arguments that addressed advocacy for unaccompanied minors who are facing immigration proceedings. However, for the purpose of this piece, I suggest we shift the lens slightly to children, youth, and their families who are impacted by both the state

5 For key facts about unauthorized immigrants enrolled in DACA, see *Pew Charitable Trusts Establishes New Nonprofit Research Organization to Help Better Inform Public & Policymakers on Issues & Trends*, PEW RESEARCH CTR. (Apr. 27, 2004), <http://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/Pew>.

6 Alexia Fernandez Campbell, *DREAMers With Kids Prepare For the Worst*, VOX (Sept. 1, 2017, 9:00 AM) <https://www.vox.com/policy-and-politics/2017/8/31/16228206/dreamers-daca-prepare>.

court child welfare proceedings and the immigration system.⁷ The child may be a U.S. citizen or may be undocumented. One or both of the parents may be undocumented. The family comes to the attention of the state because the children have been removed from their parents due to allegations of abuse and neglect, or simply because their parents were detained as part of immigration enforcement. In many jurisdictions, these children will be appointed an attorney who will be responsible for representing their best interests.⁸ Understanding the immigration process and accompanying laws, rules, and regulations is a necessary part of lawyering for these children caught in the immigration and child welfare systems. Unfortunately, unlike understanding trauma, domestic violence, or drug addiction, understanding the immigration system takes a back seat.

Child welfare law is generally driven by the “best interests” approach.⁹ While “best interests” are not always statutorily defined *per se*, there are usually factors to be considered when determining what is in a child’s best interests.¹⁰ Few statutes explicitly state that immigration status should be a part of the analysis.¹¹ However, for those families who are dually involved, it is likely the immigration system will have the biggest impact on the child’s life, determining the child’s ability to be reunified with his or her parent, and the location where that may happen. It is incumbent upon an attorney who is charged with representing these children’s interests to understand the immigration system. Ethically, attorneys are required to have the requisite legal knowledge to competently represent our clients. Per the ABA Model Rules of Professional Responsibility, “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹² The attorney must be able to make informed recommendations about placement, services, permanency planning, and reunification, requiring an understanding of the immigration system. As the attorneys do this work, competent advocacy for the child or children in one family begins to inform the players in the state court child welfare

⁷ See Reuniting Immigrant Families Act passed into law in California, S.B. 1064, (Cal. 2012), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1064. See also *In re Y.M.*, 207 Cal. App. 4th 892, 144 Cal. Rptr. 3d 54 (Cal. Ct. App. 2012) for discussion on the interplay between state child welfare proceedings and federal immigration proceedings for youth.

⁸ 42 U.S.C. 5106a (b)(2)(B)(xiii).

⁹ Campbell, *supra* note 6.

¹⁰ DETERMINING THE BEST INTERESTS OF THE CHILD, CHILD WELFARE INFORMATION GATEWAY, https://www.childwelfare.gov/pubPDFs/best_interest.pdf (last visited May 7, 2018).

¹¹ Florida is a state that requires immigration status to be considered. See FLA. STAT. ANN. § 39.5075 (West).

¹² MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR. ASS’N 1980).

system, demystifying and exposing opportunities for advocacy in cases that at times feel hopeless. As state actors shed more light on the challenges faced by separated families in the two systems, a greater push for change may gradually come.

Take for instance permanency planning. Federal law, adopted and enacted by the states as a way to secure funding for their child welfare systems, focuses on children moving out of the foster care system and into permanent placements in a timely manner.¹³ Timelines control in care and protection cases, with milestones and federal funding impacting when a case plan needs to switch from reunification to termination of parental rights. Parents have a year to work out a court ordered plan towards reunification.¹⁴ This means a year to engage and participate in services such as therapies and drug treatment; participating in visitation and maintaining contact with the child; and ensuring or securing housing for themselves and their children. The laws assume, for the most part, that a parent is not involved in the immigration system, expecting that with referrals and services, they can fulfill or at least make substantial steps towards fulfilling any court ordered services.

Children and families involved in the immigration system face a child welfare system that plays out very differently. For children who are in care because of a parent's immigration status or who have a parent who has a tenuous immigration status, this timeline creates a substantial barrier to reunification. Parents are not easily able to participate in court ordered services.¹⁵ If a parent is detained, the challenges are even greater. According to statistics, in this fiscal year there are 684,583 cases pending in immigration court.¹⁶ The national average number of days that a case is pending is 706 days, with some states such as Illinois and Colorado taking 982 days and 1,060 days respectively.¹⁷ This becomes an overwhelming barrier when compared to state laws that require a petition to terminate parental rights be filed if a child has been in care fifteen out of the last

¹³ Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (1997).

¹⁴ For a discussion of state termination statutes, see *GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS*, CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf> (last visited May 7, 2018).

¹⁵ Although ICE has a Parental Interest Directive, detained parents are being held in a system that is increasingly hostile to them, and the directive gives substantial latitude for officials to deny parents access to their children and the state court process. See *ICE Detained Parents Directive*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/parental-interest> (last visited May 7, 2018).

¹⁶ *Immigration Court Backlog Tool*, TRAC Immigration, http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Apr. 9, 2018).

¹⁷ *Children : Amid a Growing Court Backlog Many Still Unrepresented*, TRAC Immigration <http://trac.syr.edu/immigration/reports/482/> (last visited Apr. 9, 2018).

twenty-two months.¹⁸ With these two conflicting timelines, the guardian ad litem for the child becomes key in keeping best interests from being outdone by the immigration process. For example, there are exceptions to the timelines that allow the courts to keep a case from going to termination if it is in the best interests of the child.¹⁹ In Missouri, a party can show why it is not in the child's best interest for a petition to terminate parental rights to be filed, thus allowing the court to avoid the required filing at fifteen out of the last twenty-two months.²⁰ This exception creates more time for parents, especially those whose children are in care solely because of a parent's ICE detention or deportation, and preserves their right to reunify with their children. It also prevents children from becoming legal orphans when they have a parent who is perfectly capable of parenting. An attorney representing the best interests of children in state child welfare proceeding needs to be able to understand how a family's status in the immigration system impacts best interest advocacy.²¹

So how then does this individual advocacy on the state level shape federal immigration practice on behalf of unaccompanied minors? First, it increases the number of individuals who are aware of challenges for children and families that are involved in these systems.²² You cannot become knowledgeable about the immigration system and the way it impacts children and families without learning about the impact of the system on undocumented youth. Second, as more attorneys become informed, to the extent that a local docket or local interest allows, they will start conversations about practices within the local court system.²³ And, because of the connection between state child welfare law and federal

18 See GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS, *supra* note 14 for a discussion of termination of parental rights. Note that some states shorten the timeline for special circumstances, for example, the age of the child.

19 *Id.*

20 MO. R. JUV. PROC. R.124.09 and MO. R. JUV. PROC. R. 124.10

21 Another area that state system actors need to understand involves instances where they should seek special juvenile immigrant status for the children they are working with. Without understanding how this process works, and the important findings that are required at the state court level, a child can face unnecessary deportation.

22 There is limited data available on the families that fall into both systems. See Yali Lincroft & Alan Dettlaff, *Children of Immigrants In The U.S. Child Welfare System*, FIRST FOCUS (June 2010), <http://cssr.berkeley.edu/cwscmsreports/LatinoPracticeAdvisory/Children%20of%20Immigrants%20in%20the%20US%20Child%20Welfare%20System.pdf>. This speaks to the greater need for those working within the system to advocate for the importance of recognizing these families that are in the system.

23 In fact, because of writing this response, I am reaching out to colleagues in the immigration field in the area with a goal of putting together a CLE that addresses advocacy for families involved in both systems. Conferences often focus on Special Juvenile Immigrant Status, so far, I've not seen much focusing on advocacy within the state child welfare system.

immigration law, these attorneys are forced to have conversations about challenges on the federal level. There is power in knowledge and as more professionals are educated, that provides the opportunity for pressure to be exerted on reform of the federal system.

Standing up and speaking out is ultimately what is required to effect change. The chorus of voices will have to come from more than the attorneys, the non-profits, and the activists that fight every day to address the challenges in the immigration system. It will take guardian ad litem, judges, prosecutors, attorneys for children, attorneys for parents, and attorneys for the state child welfare systems to help push for us to do better for youth touched by the immigration system. In the current political climate, this groundswell seems even more possible, especially in the wake of what appears to be increased political activity from affinity groups supporting a growing variety of issues. From Black Lives Matter, #Metoo, and #Marchforourlives movements, standing up and speaking out for perceived wrongs is again taking a front seat.

This push for change has not escaped the legal profession. Take for example, Lawyers For Good Government, a group that went from an informal Facebook group to a non-profit that reaches across the country and beyond. Or, on a smaller scale, the group of over 100 female attorneys in Oklahoma who recently marched on the state capital to support funding for education. Perhaps, as more attorneys incorporate immigration law into their child welfare work and best interests assessments, the exposure to the immigration system will begin to infiltrate state court child welfare systems, making it harder to ignore the plight of youth touched by the immigration system, particularly unaccompanied minors who are in our country seeking refuge from abuse, neglect, and violence. After all, these are the very children that we as guardian ad litem are charged with protecting.