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I WANT TO GO HOME A LOOK AT CHILDREN LOST IN THE FOSTER CARE SYSTEM

Cynthia M Conward
“I WANT TO GO HOME”: A LOOK AT HOW TERMINATION OF PARENTAL RIGHTS AFFECTS CHILDREN.

Cynthia Conward

I. INTRODUCTION

Consider the following:

Ricardo, a 14 year old Hispanic boy has been in the foster care system since he was 6 years old. His parent’s parental rights were terminated. Ricardo has spent these years in several foster homes and is presently placed in a group home. His Mother lives in a bordering state. She is now fit, has remarried and has four children. Mother has completed all assessments and evaluations required of her and the results show that she, her family and her home is appropriate. Mother has contacted State Services and has convinced them to allow her visits with Ricardo at the group home. They have offered her unsupervised visitation in Ricardo’s community. Even though not one of his foster placements considered adopting Ricardo, the State will not consider placing Ricardo back in the home of his mother. Ricardo wants to go home.

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There are thousands of children in the State systems, like ‘Roberto’ who are considered “unadoptable.” As a result they remain in foster placement or group homes until they reach the age of 18, even if their parents become fit.

“Termination of parental rights not followed by adoption makes the child a “legal orphan” This is a disfavored outcome of a child dependency proceeding in California and a few other states. So for those states who don’t have these types of statutes, what happens to these “legal orphans.” What happens to these children if they also happen to be children of color or suffer from a disability, or becomes of an age that makes them unadoptable?

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2 “Unadoptable” – “the issue of adoptability posed in a termination of parental rights hearing focuses on the minor, e.g. whether the minor’s age, physical condition, and mental state make it difficult to find a person willing to adopt the minor…” San Bernardo County Department of Children’s Services v. S.I. Defendant No. E045763 (Nov. 25, 2008), citing West’s Ann. Cal. Welt. & Inst. Code sec. 366.26. A prospective adoptive parent’s willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family.” In re Sarah M. 22 Cal. App. 4th 1642, 1649-1650 (1994).

3 “Foster Care” is a system in which adults care for minor children who are not able to live with their parents. (available at http://en.wikipedia.org/wiki/Foster_care) It is intended to be a temporary placement until the children are reunified with their parents or some other goal of the state is determined is best for the child, like adoption or guardianship. Id at http://en.wikipedia.org/wiki/Foster_care. New York Social Services defines “foster care as care provided a child in a foster family home, group home, boarding home, child care institution, health care facility or any combination thereof.” N.Y. Soc. Service 392(1)(a) (McKinney 1992).

4 An effort has been made to provide persons who traditionally would have been placed in large institutions with care and treatment in a residential setting through the establishment of fosters homes, group homes for children in need of supervision, rehabilitation centers and halfway houses and group homes for mentally retarded persons. 83 Am.Jur 2d Zoning and Planning sections 178, 180, 181, 182.

5 A decision of unfitness must be supported by clear and convincing evidence, a judge’s findings will be disturbed only if they are clearly erroneous.” Adoption of Paula, 420 Mass., 716, 729 (1995).

6 “legal orphans” describes the status of children whose parents rights have been terminated but have not been adopted. M. Guggenheim, The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care – An Empirical Analysis in Two States, 29/1 Fam L. 121 In California Children can not become “legal orphans,” because California has amended their statute to provide that a child who has not been adopted after three years following the termination of parental rights could petition the juvenile court to reinstate parental rights.” Cal Jur Fam. law sec.374, 32 Cal Jur 3rd Family Law s. 37.

7 In re Francisco W., 2006 WL 135032 (Cal.App. 4th Dist. 2006).
The scope of this Article focuses on the situation of a large number of children who have been freed for adoption in this country. In recent years, laws have been enacted to make it possible for children to have permanency in their lives and avoid years in the States foster care system. Have these changes in the law lived up to their expectations? Have these changes had an adverse affect on children of color or other ‘unadoptable’ children?

Section II will focus on the history of the Adoption laws and what the Legislators were hoping would result from these new laws. Section III will look at how these changes in the laws have affected minority children and other unadoptable children and sections IV and V will conclude with solutions and suggestions.

II. HISTORY OF TERMINATING PARENTAL RIGHTS

Case law documents that parents’ “have a right to the care and custody of their children, however that right is not absolute.” 9 In Santosky, the United States Supreme Court recognized that a parent’s interest in her child “is an interest far more precious than any property rights.” 10 Only when parent’s no longer care and protect their children, will foster care then


becomes an alternative placement providing care for these children in the interim.  

Foster care initially was created to place children in a temporary safe home where the foster parent would provide the basic needs for the child. Changes in the Adoption laws, emphasized the importance for creating permanency plans that would develop “lifetime relationships” for these children.

Termination of parental rights is a necessary prelude to adoption, which is the legal process by which a child acquires parents other than their natural parents. It should be noted that children over the age of fourteen can consent to their own adoption.

By the time ‘Roberto’ turned fourteen, he had been in the foster care system for years, and he decided that he did not want to be adopted. He instead wanted to be returned to his mother who is now fit and capable of caring for him. Because the state did not want to return him to the custody of his mother and because the termination cannot be vacated, he will remain in the foster care system until he reaches 18.

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12 Preston Id at 1653. This is referred to as “rescue philosophy.” Preston, Id at 1664.

13 Preston, Id at 1653.

A major issue facing the States foster care systems is the placement of these children. “Transracial placement could be an option for all children. It involves the placing of children in foster or adoptive homes with a family of another race or culture.”\(^{15}\) This type of placement however generally involves White parents adopting Black or other race children, not the reverse.\(^{16}\)

Transracial placement has not always been a popular option, Opponents of such adoptions insist that “allowing white adults to raise black children is at worst, tantamount to cultural genocide.”\(^{17}\) These opponents rely on studies that have concluded that black children who are adopted by white parents “may perceive themselves as different from children of their race, expressing negative attitudes towards them.”\(^{18}\)

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\(^{16}\) Adoption History: Transracial Adoptions (available at [http://darkwing.uoregon.edu/- and adoption/topics/transracialadoption.htm](http://darkwing.uoregon.edu/- and adoption/topics/transracialadoption.htm)).

\(^{17}\) Margaret F. Brinig, *How Much Does Legal Status Matter? Adoption by Kin Caregivers*, 36 Fam. L. Q. 449, 457 (Fall, 2002). The National Association of Black Social Workers argued that; “Black children raised in primarily middle class white families would not develop the coping skills necessary to live as independent adults in a racist society.”\(^{17}\) Id. Another example would be the reaction of citizens involved in a 1904 case where a Mexican-American family adopted white orphans, and armed white vigilantes removed their children from their home. Cooperation, supra at n. 15 at 20-21 Ph.d. Abbreviated version published as Cooperstein, M.A. (1998, May) Pennsylvania Psychology Quarterly 58(5), 20-21, (available at [http://members.tripod.com/allanpsych/transracialadoption.htm](http://members.tripod.com/allanpsych/transracialadoption.htm)).

\(^{18}\) Cooperation, Id (available at [http://members.tripod.com/allanpsych/transracialadoption.htm](http://members.tripod.com/allanpsych/transracialadoption.htm)). “Longitudinal studies appear to demonstrate that, although a sense of racial identity may be maintained by transracial adoption children, the strength of this identification is not as enhanced as that in the same-race families. Id. (available at [http://members.tripod.com/allanpsych/transracialadoption.htm](http://members.tripod.com/allanpsych/transracialadoption.htm)). “A number of new agencies, staffed almost entirely by African Americans, such as *Homes for black children* in Detroit and *Harlem-Dowling Children’s Service* in New York, renewed the effort that had started in the late 1940’s and 1950’s to find black homes for black children.” (available at [http://members.tripod.com/allanpsych/transracialadoption.htm](http://members.tripod.com/allanpsych/transracialadoption.htm)).
In the 1970’s, much debate arose regarding adoptions involving black children by white parents. In fact, the National Association of Blac Social Workers, (NABSW)\textsuperscript{19} took the stand that adoption of black children by white parents was “unnatural,” “artificial,” and “unnecessary.”\textsuperscript{20}

Also in the 1970’s, it was documented that Indian children were six times more likely to be placed into foster care than other children.\textsuperscript{21} By 1978, the Indian Child Welfare Act (ICWA)\textsuperscript{22} was enacted and mandated that tribes be notified and given an opportunity to intervene when the state places an Indian child subject to the ICWA into foster care or when the state seeks to terminate parental rights.\textsuperscript{23}

Under the ICWA, parents who “relinquish” their parental rights can withdraw their consent “for any reason at any time prior to the entry of a final decree of termination or adoption…the child shall be returned to the

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\item NABSW is designed to promote the welfare, survival, and liberation of the Black Community; and to advocate for social change at the national, state, and local level. NABSW is comprised of over 100 membership chapters throughout the continental United States and the Caribbean.” (available at http://www.nabsw.org/mserer/Mission.)
\item Supra n. 15
\item 25 U.S.C. s.1903 Child Custody Proceedings declares that it is the policy of Congress to establish minimum Federal standards for the removal of Indian children from their families (extended families) and for the placement of such children in foster or adoptive homes which will reflect Indian Culture.” (available at http://laws.adoption.com/Indian_child_welfare_act.php. In the Matter of J.R.S., Village Of Chalkyitsik v. M.S.F. and J.J.G. the foster parents petitioned the court to adopt an Indian Child. The Tribal Court attempted to intervene. The Supreme Court held that “1) a statute governing consent to voluntary termination of parental rights and consent to voluntary proceedings for the adoptive relinquishment of parental was applicable; 2) natural mother’s attempt to revoke her voluntary relinquishment of parent rights was without effect; 3) trial court’s decision setting aside placement preference system under the ICWA was fatally flawed, where trial court had denied tribe’s motion to intervene in the adoption proceeding involving one of its members; 4) tribe had an “interest” in adoption proceeding involving a child tribal member in which the rule regarding intervention was designed to protect; and 5) intervention by the tribe into adoption proceeding involving Indian child was necessary to preserve tribe’s interest in its child member. 690 P. 2d. 10.
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parent.”  

“No termination of parental rights may be ordered in such a proceeding in the absence of a determination supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.  

The burden of proof that the State had to prove in the termination of parental rights of ‘Ricardo’s’ mother was clear and convincing evidence in Massachusetts.  In New York, termination of parental rights requires only a “fair preponderance of the evidence” to support that finding.  The burden for termination under the ICWA is beyond a reasonable doubt.  

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24 25 U.S.C sec. 1913, “After the entry of a final decree of adoption of an Indian child in any state court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree...the court shall vacate such decree and return the child to the parent...no adoption which has been effective for at least two years may be invalidated...unless otherwise permitted under State law.” “There are two prerequisites to invoking the requirements...First, it must be determined that the proceeding is a ‘child custody proceeding’...it must be determined whether the child is an Indian child...the act only applies to Indian children of federally recognized tribe...U.S.C.A. s. 1903(8)(2005)...”  

25 25 USC Sec 1912(f) (1978). In the Matter of J.R.S.N, Village of Chalkyitsik v. M.S.F. and J.J.G. supra n. 23. the lower court granted an adoption petition and denied a tribe’s motion to intervene. On appeal, the court held, that “(1) statute governing consent to voluntary termination of parental rights and consent to voluntary proceedings for the adoptive placement of Indian children was applicable. (2) natural mother’s attempt to revoke her voluntary relinquishment of parental rights was without effect; (3) trial court’s decision setting aside placement system under Indian Child Act was fatally flawed, where trial court had denied tribe’s motion to intervene in the adoption proceeding involving one of it’s members; (4) tribe had an ‘interest’ in adoption proceeding involving a child tribal member which the rule regarding intervention was designed to protect; and intervention by tribe into adoption proceeding involving Indian child was necessary to preserve tribe’s interest in its child member. Id..  


27 Supra n. 5 at 745 “Thirty five states, the District of Columbia, and the Virgin Islands currently specify a higher standard of proof.” Id.  

Other children in this country considered ‘unadoptable,’ including other children of color like ‘Roberto,’ do not have these types of options provided by the ICWA.

How about other types of placements which could be considered as options to these children? Some states have not acknowledged “gay marriages” and as a result have prevented homosexuals from adopting these “legal orphans.”\textsuperscript{29} This results in more unadoptable children. These states include Florida, Mississippi and Utah.\textsuperscript{30}

“Adoption cannot proceed unless the parents’ rights are terminated in the first instance. The converse is not true. The termination of parental rights is not always followed by adoption.”\textsuperscript{31} This increases the number of children in foster care and leaving some of them unadoptable. Before a state can sever the rights of parents, due process requires that the state prove its allegations by clear and convincing evidence.\textsuperscript{32} The hope is that these children will not become lost in the States foster care system.

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\textsuperscript{29} Id. \\
\textsuperscript{30} Id. \\
\textsuperscript{31} In re Thersa S. 196 Conn. 18, 30-31, 491 A. 2d 355 (1966). \\
\textsuperscript{32} Supra n. 5.
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“Termination of parental rights”\textsuperscript{33} although not the same in all states generally, involves one or more of the following circumstances; “(1) the parent has failed to make the necessary improvements for the child’s return; (2) longstanding pattern of abandonment or extreme parental disinterest; (3) protected long-term incapacity to care for the child; based upon mental or emotional illness, mental retardation, or physical incapacity; (4) drug or alcohol-related incarcerated or unwillingness to care for the child; with past history of unsuccessful efforts at treatment; (5) prior abuse or neglect of child, a sibling, or other children in the house; neglect or abuse of the child

\textsuperscript{33} For example…

The primary consideration in any proceeding to terminate parental rights must be whether the best interest of the child will be served by the termination….and NSR 128.106 to 128.109…..include a finding that: 1) the best interests of the child would be served by the termination of parental rights; and 2) the conduct of the parent or parents was the basis for a finding made pursuant to subsection 2 of NRS 432B.393 or demonstrated at least one of the following: (a) abandonment of the child; (b) neglect of the child; (c) unfitness of the parent; (d) failure of parental adjustment; (e) risk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home of his parent or parents…

NRS 128.023(Added to NRS by 1995, 782; A 2003, 1116).

In New Mexico there are there are three specific grounds for termination of parental rights: abandonment, failure to ameliorate the causes and conditions of the abuse and neglect, and disintegration of the parent-child relationship accompanied by a psychological parent-child relationship between the child and his caretaker. At least one of the grounds must be pled and proven for termination of parental rights to occur. In the Matter of the Termination of Parental Rights with respect to R.W., 108 N.M. 332, 335-336 (Ct. App. 1989)…N.M. Stat. Ann s. 32A-4-28(B)-(E).

Massachusetts "In determining whether the best interest of the child will be served by granting a petition for adoption without requiring certain consent, the court shall consider the ability, capacity, fitness and readiness of the child’s parents to assume parental responsibility, and shall also consider the ability, capacity, fitness and readiness of the petitioners to assume such responsibilities. In making the determination, the health and safety of the child shall be of paramount, but not exclusive, concern..." M.G.L. Ch, 210 s. 3(c).

Rhode Island courts shall, upon petition…terminate any and all legal rights of the parent to the child…if the court finds…the parent has willfully neglected to provide proper care and maintenance for the child…the parent is unfit by reason of conduct or conditions seriously detrimental to the child…R.I. St s. 40-11-12.2(a).

Texas may order termination of the parent-child relationship if the court finds…that the parent has…abandoned the child without identifying the child or furnishing means of identification…been the major cause of the failure of the child to be enrolled in school as required by law…T.X. Fam. Code s. 161.003(a).

“The family courts in Hawaii may terminate the parental rights in respect to any child as to any legal parent; who…has deserted the child…who has voluntarily surrendered the care and custody of the child to another…and has failed to communicate…failed to provide care and support of the child…Haw. Rev. Stat S. 571-61(a), (b)(1), (b)(2)n (1998).

If “…a parent has made 3 or more attempts within a 15-month period to remedy the parent’s conduct or conditions in the home without lasting change; or a parent has made no effort to remedy the parent’s conduct or the conditions in the home …Alaska Stat. S 47.10.88(a)-(h).
was so extreme that returning the child home presented unacceptable risk; (7) child has developed a deep aversion or fear of parent because prior abuse or neglect; and/or (8) parent is sentenced to prolonged imprisonment.”

What about the “Best Interest of the Child Standard?”

Massachusetts was the first state to pass an adoption statute, however today each state has it’s own adoption statute which suggest that the “best interest of the child is satisfied.” The Supreme Court has noted that “in resolving the best interests of the child, the court should not be bound by the traditional bright line solution of awarding the child like a trophy to whichever party wins the litigation.”

One of the reasons why termination of parental rights to consent to adoption has been expedited against parents is as a result of the Federal Adoption Assistance and the Child Welfare Act of 1980. Acceleration of termination proceedings was further increased by the passage of the

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35 Under the best interest of the child standard, “prospective adoptive parents are evaluated based upon the following: (1) an ability and willingness to provide a loving and nurturing home that promotes the child’s individual needs; (2) an ability and willingness to promote and encourage the child’s education and personal potential; (3) having the energy, physical stamina, and life expectancy to raise the child; (4) having adequate income and financial needs; (5) an ability to supply a healthy and safe home environment; (6) a clear record of physical, mental, and emotional health; (7) intelligence to act as an adequate person and parent, and to provide the child with stimulation that measures up to his or her capacities; and (8) good moral character.” Supra n. 29 at 384. Ark. Code. Ann. S. 9-27-341 (b)(3) (2005) “An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence…that it is in the best interest of the juvenile. Mich. Comp. Laws s. 722.23…. “best interest of the child means the sum total of the following factors to be considered, evaluated and determined by the court” some of which is “…the love and affection …between the parties…the mental and physical health of the parties involved…the length of time the child has lived in a stable environment…”

36 Id at 372.


Adoption and Safe Families Act of 1997\textsuperscript{39} (AFSA) which has as its goals to “secure the health and safety of the children who enter the system”, \textsuperscript{40} and to “secure timely permanent placement outcomes for children.”\textsuperscript{41}

The Adoption and Safe families Act requires the courts to give “primary consideration to the physical, mental and emotional welfare and needs of the child, including the likelihood of the child being adopted.”\textsuperscript{42}

As a result, the number of children in foster care is growing 33 times faster than children in the general population.\textsuperscript{43} Statistically, they turn 18 and 40\% of those who age out of the system will become part of the Welfare system.\textsuperscript{44}

\textsuperscript{39} Pub. L. No. 105-89, 111 Stat. 2115(1997) This Act requires the filing of a petition for termination of parental rights by the end of the child’s 15\textsuperscript{th} month in foster care, except in certain circumstances. S.32A-4-29(K).

\textsuperscript{40} Pub. L. No. 105-89, 111 Stat 2115 (1997). “While the ASP shortens the time that families have to work toward reunification and speeds up the termination of parental rights and adoption processes, it was passed largely in reaction to the most terrible cases of abuses in our nation.” The Other “Neglected” Parties in Child Protected Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them. Kathleen A. Bailie 66 Fordham L. Rev. 2285, 2295 (May. 1998).

\textsuperscript{41} 42 U.S.C. s. 671(a)(15) (1994).

\textsuperscript{42} AFSA sec. 32A-4-(28A).


\textsuperscript{44} Id.
III. WHY DOES IT AFFECT MINORITY CHILDREN, CHILDREN WITH DISABILITIES AND OLDER CHILDREN, MORE THAN OTHER CHILDREN?

“Fifteen percent of all children in America are black, so why is it that forty percent of the children in foster care system are black?” There is a disproportionate number of African American children in the foster care system. What this means is that the percentage of minority children in foster care is more than their percentage of the population. In Massachusetts, where the percentage of minority children is 5 percent, black children constitute half of the children who need foster care.

There is also a disproportionate number of African American parents incarcerated in this country. A report released by the Justice Department and several leading foundations confirms that it has long been known by ordinary Black, Hispanic and native American people in this country, that minorities are more likely to be arrested, detained, prosecuted, tried, sentenced (if juveniles) and imprisoned longer than their counterparts.

50 Id.

51 Randall Kennedy, Orphans of Separatism; The Painful Politics of Transracial Adoption TAP:Vol 5, Iss. 17. Orphans of Separatism. Randall Kennedy
52 Id.
53 Id.
50 Paul D’ Amato The Color of Justice. The International Socialist Review issue 12 (June – July 2000. (available at http://www.interview.org/issues/12/color of justice.shtml. “The United States has the second highest incarceration rate in the world, behind Russia. Two million people are housed in American prisons. Although they comprise less than a quarter of the U.S population, Black and Hispanic Americans make up approximately two-thirds of the total U.S prison population. The percentage of prisoners who are black is four times that of the percentage of Blacks in the U.S. population. The percentage of percentage of prisoners who are Hispanic is almost twice that of the percentage of Hispanics in the U.S….“ Id.
Incarceration, in many states, is not, in and of itself, sufficient to prove unfitness of a parent. 51

Risks factors of children of incarcerated parents include “poverty, family involvement with alcohol and other drugs, interfamilial violence, previous separations, and crime.”52 Many women are also incarcerated due to convictions of drug possessions, drug dealing and property crimes. 53 These women tend to be sentenced to an average of 49 months. 54 Children who have been separated from their mothers who are incarcerated are more likely to “succumb to truancy, substance abuse, gangs’ sexual misconduct and delinquency.”55

Another important factor is that more Minority families are indigent in this country and in some jurisdictions poverty is a factor for terminating parental rights. 56 The majority of children removed because of ‘parental neglect…are disproportionately poor, non-white and come from single

51 Id at 394 – 395. “Incarceration alone, however, is not sufficient to establish the statutory grounds for abandonment.” Id.
53 A recent case in Wisconsin, the Wisconsin Supreme Court held that “in cases where a parent is incarcerated and the only ground for termination of parental rights is that parent’s incarceration, the statute requires that the court-ordered conditions of return are tailored to the particular needs of the parent and child. In re the Termination of Parental Rights to Max G. W., WL 1889969, 11. (Wis., 2006). A study completed by the American Academy of Pediatrics concluded that “children whose fathers were in jail had higher Children’s Depression Inventory total scores compared with children without incarcerated fathers, indicating more depressive symptoms. Socioemotional Effects of Fathers’ Incarceration on Low-income, Urban, School Aged Children. MaryAnn B. Wilbur, Jodi E. Marani, Danielle Appulgliese, Ryan Woods, Jane Siegel, Howard J. Cabral, Deborah A. Frank. Pediatrics Vol. 120 No. 3 September 2007. pp. e678-e-685 (doc: 10.1542/peds. 2006-2166)
54 Id.
55 Id.
56 Claudia G. Catalino, Annotation, Natural Parent’s Indigence As Precluding Finding That Failure To Support Child Waived Requirements Of Consent to Adoption – Factors Other Than Employment Status, 84 ALR5th 191 (2000). Also see Claudia G. Cataline at 83 ALR5th 375 (2000), and 82 ALR5th 443 (2000).
family households.”^57 Welfare agencies have been cited for removing these children too soon without any procedural safeguards for poor families. ^58 “Poor parents do have a constitutional right to raise a family, subject to interference by the state only to achieve a compelling state interest.”^59

Many Minority parents suffer from mental and educational deficiencies. ^60 What constitutes normal and abnormal behavior is different in various cultures. ^61 What makes the differences could be the result of one’s age, sex, social class and occupation. ^62 The stories of adult children with a mentally ill parent, includes: “anger, isolation, shame, fear, sadness, chaos, grief neglect, feelings of helplessness, frustration, confusion, identity problems, poor self-esteem and trust and intimacy difficulties.”^63


^58 Balie supra n. 63 at 2316.


^60 Anne M. Payne, *Annotation, Parent’s Mental Deficiency As Factor In Termination Of Parental Rights – Modern Status*, 1 ALR5th 469 (1992). “Culture refers to the categories. Plans and rules that people use to interpret their world and act purposefully within it. These rules are learned in childhood while growing up in society. Cultural factors relate to mental illness in several ways. In the first instance, culture determines cultural and religious beliefs, diagnosing someone as deluded must take into account cultural and religious factors. Simon Dein *Clinical Review; ABC of Mental Health: Mental Health in a multiethnic Society. BMJ* 1997; 315: 473-476 (23 August) (available at http://www.bmj.com/content/full/315/7106473).

^61 Id. At 473-476.

^62 Id.

A study of 810 former foster care youth in eight states found that “two to four years after leaving foster care were; forty-six percent of these youth lacked high school diplomas; twenty-five percent had experienced homelessness; sixty-two percent had not maintained employment for a full year; thirty-eight percent had been diagnosed with emotional problems; fifty percent had used illegal drugs; twenty-five percent were involved with the legal system; and forty-two percent had become parents.”

IV. POSSIBLE SOLUTIONS

What about recruiting Black families for foster care placements? Many black families who may be interested in the adoption of these children have difficulties. This is due to “a decline in the value of public assistance benefits, the displacement of well-paying manufacturing jobs with low-paying service jobs for poorly educated workers, and the flight of middle-income Blacks and Hispanics from the cities have threatened the stability of minority families.” The results are fewer black children finding a permanent placement. Providing these families with financial support may provide more placement options for these children.

64 Supra n. 45 at 329. See also, The American Bar Association’s Youth at Risk Initiative, Helping Clients Transition to Independent Living, 45 Fam. Ct. Rev. 444. (July 2007). Scott Hollander, Jonathan Budd, William A. Petulla, Jennifer A. Stanley (July 2007), which cited studies which also included statistics regarding former foster care children and their lack of health insurance making it difficult to access physical and mental health services.

65 In a World Not Their Own: The Adoption of Black Children, Zanita E. Fenton 10 Hary. Blackletter J., 39 (1993). Some states offer subsidies to adopting, but with strict rules. For example, in Missouri “the subsidy shall only be granted to children who reside in a household with an income that does not exceed two hundred percent of the federal poverty level or are eligible for Title IV-E adoption assistance.” V.M.S 453.073 Adoption and Foster Care

The Child’s Attorney can play an important role by using the requirements of ASFA for permanency planning hearings to provide services for their client and to help the more mature client make their own decisions regarding their placements. In essence, the child’s attorney “can affect whether a child will live with his or her family or in foster care, receive probation or a prison sentence, or maintain contact with siblings after family dissolution or change of custody. These Attorneys should be arguing that the “Best Interest of the Child Standard” applies and that the child has due process rights as to his Best Interest which should be addressed in considering who has custody.

One problem is the fact that there are many differences between lawyers and their child clients. One difference would be that the majority of the children in the juvenile justice system are disproportionately of color, while the majority of Attorneys are white making it difficult for Attorneys to understand their clients’ needs.

Proposed statutes in some jurisdictions are designed to allow a child to petition the juvenile court to reinstate the previously terminated rights of his or her parent under the specific circumstances.

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70 Supra n. 73 at 608.
71 Supra n. 73 at 609.
72 Proposed law – RCW 13.34.215 provides that “a) the child was previously found to be a dependent child…; b) the child’s parent’s rights were terminated in a proceeding…c) the child has not achieved his or her permanency plan within three years of a final order of termination…; d) the child must be at least twelve years old at the time the petition is filed. Upon the child’s for good cause shown, or on its own motion
A revision of Adoption laws could allow African Americans and other minority children to have options similar to those available to American Indian Children.\(^{73}\)

Some states have statutes that require its agencies to give consideration to the child’s race or ethnicity.\(^{74}\) This practice, referred to as “racial matching,”\(^{75}\) has been criticized because even though it “promotes the best interest of adoptable minority children,” it instead “harms their best interest by delaying or denying placement with a family solely based on the basis of race.”\(^{76}\) It has been suggested that if there is not a same race family available for a child, that the agency should immediately place the child with a family that is willing to adopt, regardless of race differences.\(^{77}\)


\(^{74}\) “In all placements by the Department of Human Services…due consideration shall be given to the child’s minority race or minority ethnic heritage…Ark. Code Ann. S9-9-102 (a)-(b) (Michie 1993).

\(^{75}\) See Kennedy supra n. 53. “Racial matching is a disastrous social policy both in how it affects children and in what it signals about our current attitudes regarding racial distinctions. In terms of immediate consequences, strong forms of racial matching block some parentless children from access to adults who would otherwise be deemed suitable as parents except that they are disqualified on the grounds that they are of the “wrong” race. Id.


\(^{77}\) Id. at 459.
Cooperative Adoptions\(^{78}\) also called Open Adoptions\(^{79}\) allow the biological parents to maintain a relationship with their children, i.e. through cards, pictures, letters, and in some instances, limited visitation. \(^{80}\) It should be noted that youth who have contact with their biological parents have better outcomes than youth without this contact. \(^{81}\) Some courts oppose this idea of contact. For example, Minnesota law does not recognize “open adoptions”\(^{82}\)

Similar to Open Adoptions, some states have enacted “Mutual Consent Registries”\(^{83}\) which gives biological parents and their adopted children a method to contact each other. \(^{84}\)

More emphasis should be placed on helping biological parents regarding the consequence of voluntary relinquishment of parental rights, although more humane and preferable to involuntary relinquishment of parental rights, it should be presented to parents making sure that they are

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\(^{78}\) “Cooperative Adoption refers to an adoption in which the parties agree to allow some element of continuity between the birth family and the adoptive family.” Susan L. Brooks, \textit{The Case For Adoption Alternatives}, 39 Fam. & Conciliation Courts Rev. 43, 51 (January 2001).


\(^{80}\) Susan L. Brooks, \textit{The Case For Adoption Alternatives}, 39 Fam. & Conciliation Courts Rev. 43, 52 (January 2001).

\(^{81}\) Id.

\(^{82}\) “Upon the termination of parental rights, all rights including any rights to custody, control, visitation, or support existing between the child and parent, shall be severed, and the parent shall have no standing to appear at any further legal proceeding concerning the child.” Minn. Stat. s. 260.241. subd. 1(1994) In the matter of D.D.G. State of Minesota in Court of Appeals C8-96-445 (August 27, 1996).


\(^{84}\) Id at 164.
fully informed. State laws should make sure parents are advised their right to counsel, and the meaning and consequences of the relinquishment of their parental rights. 85

In most states the courts do not have the power to vacate a termination order, even though years may have passed and the child is not adopted. There are proposed statutes in some states to deal with this issue. 86 In Minnesota, “an order terminating parental rights can be set aside only upon a showing of fraud, duress, or undue influence.” 87

One suggestion would be to amend state laws to allow the courts to have the power to review termination orders that would enable the courts to restore parental rights if it is in the child’s best interest. 88

States which have amended their statutes include; Connecticut, where “the trial court must conduct a two-part analysis; first there must be a determination that no parent-child relationship exist and second, the court must look into the future and determine whether it would be detrimental to

86 Bill Number A8223 is “An act to amend the social services law and the family court act, in relation to permanency for destitute children, reinstatement of parental relationships and enhancement of supervised independent living programs’ and to repeal certain provisions of the social services law relating thereto.” One aspect of this bill addresses cases where it may be appropriate to vacate the order (termination) and reinstate the rights of the child’s parents. The bill permits the court to reinstate parental rights, with the consent of the child and the parent when it is in the best interest of the child.

87 In the matter of the Welfare of D.D.G. Minnesota Court of Appeals C8-96 -455 (August 27, 1996) “At common law, an order terminating parental rights may be set aside at any time for after-discovered fraud upon the court.” R.I.M, v. Moon, 410 N.W. 2d 925, 927 (Minn. App. 1987). “The fraud or misconduct must go to the ultimate issue of a case.” Regency of Univ. of Minn. V. Medical, Inc., 405 N.W. 2d at 927 (Minn. App. 1987).

88 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, 137-138 (1995)
the child’s best interest to allow time for such a relationship to develop.” 89

South Dakota permits a court to relieve a party from a final judgment within
a reasonable time for any reason justifying relief. 90 In Texas when all parties
have expressed a willingness to stipulate to reversal of termination of
parental rights it was ordered by the court. 91

California is proposing new legislation which would authorize a child
who has been legally freed for at least three years, or who all parties
stipulate is no longer adoptable, to petition the juvenile court to reinstate
parental rights. 92 The petition may only be brought by the child and the law
will protect termination orders from being collaterally attacked by parents,
while providing a remedy to dependent children who would otherwise be left
legal orphans to the state. 93 In Alaska, when the parents of a child wished to
retain their parental rights, they agreed to allow a third person to adopt the
child and the three individual’s shared parental duties. The court decided to
allow the adoption and the child then had three lawful parents. 94

Although the Adoption and Safe Families Act in context is concerned
with permanency planning concepts, critics believe that “lack of resources,

70 SDCL 15-6-60 .
92 CA: AB 519 .
93 Id.
combined with a lack of will,” makes the Act difficult to implement. In order for the Act to work toward its’ goals, it would require Congress to make a “substantial public investment and would entail continuous public involvement in foster children’s lives.”

Separating children from their family ties has also proven to be a mistake. Instead it appears that those children who are allowed to have family contact, “function better in the community, and better understand his or her identity.” This type of relationship can also be acquired in “kinship foster care homes” which has proven to be much more beneficial to these children because it allows them to continue to have contact with their biological parents. Unfortunately kinship foster parents are not as willing to adopt these children, because of personal family relationships, or because they just cannot afford to adopt a child.

Historically, the court also has not made it easy for family members to intervene in these matters. In Kansas, the Court of Appeals dismissed a great-aunt’s appeal denying her “interested party status.” Finding a Guardian, who also happens to be a family member, can eliminate the

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96 Id.
97 Supra n. 70 at 347.
98 “Kinship Care involves living with relatives in a situation ranging from completely informal sharing of care to permanent and somewhat supervised arrangements;” Margaret F. Brinig and Steven L. Nook, How Much Does Legal Status Matter? Adoption By Kin Caregivers. 36 Fam. L. Q. 449,460(2002). A study concluded that children who are African American do well in kinship care, while children of other racial groups suffer from depression, delinquency and drug use. Id. At 463.
99 Id at 460. Kansas Court of Appeals has held that grandparents have a fight to appeal. L.J.P. v. Cabinet for Health and Family Services, ___D.W. 32d___(Ky. App. 2008) 20098 WL 4998635.
100 Id at 466.
102 A “Legal Guardian” is a “judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental
necessity of terminating Parenting Rights. 103 A family member, or a “kinship foster home” that has custody, can determine if there should be a relationship between the child and his or her biological parent. 104 If this Guardianship is subsidized105 it will support African American families, and other ‘unadoptable’ children who culturally tend to take in children of the family for no money, but can now do it without financial pressures. 106

Another suggestion would be to extend the age limit of children in foster care from eighteen to twenty-one to enable the states to provide the children with additional supports before they age out of the system at age eighteen.107 The Independent Living initiative passed in 1986 and the Foster Care Independence Act of 1999 requires the States to provide more types of services for longer periods of time, to help these children with life skills when they leave foster care.108

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103 Supra n. 85 at 51.
104 Id.
105 “Subsidized Guardianships” assist children by providing them an opportunity to move out of their kinship foster care and into stabile guardianships programs. Susan Vivian Mangold, Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Third Option in Permanency Planning, 48 Buff. L. Rev. 835, 873 (Fall 2000).
106 Supra n. 85 at 51.
107 Supra n. 108 at 836.
108 Id. at 856.
Another proposed idea, is to create “legalized joint adoptions.” The proposal would make it possible for brothers and sisters, friends and other single people to jointly adopt a child. The author of this proposal has as her purpose to allow two single African Americans an opportunity to co-adopt and to provide a permanent home for black children, who are “still poor, in foster care, living with neither biological parent; supervised by a child welfare agency; or living with a single parent.”

V. CONCLUSION

Under the current laws, ‘Ricardo’ will remain in foster care, like other unadoptable children until the age of eighteen. These are children who most likely have never been parented because they have been removed from their parents’ custody for so long and possibly have resided in several foster care homes, group homes or residential placement. All of these placements, ‘Ricardo’ has resided. These children have not received the Independent Living Skills that are necessary to help them be successful in society.

109 “Joint Adoption” allows for a child to be adopted by two single black people who are not married to each other and who are not romantically or sexually involved with each other. Angela Mae Kupenda, Two Parents are Better Than None: Whether Two Single, African American Adults-Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship With Each Other-Should Be Allowed to Jointly Adopt and Co-Parent African American Children, 35 U. Louisvile J. Fam. Law 703 (1997)


111 Id. at 62.
Amendments in the Adoption laws along with the other suggestions noted will assist these children and help them to become more productive adults.