

Family Is in a Child's Best Interest

Amelia S. Watson

Family matters. I know this to the core of my being. It is one of the things that sustains me in my life and my profession. I knew family mattered when I started twenty years ago in Tacoma, Washington representing parents in Pierce County dependency and termination of parental rights cases. I knew it from my own experiences of having a large extended family. I continue to know family matters in my current role with the Office of Public Defense Parents Representation Program supporting parent attorneys and social services workers providing family defense in Washington State.

Like many people, the constellation that connects my family is both simple and complex. Some of my family are related by blood, including some who were surrendered for adoption but later found their way back to us. Some are related by marriage or were at one time, but while the marriage has ended, the family connection remains. Some would be considered fictive kin whom I have formed familial relationships with over time. With many of my family, I have so many memories I couldn't begin to name them all from our time spent together at holidays, vacations, graduations, weddings, and so many other experiences. Others I have met less often, perhaps at a family reunion, or still others that I have not met yet at all. But to me, they are all mine.

Not all of the parents I represented felt connected to family. Some had no family connections, or some shared they had fractured relationships with family or were ashamed to share with them that they were involved in a dependency case. Many of them did have family they wanted to be a placement. They loved their families, knew their children would be well cared for by kin, and were desperate to have children placed with them. And the family regulation system was so busy othering them that it was not even stopping to notice. Stranger foster care was viewed as "safe," and relatives were viewed as unknown and therefore questionable, presumably "unsafe until proven otherwise."

Too many people working in the family regulation system think children are better off in stranger foster care rather than with relatives. This is despite the overwhelming research that children who have been removed from their parents do better when placed with their family. I wondered, is this how they see their family, or did they just see relatives caught up in the system as different as "those people."

When representing parents, so many opportunities could flow from relative placement. A placement with an auntie or a grandmother meant a place of love to a child—but also a home that was comfortably familiar, where they knew where the light switch was if they had to get up in the middle of the night. It was not foreign; it was connection. My parent client could breathe easier and focus on what they needed to do to get their child and not fear where their child was; this was especially true for clients who shared with me their traumatic and abusive experiences in foster care. Visitation would often be easier to address, potentially occurring in the more natural setting of a relative's home and occurring more frequently. Often the trajectory of the case could feel completely different, with me not worrying the case would morph into a parental alienation where we would battle the foster parents for a parent's constitutional right to have their children returned home. So many opportunities came from the relative placement that was often quashed right at the start when the court ordered foster care over the parent's objection. It felt like basic family connectedness and what was truly in a child's best interest was ignored regularly—like they weren't thinking of family the way I thought of mine.

Complexities and Historical Problems with Background Checks

One complex area where prospective relatives are judged and stopped from becoming



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a placement is when the state conducts background checks. Nationally, federal law requires states to conduct criminal history background checks and disqualify individuals from receiving foster care maintenance or adoption payments either permanently or for five years when someone is convicted of certain felonies. If states fail to do this, they lose federal reimbursement. This was passed as a part of the Adoption and Safe Families Act of 1997 (ASFA). Also, under federal law, child abuse and neglect (CA/N) records must be checked. Washington, like many states, has codified these under state law, requiring background checks for individuals wanting unsupervised access to children under the care of the Department of Children, Youth, and Families (DCYF). In Washington, relatives have historically had to undergo the same background checks as stranger foster parents regardless of whether they want to be licensed, adopt, or just be temporary placement for a child while their parent works to have their child returned to their care.

States can add more crimes to the required federal list, making it even harder for relatives to be placement due to criminal or CA/N history. Many states do. Some states permanently disqualify individuals convicted of a drug-related crime or assault or battery. These three crimes, when felonies, are actually five-year disqualifying crimes on the ASFA list; and when lesser charged, they aren't even a part of the federal ASFA list. I am sure to many people, this feels like we are assuring the safety of children, but to me, it feels like we are putting children's welfare at risk by prohibiting access to relatives who love them and could take care of them. Having these crimes be permanent disqualifiers says that no matter what someone has done since that conviction and no matter the child's relationship with their relative, it doesn't matter—the child will be better off without that relative, and it's alright they may lose the only familial connection available to them.

This is one of the many ways the ASFA and the family regulation system dismantle families and a place where the race of a family and the racism inherent in the system makes the risk of dismantling Black, Indigenous, and other People of Color (BIPOC) families larger. The systemic racism of over-policing in the

criminal legal system leads to disproportionate conviction rates for BIPOC individuals. The over-policing in the family regulation system also leads to disproportionate CA/N findings for BIPOC individuals. Both systems impact the lives of BIPOC relatives wishing to care for their family, leaving BIPOC children at risk of being placed at disproportionate rates in stranger foster care, the majority of whom are white.

In 2002, when I started representing parents in Tacoma, Washington, it was often a painful and traumatic struggle for parents, children, and relatives caught up in the family regulation system, even though, at the time, Washington had a statute that provided clear preferences for placing with relatives. And logistically, the convoluted and complex rules around background checks were frustrating and Orwellian. If a parent was lucky enough to have identified a relative within 24–48 hours of their child being taken from them, DCYF could do an emergent background check and receive results back within an hour. If the parent and the relative missed the window and the child was in a foster care home, it was no longer considered an emergent background check—meaning that a background check went through the regular process, which took weeks, if not months, to complete. That also meant the DCYF agency case worker had to object to the proposed relative placement under DCYF policy, even if the worker believed the best placement was with that relative. Even though state law allowed courts to place with relatives while the background check was pending, judges often refused to do so. If the background check results were delayed months out, the parent would often be left arguing to place with a relative was finally approved, but the DCYF worker would often argue the child was bonded to the foster parents and shouldn't be placed for example, with their grandmother (whom they had known their entire life).

I remember once having to argue to get a child placed with a relative who worked as a school bus driver (and therefore had already had a criminal history check for her job). The relative came to the initial shelter care hearing willing to be a placement. However, the emergent placement window had already ended before I was even assigned to the case. The caseworker objected to the relative

being the placement. It felt untenable that this relative who knew this child and family, who cared for other people's children for a living, this person who already had a background check, wasn't good enough. The caseworker argued it wasn't a background check for this purpose, "So we just don't know, do we?" and "We have to confirm they haven't committed a crime since they got that other background check." I have no doubt, that every day, family defenders face similar questions from agency caseworkers and make similar pleas to courts to place children with their family, with children's wellbeing in the balance.

Back when I was doing direct representation, Washington State's disqualifying list included additional crimes not on the ASFA list and having no impact on child safety, like forgery, malicious mischief, and theft (both felony and gross misdemeanor). Additionally, a founded CA/N neglect finding was a permanent disqualifier. And under the old policy, the caseworker had to look at all criminal and civil infraction history, not just what was on the list. The line caseworker assigned to a dependency might have no experience reading a criminal history and might not know anyone convicted of a crime before. This caseworker was left to judge whether a relative's background was "approved" or whether they wanted to ask the court to keep the child with a "safe" foster parent who was a stranger.

Caseworkers were left to decide whether a crime impacted child safety. They would sometimes demand relatives track down old court records, sometimes from other counties or states. Some of the records were so old they were no longer in existence, putting the background check in limbo. If the caseworker wanted to, they could seek administrative approval to overrule some crimes on the list. But that was only if the caseworker wanted to start the process, and it could require multiple approval levels above the line caseworker. Relatives with any criminal, civil infraction or CA/N history were swimming upstream. Convincing the court to take what the court often perceived as a risk on a relative rather than the "safety" of a foster care placement felt like an uphill battle.

It felt like parents, children, and families were in a lottery system. Did the DCYF caseworker

understand the importance of and want to support family connection? Was the caseworker trained that research showed children had better outcomes in relative care rather than stranger foster care? Would the caseworker meet the parent and relative where they were at? What if the parent whose child was just removed was angry at the worker, or what if the relative didn't trust the worker—would the caseworker get that those were understandable responses? Would the caseworker come with their own preconceived notions about what criminal or CA/N history must mean based on their own experiences, presuming foster care was better? Would the background check be delayed for weeks or months with no explanation offered? Would the prospective relative even be given a chance? Would the child be given a chance?

When I moved from direct representation of parents to supporting a statewide system managing parent representation, I brought my concerns around background checks with me and realized others in Washington State were also concerned. The Washington State Parent Ally Committee (WSPAC), a majority of whom were former parents with lived experience in the system, started sharing the problems they were still having with background checks. Even though they had changed their lives, had their dependency cases dismissed, and now mentored parents going through the family regulation system, their criminal histories and CA/N findings labeled them like a scarlet letter. Sometimes they were barred from certain jobs or volunteer work with unsupervised children or they were not able to be relative placement. The motto of the WSPAC is "People Change, Families Reunite" but the family regulation system refused to see the change. At the 2008 Washington State Birth Parent Conveying organized by Children's Home Society of Washington and the WSPAC, there was a call to push state leaders to revisit background checks policy.

Changes Over Time

There have been many calls from communities and advocates since that time, and there have been changes in Washington since then that attempt to make background check requirements less harmful on relatives.

DCYF now has a separate unit responsible for conducting background checks. They are trained to understand how to read criminal history and look for trends in criminality but are also knowledgeable that people can change and that people can be unfairly judged. Rather than leaving it to a caseworker's discretion whether to request administrative approval for a crime or CA/N finding like before, all crimes that are eligible and all CA/N findings are assessed for administrative approval. Line caseworkers are prohibited from making secondary assessments under DCYF policy, meaning if someone is cleared by the background checks unit, their criminal history should not be used by the caseworker to object to the placement. Our agency and family defenders can contact the background checks unit lead if we hear of problems with background checks like someone failing when we believe they should have been cleared. We also now participate along with other advocates and our state Child and Family Ombudsman's Office in a standing monthly meeting with the background checks unit lead to work through issues we are seeing and think through ways to refine the background checks process.

In 2014, State law was amended to limit crimes and civil infractions on the DCYF disqualifying list to only ASFA crimes or a crime or civil finding involving child safety, permanency, or well-being. Crimes like theft were removed from the background checks list, and all the permanent disqualifiers on our current state list are federally required. In 2020, a state law passed requiring DCYF to develop a system for individuals with a CA/N finding to request a Certificate of Parental Approval (CPI). If someone has received a CPI, the previous CA/N finding cannot be used as the sole basis to disqualify that individual. And for those without CPIs, a CA/N finding is no longer a permanent disqualifier in Washington State.

DCYF changed its policy and expanded the time a relative can be assessed for an emergent background check for up to seven days rather than the old window of 24–48 hours. This gives parents more time to identify the best placement for their child and to access a background check process where someone could be cleared within an hour's time.

Last year, legislation passed that allows for child-specific foster care licenses. The background checks unit now has the authority to approve an individual's criminal history, knowing it is for a specific relative foster care placement when they might have been hesitant to clear a person for a full foster care license. Child-specific foster care licenses will allow relatives to access funding and benefits that can strengthen and support those placements.

The Parents Representation Program provides technical assistance to family defenders to help them understand the technicalities of Washington State's background checks law and policy. We also provide access to funds and encourage the use of independent experts, such as forensic social worker experts to complete private home studies and testify when DCYF is objecting to relative placement, including due to criminal history or due to the check not being completed.

Ongoing Problems

While progress has been made, there is still more to be done in Washington to speed up criminal and CA/N history checks and to address the bias and racism inherent in those checks. There is no system to allow for portable background checks so that if an individual is criminal history cleared for one purpose, they could get cleared for things like relative placement at the same time, which would eliminate future wait time for prospective relative placements. We hear regularly that prospective relatives are discouraged by a trial-level caseworker from even starting the background process by telling a relative they won't pass and it's "a waste of time" because they have criminal or CA/N history. DCYF caseworkers can even stop the referral for the background check from even happening. For example, in a recent case, a caseworker refused to refer for the background check unit and said they were objecting to the placement because the relative has a good relationship with the parent. Under DCYF policy, caseworkers are still required to object to relative placements when the background check is still pending, or a relative has a disqualifier. Children are still being placed in stranger foster care where there is an available relative stepping forward to care for them.



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A Washington State Supreme Court case has some examples of ongoing problems with background checks. In the unanimous decision, the Court found the trial court abused its discretion in refusing a Black child's request to be placed back with his relatives. One of the relatives, Grandma B., had a job that required her to have a background check, but she still had to go through the process again. A private home study was done of Grandma B. after DCYF refused to conduct a home study because another a home study was being completed for relative Aunt H.; this led to a private home study being completed on Grandma B. However, both DCYF and the Court Approved Special Advocate objected to the private home study on Grandma B., and the trial court said it was inadequate but refused to explain why. Another relative was discouraged from applying for a background check due to a criminal history. The decision notes relatives must be given a meaningful

preference in dependency cases. They also noted child protection service and criminal history can serve as proxies for class and race, stating:

"We know that like all human beings, judges and social workers hold biases, and we know that families of Color are disproportionately impacted by child welfare proceedings. Therefore, actors in child welfare proceedings must be vigilant in preventing bias from interfering in their decision-making. Factors that serve as proxies for race cannot be used to deny placement with relatives with whom the child has a relationship and is comfortable."¹

Parents' attorneys continue to reach out to our agency to provide technical assistance around

¹ *Matter of Dependency of K.W.*, 199 Wash.2d 131, 156 (2022).

background checks and relative placement. Private home studies have now become one of the most common experts our agency funds. But we can only support parents' attorneys on background check problems who ask for technical assistance. I worry about parents' attorneys' gatekeeping; I worry about implicit racial bias and parents' attorneys giving up on a prospective relative when DCYF objects.² What if the parent attorney does not fully understand the background check policy? What if they don't ask for expert funds for private home studies and disregard the importance of a relative placement in the life of a child? I worry about gatekeeping because I was one of those attorneys. I remember telling a Black father that I needed another proposed relative to offer the court because his mother had a founded for CA/N, and that was a permanent disqualifier under DCYF's policy. I wish I could go back and call myself on my own racism, encourage myself to get a private home study, share my client's family with the judge, and demand that the court consider my client's wishes. I wasn't seeing this grandmother like I saw my own and was allowing an arbitrary policy to make it more likely a Black child would end up in stranger foster care.

We Need Data to Address Unanswered Questions

DCYF acknowledges that they need to be focused on racial equity and addressing disproportionality and disparate outcomes for BIPOC children and families. A number of the background check changes that are described in this piece were intended by DCYF to impact racial disproportionality.

DCYF's March 4, 2020 press release for the new Secretary's List of Crimes and Negative Actions notes: "[t]he updated list has a less restrictive lens that creates opportunities for more individuals to have a second chance through individualized consideration. This reduces the number of automatic disqualifiers, reduces racial inequities and improves outcomes for children."³

When DCYF announced the new Certificate of Parental Improvement (CPI) Program, it stated "DCYF, in collaboration with stakeholders, aims to create a CPI process that:

- Reduces disproportional impacts of founded findings.
- Meets the best interests of children, youth, and vulnerable adults in these programs.
- Ensures consistency and recognizes unique circumstances and changed behavior."⁴

But I don't know if the reforms to background checks are making a difference and addressing racial disproportionality. And I don't know if DCYF knows either. At critical decisions, when relative steps forward, what are the checks to make sure they are truly being considered? If relatives are failing background checks, why are they failing? If they are passing background checks, what happens then—are they actually becoming the placement? Is DCYF conducting internal audits to mitigate bias at each decision point? Is racial disproportionality still showing up—has it increased?⁵

As DCYF notes on its website, one of its priorities is to "[p]ay attention to data about outcomes for children, youth, and families consistently...Use both quantifiable data and individuals' stories and experience to inform our actions and provide accountability." We need DCYF to gather data, and we need them to make it publicly available. DCYF needs to

² See Richardson, L. Song & Goff, Phillip Atiba. "Implicit Racial Bias in Public Defender Triage." *The Yale Law Journal*, vol.122 no.1, 2012, pp.2626-2649, https://www.yalelawjournal.org/pdf/1199_pzeey4t1.pdf. Accessed 31 August 2022.

³ DCYF Releases Revised Secretary's List. Washington State Department of Children, Youth & Families. 4 March 2020, <https://dcyf.wa.gov/news/dcyf-releases-revised-secretarys-list>. Accessed 31 August 2022.

⁴ DCYF Program Addresses Disproportionality. Washington State Department of Children, Youth & Families. 27 January 2021, <https://content.govdelivery.com/accounts/WADEL/bulletins/2bd42a4>. Accessed 31 August 2022.

⁵ For example, see OJJDP's website noting that while youth arrests have declined for all race groups, the disparity in arrest rates between white youth and Black Youth (as well as Indigenous Youth) has increased in recent years. *OJJDP Statistical Briefing Book: Racial and Ethnic Fairness*. U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. 24 June 2022, https://www.ojjdp.gov/ojstatbb/special_topics/qa11502.asp?qaDate=2020. Accessed 31 August 2022.

set goals and have a plan for addressing where racial disproportionality persists.⁶

We Need a Federal Fix

The federal criminal disqualifier list is another harm caused by ASFA. Allowing states to add on lesser crimes and CA/N history, potentially as a permanent disqualifier, creates additional layers of harm. I know that people can learn from past mistakes, and I know that people can age out of crime. We need a system that takes this into account. In the name of child

safety, we are harming children through this background process that was federally created, especially BIPOC children. It needs to stop.

⁶ *Racial Equity, Diversity and Inclusion*. Washington State Department of Children, Youth & Families. <https://www.dcyf.wa.gov/practice/racial-equity-diversity-inclusion>. Accessed 31 August 2022.

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