

RESURRECTING PARENTS OF LEGAL ORPHANS:  
UN-TERMINATING PARENTAL RIGHTS

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I met Roberta Green<sup>1</sup> in 1998 when I was a student attorney with the Family Defense Clinic at New York University School of Law. Ms. Green contacted our clinic seeking an attorney to challenge the state's termination of her parental rights. Like many parents in her situation, Ms. Green wished to prove she was capable of being a parent to her son. Unlike many parents in her situation, however, she was drug-free, gainfully employed, and had stable housing. In addition, Ms. Green's teenage son opposed the termination and was currently living with her. Without any assistance from the state, she had been providing for him for nearly two years.

Based on these facts, any state would have had difficulty terminating her parental rights. However, Ms. Green was not seeking legal assistance to defend against the termination. She wanted an attorney to restore the rights that had been taken from her nearly ten years prior. Ms. Green, now thirty-nine years old, wanted the state to recognize that she was both the biological and legal parent to her nineteen-year-old son.

Ms. Green is one of a growing number of parents who do not allow the finality of the court's termination order to discourage them from rehabilitating and seeking reunification with their children. Many of these parents have maintained relationships with their children even after the state has determined that they are not fit to parent them. As in Ms. Green's case, most must wait until the child exits foster care without a permanent home before they can resume parenting. Most states do not provide a means for them to restore their parental rights; however, when given the opportunity, many parents like Ms. Green can prove that they have overcome the barriers that led to the termination, and that it is in the best interest of their children for them to be "resurrected."

#### INTRODUCTION

Despite federal and state legislation that encourage the termination of parental rights when a child has remained in foster care for a specified period of time,<sup>2</sup> studies indicate that relationships with their biological

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<sup>1</sup> Name has been changed.

<sup>2</sup> Two major pieces of federal foster care legislation, the Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272 (1980) ("AACWA") and the Adoption and Safe Families Act, Pub. L. No. 105-89 (1997) ("ASFA") were

parents (and other relatives) remain important to children in foster care.<sup>3</sup> Especially for children whose parents' parental rights have been terminated, the connection with their biological parent remains central to their development and these children make efforts to maintain that connection.<sup>4</sup> Once it becomes clear that the purpose for terminating the parental rights (i.e., freeing the child for adoption) will not be served, in an increasing number of cases, the state child-placing agency, parent, or the child has approached the court asking that the legal relationship between the parent and child be reinstated.<sup>5</sup>

Those efforts to recognize the importance of the parent-child relationship and the legal significance of that relationship have manifested themselves in state legislation that allows specific individuals

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enacted to ensure that children who cannot return to their family or extended family do not remain in long-term foster care. Under ASFA, states must file a petition to terminate parental rights and concurrently, identify, recruit, process and approve a qualified adoptive family on behalf of any child, regardless of age, that has been in foster care for 15 out of the most recent 22 months. Exceptions can be made to these requirements if: (1) at the state's option, a child is being cared for by a relative; (2) the state agency documents, in the case plan which is available for court review, a compelling reason why filing is not in the best interest of the child; or (3) the state agency has not provided to the child's family, consistent with the time period in the case plan, the services deemed necessary to return the child to a safe home. ASFA § 103.

<sup>3</sup> See MARK COURTNEY ET AL., EXECUTIVE SUMMARY, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 21, 3 (2007). ("Midwest Study") (finding that almost all of "aged out" foster youth in their sample maintained at least some family ties). The prospective study was designed to provide a comprehensive picture of how foster youth made the transition to adulthood. No distinctions were made between legal orphans and those who "aged out" of the foster care system with legal parents. Ninety-four percent of those studied reported feeling somewhat or very close to at least one biological family member. *Id.* Eighty-three percent reported having contact with one or more biological family members at least once a week. *Id.* See Mary E. Collins, Ruth Paris & Rolanda L. Ward, *The Permanence of Family Ties: Implications for Youth Transitioning From Foster Care*, 78(1) AM. J. ORTHOPSYCHIATRY 54 (2008) (providing an overview of recent study findings of former foster youth living with family after care); Katharine Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 905 (1984).

<sup>4</sup> Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L. Q. 233, 237 (1986).

<sup>5</sup> See Patrick Parkinson, *Child Protection, Permanency Planning and Children's Right to Family Life*, 17 INT'L J.L. POL'Y & FAM. 147, 159 (2003) (noting that being 'freed' for adoption, but 'not chosen' is one of the worst possible outcomes for children because it in limbo and is likely to undermine any sense of permanence or security for these children).

to petition the court to reinstate parental rights.<sup>6</sup> Before such statutes were enacted and where no statute exists, parties have constructed legal theories that would allow the parent and child to enjoy some of the legal rights and responsibilities that they possessed prior to the termination.<sup>7</sup> The success of these latter efforts has been mixed, as courts have dealt with the tension of balancing the best interest of the child against public policy that weighs toward the finality of termination orders.<sup>8</sup>

Though the legal responses to parents' attempts to resuscitate parental rights vary, each attempts to respond to the lack of flexibility inherent in a permanent termination final judgment or order. The courts' lack of explicit statutory authority to modify termination orders when circumstances change has made individual responses necessary. Instead of enacting legislation to require a separate legal proceeding to vacate the order, this article recommends giving courts statutory authority and discretion to enter temporary termination of parental rights orders. These provisional orders would free the child for adoption for a limited time period but would also allow parental rights to be reinstated if the court subsequently determines that the child is no longer adoptable or that adoption is no longer in the child's best interest.

Recognizing the need for more uniform solutions to the problems created when a child loses legal rights to his or her biological parents without those rights being replaced through adoption, this article examines the efforts currently being made to address the increasing number of legal orphans<sup>9</sup> created each year. After recounting both state and individual initiatives, this article proposes that states enact legislation providing for a temporary termination of parental rights order ("TTPR") entered after a bifurcated hearing on the parent's fitness and the child's best interests.

Section I provides a brief overview of the Adoption and Safe Families Act, a federal law enacted in 1997, and its possible impact on the creation of legal orphans. Section II presents an overview of current state efforts to provide a mechanism by which parental rights may be reinstated. Section III explores court responses to individual requests to recreate parent-child relationships after termination of parental rights.

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<sup>6</sup> See *infra* Section II.

<sup>7</sup> See *infra* Section III.

<sup>8</sup> *Id.*

<sup>9</sup> 47 AM. JUR. 2D *Juvenile Courts, Etc.* § 63 (2008) (defining a "legal orphan" as a child whose parents' rights have been terminated, but has not yet been adopted). The term "legal orphan," in the sense in which it is used in this article, seems to have been originated by Professor Martin Guggenheim. See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care – An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995).

Section IV outlines arguments related to *res judicata* and equal protection that may be used by parents when the court denies standing. Finally, section V proposes a method of temporarily terminating parental rights which ensures that children do not exit the foster care system without legal parents. Further, this section discusses situations when the option may be most appropriate.

#### I. THE ADOPTIONS AND SAFE FAMILIES ACT MAY BE RESPONSIBLE FOR THE INCREASE IN THE NUMBER OF LEGAL ORPHANS

As of September 30, 2006, there were 510,000 children in the foster care system nationally.<sup>10</sup> The majority of children brought to the attention of the state protection agencies are victims of child neglect.<sup>11</sup> When it is deemed unsafe for a child to return to his or her home, he or she may be placed in foster care.<sup>12</sup> Foster care placement can be with a relative, in a group home or state facility, or with a licensed foster family.<sup>13</sup> While the children are in the foster care system, the state child protection agency is legally obligated to provide services to the child's family to support reunification.<sup>14</sup> When reunification is not possible, however, the state has a concurrent obligation to ensure the child's move towards a permanent living arrangement.<sup>15</sup> In most cases, permanency for these children means adoption.<sup>16</sup>

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<sup>10</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, AFCARS REPORT #14 (2008), *available at* [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report14.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.htm) [hereinafter AFCARS REPORT #14].

<sup>11</sup> During FY 2007, 59.0 percent of child victims experienced neglect, 10.8 percent were physically abused, 7.6 percent were sexually abused, 4.2 percent were psychologically maltreated, less than 1 percent were medically neglected, and 13.1 percent were victims of multiple maltreatments. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, CHILD MALTREATMENT 2007 (2007), *available at* <http://www.acf.hhs.gov/programs/cb/pubs/cm07/index.htm>.

<sup>12</sup> SUE BADEAU & SARAH GESIRIECH, A CHILD'S JOURNEY THROUGH THE CHILD WELFARE SYSTEM (2003), *available at* <http://pewfostercare.org/docs/index.php?DocID=24>.

<sup>13</sup> *Id.*

<sup>14</sup> *See* 42 U.S.C. § 671(a)(15)(B) (2009) (declaring that states reasonable efforts shall be made to preserve and reunify families unless the parent has committed a serious violent crime, such as murder).

<sup>15</sup> *See* 42 U.S.C. § 675 (E) (2009) (requiring that the state takes steps to free children who have been in foster care for 15 of the most recent 22 months for adoption, unless the child has been placed with a relative or there are other compelling reasons not to terminate parental rights).

<sup>16</sup> *See id.* (laying out the options for permanency including reunification with parents, adoption, or legal guardianship). Of the 510,000 children in foster care on September 30, 2006, 49% had a permanency goal of reunification and 23% had a goal of adoption. AFCARS REPORT #14, *supra* note 10.

## A. THE ADOPTION AND SAFE FAMILIES ACT OF 1997

The enactment of the federal Adoption Assistance and Child Welfare Act of 1980 signaled a change in federal policy impacting children and families in foster care. This legislation required states to focus on reunification and family preservation.<sup>17</sup> The law required states to make “reasonable efforts” prior to removing a child from his or her home and similar efforts to return the child after removal has occurred.<sup>18</sup> Critics questioned whether the law actually protected children and argued that it led to keeping children in unsafe homes or reunifying them with unfit parents.<sup>19</sup> After years of debate, the Adoption and Safe Families Act (ASFA)<sup>20</sup> was passed in an effort to address three general perceptions about the child welfare system at that time: children continued to remain too long in foster care; the child welfare system was biased toward family preservation at the expense of children’s safety and well-being; and inadequate attention and resources were devoted to adoption as a permanent placement option for abused and neglected children.<sup>21</sup>

The purpose of the 1997 law was to assist states with achieving permanency for children in foster care, either by reuniting them with their families or moving them more quickly to a permanent placement with another family.<sup>22</sup> When a child is placed in foster care, ASFA established strict timelines for the state to return children placed in foster care to their parents or to initiate parental rights termination proceedings so the child could be adopted. In order to remain eligible for federal

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<sup>17</sup> Cristina Chi-Young Chou, *Renewing The Good Intentions Of Foster Care: Enforcement Of The Adoption Assistance and Child Welfare Act Of 1980 And The Substantive Due Process Right to Safety*, 46 VAND. L. REV. 683, 689 (1993).

<sup>18</sup> AACWA § 101.

<sup>19</sup> See Jill Sheldon, *50,000 Children are Waiting, Permanency, Planning and Termination of Parental Rights under the Adoption Assistance and Child Welfare Act of 1980*, 17 B.C. THIRD WORLD L.J. 73, 83-85 (detailing two tragic stories of children who experienced violence at the hands of their biological parents after they were reunited with their families).

<sup>20</sup> AFSA was signed into law by President Bill Clinton on November 19, 1997.

<sup>21</sup> KASIA O’NEILL MURRAY & SARAH GESIRIECH, PEW COMM’N ON CHILDREN IN WELFARE, A BRIEF LEGISLATIVE HISTORY OF THE CHILD WELFARE SYSTEM 5 (2004), available at [http://www.pewtrusts.org/our\\_work\\_report\\_detail.aspx?id=48994](http://www.pewtrusts.org/our_work_report_detail.aspx?id=48994).

<sup>22</sup> Two ways in which AFSA attempted to expedite permanent placement of children were by eliminating the “reasonable efforts” for reunification requirement in circumstances where there were aggravating factors inhibiting the reunion of parent and child, such as murder and by promoting concurrent planning where attempts at reunification proceed alongside attempts to find an adoptive family. See Patrick Parkinson, *Child Protection, Permanency Planning, and Children’s Right to Family Life*, 17 INT’L J.L. POL’Y & FAM. 147, 154-55 (2003).

funding, each state must include these provisions in their plan for foster care and adoption assistance.<sup>23</sup>

#### B. TERMINATION OF PARENTAL RIGHTS

The right of parents to raise their children is fundamental.<sup>24</sup> However, the *parens patriae* authority of the state enables it to intervene to protect children.<sup>25</sup> When a child is removed from his or her home due to abuse and/or neglect and cannot return, every state provides by statute a mechanism for the involuntary termination of parental rights.<sup>26</sup> The termination case is initiated, “not to punish parents who fail to meet their obligations to the child, but to protect the child and her interests.”<sup>27</sup> To do so, the state<sup>28</sup> must file a petition setting forth the grounds for the termination<sup>29</sup> and a hearing must be held.<sup>30</sup> Termination is granted only if

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<sup>23</sup> See 42 U.S.C. § 671. Federal law also states that the provisions should not be construed to preclude state courts from exercising their discretion to protect the health and safety of children in individual cases. See 42 U.S.C. § 678.

<sup>24</sup> See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that a statute excluding an unwed father from the definition of parent and denying him a parental fitness hearing upon the death of the child’s mother was a violation of the father’s due process rights).

<sup>25</sup> See *Schall v. Martin*, 467 U.S. 253, 265 (1984).

<sup>26</sup> See CHILD WELFARE INFORMATION GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1 (2007), available at [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/groundtermin.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.cfm). See also Jenina Mella, *Termination of Parental Rights Based on Abuse or Neglect*, 9 CAUSES OF ACTION 2d 483 §2 (2007) (asserting that actions for the termination of parental rights in the context of abuse, neglect, or dependency proceedings are the centerpiece of the child welfare adjudication system).

<sup>27</sup> *C.A. v. Dep’t of Child. and Families*, 16 So.3d 888, 889 (Fla. Dist. Ct. App. 2009).

<sup>28</sup> In most states only the state has standing to seek termination of parental rights; however, some states grant standing to individuals, including the parent, guardian *ad litem* and those seeking to adopt the child. See, e.g., *DKM v. RJS*, 924 P.2d 985 (Wyo. 1996) (terminating father’s parental rights upon application of mother); *Stanley v. Fairfax County Dep’t of Soc. Servs.*, 405 S.E.2d 621, 622-23 (Va. 1991) (holding that guardian *ad litem* of children had standing to petition for termination of residual rights of parents). But see *In re Kingsley*, 623 So.2d 780, 783 (Fla. Dist. Ct. App. 1993) (holding that a minor child did not have capacity to bring termination proceeding in his own right); Christina Dugger Sommer, *Empowering Children: Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings*, 79 CORNELL L. REV. 1200 (1994).

<sup>29</sup> The grounds for involuntary termination of parental rights are specific circumstances under which the child cannot safely be returned home because of risk of harm by the parent or the inability of the parent to provide for the child’s basic needs. Each state is responsible for establishing its own statutory grounds, and these vary by state.

<sup>30</sup> See *Stanley*, 405 U.S. at 649.

it is proven by at least clear and convincing evidence<sup>31</sup> that the parent is “unfit” and that terminating parental rights is in the child’s best interest.

The factors that the court considers when deciding whether to grant the petition vary from state to state.<sup>32</sup> Generally, however, courts consider the nature of the original abuse/neglect report and continued risk; the mental status of the parent; the degree of parental compliance with the service plans and the consistency with which the parents visit the child.<sup>33</sup> In most cases, parents have little chance of successfully defending against termination,<sup>34</sup> even when they have an attorney (which is not constitutionally required in every case).<sup>35</sup>

Terminating parental rights does not guarantee that the child will be adopted.<sup>36</sup> Thus, it is impossible for the state to prove conclusively that the termination will achieve its intended purpose. When it does not, children are left in legal limbo and are likely to experience post-termination changes in placement.<sup>37</sup> Further, one recent study found that

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<sup>31</sup> Santosky v. Kramer, 455 U.S. 745, 769 (1982).

<sup>32</sup> *Id.* (establishing procedural guidelines for termination of parental rights proceedings; however, it provided no guidance for substantive standards). The Court noted that “[p]ermanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge.” *Id.* at 762.

<sup>33</sup> See CHILD WELFARE INFORMATION GATEWAY, *supra* note 26, at 2; Eve M. Brank et al., *Parental Compliance: Its Role in Termination of Parental Rights Cases*, 80 NEBRASKA L. REV. 343-45 (2001).

<sup>34</sup> A study of the outcome of termination of parental rights hearings in New York City in 2008 revealed that 59.5% of proceedings resulted in a termination. KIDS’ WELL-BEING INDICATORS CLEARINGHOUSE, KWIC INDICATORS AND NARRATIVE FOR FOSTER CARE – TERMINATED PARENTAL RIGHTS JUDGMENTS, [http://www.nyskwic.org/u\\_indicators/indicator\\_narrative.cfm?numIndicatorID=38](http://www.nyskwic.org/u_indicators/indicator_narrative.cfm?numIndicatorID=38) (last visited Nov. 23, 2009). In FY 2006, 79,000 children in foster had their parental rights terminated for all living parents. AFCARS REPORT #14, *supra* note 10, at 6. In FY 2005, parents of 66,000 children had their rights terminated. U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN’S BUREAU, THE AFCARS REPORT #13 6 (2006) [hereinafter AFCARS REPORT #13]. In FY 2002, 67,000; in FY 2001, 66,000; in FY 2000, 73,000; in FY 1999, 72,000; and in FY 1998, 60,000. U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN’S BUREAU, THE AFCARS REPORT #12 11 (2006) [hereinafter AFCARS REPORT #12].

<sup>35</sup> See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31-32 (1981).

<sup>36</sup> See PARKINSON *supra*, note 22 at 159 (expressing concern over the number of children in the United States who have had parental rights terminated, but have not found alternative families to provide long term care).

<sup>37</sup> Gretta Cushing & Sarah B. Greenblatt, *Vulnerability to Foster Care Drift after the Termination of Parental Rights*, 19 RES. SOC. WORK PRAC. 694, 698

for each year that a child spent in foster care after termination of parental rights, the likelihood of adoption was reduced by 80%.<sup>38</sup>

### C. LEGAL ORPHANS

It is difficult to determine the number of legal orphans in the United States. In 1999, one source estimated that there were between 40,000 and 80,000 children who had been freed for adoption but had not yet been adopted nationwide.<sup>39</sup> Another source approximated that there were 5,970 legal orphans created in 1997 and 24,219 in 1999.<sup>40</sup> The U.S. Department of Health and Human Services estimates that on September 30, 2006, there were 129,000 children waiting to be adopted.<sup>41</sup> This latter figure includes children who have a goal of adoption and/or whose parental rights have been terminated. It does not, however, include children sixteen years old and older whose parental rights have been terminated and who have a permanency goal of emancipation. Thus, this estimate is both over- and under-inclusive.

While studies have not provided accurate numbers, they have concluded that the absence of a legal parent has negative social,

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(2009) (finding that only 30% of children who were not adopted by family that they lived with prior to termination remained in that home).

<sup>38</sup> *Id.* In that study, permanency goal changes were experienced by 29% of the children who had not been adopted. 8% had a goal change to independent living, 15% had a goal change to long-term foster care, 1% had a goal change to subsidized guardianship, less than 1% had a goal change to reunification and 2% had a goal change to "other" with indication that transfer to a long-term care facility was planned. As of September 30, 2006, a median of 13.0 months (mean: 24.9) had elapsed since termination of parental rights. AFCARS REPORT #14, *supra* note 10, at 6. From FYs 1998-2005, the median was 12.8, 12.0, 13.5, 14.8, 15.7, and 15.3 months, respectively. AFCARS REPORT #12, *supra* note 34, at 11; AFCARS REPORT #13, *supra* note 34, at 6.

<sup>39</sup> Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care - An Empirical Analysis in Two States*, 29 FAM. L. Q. 121, 140 (1995) (extrapolating on data from Michigan and New York).

<sup>40</sup> Barbara W. Stack, *Law to Increase Adoptions Results in More Orphans*, PITTSBURGH POST-GAZETTE, Jan. 3, 2005.

<sup>41</sup> AFCARS REPORT #14, *supra* note 10. The number of children who fall within the specified categories is counted each year on September 30th. In FY 1998 there were 125,000; FY 1999 there were 130,000; FY 2000 there were 131,000; FY 2001 there were 129,000; FY 2002 there were 124,000. AFCARS REPORT #12, *supra* note 35. In FY 2003 there were 120,000. U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT #10. In FY 2004 there were 118,000. U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT #11. In FY 2005 there were 114,000. AFCARS REPORT #13, *supra* note 34.

emotional, and financial effects.<sup>42</sup> The loss of the legal relationship can mean a loss of the physical and emotional relationship between the parent and child.<sup>43</sup> When parental rights are terminated, the biological parents usually lack standing to request continued visitation with their children,<sup>44</sup> even if no adoption is pending. Thus, legal orphans can lose the connection to their biological parent that is important to their social and emotional development.<sup>45</sup> Although it is arguable that every child whose parents' rights are terminated experiences a similar loss, the effects are magnified when the connection is not replaced through adoption.<sup>46</sup>

In addition to the social and emotional consequence of losing their parents, laws require many legal orphans to forfeit continued financial assistance from their biological parents.<sup>47</sup> While states differ on the issue

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<sup>42</sup> See sources cited *supra* note 3.

<sup>43</sup> *Id.*

<sup>44</sup> See discussion *infra* Section (V)(b)(i) of this article.

<sup>45</sup> There is a connection between loss due to foster care placement, termination of parental rights and negative behaviors in children. "Children who experience such losses may be particularly vulnerable to angry behavior and disrespect toward adults and are at risk of falling into a cycle of negative behavior and weakened connections with adults." MARCY VIBOCH, CHILDHOOD LOSS AND BEHAVIORAL PROBLEMS: LOOSENING THE LINKS 1, 5 (Dec. 1, 2005), available at <http://www.vera.org/content/childhood-loss-and-behavioral-problems-loosening-links> (citing Francine Cournois, *The Trauma of Profound Childhood Loss: A Personal and Professional Perspective*, 73 PSYCHIATRIC Q. 145 (2002)). Studies further reveal that ties to extended family are integral to the development of cultural and personal identity as well as emotional well-being. Rita S. Eagle, *The Separation Experience of Children in Long Term Care: Theory, Research, and Implications for Practice*, 64 AMER. J. ORTHOPSYCHIATRY 421 (Jul. 1994).

<sup>46</sup> When a child is adopted, he or she becomes the legal child of the adoptive parent. 2 AM. JUR. 2D *Adoption* § 170 (2009) ("The effect of the adoption decree is to transfer to the adoptive parent all legal rights, duties, and consequences of the parental relationship; accordingly, the adoption decree transfers the right to custody of the child, the right to control the child's education, the duty of obedience owing by the child, and all other legal consequences and incidents of the natural relation in the same manner as if the child had been born of such adoptive parents in lawful wedlock.").

<sup>47</sup> See Richard L. Brown, *Disinheriting the Legal Orphan: Inheritance Rights of Children After Termination of Parental Rights*, 70 MO. L. REV. 125, 175 (2005) (noting that in some states, termination of parental rights statutes expressly provide that the right of the child to inherit from the biological parent survives termination; other state statutes extinguish the inheritance of the child. However, many state termination statutes make no specific reference to inheritance rights). Robert Schoeni & Karen Ross, *Family Support during the Transition to Adulthood*, 12 NETWORK ON TRANSITIONS TO ADULTHOOD POLICY BRIEF, (Oct. 2004), available at <http://www.transad.pop.upenn.edu/downloads/chap%2012-formatted.pdf> (estimating that parents provide their young

of whether parents have a continuing obligation to support the child after their rights have been terminated,<sup>48</sup> in a significant number of states termination of parental rights results in the loss of the child's right to inherit from his biological parents intestate.<sup>49</sup>

Not surprisingly, children who age out of the foster care system without permanent homes or legal connections experience dire outcomes<sup>50</sup> in an array of well-being indicators, including homelessness,<sup>51</sup> criminal involvement,<sup>52</sup> mental and physical health,<sup>53</sup>

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adult children with assistance totaling approximately \$38,000 between the ages of 18 and 34).

<sup>48</sup> See *M.D.C. v. K.D.*, --So.2d--, 2008 WL 3582689 (Ala. Civ. App. 2008)(providing overview of state case law deciding whether a parent's obligation to pay child support ends when parental rights are terminated).

<sup>49</sup> See *BROWN*, *supra* note 47.

<sup>50</sup> Mark Courtney, *The Difficult Transition to Adulthood for Foster Youth in the US: Implications for the State as Corporate Parent*, 23 *SOCIAL POLICY REPORT* 3 (2009) (providing a complete survey of research on children transitioning from the foster care system).

<sup>51</sup> In New York City, the Department of Homeless Services estimated that 23% of children who age out of foster care enter homeless shelters. William Scarborough & Michelle Titus, Notice of Public Hearing on the Needs of Youth Aging out of Foster Care, Assembly Standing Committee on Children and Families, Assembly Subcommittee on Foster Care, York College, 1 (Dec. 14, 2007). In another sample, 80% of homeless youth did not earn enough to be self-supporting four years after aging out, with 50% unemployed, and 25% experiencing homelessness. Ronna Cook, et al., Westat, Inc., *A National Evaluation of Title IV-E Foster Care Independent Living Programs for Youth*, 14 (1991).

<sup>52</sup> Mark Courtney, et al., *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, 80 *CHILD WELFARE* 685 (Nov. 2001). Twenty-five percent of males who aged out without a permanent placement had been incarcerated at least once in a six month period within 12-18 months after leaving custody. *MIDWEST STUDY*, *supra* note 3, at 65-68. Twenty-four percent of males in the sample were arrested within a year of aging out. Richard Barth, *On Their Own: The Experiences of Youth After Foster Care*, 7 *CHILD & ADOLESCENT SOC. WORK J.* 419 (Oct. 1990) (35% of California youths aging out were arrested or convicted).

<sup>53</sup> The Illinois Child Well-Being Study, a longitudinal analysis of 400 children, found clinical and borderline levels of behavior and mental health diagnoses associated with lack of exit to permanency and found the rate of posttraumatic stress disorder (PTSD) at 25%. The Midwest study sample of children that did not exit to permanency found that the majority were without health insurance and that 15% had developed a mental health or substance disorder after the first year of aging out. *MIDWEST STUDY*, *supra* note 3, at 44-45. Over two-fifths of former foster children who had aged out scored highly on a depression scale. DIANA BRANFORD & CAROL ENGLISH, *FOSTER YOUTH TRANSITION TO INDEPENDENCE STUDY*, (2004), at 26, available at [http://www.dshs.wa.gov/pdf/ca/FYTRpt\\_2.pdf](http://www.dshs.wa.gov/pdf/ca/FYTRpt_2.pdf).

education level,<sup>54</sup> and reliance on public assistance.<sup>55</sup> These problems are particularly acute for the legal orphans who are not adopted and who exit the foster care system through emancipation at the age of 18 or 21.<sup>56</sup> Without the support of a family, they are on their own to access needed services. Because these young adults have high instances of poverty, unemployment and homelessness,<sup>57</sup> depriving them of child support, inheritance and familial support is particularly problematic.

In his article *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care – An Empirical Analysis in Two States*, Professor Martin Guggenheim suggested two proposals to change the way termination proceedings are conducted in most states.<sup>58</sup> The first concerned the bases upon which termination orders are entered, and the second concerned the reviewability of termination orders when it becomes clear that the children freed for adoption will not be adopted.<sup>59</sup> Professor Guggenheim urged state legislatures to develop a mechanism by which courts could review parental rights termination orders after one year.<sup>60</sup> Under this

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<sup>54</sup> In a 2001 study of individuals who had aged out of care within the prior two to four years, only about 50% of the sample had completed high school or received a GED. KIMBERLEY NOLLAN & CHRIS DOWNS, PREPARING YOUTH FOR LONG-TERM SUCCESS – PROCEEDINGS FROM THE CASEY FAMILY PROGRAM NATIONAL INDEPENDENT LIVING FORUM 28 (2001). In a 1998 study, only 9% of the study sample of who had aged out had entered college. COURTNEY, *Foster Youth Transitions*, *supra* note 52, at 685-717. A 2005 study found that children exiting to permanency were twice as likely to have a high school diploma or GED as their age group peers who had not reached permanency. Midwest Study, *supra* note 3, at 26-27.

<sup>55</sup> Of the 2001 sample, under half of the approximately 600 individuals studied maintained stable employment after aging out. NOLLAN & DOWNS, PREPARING YOUTH FOR LONG-TERM SUCCESS, *supra* note 54, at 28.

<sup>56</sup> Each year, an estimated 20,000 youth transition out of foster care in the United States. Most states emancipate foster children at the age of eighteen; however, a growing number of states allow children to remain in foster care until age twenty-one. Mark E. Courtney, *Youth Aging Out of Foster Care*, Policy Brief, 19 NETWORK ON TRANSITIONS TO ADULTHOOD 1-2 (Apr. 2005), available at <http://www.transad.pop.upenn.edu/downloads/courtney--foster%20care.pdf>.

<sup>57</sup> See MIDWEST STUDY, *supra* note 3.

<sup>58</sup> Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care – An Empirical Analysis in Two States*, 29 FAM. L. Q. 121, 134-35 (1995).

<sup>59</sup> *Id.* In her article, entitled *50,000 Children are Waiting: Permanency, Planning and Termination of Parental Rights under the Adoption Assistance and Child Welfare Act of 1980* 17 B.C. THIRD WORLD L.J. 73, 82 (Winter, 1997), Jill Sheldon opined that the proposal would create greater confusion and uncertainty in the life of a child.

<sup>60</sup> GUGGENHEIM, *supra* note 58, at 137.

proposal, courts would be empowered to revoke the termination order and restore parental rights if deemed in the child's best interest.<sup>61</sup>

Other solutions to address the issue that have been proposed include: (1) establishing a higher threshold before terminating rights, whereby the court would require that the child had been successfully placed in an adoption home for a specified period, that the adoptive home study had been approved, or that the adoptive placement paper had been signed;<sup>62</sup> (2) making the termination of parental rights (TPR) order interlocutory;<sup>63</sup> and (3) setting aside the TPR order if the child is not adopted.<sup>64</sup> Furthermore, while not created to address the issues related to legal orphans, New York statute authorizes the court to suspend termination of parental rights judgments for no more than two years when in the child's best interest.<sup>65</sup> "The Legislature created the option of a suspended judgment in a parental rights termination proceeding so as to allow a brief grace period designed to prepare the parent to be reunited with the child should such a second chance be in the child's best interest."<sup>66</sup>

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<sup>61</sup> *Id.* at 137-38.

<sup>62</sup> Kirstin Andreasen, *Eliminating the Legal Orphan Problem*, 16 J. CONTEMP. LEGAL ISSUES 351, 353 (Fall 2003) (discussing the proposal without providing a source).

<sup>63</sup> Christopher Blake, *Legal Orphans: Courts, Legislature Must Make Sure Children Don't Get Lost in System*, L.A. DAILY J., Aug. 20, 2002, at 6.

<sup>64</sup> ANDREASEN, *supra* note 62, at 354.

<sup>65</sup> NY FAM CT § 633 (2006). The maximum duration of a suspended judgment is one year, unless the court finds at the conclusion of that period that exceptional circumstances require an extension of that period for one additional period of up to one year. Successive extensions may not be granted. §633(b).

Upon finding that the respondent has violated the terms and conditions of the order of suspended judgment, the court may enter an order revoking the order of suspended judgment and terminating the parental rights of the respondent or, where such extension is in the best interests of the child, extend the period of suspended judgment for an additional period of up to one year, if no prior extension has been granted.

§633(f). In 2007, only 7.2% of TPR proceedings in New York State resulted in the outcome of a suspended judgment, increasing from 5.6% in 2006. NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK STATE KIDS' WELL-BEING INDICATOR CLEARINGHOUSE, KWIC INDICATORS AND NARRATIVE FOR FOSTER CARE TERMINATED PARENTAL RIGHTS JUDGMENTS (2007), available at [http://www.nyskwic.org/access\\_data/ind\\_profile.cfm?subIndicatorID=85&indYear1=2007&go.x=8&go.y=4&go=Submit&indYear2=2006](http://www.nyskwic.org/access_data/ind_profile.cfm?subIndicatorID=85&indYear1=2007&go.x=8&go.y=4&go=Submit&indYear2=2006).

<sup>66</sup> *In re Joshua B.B.*, 27 A.D.3d, slip op. 867, 869 (N.Y. App. Div. 2006).

II. STATES HAVE BEGUN TO RECOGNIZE THE PROBLEMS FACED BY  
LEGAL ORPHANS AND ARE BEGINNING TO PROVIDE A STATUTORY  
MECHANISM BY WHICH PARENTAL RIGHTS MAY BE RESTORED

As of the writing of this article, at least ten states have enacted or are considering legislation that would allow parental rights to be restored when in the best interest of the child.<sup>67</sup> These efforts evidence recognition by states that the problems associated with legal orphans are increasing substantially and must be addressed on a systemic level. While these states should be commended for their efforts and other states should follow suit,<sup>68</sup> more needs to be done to ensure that children do not exit the foster care system without legal parents.

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<sup>67</sup> The states are Hawaii, California, Nevada, Washington, Louisiana, Oklahoma, Illinois, New York, Georgia and Minnesota. HAW. REV. STAT. §571-63; CAL. WELF. & INST. CODE § 366.26(i)(2); NEV. REV. STAT. ANN. § 128.160, 128.170; WASH. REV. CODE. ANN. § 13.34.215; LA. CHILD. CODE ANN. art. 1051; OKLA. STAT. ANN. tit. 10A, §1-4-909; 705 ILL. COMP. STAT. 405/2-28 (2010) and 705 ILL. COMP. STAT. 405/2-34 (2010); S.B. 8524, 2009 S., Reg. Sess. (N.Y. 2009); S.B. 292, 150th Gen. Assem., Reg. Sess. (Ga. 2009); H.R. 1462, 2009 Leg., 86th Sess. (Minn. 2009). In addition, Virginia law permits a “natural parent, whose parental rights to a child have been voluntarily relinquished . . . to seek reversal of the court order terminating his or her parental rights.” The petition may only be filed if the child has not been placed in the home of an adoptive parent. VA. CODE ANN. §16.1-241(K). *See also*, Segura v. Fairfax County Dep’t of Family Serv., No. 0858-07-4, 2008 WL 495503 at \*1 (Va. App., 2008) (upholding trial court decision dismissing mother’s petition as untimely where child had been placed in pre-adoptive home). Alaska law contains a similar provision, allowing:

[A] person who voluntarily relinquished parental rights to . . . request a review hearing, upon a showing of good cause, to vacate a termination order . . . if the person shows, by clear and convincing evidence, that reinstatement of parental rights is in the best interest of the child and that the person is rehabilitated and capable of providing care and guidance that will serve the moral, emotional, mental, and physical welfare of the child.

ALASKA STAT. § 47.10.089 (h). The request must be made after a termination order is entered and before the entry of an adoption or legal guardianship decree. *Id.* *See also*, Lara S. v. State, Dep’t. of Health & Soc. Servs., 209 P.3d 120 (Alaska 2009) (denying motion for review of termination order where mother failed to show good cause for review of voluntary relinquishment of her parental rights).

<sup>68</sup> Other states, such as New Jersey, have identified an increase in the number of legal orphans in their state child welfare system and have made recommendations aimed at remedying the problem. *See, e.g.*, Valerie S. Ayers, New Jersey Department of Children and Families, *No More Legal Orphans: The State Makes a Poor Parent*, available at [www.nrcadoption.org/.../Action%20Research%20Powerpoints/V%20Ayers%20-%20New%20Jersey.ppt](http://www.nrcadoption.org/.../Action%20Research%20Powerpoints/V%20Ayers%20-%20New%20Jersey.ppt); *see also*

## A. ENACTED STATUTES

Hawaii is perhaps the first state to recognize the need for legislation aimed at allowing the restoration of the parent-child relationship.<sup>69</sup> “[T]he statutory framework adopted by the Hawaii legislature appears among the most in tune with the child’s best interest. The Hawaiian approach to the problem at hand is sensitive to the needs of children in the system.”<sup>70</sup> HAW. REV. STAT. § 571-63 provides that at any time following the expiration of one year from the termination order, the parent or child-placing agency may move the court to set aside the judgment if the child has not been adopted or placed in a prospective adoptive home.<sup>71</sup> In reviewing the request, the court considers the current circumstances of the child and parent and determines whether those circumstances and the child’s best interests justify the continuance of the judgment.<sup>72</sup>

In 2005, the California legislature passed legislation that would allow a child who has not been adopted after at least three years from the date the court terminated parental rights to petition to have parental rights reinstated if a court has determined that adoption is no longer the permanent plan.<sup>73</sup> Children who are no longer likely to be adopted (as determined by the State Department of Social Services or the licensed adoption agency responsible for custody and supervision of the child) may file the petition before the expiration of the three-year period.<sup>74</sup>

The legislation was introduced in response to a number of court decisions that expressed frustration with the finality of the law as it

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Judge Sallyanne Floria, *More Good Than Harm: Legal Orphans and the New Jersey Post-Termination Project*, 59 JUV. & FAM. CT. J. 2 (Spring 2008); see also Memorandum from Esther Wattenberg & Meghan Kelley, *Legal Orphans: Are We Creating a New Class of Children in Limbo?* (Apr. 30, 1999), available at [http://cehd.umn.edu/SSW/cascw/attributes/PDF/publications/Legal\\_Orphans\\_Memo.pdf](http://cehd.umn.edu/SSW/cascw/attributes/PDF/publications/Legal_Orphans_Memo.pdf). Furthermore, at least one class action lawsuit has been filed identifying the number of legal orphans as an issue. On August 8, 2006, *Dwayne B. v. Granholm*, No. 2:06-CV-13548 (E.D. Mich, filed Aug. 8, 2006), was filed in the Eastern District of Michigan.

<sup>69</sup> Hawaii established a mechanism for reviewing termination orders in 1965, when the family court was established. Act to Establish Family Courts, HAW. REV. STAT § 571-63 (2010).

<sup>70</sup> Daniel A. Starett, *A Plea for Permanence After Termination of Parental Rights: Protecting the Best Interests of the Child in Ohio*, 56 CLEV. ST. L. REV. 419, 443 (2008).

<sup>71</sup> HAW. REV. STAT. § 571-63 (2009).

<sup>72</sup> *Id.*

<sup>73</sup> A.B. 519 was signed into law on October 7, 2005 and went into effect on January 1, 2006. CAL. WELF. & INST. CODE § 366.26(i)(2) provides a method for reinstating parental rights over a child who has not been adopted.

<sup>74</sup> CAL. WELF. & INST. CODE § 366.26(i)(2).

existed at the time.<sup>75</sup> In *Jerred H.*, the First District Court of Appeals invited the California Legislature to consider allowing the juvenile courts limited discretion to reinstate parental rights where the child would otherwise be left a legal orphan.<sup>76</sup> “To avoid such an unhappy consequence, legislation may be advisable authorizing judicial intervention under very limited circumstances following the termination of parental rights and prior to the completion of adoption.”<sup>77</sup> More than fifteen parents have had their terminations reversed since the legislation has been in effect.<sup>78</sup>

Nevada Revised Statutes 128.170, which became effective October 1, 2007, allows a Nevada court to restore parental rights if a child is not likely to be adopted and if such restoration is in the child’s best interest.<sup>79</sup> The statute allows a child or legal guardian to petition for the rights to be reinstated but does not grant standing to the birth parents.<sup>80</sup> The law was created in reaction to statistics that suggested that adoptions had not kept pace with terminations.<sup>81</sup>

A similar law, Revised Code of Washington Annotated §13.34.215, was enacted in Washington State in response to concern about the 1,400 legal orphans in that state.<sup>82</sup> Under the Washington statute, a child who has not achieved permanency within three years after the termination of parental rights may petition to have his or her parents’ rights reinstated.<sup>83</sup> If the court conditionally reinstates parental rights, the child will be placed in the custody of the parent.<sup>84</sup> After six months of successful placement, the court will conduct a hearing and enter a permanent order.<sup>85</sup> Even if parental rights are reinstated, the reinstatement does not vacate the termination of parental rights order previously entered.<sup>86</sup> The

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<sup>75</sup> There was a concern that the existing statute did not serve the best interests of children who would never be adopted into new families.

<sup>76</sup> *In re Jerred H.*, 17 Cal.Rptr.3d 481 (Cal. Ct. App. 2004).

<sup>77</sup> *Id.* at 799.

<sup>78</sup> Kendra Hurley, *When You Can’t Go Home*, 15 CHILD WELFARE WATCH 18 (Winter 2008) (quoting Leslie Heimov, Executive Director of the Children’s Law Center of Los Angeles).

<sup>79</sup> See NEV. REV. STAT. ANN. § 128.160, 128.170 (West 2008).

<sup>80</sup> See NEV. REV. STAT. ANN. § 128.170 (West 2008).

<sup>81</sup> Amanda Fehd, *Nevada Law Would Let Courts Restore Parental Rights*, LAS VEGAS SUN, Apr. 4, 2007 (finding that in 2004, there were 1,153 children waiting for adoption around the state).

<sup>82</sup> See WASH. REV. CODE. ANN. § 13.34.215 (West 2008).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

impetus for the law was a case involving parents who had rehabilitated four years after their parental rights had been terminated.<sup>87</sup>

On recommendation of the Louisiana State Law Institute, the Louisiana Children's Code was amended in 2008 to permit parental rights to be reinstated upon motion by the department or a child who is over the age of fifteen.<sup>88</sup> The law specifies that the parent have a right to be heard at the hearing on the motion but is not a party to the action. The court may restore parental rights when it is in the child's best interest; however, even when restoration is not appropriate, the court may allow contact between the child and the parent or place the child in the custody of the parent.

In 2009, Oklahoma modified its Children's Code to provide a mechanism by which parental rights could be restored. Under Oklahoma Statutes Annotated Title 10A §1-4-909, the child of at least fifteen years of age may make an application with the court three years after a final order of termination.<sup>89</sup> If, after a preliminary hearing to consider the parent's apparent fitness and interest in reinstatement of parental rights, the court finds by a preponderance of the evidence that the best interests of the child may be served by the reinstatement, the court will conduct a hearing on the merits. At that hearing, the parent-child relationship will be reestablished if the court finds by clear and convincing evidence that the child has not and is not likely to imminently achieve permanency and that reinstatement of parental rights is in the child's best interest.

Also in 2009, 705 ILL. COMP. STAT. 405/2-28<sup>90</sup> was amended and 705 ILL. COMP. STAT. 405/2-34<sup>91</sup> was enacted in response to a report to the majority leader of the Illinois House of Representatives which identified the lack of standards for reinstating custody or restoring parental rights to rehabilitated birth parents as a systemic barrier to achieving permanency and stability for children in the care of elderly caregivers.<sup>92</sup> The former statute provides that when parental rights have been terminated for a minimum of three years and the child who is the

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<sup>87</sup> Maureen O'Hagan, *Kids Try to Reunite with Parents*, THE SEATTLE TIMES, Aug. 7, 2007 (documenting Elaine Wolcott-Ehrhardt's efforts to enact legislation in Washington).

<sup>88</sup> See LA. CHILD. CODE ANN. art. 1051 (2008).

<sup>89</sup> See OKLA. STAT. ANN. tit. 10A, §1-4-909 (West 2009).

<sup>90</sup> 705 ILL. COMP. STAT. 405/2-28 (2010).

<sup>91</sup> 705 ILL. COMP. STAT. 405/2-34 (2010). This statute will only be in effect for four years after the effective date.

<sup>92</sup> See CENTER FOR LAW AND SOCIAL & FAMILY MATTERS ADVISORY COMMITTEE WORK, DCFS FAMILY MATTERS PILOT PROGRAM: PERMANENCY AND STABILITY FOR CHILDREN IN CARE OF ELDERLY/FRAIL ADOPTIVE PARENTS AND SUBSIDIZED GUARDIANS 7 (2007), available at <http://www.ilga.gov/reports/special/Final%20Family%20Matters.pdf>.

subject of the permanency hearing is thirteen years old or older and is not currently in a placement likely to achieve permanency, the state child-placing agency shall make reasonable efforts to locate the parents whose rights have been terminated.<sup>93</sup> Once the parent is located, the agency will assess the appropriateness of the parent and, as appropriate, foster and support connections between the parent and child. To further reunification efforts, the agency may file a motion to reinstate parental rights,<sup>94</sup> which is granted if supported by clear and convincing evidence.<sup>95</sup>

#### B. PROPOSED STATUTES

New York Senate Bill 8524<sup>96</sup> was introduced in response to a committee report that recommended that “a provision be added to the termination of parental rights statutes to authorize the Family Court, in narrowly defined circumstances, to vacate orders committing guardianship and custody of children and reinstate their birth parents’ parental rights.”<sup>97</sup> Furthermore, an Administration for Children’s Services memorandum outlining the guidelines for adolescent cases recognized that, in certain special cases:

The best permanency resources for a young person who has been freed for adoption may be a member of the child’s birth family, including a parent from whom the child has been freed. Sometimes, a parent’s situation has changed significantly since the time of the termination proceeding and a bond between the youth and his birth family continues.<sup>98</sup>

Prior to the bill, cases had been reported where children found permanence with their birth parents after a judge vacated the termination of parental rights order.<sup>99</sup> Once enacted, the New York statute would

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<sup>93</sup> 705 ILL. COMP. STAT. 405/2-28 (2010) (efforts to locate the parent need not be made when such efforts would be futile or inconsistent with the child’s best interests).

<sup>94</sup> 705 ILL. COMP. STAT. 405/2-34 (2010).

<sup>95</sup> *Id.*

<sup>96</sup> See S.B. 8524, 2009 S., Reg. Sess. (N.Y. 2009).

<sup>97</sup> REPORT OF THE FAMILY COURT ADVISORY AND RULES COMMITTEE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 31 (2007), available at <http://nysl.nysed.gov/Archimages/88205.pdf>.

<sup>98</sup> Memorandum from William C. Bell, Commissioner, The City of New York Administration for Children’s Services to Executive Directors, Contract Foster Care Agencies ACS Staff (June 12, 2003).

<sup>99</sup> See Diane Riggs, *Permanence Can Mean Going Home*, ADOPTALK (Spring 2006) (outlining process used in several New York cases to vacate the order terminating parental rights). See also HURLEY, *supra* note 78, at 17, 20 (showing uncertainty in the number of reversed parental rights in New York

allow a petition to vacate a commitment of guardianship and custody when parental rights have been terminated for more than two years prior to the date of filing.<sup>100</sup> The child, his or her law guardian, and the social services district or agency to which the child was committed have standing to file.<sup>101</sup> As in other state proposals, the parents lack standing to bring these actions.<sup>102</sup>

Recently, Georgia State Senator Bill Hamrick (R-Carrollton), Vice Chairman of the Senate Judiciary Committee, introduced Senate Bill 292 designed to revise and modernize the state's Juvenile Code.<sup>103</sup> The bill allows for reinstatement of parental rights in certain circumstances. Section 15-11-323 empowers the child to file a petition if he remains in foster care for at least three years after the termination of parental rights and it has been determined that adoption is no longer the permanent plan.<sup>104</sup> The child may petition prior to the expiration of the three-year period if the child-placing agency and child stipulate that the child is no longer likely to be adopted.<sup>105</sup> The court shall grant the petition if it finds by clear and convincing evidence that the child is not likely to be adopted and that the child's best interests will be served by the reinstatement of parental rights.<sup>106</sup>

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City since AFSA. One child advocate approximates the total number to be in the hundreds while others estimate the number to be less than ten) and Barbara White Stack, *Teen in Flight in the Public Care System but on the Lam, 14-year-old Longs for Someone Who Cares*, PITTSBURGH POST-GAZETTE, Sept. 12, 2004 (showing that similar reverse terminations have been performed in Pennsylvania, where no restoration statute exists. "A radical solution has been pursued for a few . . . teens by the Child Advocacy Unit of the Defender's Association of Philadelphia . . . It has persuaded judges to reverse termination in two cases and send the teens back to parents.").

<sup>100</sup> S.B. 4543, 2007 S., Reg. Sess. (N.Y. 2007).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See Press Release, JUSTGeorgia, *Senator Hamrick to introduce Child Protection & Public Safety Act* (Apr. 2, 2009), available at [http://www.justgeorgia.org/SB\\_292\\_Introduction.html](http://www.justgeorgia.org/SB_292_Introduction.html). The Senator explained:

This is an important, complex piece of legislation designed to improve the manner in which our courts interact with children . . . For more than a year now, the JUSTGeorgia coalition has done the hard work of carefully analyzing Georgia's existing Juvenile Code and developing thoughtful improvements. They have pulled together a wealth of valuable input from juvenile court judges, social workers, lawyers who work in the juvenile justice system, and, not least, affected children and their families.

<sup>104</sup> S.B. 292, 150th Gen. Assem., Reg. Sess. (Ga. 2009).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

In 2009, Minnesota became the most recent state to initiate legislation allowing parental rights to be reinstated when the child is ten years of age or older; the child has not been adopted; the child consents to the reinstatement; the parent has rectified the situation that lead to the termination; the parent and child have reestablished a relationship; the parent has voluntarily terminated his/her rights; and five years have passed since the TPR order was entered, unless the motion is filed by a child age sixteen or older, or by the local social services agency.<sup>107</sup> Under the language of the bill, the court will use the same “hearing procedures, legal standard, burden of proof and rules that apply to the modification of a long-term foster care order” to determine whether reinstatement is in the child’s best interest.<sup>108</sup>

In states without statutes granting courts the authority to review and vacate termination orders where appropriate, individuals have filed pleadings with the court to achieve the same or similar outcomes. In several states, birth parents have petitioned the court to adopt or obtain custody or legal guardianship of their biological children. Other birth parents have moved to be declared the child’s presumed parent or brought a writ of habeas corpus. In efforts more akin to the process envisioned by the newly-enacted legislation, birth parents have filed motions under statutes that allow orders to be vacated or modified when there have been changes in circumstances or where new evidence has been discovered. Where no legal framework exists to support such arguments, attempts have been made to invoke the court’s *parens patriae* authority.

### III. BEFORE RECENT STATUTES AND IN STATES WHERE NO STATUTES TO VACATE TERMINATION OF PARENTAL RIGHTS ORDERS EXIST, THERE HAVE BEEN A VARIETY OF INDIVIDUAL EFFORTS TO RESTORE THE PARENT-CHILD RELATIONSHIP

#### A. ADOPTION BY BIOLOGICAL PARENT

Adoption is the statutory process by which a child’s legal rights and duties toward his or her birth parent(s) are substituted by identical rights and duties toward adoptive parent(s).<sup>109</sup> In the United States adoption is governed by state law,<sup>110</sup> although state law must comply with

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<sup>107</sup> H.R. 1462, 2009 Leg., 86th Sess. (Minn. 2009).

<sup>108</sup> *Id.*

<sup>109</sup> See BLACK’S LAW DICTIONARY 55 (9th ed. 2009).

<sup>110</sup> See State Adoption Laws, available at <http://laws.adoption.com/statutes/state-adoption-laws.html> (last visited Nov. 22, 2009) (cataloguing each state’s adoption laws).

overarching federal legislation. In most states, any single adult or a husband and wife jointly can be eligible to adopt.<sup>111</sup>

In an effort to restore their legal relationship with their biological child, some birth parents have sought to adopt their children.<sup>112</sup> Most petitions are filed under laws that neither specifically grant nor deny standing to birth parents whose rights have been terminated.<sup>113</sup> Thus, individual state courts have decided whether to allow parents to establish new rights by independent adoption proceedings.

In some cases, courts have held that a parent whose rights have been terminated may not relitigate that issue through a petition for adoption or through any other legal proceeding.<sup>114</sup> In others, however, courts have

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<sup>111</sup> Child Welfare Information Gateway, Who May Adopt, Be Adopted, or Place a Child for Adoption? (Feb. 2006), available at [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/parties.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/parties.cfm).

<sup>112</sup> In some cases, birth parents have been encouraged to file an adoption petition after other efforts have been unsuccessful. For example, in *In re Cody B.*, 63 Cal. Rptr. 3d 652, 658 n.8 (Cal. 2007), the lower court stated “in the past I have had mother’s parental rights terminated and who readopted their kids.” *Id.* at 658 n.8. In *In the Matter of M.O.*, No. M2007-003470COA-R3-PT, 2007 WL 2827373, 2 n.1 (Tenn. Ct. App. 2007), the court noted that an adoption proceeding “would be the most likely available means by which to seek a legal parent/child relationship where none exists, including after a termination order.” In *Thompson v. Department of Health and Rehabilitative Services*, 353 So. 2d 197, 198 (Fla. Dist. Ct. App. 1977), the court stated that the children’s birth mother “may petition the Circuit Court, as anyone else, for the right to adopt the children, and appropriate means are available for a complete review of her petition”.

<sup>113</sup> While not the subject of this article, the Illinois law creates a specific process for a birth parent to adopt his or her biological child if that child had been previously adopted by a relative. This law is targeted to address situations where the children have been adopted by relatives, such as grandparents, because the birth parents were unable to fulfill their parental responsibilities. Later, the birth parent has rehabilitated and is able to parent, while the adoptive parent is no longer able to parent due to death or incapacity. In some instances, the children may be legal orphans and already living with their birth parents. These adoptions would undergo scrutiny by the Department of Children and Family Services and be approved by the court only if the adoptions are in the children’s best interests. 750 ILL. COMP. STAT. 50/14.5.

<sup>114</sup> In *In re the Dependency of G.C.B.*, 870 P.2d 1037 (Wash. Ct. App. 1994), married couple Megan and Wade Lucas sought to adopt Mrs. Lucas’ biological child nearly a year after she voluntarily relinquished her parental rights. The court rejected the Lucas’ argument that Mrs. Lucas possessed the same rights as any other person to petition to adopt the child and held that “a parent whose rights have been terminated may not relitigate that issue through a petition for adoption, or through any other legal proceeding.” *Id.* at 1043. In *In the Interest of R.N.R.R.*, 2007 WL 2505629 (2007), the Court of Appeals of Texas affirmed the trial court’s dismissal of a biological father’s adoption petition.

looked favorably on a biological parent's adoption petition, especially when parental rights had been voluntarily terminated<sup>115</sup> or when the child had not been placed for adoption.<sup>116</sup>

When permitted to file adoption petitions after termination of their parental rights, birth parents undergo background checks and go through the same home study and court approval process as other adoptive parents.<sup>117</sup> They are not, however, eligible to receive an adoption subsidy to financially assist them with the care of the child.<sup>118</sup> Where biological parents have not been granted standing to adopt after a termination order or where state law explicitly prohibits it,<sup>119</sup> some biological parents have filed to become the legal custodian or legal guardian to their birth children.

#### B. CUSTODY PETITION FILED BY BIOLOGICAL PARENT

Child custody is a court's determination of who should have physical and/or legal control and responsibility for a minor child. Many states have "third party" custody statutes that grant non-parents standing to initiate custody proceedings. However, few states have statutes that specifically grant or deny biological parents standing in such cases. One notable exception is a Virginia statute that specifically states that a

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<sup>115</sup> In *In the Matter of Theresa O. v. Arthur P.*, 809 N.Y.S.2d 439 (N.Y. Fam. Ct. 2006), a biological mother who surrendered her parental rights filed a petition to adopt after the child had been adopted by his foster parents. While no party to the proceeding raised the issue, the court found that a line of cases holding that *res judicata* prevented standing to file petitions after termination of parental rights did not apply in this case. *Id.* at 442. Based on public policy and the specific facts of the case, the court held that standing existed where no finding of permanent neglect had been made against the birth parent. *Id.* at 442-43.

<sup>116</sup> In *Partington v. Ill. Dep't of Children and Family Servs.*, 414 N.E.2d 540 (Ill. App. Ct. 1980), a biological mother petitioned to adopt one year after her parental rights had been terminated. The child welfare agency moved to dismiss the petition on the grounds that the petitioner was under a legal disability by virtue of the termination of her parental rights. *Id.* at 541. The agency further argued that allowing the petition would circumvent the statute which makes surrender of children for adoption irrevocable except for fraud or duress. *Id.* The Appellate Court of Illinois disagreed with the agency's position, stating, "we fail to see how the need for stability in adoption proceedings is thwarted by permitting the parent to petition before the child is placed for adoption." *Id.* at 542.

<sup>117</sup> See, e.g., 750 ILL. COMP. STAT. 50/14.5.

<sup>118</sup> ADMINISTRATION FOR CHILDREN & FAMILIES, *Adoption Assistance Program, Eligibility, Biological parents*, in CHILD WELFARE POLICY MANUAL, available at <http://www.acf.hhs.gov/programs/cb/index.htm> (follow "Child Welfare Policy Manual" hyperlink; then follow "Title IV-E hyperlink; then follow "8.2B.1 Biological parents" hyperlink) (last visited Mar. 18, 2008).

<sup>119</sup> See, e.g., TEX. FAM. CODE ANN. § 162.001(a) (Vernon 2003).

person whose parental rights have been terminated by court order lacks standing to seek custody.<sup>120</sup>

Even where the statute does not explicitly deny standing, however, some state courts have dismissed custody petitions filed by birth parents whose parental rights have been terminated. Recently, in *In re McBride*, 850 N.E.2d 43 (Ohio 2006), a biological mother brought a claim for custody under an Ohio statute that permitted “any person” to apply to the juvenile court for custody of a child. The lower courts concluded that there was no legal bar to pursuing the petition; however, the Ohio Supreme Court held that a statutory bar did exist.<sup>121</sup> Similar decisions have been reached in New York, which also has a custody statute that does not restrict the category of individuals who may apply to the court for custody of a child. In *In the Matter of John Santosky*, 557 N.Y.S.2d 473 (N.Y. App. Div. 1990), the court held that biological parents whose parental rights had been permanently terminated due to neglect lacked standing to seek custody. The court reached the same decision in *In the Matter of Tiffany H.*, 656 N.Y.S.2d 792 (N.Y. Fam. Ct. 1996), and *In the Matter of T.C.*, 759 N.Y.S.2d 295 (N.Y. Fam. Ct. 2003), where TPR’ed mothers were denied standing to bring a custody proceeding.

Other courts have issued rulings in favor of birth parents in their effort to establish a legally-recognized connection with their biological children.<sup>122</sup> Some judges have even done so despite long lines of cases denying standing in their jurisdiction. In late 2007, a Kings County New York referee awarded guardianship to a biological mother nearly ten years after the child had been freed for adoption. In that case, *In re Rasheed A.*, the court held that a biological parent could obtain such relief upon showing that the circumstances precipitating the child’s placement in foster care had been resolved.<sup>123</sup> Further, the movant had

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<sup>120</sup> VA. CODE ANN. § 16.1-241(A) (West 2009).

<sup>121</sup> *McBride*, 850 N.E.2d at 43, 47.

<sup>122</sup> In *In the Interest of Konczak*, 371 N.E.2d 136, (Ill. App. Ct. 1977), the court held that a birth mother had standing to seek custody under a statute that permitted any “person interested in the minor” to apply to the court for a change in custody. In *In re the Custody of R.R.B.*, 31 P.3d 1212 (Wash. Ct. App. 2001), a biological father petitioned for custody of a child nine years after her rights were terminated. The court upheld the lower court’s decision to grant the petition by concluding that the adoption laws did not bar the petition. The court stated that “nothing in the adoption statutes precludes him from participating in a separate, unrelated proceeding. And the cases involving dependency and involuntary termination of parental rights are distinguishable.” *Id.* at 1216. Addressing the argument that allowing such petitions is against the public policy of enhancing finality in adoption proceedings, the court stated that the biological father’s “nonparent petition for custody does not threaten the integrity of the adoption process.” *Id.*

<sup>123</sup> See *In re Rasheed A.*, 2007 N.Y. Misc. LEXIS 5853, at \*1 (N.Y. Fam. Ct. July 6, 2007).

established by substantial evidence that the child would suffer serious harm if the parent was not awarded custody.

A legal custody order grants the caretaker the right to consent to medical care, enroll the child in school, and make other decisions on behalf of a minor child.<sup>124</sup> However, third party custodians are not financially responsible for the children in their care and these legal arrangements end when the child reaches the age of majority.<sup>125</sup> Thus, the child remains a legal orphan and is left without any legally recognized relationship in adulthood.

### C. BIOLOGICAL PARENT AS PRESUMED PARENT

Presumed parentage is most commonly associated with determining the paternity of a child since maternity is more easily ascertained.<sup>126</sup> “Though most of the decisional law has focused on the definition of the presumed father, the legal principles concerning the presumed father apply equally to a woman seeking presumed mother status.”<sup>127</sup> Moreover, though most of the decisional law has focused on children born out of wedlock or in same-sex relationships, biological parents have used the doctrine in an effort to reestablish a parent-child relationship after parental rights have been terminated.

In *In re Cody B.*, six years after the termination order was entered, the birth mother requested to be designated the “presumed mother.”<sup>128</sup> The birth mother argued that her actions subsequent to the termination (e.g., allowing the child to live with her and holding him out to be her biological son) satisfied the provisions of California law.<sup>129</sup> The juvenile court denied the motion as an improper collateral attack on the earlier

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<sup>124</sup> See, e.g., 23 PA. CONS. STAT. § 5302 (2009) (defining legal custody as “[t]he legal right to make major decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions.”).

<sup>125</sup> The court retains jurisdiction over child custody issues until the child reaches the age of emancipation, usually 18 or 21. See, e.g., ALA. CODE § 12-15-117(a) (2009).

<sup>126</sup> See generally *Michael H. v. Gerald D.*, 491 U.S. 110, 117 (1989) (noting that a presumed father is the individual that the law presumes, until shown otherwise, to be the legal father of a child). This may not be the actual biological father of the child. See *id.* at 113-17. The law in most states creates a “rebuttable presumption” that if a woman conceives or gives birth to a child while she is married, her husband will be “presumed” to be the father of the child. *Id.* at 124. A similar “presumption” can also be created if a father voluntarily allows his name to be placed on a child’s birth certificate. *Id.* These legal presumptions will remain effective until they are successfully “rebutted,” or challenged by someone in a formal legal proceeding. *Id.*

<sup>127</sup> *In re Salvador M.*, 111 Cal. App. 4th 1353, 1357 (Cal. Ct. App. 2003).

<sup>128</sup> *In re Cody B.*, 153 Cal. App. 4th 1004, 1007-08 (Cal. Ct. App. 2007).

<sup>129</sup> *Id.* at 1010.

judgment of termination citing California §366.26.<sup>130</sup> The California Court of Appeal, Fourth Appellate District, Division One, upheld the decision.<sup>131</sup>

#### D. WRIT OF HABEAS CORPUS

A writ of habeas corpus is a legal action through which a person can seek relief from unlawful detention of themselves or another person.<sup>132</sup> “[I]n order to prevail on a petition for a writ of habeas corpus in a child custody case, the petitioner must establish that (1) the child is being unlawfully detained, and (2) the petitioner has the superior legal right to custody of the child.”<sup>133</sup> Additionally, there must be no adequate remedy in the ordinary course of law. Since termination orders may be appealed, most cases seeking a writ of habeas corpus as a means of returning the child to his or her biological parent’s care are denied.<sup>134</sup> Thus, it is clear that parents seeking habeas corpus relief to challenge state procedures which involuntarily terminate their parental rights are unlikely to be successful.

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<sup>130</sup> *See id.*

<sup>131</sup> *Id.* at 1012-13.

<sup>132</sup> 39 AM. JUR. 2D *Habeas Corpus and Post Conviction Remedies* § 1 (2008) (“The writ of habeas corpus traditionally has been accepted as the specific instrument to obtain release from unlawful confinement, or to deliver someone from unlawful custody.”).

<sup>133</sup> *Pegan v. Crawmer*, 666 N.E.2d 1091, 1095 (Ohio 1996).

<sup>134</sup> For example, in the case of *In re Lucy M.*, 132 Misc. 2d 251 (N.Y. Fam. Ct. 1986), the natural mother brought a writ of habeas corpus seeking a return of the child ten months after parental rights had been terminated. *Id.* at 251-52. Since no appeal was taken from the original order, there was no challenge to the court’s jurisdiction, and other remedies were available, the court held that habeas corpus proceeding could not be used to dispute the termination. *See id.* at 252-53. Similarly, in *Holloway v. Clermont County Dep’t of Human Servs.*, 684 N.E.2d 1217 (Ohio 1997), the Supreme Court of Ohio held that the birth mother was not entitled to a writ of habeas corpus when there was an adequate remedy at law. *Id.* at 1219. Likewise, in *In re Miller*, 465 N.E.2d 397 (Ohio 1984), the natural mother’s request for a writ was denied because her “nonconstitutional” claims could have been raised on appeal from the termination order. *Id.* at 399.

*E. MODIFYING OR VACATING TERMINATION ORDER*

Many states permit orders issued in child welfare proceedings to be modified or vacated when new evidence is discovered<sup>135</sup> or when there has been a change in circumstances that affects the child's best interests.<sup>136</sup> Birth parents, when granted standing,<sup>137</sup> generally must prove that the evidence is material to the issues; is more than cumulative or impeaching; will most likely change the result at trial; and could not have been discovered prior to trial through the use of due diligence.<sup>138</sup> Further, facts which occur subsequent to trial are usually not considered newly discovered evidence.<sup>139</sup>

As a result, parents seeking to modify or vacate orders terminating their parental rights have had difficulty meeting their burden and persuading the court that such action is legally justified.<sup>140</sup> Some courts,

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<sup>135</sup> See, e.g., D.C. SCR-Dom. Rel. Rule 60(b)(2).

<sup>136</sup> Notably, North Dakota law explicitly states that general modification principles do not apply to orders terminating parental rights. N.D. CENT. CODE § 27-20-37 (2009). An order terminating parental rights may be vacated by the court upon motion of the parent if the child is not in an adoptive placement and the person having custody of the child consents in writing to the vacation of the decree. *Id.*

<sup>137</sup> See *In re Cesar L.*, 221 W.Va. 249, 654 S.E.2d 373 (2007) (holding that birth mother whose parental rights had been terminated lacked standing to request a modification of termination order where there was no fraud or distress).

<sup>138</sup> 47 AM. JUR. 2D *Judgments* § 692 (2008).

<sup>139</sup> *But see In re T.W.W.*, 449 N.W.2d 103, 105 (Iowa Ct. App. 1989) (remanding the case where the trial court did not reopen the record to allow newly discovered evidence). There, the birth mother filed a motion for a new trial after her parental rights had been terminated. *Id.* at 104. The appellate court determined that evidence of her parenting ability, her marriage and a recent medical diagnosis should have been considered by the court post-termination. *Id.* at 104-05.

<sup>140</sup> In *In re Anthony S.*, 178 Misc. 2d 1 (N.Y. Fam. Ct. 1998), the Family Court, Kings County held that the foster parent's opposition to adopting the child and his pattern of running away to his birth father was not newly discovered evidence. *Id.* at 7-8. In *In re Frederick S.*, 678 N.Y.S.2d 448 (N.Y. Fam. Ct. 1998), the same court decided that newly discovered evidence did not include a child changing his mind about adoption. *Id.* at 451. In *Utah ex rel. C.L.*, 166 P.3d 608 (2007), the Supreme Court of Utah, ruled that the failure of a planned adoption did not constitute newly discovered evidence. *Id.* at 614. In *In re Jane Doe, I*, 182 P.3d 707 (Idaho 2008), the Supreme Court of Idaho held that the revocation of the foster placement family's licenses did not materially change the finding that it was in the child's best interest to terminate parental rights. *Id.* at 709. In *In re M.F.*, 644 A.2d 1363 (D.C. 1994), the District of Columbia Court of Appeals held that the rule allowing for a new trial on the basis of newly discovered evidence did not apply to neglect proceedings. *Id.* at 1365. However, if the rule did apply, the parent must show the existence of an extraordinary situation to override the public interest in finality and stability for

however, have vacated prior termination orders and ordered new dispositional hearing when changed circumstances impacted the prior best interest determination.<sup>141</sup>

#### F. PARENS PATRIAE AUTHORITY OF THE COURT

*Parens patriae* is Latin for “parent of the country” and refers to the public policy power of the state to interfere with the rights of parents and to act as the parent of any child who is in need of protection.<sup>142</sup> In 1890, the Supreme Court held that the doctrine was “inherent in the supreme power of every state, . . . a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.”<sup>143</sup>

Where no statute that provides authority to challenge the termination order exists, parents have asked the court to rely on its *parens patriae* authority. In *In the Matter of Female S.*, a biological mother filed a motion to vacate an order terminating her parental rights four years after it was entered.<sup>144</sup> The Family Court in New York County held that the court, pursuant to *parens patriae*, had a duty to ensure that the best interests of the children are safeguarded.<sup>145</sup> Thus, a hearing was required to determine whether the order should be vacated. However, more recently in *In the Matter of Frederick S.*, a Family Court in New York refused to apply the doctrine.<sup>146</sup> Thus, as a practical matter, the reach of the *parens patriae* doctrine may be affected by the reluctance of judges to use its authority.

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the children. *See id.* at 1365-66. The children’s diminished prospects for adoption were not sufficient. *See id.* at 1366.

<sup>141</sup> *See, e.g., In re Darrell V.*, 284 A.D.2d 247, 247 (N.Y. App. Div. 2001) (holding that the foster parent’s decision not to adopt within a year after the termination justified a reevaluation of the best interests of the children); *In re Alasha E.*, 8 A.D.3d 375, 375 (N.Y. App. Div. 2004) (noting that the biological mother’s progress towards overcoming barriers to reunification provided adequate support for the court’s progress towards overcoming barriers to reunification provided adequate support for the court’s reconsideration); *In re Tony H.*, 28 A.D.3d 379, 379 (N.Y. App. Div. 2006) (holding that the court’s decision was based on the inaction of the foster parent and the positive steps that the birth parent had made); *In re D.G.*, 583 A.2d 160, 169 (D.C. 1990) (vacating the termination order and remanding the case when adoption was no longer a realistic possibility).

<sup>142</sup> Black’s Law Dictionary 1144 (8th ed. 2004).

<sup>143</sup> *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890).

<sup>144</sup> *In the Matter of Female S.*, 444 N.Y.S.2d 829 (N.Y. Fam. Ct. 1981).

<sup>145</sup> *Id.* at 832.

<sup>146</sup> *In the Matter of Frederick S.*, 678 N.Y.S.2d 448 (N.Y. Fam. Ct. 1998).

IV. IN CIRCUMSTANCES WHERE COURTS DENY STANDING, PARENTS  
MAY HAVE ARGUMENTS RELATED TO RES JUDICATA AND EQUAL  
PROTECTION

A. *APPLICABILITY OF RES JUDICATA*

When faced with legal efforts to reestablish the parent-child relationship once severed by a termination order, whether by the filing of a petition to regain custody, a motion seeking a vacation or modification of the termination order, or by other means, many court decisions have relied on the doctrine of res judicata, which includes claim preclusion and collateral estoppel,<sup>147</sup> to dismiss the case and deny relief.<sup>148</sup> The majority of these cases, however, fail to discuss whether the doctrine applies to such proceedings.<sup>149</sup> While few courts have expressly held that the doctrine does not apply in child custody and termination of parental rights cases, including those filed post-termination of parental rights,<sup>150</sup> far more have failed to rule on the issue.<sup>151</sup>

When applied to termination of parental rights cases, this doctrine has served to prevent biological parents from revisiting the issue of parental fitness by filing requests for adoption or custody. However, the doctrine is rarely, if ever, successfully used to prohibit the state from filing second petitions to terminate parental rights when the first was

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<sup>147</sup> Res judicata has two distinct but related branches: (1) claim preclusion, which bars the re-litigation of claims that have been previously litigated between the same parties, and (2) issue preclusion, or collateral estoppel, which prevents re-litigation of issues that have been decided, though the causes of action or claims for relief are not the same.

<sup>148</sup> See, e.g., *Matter of Lucy M.*, 503 N.Y.S.2d 667 (N.Y. Fam. Ct. 1986); *Santosky v. Roach*, 557 N.Y.S.2d 473 (N.Y. 1990); *Matter of Custody of Tiffany H.*, 656 N.Y.S.2d 792 (N.Y. Fam. Ct. 1996); and *T.C. v. R.C.*, 759 N.Y.S.2d 295 (N.Y. Fam. Ct. 2003).

<sup>149</sup> Some states have enacted laws that explicitly apply these doctrines to termination orders. For example, the Tennessee statute prohibits a termination of parental rights to be overturned by any court or collaterally attacked by any person or entity after one year from the date of entry of the final order of termination. TENN. CODE ANN. § 36-1-113(q) (2009).

<sup>150</sup> See, e.g., *In the Matter of Theresa O.*, 809 N.Y.S.2d (holding that res judicata did not prevent biological mother to seek adoption).

<sup>151</sup> See, e.g., *In the Interest of T.J., A.H. and K.H.*, 945 P.2d 158, 162 (Utah Ct. App. 1997) (“[W]e need not reach the issue of whether different notions of res judicata should be applied in termination of parental rights proceedings.”) and *In the Interest of J.J.T. and T.J.T.*, 877 P.2d 161, 164 (Utah Ct. App. 1994) (“Thus we save for another day the difficult question of whether, and to what extent, res judicata really applies in the context of termination of parental rights.”).

unsuccessful.<sup>152</sup> Thus, the doctrine—as commonly applied—provides little protection to parents, either before or after their parental rights have been terminated.

Due to the unique nature of parental rights termination proceedings, movants can argue that traditional *res judicata* analysis should not apply. As the issue of whether rights should be terminated must be decided upon the basis of the conditions at the time of trial, parents should not be foreclosed from initiating proceedings to reestablish a legal relationship with children in a subsequent proceeding. A court's conclusion that that termination was warranted at the time of the initial proceeding is not a judicial termination that the parent will forever be "unfit" and that their subsequent actions could not deem them "fit."

In *Green v. State Dep't of Health & Rehabilitative Servs.*, the District Court of Appeals of Florida noted that collateral estoppel does not apply when a birth parent files to adopt her child after parental rights have been terminated.<sup>153</sup> "[W]hen the circumstances supporting the order of commitment are no longer present at the time an adoption petition is filed, estoppel by judgment may not be invoked to prevent litigation of the adoption issues."<sup>154</sup> Similarly, in *Stefanos v. Rivera-Berrios*, the District Court of Appeals held that collateral estoppel was not available because the termination proceeding had not determined the birth father's present fitness to adopt.<sup>155</sup>

#### B. DENIAL OF EQUAL PROTECTION

Another argument available to movants seeking to restore the parent-child relationship is that denying standing to terminated parents violates their right to equal protection under the law.<sup>156</sup> In *In the Interest of Hughes*, the birth mother argued that a Texas statute that prohibited "a former parent whose parent-child relationship with the child has been terminated by court decree" from filing a petition to adopt violated equal

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<sup>152</sup> In *Slatton v. Brazoria County Protective Servs. Unit*, 804 S.W.2d 550, 553 (Tex. Ct. App. 1991), for example, the Texas Court of Appeals held that the state could file a petition to terminate parental rights less than one year after the court had dismissed a prior petition. "The prior denial of termination was not a complete bar to the subsequent action, but it was a bar to the admission of the [parent's] conduct which occurred prior to that order being used against them."

<sup>153</sup> *Green v. State Dep't of Health & Rehab. Servs.*, 412 So.2d 413, 415 (Fla. Dist. Ct. App. 1982).

<sup>154</sup> *Id.* at 415.

<sup>155</sup> *Stefanos v. Rivera-Berrios*, 673 So.2d 12 (Fl. Dist. Ct. App. 1996). The decision of the district court was reversed on appeal on other grounds.

<sup>156</sup> The 14th Amendment of the United States Constitution guarantees that the government must treat a person or class of persons the same as it treats other persons or classes in like circumstances. U.S. CONST. AMEND. XIV, § 1.

protection under both the state and federal constitutions.<sup>157</sup> Since biological parents whose parental rights have been terminated are not a suspect class, the court applied the “rational basis test” to determine the legality of the statute.<sup>158</sup> The court found that legitimate state interests relating to the child and the public policy favoring the finality of judgments are both served by the statute.<sup>159</sup>

In *In re McBride*, the biological mother similarly argued that not allowing her to seek custody under a statute that permits “any person” to file a custody petition violated state and federal equal protection.<sup>160</sup> While not directly addressing this argument, the court justified the disparate treatment by referring to statutory language that denies biological parents standing to modify termination orders.<sup>161</sup> Had the equal protection claim been addressed, the court may have come to the same conclusion as the *Hughes* court, unless a higher level of scrutiny was invoked.

By arguing that such statutes and the court’s interpretation of those statutes have a disparate impact on women and minorities, movants can persuade the court to employ intermediate and strict scrutiny analyses, respectively.<sup>162</sup> Research supports the contention that women and people

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<sup>157</sup> *In the Interest of Hughes*, 770 S.W.2d 635 (1989).

<sup>158</sup> *Id.* at 637. *See also*, *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966) (“Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.”). In today’s constitutional jurisprudence, equal protection means that legislation that discriminates must have a rational basis for doing so. If the legislation affects a fundamental right (such as the right to vote) or involves a suspect classification (such as race), it is unconstitutional unless it can withstand strict scrutiny. Under strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question.

<sup>159</sup> *In the Interest of Hughes*, 770 S.W.2d at 637.

<sup>160</sup> *In re McBride*, 850 N.E.2d.

<sup>161</sup>

We find unpersuasive the arguments that [the mother] should not be placed in a worse position than a legal stranger and that in denying her standing we create a separate class of those who cannot file for custody. [The mother] is already in a limited class of two as one of [the child’s] biological parents whose own actions caused her parental rights to be terminated.

*Id.* at 47.

<sup>162</sup> Challenged laws that negatively affect women at a disproportionate rate are tested under intermediate scrutiny because gender is a quasi-suspect class. Under the standard, the disparate treatment must be substantially related to the achievement of an important governmental objective. Further, the court uses a strict scrutiny analysis when reviewing laws having a disparate impact on a suspect class, such as race. *See discussion supra* note 158.

of color are more likely than their male and white counterparts to be in the position to seek restoration of their parental rights. One study revealed that a mother's substance abuse led to the termination of parental rights in over half of the cases examined.<sup>163</sup> Further, because birth mothers maintain closer, ongoing relationships with their children while they are in foster care and after they age out, mothers are more likely than fathers to seek restoration of their parental rights.<sup>164</sup>

Similarly, minorities are disparately affected by laws denying former parents standing to restore parental rights or challenge termination orders. While African American and Hispanic parents have a significantly lower risk of having their parental rights terminated,<sup>165</sup> minority children are also less likely to be adopted.<sup>166</sup> As a consequence, minority parents are more likely to be in the position to petition the court to have their parental rights reinstated.

While these arguments may be available to TPR'ed parents, their necessity arises from the fact that new proceedings must be initiated in order to restore the parent-child relationship. The following section describes a process by which restoration can be accomplished without raising standing issues associated with requiring biological parents or children to initiate proceedings after rights have been permanently and "irrevocably" terminated.

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<sup>163</sup> Esther Wattenberg, Meghan Kelley, & Hyungmo Kim, *When the Rehabilitation Ideal Fails: A Study of Parental Rights Termination*, 80 CHILD WELFARE 405, 414 (2001).

<sup>164</sup> One longitudinal study found that of children age 19, who had aged out of the foster care system, 67.2% felt "very close" or "somewhat close" to their biological mother. Of the same cohort, only 38% reported feeling same level of closeness to their biological father. When studied 3 years later at age 21, 55% of former foster youth had a "very close" or "somewhat close" relationship with their biological mother and 30.6% with their biological father. Moreover, 27.5% reported having daily contact with their biological mother; 9.2% with their biological father. MARK E. COURTNEY & AMY DWORSKY, MIDWEST EVALUATION OF ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 19 14 (May 2005) and MARK E. COURTNEY, ET. AL., MIDWEST EVALUATION OF ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 21 17-18 (Dec. 2007). This is also supported by the author's informal survey of case law which found the birth mother to be the moving party in the overwhelming majority of the cases reviewed.

<sup>165</sup> Kelly Noonan & Kathleen Burke, *Termination of Parental Rights: Which Foster Care Children are Affected*, 42 SOC. SCI. J. 241, 253 (2005).

<sup>166</sup> Of the 129,000 children waiting to be adopted, nearly sixty percent are minority. AFCARS REPORT #14, *supra* note 10. *See also*, note 210.

V. A TEMPORARY TERMINATION OF PARENTAL RIGHTS ORDER WOULD PROVIDE THE COURT WITH AN OPTION THAT ENSURES THAT ALL CHILDREN CAN EXIT THE FOSTER CARE SYSTEM WITH LEGAL PARENTS

The recent enactment of state laws that allow parental rights to be reinstated, as well as the number of cases that have been filed to reestablish the parent-child relationship, clearly highlight the need to reconsider the legal permanency of termination of parental rights orders. The traditional notion that termination orders must be final to promote stability is challenged by the increasing number of children who are being permanently harmed by laws that purport to serve their best interests. Current laws governing termination of parental rights do not appreciate the growing problem of legal orphans nor do they allow judges to serve the best interests of children. Therefore, they must be reformed and a broader menu of permanency options must be made available to respond to the needs of children.

While permanently severing the relationship may be the proper decision in many circumstances, state legislatures must provide courts with another option when ruling on termination petitions. One option that should be available to judges is the authority to temporarily terminate parental rights when it is in the child's best interest. This proposal encompasses many of the positive aspects of solutions offered previously.<sup>167</sup>

A. *THE PROCESS*<sup>168</sup>

Consistent with the current procedure, the government attorney would file a petition to terminate parental rights. That petition would be fully litigated and the court would then issue a ruling on the issue of whether the government had met its burden. Thus, a temporary termination of parental rights order could only be entered after the government has met the burden necessary to constitute a permanent termination of parental rights order. The government would have no standing to move the court to order a temporary termination of parental rights. This requirement is necessary to prevent misuse and abuse by the government attorneys who may attempt to persuade the court that a temporary termination order does not require the same level of evidentiary proof as a permanent order. Such action would undermine the purpose of the proposal and serve to harm children and families by potentially making it easier to terminate parental rights.

If the government meets its burden, the court would not issue an order terminating parental rights. Instead, a "TPR finding" would be issued and the parent would be given the opportunity to appeal the

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<sup>167</sup> See sources cited *supra* notes 60-64.

<sup>168</sup> Appendix A presents a series of flow charts illustrating the process.

ruling<sup>169</sup> or request a temporary termination of parental rights hearing.<sup>170</sup> If an appeal is filed, the TPR proceeding will be stayed until it is resolved. If the parent prevails, then the TPR finding would be vacated; if the parent does not prevail, the court would remand the case to give the parent the opportunity to request a temporary termination of parental rights hearing. If no temporary termination of parental rights hearing is requested, a permanent TPR order would be entered. If, however, the parent does request that a temporary termination of parental rights be ordered, the court would conduct a temporary termination of parental rights hearing at which the parent would have the burden of proving by preponderance of the evidence that temporarily, rather than permanently, terminating parental rights would be in the child's best interest.<sup>171</sup>

When determining whether to grant a parent's request for a temporary termination of parental rights order, the court should consider evidence related to the relationship between the child and the parent; the child's attitude regarding the termination; the child's adoptability; the type and extent of the abuse or neglect that lead to foster care placement; the parent's ability to rehabilitate; and economic factors.<sup>172</sup> If the parent meets his or her burden, a temporary termination of parental rights order would be entered. If the court determines that the burden has not been met, the parent can appeal on the temporary termination of parental rights issue only. The appellate court could either affirm the decision or

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<sup>169</sup> A parent's ability to fully take advantage of the TTPR process is dependent upon an expedited appellate process. Most state court rules either give priority to all cases involving child custody or specifically provide for TPR appeals to be handled in an expedited manner. In Minnesota, for example, all decisions regarding juvenile protection matters shall be issued by the appellate court within forty-five (45) days of the date the case is deemed submitted pursuant to the Rules of Civil Appellate Procedure. MINN. R. JUV. PROT P. 47.06. *See also*, National Center for State Courts, *State Links for Appellate Procedure*, available at <http://www.ncsconline.org/wc/CourTopics/StateLinks.asp?id=7&topic=AppMan.Courts>.

<sup>170</sup> Only final orders are appealable. Since the finding that sufficient evidence exists to terminate parental rights is tantamount to a permanent denial of parental rights, it should be appealable. A flowchart explaining this process is appended to this article. This article does not discuss the standard of appellate review that the court should apply.

<sup>171</sup> NEV. REV. STAT. § 128.190 (2008) (stating that preponderance of the evidence is the standard of proof necessary to restore parental rights). In 2008, Washington state amended its statute to require a preponderance of the evidence standard. S. 6792, § 1(c)(4) 60th Leg., Reg. Sess. (Wash. 2008). *See also*, *In re T.E.*, 155 Vt. 172 (Vt. 1990) (holding proof by preponderance of the evidence is sufficient to sustain parent's motion to vacate termination order). The California, New York, Illinois and Georgia statutes, bills or proposals require clear and convincing evidence.

<sup>172</sup> For an explanation of each factor, *see* discussion *infra* Sections V(b)(i)-(vi).

remand for another hearing on the temporary termination of parental rights issue.<sup>173</sup>

Once a temporary termination of parental rights order is entered, it would remain in effect indefinitely<sup>174</sup> and only the state child protection agency and the child would have standing to seek to vacate or modify the order. If a vacation or modification is sought, the movant would have to prove by preponderance of the evidence that there had been a substantial and material change in circumstances related to the best interest of the child and that the original order temporarily terminating parental rights is no longer in the child's best interest.<sup>175</sup> While a finalized adoption decree would extinguish any rights to visitation or support obligations<sup>176</sup> (unless the parties have entered into post-adoption contact agreement),<sup>177</sup> the termination petition would be dismissed if a

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<sup>173</sup> The same options are available to the appellate court when a dispositional order terminating parental rights is entered. *See, e.g., In re Jelissa Ninette O.*, 233 A.D.2d 874 (N.Y.A.D. 1996) (determining that request for suspended judgment was erroneously denied and remitted matter to trial court for a new dispositional hearing); *In re Joshua BB.*, 27 A.D.3d 867 (N.Y. 2006) (upholding lower court decision after finding sufficient evidence to deny request for suspended judgment).

<sup>174</sup> This is an aspect of the temporary termination of parental rights order that differs from the New York suspended judgment statute. The Family Court Act explicitly states that a suspended judgment is intended to be in effect for not more than 12 months unless extended by the court. N.Y. FAM. CT. ACT. § 633 (2006). A suspended judgment is not intended to exist in perpetuity.

<sup>175</sup> This is the standard used in some states when a party moves to modify a custody order. *See, e.g., In re Custody of Pearce*, 456 A.2d 597, 602 (Pa. Super. Ct. 1983) ("Petitioner who seeks modification of custody order has burden to prove that change of circumstances has occurred.").

<sup>176</sup> *But see* ALASKA STAT. § 47.10.089(e) and (j). Parents who voluntarily relinquish their parental right may retain privileges with respect to the child, including the ability to have future contact, communication, and visitation. If a parent has retained one or more privileges, the court shall incorporate the retained privileges in the termination order with a recommendation that the retained privileges be incorporated in an adoption or legal guardianship decree. A prospective adoptive parent or a guardian of a child may request that the court decline to incorporate a privilege retained in a termination order and recommended for incorporation in an adoption or guardianship decree. The court may decline to incorporate a retained privilege if the person who retained the privilege agrees with the request or if the court finds that is in the child's best interest.

<sup>177</sup> Post-adoption contact agreements are arrangements that allow for some kind of contact between a child's adoptive family and members of the child's birth family or other persons with whom the child has an established relationship, such as a foster parent, after the child's adoption has been finalized. These arrangements, sometimes referred to as cooperative adoption or open adoption agreements, can range from informal, mutual understandings between birth and adoptive families to written, formal contracts. Studies show that 4.5 years after

child emancipates from or otherwise leaves the foster care system while a temporary termination of parental rights order is in effect.<sup>178</sup>

*B. THE TEMPORARY TERMINATION OF PARENTAL RIGHTS (TTPR) HEARING FACTORS*

*1. The Relationship Between The Child And The Parent*

Studies have shown that maintaining emotional connections with birth family is important to many foster children.<sup>179</sup> Although most courts use patterns of visitation as an indicator of parental commitment when making termination of parental rights decisions, visitation alone may not determine the presence of a parent-child relationship.<sup>180</sup> Even when a parent has not visited the child with frequency or regularity, they may have an emotional connection that should be considered.

While states have begun to recognize the importance of biological ties even after a child has been adopted<sup>181</sup> there has not been a concurrent acknowledgment that ties may be as important, if not more so, before a child is adopted. Many states allow the adoptive parent to enter into open adoption or enforceable post-adoption contact agreements with the birth parents,<sup>182</sup> thus allowing the child continuing contact with the parents after adoption. However, parents whose children have not been adopted rarely have the opportunity to maintain a relationship that is legally sanctioned. Although some courts have

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adoption, approximately ninety-eight percent of biological and adoptive parents comply with the agreements and that nearly ninety-four percent are satisfied with the open adoption process. Jeanne Etter, *Levels of Cooperation and Satisfaction in 56 Open Adoptions*, 72 CHILD WELFARE 257, 261-263 (1993) (examining the ability of biological and adoptive parents to cooperate in post-adoption contact through the use of written contact agreements).

<sup>178</sup> Similarly, courts have determined that the expiration of a suspended judgment does not automatically result in the termination of parental rights and the commitment of the child unless there is specific language in the court's order providing for that result. *Matter of Josh Ray O.*, 267 A.D.2d 1048 (N.Y.A.D. 1999).

<sup>179</sup> See sources cited *supra* note 3.

<sup>180</sup> See GINA M. SAMUELS, A REASON, A SEASON, OR A LIFETIME: RELATIONAL PERMANENCE AMONG YOUNG ADULTS WITH FOSTER CARE BACKGROUNDS 52-60 (2008).

<sup>181</sup> See Jerica M. Berge, et al., *Adolescents' Feelings about Openness in Adoption: Implications for Adoption Agencies*, 85 CHILD WELFARE 1011, 1015-1017 (2006) (providing an overview of the evidence-based benefits of openness in adoption).

<sup>182</sup> Approximately 23 States currently have statutes that allow written and enforceable contact agreements. CHILD WELFARE INFORMATION GATEWAY, POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES (2005), available at [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/cooperative.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.cfm).

ordered post-termination visitation when in the child's best interests,<sup>183</sup> in most cases, courts have denied requests for continued contact after parental rights have been terminated<sup>184</sup> or the post-termination visitation order has been vacated on appeal.<sup>185</sup> Courts have also determined that issues related to continued rights to visitation and post-termination contact are for the legislature, not the courts.<sup>186</sup>

Even though the court may have the discretion to order visitation between the parent and child after parental rights have been terminated or the child protection agency may permit it, a parent who knows that she or he has no legal rights may have little incentive to continue visitation. If, however, parental rights are not permanently severed and the parent has some hope for later reunification, the child is more likely to reap the benefits associated with continued contact.<sup>187</sup>

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<sup>183</sup> *In re Elise K.*, 33 Cal.3d 128 (1982), the trial court recognized that it would have been detrimental to the child to completely sever her ties with her mother and ordered bimonthly visits pending a final decree of adoption. In *In re Kahlil S.*, 35 A.D.3d 1164, 1165 (2006), the appellate court held that the Family Court has discretion to order post-termination contact with a mentally ill or mentally retarded biological parent. *In re Christina L.*, 194 W. Va. 446 (W. Va., 1995) (finding that when parental rights are terminated due to neglect or abuse, the circuit court may consider whether continued visitation or other contact with the abusing parent is in the best interest of the child).

<sup>184</sup> In most states, once parental rights are terminated, the parent is no longer a party to the proceeding and has no right to appear or move the court for visitation. *See, e.g.*, *Amber R. v. Superior Court of Orange County*, 43 Cal.Rptr.3d 297, 298-99 (Cal. Ct. App. 2006) (holding that birth mother lacked standing to seek visitation after her rights were terminated). In other cases, the parent does not present sufficient evidence to support the granting of post-termination visitation. *See, e.g.*, *A.W. ex rel. B.W. v. Dep't of Children & Families*, 969 So. 2d 496, 505 (Fla. Dist. Ct. App. 2007) (upholding trial court order prohibiting mother from having post-termination visitation or contact with child where no parent-child relationship existed); *In re Alyssa W.*, 619 S.E.2d 220, 224-25 (W. Va. 2005) (denying post-termination visitation where there was no close emotional bond and where visits would have interfered with child's permanent placement).

<sup>185</sup> *See, e.g.*, *In re Jacob E.*, 18 Cal.Rptr.3d 15, 26-7 (Cal. Ct. App. 2004) (voiding trial court order granting birth mother post-termination visitation); *Ament ex rel. C.R.H. v. C.H.*, 620 N.W.2d 175, 180 (N.D. 2000) (holding that governing statutes do not vest any discretionary authority upon a court entering a decree of parental termination to provide visitation rights or other privileges to terminated parent).

<sup>186</sup> *See, e.g.*, *In re C.R.H.*, 620 N.W.2d at 179-80 ("If they [open adoptions] are to be established it is the Legislature that more appropriately should be called upon to balance the critical social policy choices and the delicate issues of family relations involved in such a determination.").

<sup>187</sup> *See* sources cited *supra* note 3.

Moreover, a temporary termination of parental rights order would benefit children with incarcerated parents.<sup>188</sup> These children have increased difficulty maintaining meaningful parent-child relationships prior to termination.<sup>189</sup> However, when a relationship does exist, continued visitation may be beneficial to both parties.<sup>190</sup> Although there may be little likelihood that the parent will resume parenting and a termination of parental rights may be warranted, a permanent termination of parental rights order may prohibit further visitation even if the child's social worker later deems such contact to be in his or her best interest.

In *Bazzetta v. McGinnis*, Michigan state prisoners brought a class action lawsuit challenging, *inter alia*, the constitutionality of the state department of corrections' regulation banning visitation between inmates and their biological children as to whom parental rights had been terminated.<sup>191</sup> The Court of Appeals held that the regulation did not violate their due process rights.<sup>192</sup> Other state departments of corrections

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<sup>188</sup> In 2006, there were at least 29,000 children across the country in foster care because of parental incarceration. PATRICIA E. ALLARD & LYNN D. LU, BRENNAN CENTER FOR JUSTICE, REBUILDING FAMILIES, RECLAIMING LIVES: STATE OBLIGATIONS TO CHILDREN IN FOSTER CARE AND THEIR INCARCERATED PARENTS 4 (2006), available at [http://www.brennancenter.org/content/resource/rebuilding\\_families\\_reclaiming\\_lives/](http://www.brennancenter.org/content/resource/rebuilding_families_reclaiming_lives/). "An estimated 809,800 prisoners of the 1,518,535 held in the nation's prisons at mid-year 2007 were parents of minor children" (744,200 fathers and 65,600 mothers). LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1-2 (Aug. 2008, rev. Jan. 8, 2009), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pptmc.pdf>. An estimated 10% of children with mothers in prison are sent to foster homes. Dona Playton, *Incarceration and the Sentences for the Children Left Behind*, 32 WYO. LAWYER, 36, 38 (Feb. 2009). See generally ARLENE F. LEE ET AL., THE IMPACT OF THE ADOPTION AND SAFE FAMILIES ACT ON CHILDREN OF INCARCERATED PARENTS (Child Welfare League of America 2005).

<sup>189</sup> One study found that only about 13% of prisoners' children in long-term foster care visit their incarcerated mothers; fewer than 5% visit their incarcerated fathers. PLAYTON, *supra* note 188, at 39.

<sup>190</sup> BERGE, *supra* note 181, at 1015-17.

<sup>191</sup> *Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997). See also *Bazzetta v. McGinnis*, 133 F.3d 382 (6th Cir. 1998) (clarifying the earlier decision).

<sup>192</sup> "Viewed from a constitutional standpoint, if, as we now hold, the prison officials properly limited the visitation rights of the prisoners because the limitations were reasonably related to legitimate penological interests, the effect of these regulations upon persons outside the prison was largely irrelevant." *Bazzetta*, 124 F.3d at 780.

have similar restrictions on visitation between biological parents and their children after parental rights have been terminated.<sup>193</sup>

A temporary termination of parental rights order could be entered if it is determined that the child has a relationship with the parent that would be adversely affected by a permanent termination or if the child would be psychologically damaged by the entry of the order. There are cases where, despite this relationship, courts have terminated parental rights because they were left with little choice. Examples include circumstances where a parent, due to mental disability<sup>194</sup> or other health-related issues, is unable to care for a child, or when a parent is incarcerated. Despite a strong relationship with the child, parental rights must be terminated in order to comply with ASFA deadlines and free the child for adoption.<sup>195</sup>

A temporary termination order would allow the social services agency time to secure an adoptive placement for the child but, if such placement could not be found or the adoption is not finalized, permit the parental rights to be “reinstated” without additional court proceedings. Restoring these rights upon emancipation acknowledges the reality that

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<sup>193</sup> See, e.g., Arizona Dep’t of Corr., *Department Order Manual: 911 Inmate Visitation* (Oct. 5, 2009), available at [http://www.adc.state.az.us/Hema\\_PO\\_DO\\_911.aspx](http://www.adc.state.az.us/Hema_PO_DO_911.aspx).

<sup>194</sup> See, e.g., *People ex rel. R.M.S. v. T.S.*, 542 N.E.2d 1323 (Ill. App. Ct. 1989); *In re Terry*, 610 N.W.2d 563, 568-69 (Mich. Ct. App. 2000); *In re D.L.S.*, 432 N.W.2d 31, 37-38 (Neb. 1988); *In re Joyce T.*, 65 N.Y.2d 39, 49 (N.Y. 1985); *In re Montgomery*, 316 S.E.2d 246, 251-52 (N.C. 1984).

<sup>195</sup> The Adoption Incentive Program, created in 1997 by the Adoption and Safe Families Act, provides a financial reward to states that increase the number of finalized adoptions from foster care. For each foster care adoption that exceeds an established baseline number, the state receives \$4,000, which can be used for any child welfare purpose. 42 U.S.C. § 673(b) (2006). In 2003, Congress passed the Adoption Promotion Act. Its key provision was the reauthorization of the Adoption Incentive Program and, at the request of President George W. Bush, the addition of bonus awards for adoptions of children ages nine and older. Under this Act, states are eligible to receive financial awards for increasing the number of children adopted from foster care above established baselines. States are awarded \$4,000 for each child adopted from foster care above the baseline; \$4,000 for each child age nine or older above the baseline; and if a state qualifies for either of these bonuses, an additional \$2,000 for each child who has special needs and is under age nine above the baseline. The Act authorized up to \$43 million for bonuses for fiscal years 2004 through 2008, and was then extended through 2013. Adoption Promotion Act of 2003, 42 U.S.C. § 673(b) (2006). U.S. DEP’T OF HEALTH & HUMAN SERVICES, PROGRAM INSTRUCTION ACYF-CB-PI-04-03 (Mar. 23, 2004), available at [http://www.acf.hhs.gov/progr\\_ams/cb/laws\\_policies/policy/pi/2004/pi0403.htm](http://www.acf.hhs.gov/progr_ams/cb/laws_policies/policy/pi/2004/pi0403.htm).

youth reconnect with their biological parents after they leave foster care and many return to live with their biological family.<sup>196</sup>

While rights are temporarily terminated, the court and the child protection agency can decide whether continued visitation or other forms of contact is in the child's best interest (i.e., not detrimental to the child). While some may argue that such continued contact may interfere with the development of a relationship with the pre-adoptive family or hinder the adoption process, one recent study found that the child's connection with his or her family of origin was not associated with an increased length of time to adoption after parental rights had been terminated.<sup>197</sup> Thus, contrary to expectations, plans to continue relationships with birth families do not pose a realistic barrier to adoption.

## 2. *The Child's Attitude Towards Termination (And Adoption)*

Many states currently recognize the right of older children to participate in decisions regarding custody and adoption. In fact, the majority of states require children over fourteen to consent to their adoption and some require consent of children as young as ten.<sup>198</sup> Furthermore, federal law requires states to apply procedural safeguards to assure that any court or administrative body conducting a permanency hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child.<sup>199</sup>

Despite this limited right of participation,<sup>200</sup> in the majority of states, children do not have standing to object to the termination of their

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<sup>196</sup> MARK E. COURTNEY & AMY DWORSKY, MIDWEST EVALUATION OF ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 19, *supra* note 164, at 13-14; MARK E. COURTNEY, ET. AL., MIDWEST EVALUATION OF ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 21, *supra* note 15, at 16.

<sup>197</sup> CUSHING, *supra* note 37, at 698.

<sup>198</sup> MARGARET C. JASPER, YOUR CHILD'S LEGAL RIGHTS: AN OVERVIEW 93 (Oceana Publications, Inc. 2003).

<sup>199</sup> In 2006, Congress enacted the Child and Families Services Improvement Act, 42 U.S.C. § 675(5)(C) (2006).

<sup>200</sup> The U.S. Department of Health and Human Services Administration for Children and Families Children's Bureau does not interpret the term "consult" to require a court representative to pose a literal question to a child or require the physical presence of the child at a permanency hearing. However, the child's views on the child's permanency or transition plan must be obtained by the court for consideration during the hearing. §8.3C.2c, Tit. IV-E, *Foster Care Maintenance Payments Program, State Plan/Procedural Requirements, Case Review System, Permanency Hearings*, available at [http://www.acf.hhs.gov/j2ee/programs/cb/laws\\_policies/laws/cwpm/qaHistory.jsp?citID=58&id=1720](http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/qaHistory.jsp?citID=58&id=1720).

parents' parental rights.<sup>201</sup> Although appointed an attorney or guardian *ad litem* in the neglect proceeding,<sup>202</sup> the child has little voice in the resulting termination proceeding. To the extent that the child has an attitude towards the termination, it is only evidence used by the court in reaching the decision and is not dispositive. "[K]nowledge that the child will withhold consent to adoption is a relevant factor to be considered in determining whether an order freeing the child for adoption is in the child's best interest."<sup>203</sup>

At the temporary termination of parental rights hearing, the court should consider how the child's attitude towards termination may affect his or her psychological well-being if a permanent order is entered. An older child's strong opposition to termination may forecast future actions that will undermine any adoptive placement. Further, where the child must consent to his or her own adoption, the child's feelings about the termination may directly relate to adoptability.<sup>204</sup> Considering the child's opinion is consistent with recently enacted and proposed legislation that allow children, as young as 10 years old, to petition to reinstate parental rights.<sup>205</sup>

### 3. The Child's Adoptability

A child's adoptability relates to whether his or her age, physical condition, and emotional state make it difficult to find a person willing to adopt him or her.<sup>206</sup> A determination whether a child is adoptable may

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<sup>201</sup> See, e.g., *In re Anthony S.*, 178 Misc.2d 1, 6 (N.Y. Fam. Ct. 1998) (holding that child was not a party to the termination proceeding and was not entitled to seek relief from the order). But see W. VA. CODE, 49-6-5(6) (1992) ("Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights."); *In re Adoption/Guardianship No. T97036005*, 746 A.2d 379, 386 (2000) (holding that a child who is the subject of a petition to terminate parental rights is a party to the proceeding and is entitled to a hearing on the petition's merits).

<sup>202</sup> See Child Abuse Prevention and Treatment Act, 42 U.S.C. § 67 (2008), available at [www4.law.cornell.edu/uscode/42/ch67.html](http://www4.law.cornell.edu/uscode/42/ch67.html). See also, LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605 (2009).

<sup>203</sup> *In re Frederick S.*, 678 N.Y.S.2d 448, 451 (N.Y. Fam. Ct. 1998).

<sup>204</sup> See, e.g., *In re Involuntary Termination of Parental Rights of E.M. and R.M.*, 908 A.2d 297 (Pa. Super. Ct. 2006) (vacating termination order where children were unwilling to consent to adoption).

<sup>205</sup> The minimum ages are: 10 years old in Minnesota; 12 years old in Washington; 13 years old in Illinois; 14 years old in New York; and 15 years old in Louisiana and Oklahoma.

<sup>206</sup> See, e.g. *In re: R.C.*, 86 Cal. Rptr. 3d 776, 781 (Cal. Ct. App. 2008) (stating that in determining adoptability, the focus is on whether a child's age, physical

also consider whether an identified person has filed or intends to file an adoption petition. However, this latter factor is not determinative because 10 to 25 percent of anticipated adoptions do not finalize.<sup>207</sup>

Most state statutes do not require the court to consider adoptability when making termination of parental rights decisions. In fact, the child need not be in a pre-adoptive placement nor must an adoptive home be identified prior to the termination of parental rights.<sup>208</sup> Some argue that if the government is going to terminate a child's ties to his or her natural parents, then there must be reasonable certainty that the child is not going to be left a legal orphan.<sup>209</sup> Further, one study found that of adopted children, those who had been placed with a pre-adoptive home prior to termination were adopted much more quickly than those who were not.<sup>210</sup>

Temporary termination of parental rights orders would be available in all cases but would be particularly applicable when there is little chance that the purpose for the termination, adoption, will be achieved. Statistics show that older children, minority children and children with

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condition and emotional state will create difficulty in locating a family willing to adopt.); Jenny Cheung, Children's Law Center, *Adoptability*, 4 DEPENDENCY LEGAL NEWS 24 (2009), available at [http://www.clcla.org/Images/pdfs/pdfs\\_tra\\_in\\_caselaw/LegalUpv4i24.pdf](http://www.clcla.org/Images/pdfs/pdfs_tra_in_caselaw/LegalUpv4i24.pdf).

<sup>207</sup> HURLEY, *supra* note 78 (citing a national study). One study found that the most frequent reasons for ambivalence regarding adoption are: lack of resources to meet the child's needs (28%), loss of financial support (20%), loss of casework services or support (19%), family not ready (18%), and child's behavior (17%). CUSHING & GREENBLATT, *supra* note 37, at 699. Another found the major reasons for the disruption of an adoptive placement to be: child's behavior, foster parents' inability to provide services, abuse by foster parents or other children in the pre-adoptive home, reappearance of a birth parent, and reconsideration by foster parents. Rosemary J. Avery, *Perceptions and practice: Agency efforts for the hardest-to-place children*, 22 CHILD. & YOUTH SERVS. REV., 399, 408 (2000). When the family with whom the child was living at the time of the termination proceeding does not adopt, the likelihood of adoption is reduced by 66%. CUSHING & GREENBLATT, *supra* note 37, at 694.

<sup>208</sup> See, e.g., *In the Matter of K.C.F., L.T.F., and T.C.A.*, 928 A.2d 1046, 1053-54 (Pa. Super. Ct. 2007) (noting that the termination statute, 23 PA. CONS. STAT. ANN. § 2511, does not require children to be placed in a pre-adoptive home as a precondition to termination of parental rights); *In re Davonta V.*, 940 A.2d 733, 739 (Conn. 2008) (holding that termination may be in the child's best interest even when adoption by new parents is not imminent).

<sup>209</sup> See, e.g., *In re Jayson T.*, 118 Cal. Rptr. 2d 228, 230 (Cal. Ct. App. 2002).

<sup>210</sup> CUSHING & GREENBLATT, *supra* note 37, at 698 (finding children who had been placed prior to termination were adopted in a median of 11.63 months compared to 20.47 months for those placed post-termination).

special needs are less adoptable.<sup>211</sup> Further, the longer that a child remains in foster care, the less likely it becomes that he or she will exit prior to legal emancipation.<sup>212</sup> Although efforts should be made to secure all children permanent homes, whenever possible,<sup>213</sup> the court should consider the child's adoptability when deciding whether to enter a temporary termination of parental rights order.

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<sup>211</sup> *Id.*, at 695 (providing overview of studies finding that older children are less likely than younger children and infants to reach the goal of adoption prior to aging out of foster care, that African American children were less than half as likely to achieve permanence through guardianship or adoption as were children of Caucasian backgrounds and that children with special needs are more likely to experience delays and reduced likelihood of adoption prior to aging out of care than youth without these problems); *see also* Evan B. Donaldson Adoption Institute, *Finding Families for African American Children: The Role of Race & Law in Adoption from Foster Care* 11-12 (2008), available at <http://www.adoptioninstitute.org/publications/MEPApaper20080527.pdf> (finding that African American children wait in foster care for adoption an average of nine months longer than White children); Susan P. Kemp & Jami M. Bodonyi, *Beyond Termination: Length of Stay and Predictors of Permanency for Legally Free Children*, 81 CHILD WELFARE 58, 69-72 (2002) (finding that older children, boys and African American children were all significantly less likely to achieve permanency than were Caucasian children); Richard P. Barth, *Effects of age and race on the odds of adoption versus remaining in foster care*, 76 CHILD WELFARE 285, 294 (1997) (finding that African American children are more than twice as likely to remain in foster care as to be adopted); AVERY, *supra* note 207, at 400-01 (finding that children experiencing long delays in placement are more likely to be older when they enter care, male, African American and have substantial disabilities).

<sup>212</sup> CUSHING & GREENBLATT, *supra* note 37, at 695 This phenomenon is known as "negative duration dependence" and it means that children are progressively less likely to leave care as their time in care increases. NOONAN & BURKE, *supra* note 165 at 242.

<sup>213</sup> This article does not suggest that state agencies should cease efforts toward providing permanency for all children. It does suggest, however, that agencies and courts employ a broader view permanency. For some children, the emphasis on adoption is misplaced because it focuses attention on one particular permanency option rather than on the child's need for and right to permanent family connections. Title IV-E of the Social Security Act requires states to make reasonable efforts to place foster children in a timely manner in accordance with a permanency plan and to complete whatever steps are necessary to finalize a permanent placement when children cannot return home. 42 U.S.C. §671(a)(15) (C)-(D). Despite this requirement, one study found that the children who were most in need of enhanced recruitment efforts got the least because caseworkers were not convinced of their eventual adoptability. AVERY, *supra* note 207, at 399; *see also* Rosemary J. Avery, et al., *AdoptUsKids national photolisting service: Characteristics of listed children and length of time to placement*, 31 CHILD. & YOUTH SERVS. REV. 140, 151 (2009) (finding that states are using the AdoptUsKids website to list their hardest-to-place children).

Despite their decreased chances of being adopted, studies show that children who are diagnosed with a disability are more likely to have their parents' rights terminated.<sup>214</sup> One study hypothesized that "since children diagnosed with a disability may be harder to care for, parents may be more apprehensive about having their children return home and social workers may try to expedite a permanent placement by quickly terminating parental rights."<sup>215</sup> Even if this is true and parents do not feel that they are capable of caring for their disabled child, a temporary termination of parental rights order would allow them to visit and maintain a relationship while the child receives necessary care.

Admittedly, it is more difficult for a court to deem a child unadoptable if the child is living in an adoptive placement at the time of the termination proceeding. In *In re Elise K.*, the child was ten years old at the time of the termination proceeding and all parties agreed that "there was no doubt the child is adoptable."<sup>216</sup> However, in the four years that the appeal was pending, the child's pre-adoptive placement disrupted and she was deemed "no longer adoptable."<sup>217</sup> Similarly, in *In re Jayson T.* and *In re J.I.*, the California Court of Appeal reversed the termination of parental rights judgment when the adoptive placement disrupted and the children were no longer adoptable.<sup>218</sup> "[I]f they are not adoptable, it would be a travesty of the juvenile dependency law to terminate parental rights."<sup>219</sup>

In such cases, even if the court had litigated the issue at the trial level, it is most likely that, since the children were in a pre-adoptive placement, the court would have found them adoptable.<sup>220</sup> Thus, considering whether a child is not adoptable may be more relevant to the court's decision than whether a child is deemed adoptable. Finding that a child is adoptable should not weigh against entering a temporary termination of parental rights order but finding a child not adoptable should weigh towards entering a temporary termination of parental rights order.

Even when a child is in a pre-adoptive placement, the court may choose to enter a temporary termination of parental rights order as a way to protect the child in the event that the adoption does not finalize. This may be an appropriate safeguard even if the order does not allow for

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<sup>214</sup> NOONAN & BURKE, *supra* note 165, at 253.

<sup>215</sup> *Id.*

<sup>216</sup> *In re Elise K.*, 33 Cal.3d at 144.

<sup>217</sup> *Id.* at 148.

<sup>218</sup> *In re Jayson T.*, 97 Cal.App.4th at 91; *In re J.I.*, 108 Cal.App. 4th 903, 915 (Cal. Ct. App. 2003).

<sup>219</sup> *In re Jayson T.*, 97 Cal.App.4th at 78.

<sup>220</sup> *Id.* at 83 (noting that "the issue of adoptability was not actually litigated at the trial level- it was a nonissue").

continued contact between the child and the biological parent, In *Ronald V.*, the birth mother's rights were terminated in anticipation of the adoption of the child by the mother's former boyfriend.<sup>221</sup> The pre-adoptive father and the mother agreed that she would have visitation after the adoption was finalized.<sup>222</sup> A year after the termination order was entered and before the adoption was completed, the former boyfriend died. The birth mother asked the court to modify the order terminating her parental rights but the California Court of Appeal, First District, Division 4, found that it lacked jurisdiction to decide the motion.<sup>223</sup> As a result, the child was left a legal orphan. In *In re Jerred H.*, parental rights were terminated so that the fourteen-year-old child could be adopted by his stepfather.<sup>224</sup> Eight months later, after he had been removed from the pre-adoptive home, the child petitioned the court to reinstate parental rights. The court denied the request on the ground that it lacked jurisdiction.<sup>225</sup> He, too, remained a legal orphan. If the court has the option to enter a temporary termination of parental rights order in such circumstances, fewer children will languish in and exit from the foster care system as legal orphans.

#### 4. The Type and Extent of the Abuse or Neglect That Lead to Foster Care Placement

Studies show that parental rights are most often terminated due to parental neglect rather than abuse.<sup>226</sup> Furthermore, the neglect is usually due to parental substance abuse.<sup>227</sup> Despite the grounds for termination, studies reveal that children who experience parental rights termination

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<sup>221</sup> *In re Ronald V.*, 13 Cal. App. 4th 1803, 1805 (Cal. App. 1993).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *In re Jerred H.*, 17 Cal.Rptr.3d at 482. The most common form of adoption is that of children by stepparents. In these situations the adopting stepparent assumes financial and legal responsibility for his/her spouse's child or children and releases the noncustodial parent of parental responsibilities, including child support. When a stepparent wishes to adopt a stepchild, the child's parents (the stepparent's spouse and the noncustodial or absent parent) are usually both required to consent to that adoption. In consenting to an adoption, only the noncustodial parent relinquishes all parental rights and responsibilities, while the petitioner's spouse retains his or her parental rights. U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., CHILDREN'S BUREAU, CHILD WELFARE INFORMATION GATEWAY, STEPPARENT ADOPTION (2004), available at [http://www.childwelfare.gov/pubs/f\\_step.cfm](http://www.childwelfare.gov/pubs/f_step.cfm).

<sup>225</sup> *In re Jerred H.*, 17 Cal.Rptr.3d at 483.

<sup>226</sup> See Diane H. Schetky et al., *Parents Who Fail: 51 Cases of Termination of Parental Rights*, 18 J. AM. ACAD. CHILD PSYCHIATRY 366 (1979); See also Sandra J. Bishop et al., *Serious Child Maltreatment in Massachusetts: The Course of 206 Children Through the Courts*, 16 CHILD ABUSE & NEGLECT 179, 181(1992).

<sup>227</sup> WATTENBERG, *supra* note 163, at 414-415

come from poor families where parents are involved in high-risk behavior and have a history of problems, both physical and mental.<sup>228</sup> The parents are also poorly educated,<sup>229</sup> not regularly employed<sup>230</sup> and members of minority groups.<sup>231</sup>

Admittedly, there are circumstances when the permanent and complete severance of parental rights is warranted. There are also cases where parents do not challenge the petition and/or have little interest in appealing an adverse decision. Ordering a temporary termination of parental rights would not be applicable those situations. However, when a parent does want to maintain a relationship with his or her child and has an interest in a possible second chance at parenting, the court should evaluate the circumstances that led to the initial removal and the grounds for termination to determine whether a temporary termination of parental rights order is appropriate.

In a recent New York appeals decision, the court held, “[I]n the event that parental rights are terminated after a finding that the parent is unable by reason of mental illness or mental retardation to provide proper and adequate care for his or her child or after a finding of permanent neglect, Family Court may, in those cases in which the court deems it appropriate, exercise its discretion in determining whether some form of post[-]termination contact with the biological parent is in the best interest of the child.”<sup>232</sup>

Not only have courts given consideration to the underlying cause of the maltreatment and subsequent termination, distinctions have been made between voluntary and involuntary termination. In *Theresa O. v. Arthur P.*, the court permitted the biological mother to petition to adopt her child after her rights had been terminated because had been no finding of permanent neglect had been made against her.<sup>233</sup> Further, Virginia and Alaska law permit a natural parent whose parental rights to a child have been voluntarily relinquished to seek reversal of the court order terminating his or her parental rights if the child has not been placed in a pre-adoptive home.<sup>234</sup>

##### 5. The Parent's Ability to Rehabilitate

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<sup>228</sup> NOONAN & BURKE, *supra* note 165 (discussing the results of three prior studies analyzing which children are most likely to experience termination of parental rights), at 244.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Santosky v. Kramer*, 455 U.S. 745, 763 (1982).

<sup>232</sup> *In re Kahlil S.*, 830 N.Y.S.2d 625 No. 09742, slip op. at 2 (N.Y. App. Div. Dec. 22, 2006).

<sup>233</sup> *In the Matter of Theresa O. v. Arthur P.*, 809 N.Y.S.2d.

<sup>234</sup> VA CODE ANN. § 16.1-241 (K) (2003); ALASKA STAT. §47.10.089(h) (2008).

Despite a parent's sincere efforts to address the issues that led to the child's placement in foster care, parental rights may be terminated before he or she can fully rehabilitate. This may be done because the government has determined that the child's continued foster care placement will jeopardize his or her adoptability or because AFSA time limits have been met. For parents with substance abuse issues, the AFSA pressures can present particular problems.<sup>235</sup>

In *In the Matter of Society for Seamen's Children v. Jennifer J.*, the trial court terminated the parental rights of a substance abusing mother who had completed a residential drug rehabilitation program and a parenting skills course, maintained regular contact with her child and secured an apartment.<sup>236</sup> The mother's caseworker, who saw her weekly, testified that the mother was making excellent progress toward being reunited with her youngest child and, while the caseworker could not recommend such a step at that time, anticipated that such a recommendation could be made in the next four to five months if the mother's progress continued.<sup>237</sup> In such a case, though the grounds for a termination may be met, a temporary termination of parental rights order would provide incentive for the mother to continue working towards her treatment goals.

This is also true for incarcerated parents. "The fear - or reality - of permanent loss of her children can send a mother into a downward spiral of relapse and recidivism."<sup>238</sup> Maintenance of family ties promotes

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<sup>235</sup> See Mickey J.W. Smith, *ASFA and Substance Abuse: Understanding the Issues Impacting Two Systems of Care*, CHILD WELFARE PRACTICE UPDATE, 1-3 (Oct. 2003).

<sup>236</sup> *In the Matter of Society for Seamen's Children v. Jennifer J.*, 208 A.D.2d 849 (N.Y. App. Div. 1994). While the appellate court held that a suspended judgment should have been entered and remanded the case, it did not find that the court lacked sufficient evidence to sustain the petition.

<sup>237</sup> *Id.* at 850.

<sup>238</sup> Gail T. Smith, *The Adoption and Safe Families Act of 1997: Its Impact on Prisoner Mothers and Their Children*, available at <http://womenandprison.org/motherhood/gail-smith.html> (last visited Aug. 23, 2009). One former inmate reflected on the probable outcome of a female prisoner after her parental rights were terminated:

I would be willing to bet, knowing these women like I do, that she didn't stay clean, that she didn't stay straight, she didn't stay crime free and she didn't finish her parole. Because why should she? You've just taken every reason for her to turn her life around, and taken it away from her. And told her that she is the failure that she truly, ultimately believes she is, she has no reason not to be anything else. But what you've told her is she has no value, she can't do anything, will never do anything, and she deserved to lose her child.

inmate morale, improves interactions between the staff and the inmates, and strengthens connections with the community, which make the inmates less likely to return to prison after release.<sup>239</sup> Although the decision on whether to enter a temporary termination of parental rights order should be based on the best interests of the child, in most circumstances it would be in the best interests of the child for his or her biological parent not to be incarcerated or drug dependant. Thus, the negative impact of a permanent termination on the parent may have an impact on the child with an incarcerated parent.

Young parents may have similar challenges to those with developmental disabilities as it relates to caring for their children—inexperience, poor decision-making skills and lack of appreciation for the consequences of their actions.<sup>240</sup> Many teen mothers find it necessary to voluntarily place their children with the state child protection services or risk having them involuntarily removed.<sup>241</sup> When the initial placement

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Shannon Eddy, *Termination of Parental Rights for Incarcerated Mothers* 25-26 (Spring 2003) (unpublished student paper, University of Oregon School of Law), available at <http://www.law.uoregon.edu/faculty/cforell/docs/shannon-eddy.pdf>.

<sup>239</sup> ALLARD & LU, *supra* note 188, at 7 (quoting Office of the Inspector Gen., U.S. Dep't of Justice, *Criminal Calls: A Review of the Bureau of Prisons' Management of Inmate Telephone Privileges* ch. II, n.6 (1999), available at <http://www.usdoj.gov/oig/special/9908/callsp2.htm#Background> (quoting reports provided to OIG by Bureau of Prisons)).

<sup>240</sup> After controlling for all other demographic factors, one study found that children born to teen mothers are significantly more likely to have an indicated report of child abuse and neglect during their early childhood than are those born to non-teen mothers. The study further suggested that children born to younger teen mothers are at a greater risk of abuse or neglect than are children born to older teen mothers. Robert M. Goerge, Allen Harden & Bong Joo Lee, *Consequences of Teen Childbearing for Child Abuse, Neglect, and Foster Care Placement* in KIDS HAVING KIDS: ECONOMIC COSTS AND SOCIAL CONSEQUENCES OF TEEN PREGNANCY 257, 276 (Saul D. Hoffman & Rebecca A. Maynard eds., 2nd ed. 2008).

<sup>241</sup> See, e.g., DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 87-88 (2002) (“Social workers told fifteen-year-old Anisha Henry that if she didn’t relinquish custody of her baby boy, they would take him away from her— with frightening consequences.”). According to Professor Roberts, Anisha Henry was a teen mother in the custody of New York’s child welfare agency, which was pressuring teen mothers in its custody to give up their babies in an effort to relieve the shortage of foster homes. See also, YOUTH ADVOCACY CTR., INC., CARING FOR OUR CHILDREN: IMPROVING THE FOSTER CARE SYSTEM FOR TEEN MOTHERS AND THEIR CHILDREN 3 (1995), available at <http://www.youthadvocacycenter.org/pubs/reports.html#caring> (finding that nearly one third of the mothers and babies in survey sample were separated, although they did not want to be, while waiting for foster care placement) and Katherine C. Pearson, *Cooperate or We’ll Take Your Child: The Parents’ Fictional Voluntary Separation Decision and a Proposal for Change*, 85 TENN.

is due to minority or immaturity, it is more likely that, with time, the deficiency will be corrected.<sup>242</sup> However, overly rigid application of ASFA timelines does not provide the opportunity for states to exercise necessary patience with young parents.

In *In the Matter of Vanessa S.*, the mother was fifteen when she gave birth and voluntarily placed her child in foster care; she was twenty years old when her parental rights were terminated.<sup>243</sup> Nine years later, she filed a motion to vacate the termination. At that time, she had re-established a relationship with the child and was the primary caregiver for her two younger daughters.<sup>244</sup> The court, relying on its *parens patriae* authority, vacated the order.<sup>245</sup> The availability of a temporary termination of parental rights option would have allowed the state to remain compliant with ASFA by initiating the termination proceeding<sup>246</sup>

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L. REV. 835, 836 (1998) (arguing that the voluntary label is often misleading when applied to such placement agreements). For this reason, the TTPR option is particularly germane when the teen mother is a ward of the state at the time of the termination proceeding. In 1996, it was estimated that early childbearing and closely linked factors lead to 23,000 children, an estimated five percent of all those born to adolescent mothers each year, ending up in foster care. ROBIN HOOD FOUNDATION, KIDS HAVING KIDS: A ROBIN HOOD FOUNDATION SPECIAL REPORT ON THE COST OF ADOLESCENT CHILDBEARING 8 (Rebecca A. Maynard ed., 1996), available at [www.robinhood.org/media/7490/khk.pdf](http://www.robinhood.org/media/7490/khk.pdf). Further, in 2004, teen childbearing cost the child welfare system \$2.3 billion nationally. SAUL D. HOFFMAN, BY THE NUMBERS: THE PUBLIC COSTS OF TEEN CHILDBEARING 13 (2006), available at [http://www.thenationalcampaign.org/costs/pdf/report/BTN\\_National\\_Report.pdf](http://www.thenationalcampaign.org/costs/pdf/report/BTN_National_Report.pdf).

<sup>242</sup> See *T.N.H. v. J.L.H.*, 2006-CA-001288-ME, 2007 Ky. App. LEXIS 325, at \*15 (Ky. Ct. App. Aug. 31, 2007) (vacating order where termination was based on mother's past conduct as a juvenile with no consideration as to her future parenting abilities).

In cases such as this, where a parent's age and emotional immaturity undeniably contribute to her lack of parenting skills, we believe that termination must not be based solely on the parent's prior behavior without some objective assessment of her psychological and mental capacity to develop the abilities to effectively parent a child.

*Id.* at \*16.

<sup>243</sup> *In the Matter of Vanessa S.*, 111 Misc. 2d 313, 317 (N.Y. Fam. Ct. 1981).

<sup>244</sup> *Id.* at 318.

<sup>245</sup> *Id.* at 315-319.

<sup>246</sup> On October 20, 2008, the author received the following response from ACF regarding whether a state could initiate or join the proceeding but fail to seek resolution and still be in compliance with Federal law. "Yes. According to the preamble to the Final Rule published in the Federal Register on January 25, 2000 (65 FR 4062, middle column) which implemented the requirements of Public Law 105-89, the Administration for Children and Families' authority does not extend into the finalization of proceedings for termination of parental

while also recognizing the impact of the parent's age and emotional immaturity on her lack of parenting skills. Having a TTPR option would also negate the necessity for a subsequent proceeding to reestablish the parent-child relationship.

### 6. Economic Factors

As previously discussed, in many states, the obligation to support a child and the right of the child to inherit intestate cease when parental rights are terminated.<sup>247</sup>

Extinguishing the right of the child to inherit from its terminated parent. . . seems not to further the primary goal of the termination statutes – protecting the interests of the child – but rather to add additional injury to children who already suffer from inadequate parenting and very likely the additional burdens of poverty and minority status as well.<sup>248</sup>

A temporary termination of parental rights order would address the problems previously discussed by significantly decreasing, if not totally eliminating, the number of children who leave foster care without legal parents. Moreover, while a temporary termination of parental rights order was in effect, the child would remain eligible for continued child support and retain his or her inheritance rights since there would be no permanent termination order. Thus, a temporary termination of parental rights order would benefit both children in the foster care system and those who exit prior to adoption.

Although considering economic factors may serve to adversely impact minority parents, studies reveal that African American children and children of Hispanic descent have a significantly lower risk of being the subject of termination proceedings.<sup>249</sup> So as not to discriminate against poor and minority parents, consideration of economic factors should not be determinative but rather should only be one aspect of the court's reasoning during the temporary termination of parental rights hearing.

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rights as this is a matter of State law.” Email from Sandi McCloud to the author (Oct. 20, 2008) (on file with the VA. J. SOC. POL’Y & L.).

<sup>247</sup> See sources cited *supra* notes 48-50.

<sup>248</sup> BROWN, *supra* note 47, at 143.

<sup>249</sup> NOONAN & BURKE, *supra* note 165, at 253 (further noting that African American and Hispanic children are also less likely to be reunited with their parents). While black parents' rights are less likely to be terminated, Dorothy Roberts, in her book *SHATTERED BONDS: THE COLOR OF CHILD WELFARE*, argues that blacks are more likely to be affected by an expedited termination process. ROBERTS, *supra* note 241, at 159.

Appellate courts, when reviewing termination orders, have recognized that the loss of inheritance and support rights may not be in the child's best interest.<sup>250</sup> In a recent case, the District Court of Appeal of Florida, Fourth District, authorized the trial court to reopen a termination case after the father's death to determine whether it was in the child's best interest to enter a final order terminating parental rights.<sup>251</sup> In that case, the father's parental rights had been terminated and he was killed during the pendency of his appeal; therefore, a TPR may have had adverse legal consequences for the child in regard to any interest she may have had in a wrongful death action. "[T]he State's interest in vindicating judgments presumed correct must give way to that paramount concern, the best interests of the child, especially as to collateral property rights related to her father that might be lost by upholding a final judgment terminating his parental rights."<sup>252</sup>

Although the fact that financial support would be eliminated by termination is an inadequate reason, by itself, to refuse to terminate parental rights, considering the economic effect that termination may have on the child is appropriate at the temporary termination of parental rights stage.

## VI. CONCLUSION

As the number of "legal orphans" with no likelihood of adoption increases, courts will become inundated with cases involving children and parents who want a second chance at a legally recognized parent-child relationship. The legal system must respond to this phenomenon by continuing to devise ways to reestablish parent-child relationships when in the child's best interest. While states have begun to enact legislation that allows parental rights to be reinstated, courts continue to be unpredictable in their response and there remain few legal pathways to restoring parental rights. Handicapped by the permanency of termination of parental rights orders, courts have few options available to them after the order has been entered. Temporary termination of parental rights orders address the need to provide safe and permanent homes for children while also having the flexibility to address the best interests of the child as those interests evolve.

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<sup>250</sup> See, e.g., *In the Matter of David Carlton Stephenson*, 513 So. 2d 614, 617 (Ala. 1987) (reversing termination order where child's best interests were not protected by loss of right to receive support from his father); *A.B. v. State of Alaska Dep't of Health and Social Servs.*, 7 P.3d 946, 955 (Alaska 2000); *In re G.A.Z.*, 2002 WL 575640, at \*5 (Iowa Ct. App. Feb. 20, 2002).

<sup>251</sup> *C.A. v. Dep't of Child. & Families*, 16 So. 3d 888, 890 (Fla. Dist. Ct. App. 4th, 2009).

<sup>252</sup> *Id.* at 890.

While a child is in the foster care system, periodic hearings are held in which the court has the authority to enter individualized orders that further the child's best interests.<sup>253</sup> In these proceedings, there is recognition that each child is different and his or her best interests must be determined on a case-by-case basis. Only when a termination of parental rights petition is filed does the court only have two options available— terminate parental rights or dismiss the petition.<sup>254</sup> This “one size fits all” approach to resolving issues related to child neglect and child custody is not responsive to the needs of the children involved in the case. As the best interests of the child fluctuate along a continuum, courts must have an expanded range of options available in order to address those interests.

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<sup>253</sup> The Adoption and Safe Families Act, 42 U.S.C. § 675(5)(B) (2009), requires that the status of each child in out-of-home care be reviewed at least once every 6 months by either a court or an administrative review.

<sup>254</sup> As previously noted, in New York, there is a third dispositional alternative, suspended judgment. *See* sources cited *supra* note 65.

APPENDIX A

The following is a series of flowcharts illustrating the proposed trial and appellate process for entering a temporary termination of parental rights order (TTPR).







