THE REVOLVING DOORS OF FAMILY COURT: CONFRONTING BROKEN ADOPTIONS*

BY DAWN J. POST** AND BRIAN ZIMMERMAN***

I. INTRODUCTION

In the last few years, headlines have gripped the public, highlighting dramatic failures in international adoption cases.[1] Who can forget the

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* The authors are practitioners in the child welfare field. Accordingly, much of what is written in this article is their view of the situation as it currently stands. Also, the case examples mentioned contain confidential information for which citation cannot be provided. However, these cases were handled by the authors or explained to the authors by other attorneys, social workers, or participants in the respective cases.

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Tennessee woman who abruptly placed her adopted son from Russia alone on a plane back to his native country with a note that he was "'violent and ha[d] severe psychopathic issues'"?[2] Similarly, there is a recent focus on domestic cases in which parents have sought to dissolve their relationship with their adopted children, alleging extreme behavioral, psychological, or medical needs, only to return them to the state foster care system to receive treatment and care.[3] Acknowledging that while "the last thing adoptive

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New York City Family Court judges and referees; and Lawyers for Children, for their collaboration and participation in the anonymous survey process.

[1] Brooke Adams, *The Challenge of Adopting Foreign Children*, THE SALT LAKE TRIB. (Apr. 20, 2010), http://archive.sltrib.com/article.php?id=10536571&itype=storyID&keyword=challenge+adopting&sdate=2010-08-20&edate=2010-08-20&qtype=any. Ethiopian adoptive families were shocked to read a post advertising for a new adoptive family for a five year old girl whose family could not keep her, because "'[t]hey c[ould]not continue to have her in their home as they [were] not equipped to deal with her needs and they ha[d] other small children they need[ed] to protect.'" The girl was born to a single mother who died of AIDS, was diagnosed as HIV positive and as having Reactive Attachment Disorder. She was engaging in inappropriate sexualized behavior. *Id.* *See also* Sarah Viren, *Houstonians Step Forward to Fix Failed Adoptions*, HOUS. CHRON. (Sept. 26, 2007), http://www.chron.com/news/houston-texas/article/Houstonians-step-forward-to-fix-failed-adoptions-1583216.php ("Organizing through phone calls among friends or Internet mailing lists, parents and adoption agencies work to find new homes for children" whose international adoptions have failed).

[2] Damien Cave, *At a Family's Home in Tennessee, Reminders of a Boy Returned to Russia*, N.Y. TIMES, Apr. 11, 2010, at A16.

[3] Beata Mostafavi, *Grand Blanc Mother Who Made Headlines for Transracial Adoption 10 Years Ago Now Struggles Caring for Adopted Daughter with Special Needs*, FLINT J. (Aug. 22, 2010), http://www.mlive.com/news/flint/index.ssf/2010/08/grand_blanc_mother_who_made_he.html (discussing an adoptive mother who stated that she could "no longer parent one of her five adopted children and she want[ed] the young woman—who had a long history of aggression and mental health issues—out of her home"); Ryan Owens & Suzan Clarke, *Oklahoma Couple Want to Return Troubled Adopted Son to State*, ABCNEWS.COM (Dec. 21, 2009), http://abcnews.go.com/GMA/Parenting/tony-melissa-wescott-oklahoma-return-adopted-son/story?id=9387389 (describing adoptive parents who stated that their adopted son was too much for them to handle after he became violent toward other children, hurt and killed animals, and ran away regularly); Barbara White Stack, *When Adoption Isn't the Right Answer*, PITT. POST-GAZETTE (Jan. 18, 2004), http://www.post-gazette.com/localnews/20040118fosterlocal2p2.asp (describing an adoptive parent who was charged by the Allegheny County's Office of Children, Youth and

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children need is to be rejected by another family,"[4] these middle-to-upper class families argue that their children's mental health needs are so great that they cannot financially, emotionally, or physically afford to continue to care for them,[5] and that "loving [them] means letting [them] go."[6] This problem was highlighted in 2008 when Nebraska became notorious for being the one state in the country with a unique safe haven law.[7] The safe haven law was intended to allow parents to leave unwanted infants at the hospital; however, the law did not identify an age limit, allowing parents to abandon children up the age of eighteen without legal consequences.[8] In the first four months of the law's existence, before this loophole was corrected, twenty-seven parents or guardians left thirty-six children at hospitals (none of them infants).[9] About half of these cases involved adoptive parents or guardians, and six children were transported into Nebraska from other states and abandoned in hospitals.[10] Americans have vilified these adoptive families, comparing their decisions to return

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Families with failing to assist after adopting a child who became out of control in teenage years, fought with students and teachers in class, hit his sisters, defied rules, and ran away); Barbara White Stack, *Adoptions Don't Always Pan Out*, PITT. POST-GAZETTE (July 6, 2003), http://www.post-gazette.com/localnews/20030706brokenadoptionsreg2p2.asp (describing an adoptive parent who returned to the state a ten year old, whom she had adopted as a two year old, because of bad behavior, school suspensions, lying, and stealing).

[4] Owens & Clarke, *supra* note 3.

[5] *See* Bonnie Miller Rubin, *Parents Face Heartbreaking Choice: Do They Give up Their Adopted 7-Year-Old Daughter?*, CHI. TRIB. (Sept. 21, 2010), http://articles.chicagotribune.com/2010-09-21/health/ct-met-disrupted-adoption-0921-20100921_1_ellie-family-constellation-new-jersey-woman; Patrick Yeagle, *When Adoption Goes Wrong*, ILL. TIMES (Aug. 11, 2011), http://www.illinoistimes.com/Springfield/article-8964-when-adoptiongoes-wrong.html.

[6] Owens & Clarke, *supra* note 3.

[7] *See* Erik Eckholm, *Nebraska Limits Child Safe-Haven Law to Infants*, N.Y. TIMES, Nov. 22, 2008, at A10.

[8] *Id.*

[9] *LB157 - Safe Haven Cases*, NEB. DEP'T HEALTH & HUMAN SERVS., http://dhhs.ne.gov/children_family_services/Documents/cases.pdf (last updated Nov. 22, 2008).

[10] *LB157 - Safe Haven Cases*, *supra* note 9; *Matrix of Commonalities of Safe Haven Cases*, NEB. DEP'T HEALTH & HUMAN SERVS., http://dhhs.ne.gov/children_family_services/Documents/SHChrt112608.pdf (last updated Nov. 26, 2008).

children to the system to that of returning a defective product to a store.[11] Revictimizing an already vulnerable and innocent child is certainly difficult to justify.[12] However, the actions of the adoptive families and the reactions of many Americans raise very different questions for the authors who practice as attorneys for children in one of the busiest family courts in the country. Unlike these adoptive parents, who were publicly vilified, very little attention has been paid to the many children who are a product of the foster care system and who return to family court through its revolving doors after achieving so-called "permanency" through adoption.

In the field of child welfare, changes in policy goals and objectives to achieve permanency for children in foster care have, in practice, resulted in an increase in adoptions.[13] Although there are no federal standards for data collection to track broken adoptions,[14] attorneys for children who regularly practice in family court frequently see cases in which children who were previously adopted return to family court or to the foster care system as subjects in subsequent cases, whether in abuse or neglect, custody or guardianship, voluntary placements, persons in need of supervision (PINS), or delinquency cases.[15] Related factors associated with broken adoptions may include: age of the child or adoptive parent; behavioral and emotional issues of the child; prior placement history; sexual abuse history;

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[11] Shannon Lisa, *Should Adoptive Parents Be Allowed to Return Children with Behavior Problems to the State?*, HELIUM (June 21, 2010), http://www.helium.com/debates/310335/side_by_side; Bonnie Miller Rubin, *A Firestorm from Tribune Readers*, TRIB. NATION BLOG (Sept. 30, 2010, 3:56 PM), http://newsblogs.chicagotribune.com/tribnation/2010/09/a-firestorm-from-tribune-readers.html.

[12] *See* Rubin, *supra* note 11.

[13] *What's Working for Children: A Policy Study of Adoption Stability and Termination, Executive Summary*, EVAN B. DONALDSON ADOPTION INST., 2 (Nov. 2004), http://www.adoptioninstitute.org/publications/Disruption_Executive_Summary.pdf [hereinafter *What's Working for Children, Executive Summary*].

[14] Kelli Kennedy, *Experts Push Disclosure of Failed Adoptions*, YAHOO! NEWS (Aug. 22, 2011), http://news.yahoo.com/experts-push-disclosure-failed-foster-adoptions-094112187.html; *What's Working for Children, Executive Summary*, *supra* note 13, at 2.

[15] Dawn J. Post & Brian Zimmerman, Assigned Counsel Panel Survey (2011) (unpublished) (on file with authors) [hereinafter Assigned Counsel Survey]; Dawn J. Post & Brian Zimmerman, Lawyers for Children Survey (2011) (unpublished) (on file with authors) [hereinafter LFC Survey]; Dawn J. Post & Brian Zimmerman, Judges and Referees Survey (2011) (unpublished) (on file with authors) [hereinafter Judges and Referees Survey].

attachments of sibling groups; attachment to the birth parent; prenatal drug and alcohol exposure; and the lack of services and resources to properly address these issues.[16] They may also include organizational and institutional failures in the child welfare, mental health, education, health care, and legal communities.[17]

As the authors of this article thought about the revolving doors of family court and the seeming lack of reported numbers on this issue, they began to make local inquiries into whether anyone in New York City or the state could provide data on cases involving children who had returned to care after being adopted. The Office of Court Administration, the Department of Probation, the Mental Health Clinic,[18] and attorneys for children groups, including The Children's Law Center (CLCNY),[19] all indicated that they did not have a statistical field to capture these numbers.

Some of the difficulty lies in the fact that children's names may be changed,[20] and that they are assigned different case numbers after they are adopted and return to court.[21] Frequently, a broken adoption only becomes known if volunteered by the adoptive parent or child or if it is included in the text of the filed petition. Survey results suggest that in perhaps over 50% of the cases, the displacement becomes known when the adoptive parents state their relationship as such at the beginning of the appearance to

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[16] *What's Working for Children: A Policy Study of Adoption Stability and Termination*, EVAN B. DONALDSON ADOPTION INST., 12–16 (Nov. 2004), http://www.adoptioninstitute.org/ publications/Disruption_Report.pdf [hereinafter *What's Working for Children*].

[17] Judith S. Rycus et al., *Confronting Barriers to Adoption Success*, 44 FAM. CT. REV. 210, 211–18 (2006); *What's Working for Children*, *supra* note 16, at 22–25.

[18] During the dispositional phase of a delinquency case, the family court judge will order an evaluation and report from the city's Mental Health Services, which is necessary before a juvenile delinquent can be placed away from home.

[19] The Children's Law Center in New York City is a non-profit law firm that represents children in custody, visitation, guardianship, family offense, paternity, and related child protective proceedings. *See Home*, CHILD. L. CENTER, http://www.clcny.org (last visited Dec. 26, 2011).

[20] *What's Working for Children*, *supra* note 16, at 21.

[21] *E.g.*, *Adoption and IIS-Policy*, OR. DEP'T HUMAN SERVS. (Sept. 17, 1996), http://www.dhs.state.or.us/policy/childwelfare/manual_1/i-g18.pdf (declaring the protocol to be followed for assigning numbers to disrupted adoption cases).

the family court.[22] Indeed, it appears that only a few states now keep track of children returned to the system during or after the adoption.[23]

The desire to obtain statistics on broken adoptions was multifold in purpose. In part, the statistics might confirm what the authors had already surmised based on anecdotal evidence: that broken adoptions are a significant and unspoken issue, not only for the children whose lives are disrupted time and again but also for the system as a whole. In addition, the statistics could inform a meaningful policy discussion that could minimize the number of cases where children come back into the system as a result of broken adoptions. Unless one can identify the characteristics of these cases, one cannot determine what might have been done to avoid the broken adoption. Thus, while statistics only reveal part of the picture, the authors believed it was critical to see what numbers could be uncovered, even on a smaller scale.

In preparation for this article, the CLCNY conducted a six-month case study to examine cases of broken adoptions and the children who return to family court in guardianship cases. The authors also surveyed the New York City Family Court (N.Y.C. Family Court) bench and several attorney groups through anonymous surveys. In sharing the results through this article and facilitating the discussion, the authors seek to work toward finding a solution to limit the revolving doors of family court. They recognize that it is the shared responsibility of the many service providers and disciplines involved in these children and teenager's lives, both pre- and post-adoption, to acknowledge the large number of children and teenagers who are returned to the system through the revolving doors of family court, as well as each parties' role contributing to children returning. Only then can a commitment be made to modify or eliminate the conditions which lead to the broken adoptions.

Originally, the presentation which led to this article was entitled "The Revolving Doors of Family Court: Confronting Failed Adoptions." However, after reflecting upon the results of the trend study and unique stories and circumstances of each case, the authors decided to change the term to "Broken Adoptions." The term "failed" imputes blame and the purpose of the article is not to engage in finger pointing and accusation. Rather, the purpose is to encourage discussion about these issues and to identify and implement possible solutions. While the term "broken"

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[22] Assigned Counsel Survey, *supra* note 15; LFC Survey, *supra* note 15; Judges and Referees Survey, *supra* note 15.

[23] Kennedy, *supra* note 14.

means, in part, that something is not functioning properly, it suggests that it is also repairable. Accordingly, the term broken seemed more in keeping with the purpose of this article, which is to provide a view from the trenches of N.Y.C. Family Court; to identify some of the more prevalent issues and associated factors in broken adoptions; to introduce the data from CLCNY's six month case study; and to provide recommendations concerning the child welfare and legal communities' response to this trend.

Understanding the revolving doors of family court with respect to broken adoptions requires an acute understanding of not only the legal context of the cases but also requires a grounding in psychological terms such as attachment, bonding, identity, resilience, trauma, loss, and grief; social service related concepts such as stretching, commitment, and open adoptions; policy concerns such as fiscal incentives, the fact that that biological connections remain alive for children in actuality or as an ideal; and the changing world that includes social media as a connecting device. Part II of this article focuses on the legal aspects, including CLCNY's trend study, case studies, and related issues. Part III focuses on the related psychological and social services issues.

II. A VIEW FROM THE TRENCHES

A. Terminology

For purposes of this discussion, the term "disruption" is used to describe an adoption that is not completed after the child is placed in an adoptive home and the parental rights of the biological parents have been terminated and before legal finalization.[24] "Dissolution" is used to describe an adoption in which the parental rights of the adoptive parents are terminated after an adoption is legally finalized.[25] Finally, the "temporary (short or long term) return of a child to state custody after a legally finalized adoption" is referred to as "displacement."[26] In practice and in the literature, the terms are used inconsistently, and the term disruption is often globally used to describe a broken adoption no matter what the timing or circumstances, thereby contributing to the problem of accurately gathering data rather than clarifying the issues.[27] Research has shown that disruption rates range from 10%–25%, and dissolution rates

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[24] *What's Working for Children, Executive Summary*, *supra* note 13, at 7.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 9.

between 1%–10%,[28] leading researchers and observers to conclude that dissolution is rare.[29] Whatever the terminology, the sad reality is that the family court system is a revolving door for adolescents who have been adopted and are struggling with mental health issues, behavioral, conduct, and attachment disorders, and identity exploration and formation. It seems, from a family court practitioner's perspective that the forever home that these children were promised often evaporates. They frequently return to family court under the umbrella of a different specialty, as subjects in abuse and neglect, voluntary placements, delinquency or persons in need of supervision (PINS), or custody and guardianship cases. Some common examples include:

- Child Protective Abuse or Neglect Case: An attorney is assigned to represent an adopted child or parent in a child protective case charging the parent of abuse or neglect of the adoptive child or another child in the home.
- Voluntary Placements: An attorney is assigned to represent a child in which an adoptive parent is seeking to voluntarily place the adopted child back into foster care.
- PINS: An attorney is assigned to a child in a case in which the adoptive parent is seeking to place the child back into the system based upon the child's behaviors, which the adoptive parent alleges they are unable to control.
- Juvenile Delinquency: During the course of representation, an attorney learns the child is adopted and the adoptive parent supports placement of the child in the Department of Juvenile Justice (DJJ) or some other facility and is unwilling to actively plan for the child to remain in the home or community.
- Custody or Guardianship: An attorney is assigned to represent a child in a case in which the petitioner, who may be a relative or non-relative, is seeking custody or guardianship of a child who had been adopted and who is no longer living in the adoptive home.

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[28] Child Welfare Information Gateway, *Adoption Disruption and Dissolution,* U.S. DEP'T HEALTH & HUMAN SERVS., ADMIN. FOR CHILD. & FAM., 2–3 (Dec. 2004), http://www.childwelfare.gov/pubs/s_disrup.cfm.

[29] *See, e.g.*, Trudy Festinger, *After Adoption: Dissolution or Permanence?*, 81 CHILD WELFARE 515, 527–28 (2002) (finding, in a study of 516 children adopted from foster care in New York City in 1996, that none of the children were involved in a legal dissolution and only 3.3% had experienced some form of out-of-home placement since being adopted).

B. The Players

In each proceeding in N.Y.C. Family Court there are several players, including: the child, the parents, and the judge. Because custody, guardianship, and PINS cases are essentially private disputes, the petitioners and respondents may hire or be assigned an attorney from the assigned counsel panel. In child protective proceedings, parents who are charged as respondents will generally be appointed an attorney from an institutional provider or the assigned counsel panel. In almost all proceedings, except perhaps pre-verbal children in a custody dispute, the child will be appointed an attorney. The city child welfare agency New York City Administration for Children's Services (N.Y.C. Children's Services) which is represented by Family Court Legal Services may also be present in cases such as child protective and voluntary placements. The agency that N.Y.C. Children's Services contracts with to provide foster care also has its own retained attorney or firm that pursues termination of parental rights and handles other related matters. A prosecuting attorney from the New York City Law Department, called an "Assistant Corporation Counsel," is also a party and presents the juvenile delinquency case.

In all proceedings, attorneys will act as an advocate for their clients. Two of the players, however, warrant further discussion as their roles and obligations can seemingly be in conflict at times and the resolutions of those conflicts can have an enormous effect on cases involving children who come in contact with the system. The first are the attorneys for the children and the second are the foster care agency or the child protective workers.

1. Attorney for the Child

In New York, the Attorney for the Child (AFC), formerly Law Guardian, takes a client-directed approach in advocating the client's position in all proceedings before the court. This was codified in 2007 under rule 7.2 of the New York Rules of Court.[30] According to this rule,

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[30] N.Y. CT. RULES, § 7.2 (McKinney 2011). New York Court Rules defines the function of the attorney for the child as follows:

> (a) As used in this part, "attorney for the child" means a law guardian appointed by the family court pursuant to section 249 of the Family Court Act . . . (c) In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney

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the AFC must zealously advocate the child's position unless the child "lacks the capacity for knowing, voluntary and considered judgment" or if "following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child."[31]

With respect to termination proceedings prior to adoption as well as cases of adopted children thrust back into the system, AFCs generally take a client-directed advocacy approach. Therefore, if a child wishes to remain in a foster home, even one that is apparently providing only marginal care, the attorney for the child cannot seek to disrupt that placement simply because the attorney believes things could be better elsewhere. It is unlikely that the "substantial risk of imminent, serious harm to the child" standard can be easily met for a child to allow for substitution of judgment in most foster care placements, particularly for adolescents who have been in a certified foster home. Similarly, with respect to termination of

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> for the child must zealously defend the child. (d) In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position. (1) In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances. (2) If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests.

Id.

[31] *Id.* § 7.2(3). The rules further explain:

> When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

Id.

parental rights or adoption, if the client wishes to remain with the pre-adoptive parent, one might not be able to request evaluations to assess the appropriateness of that placement if the child does not wish it. Indeed, with respect to therapy or counseling, the child may instruct the AFC that the child does not want counseling and that the child's behavioral issues do not warrant intervention. Of course, it is not being suggested that these services or evaluations cannot be conducted, just that in New York the child's attorney may not be the default person in the courtroom making these requests. Accordingly, the court, the agency, or the parent, may want to ask for evaluations to properly assess children's attachments and emotional well-being in pre-adoptive placements prior to making critical decisions.

Attorneys who represent children are often faced with situations where a child reports that everything is okay in the foster home even if it is not. As the professional literature related to attachment, trauma, and loss reveal, and as discussed in Part III, a child may, to protect themselves from further trauma, abandonment, neglect, or disappointment, simply accept the situation out of the fear of the unknown.[32] Accordingly, the court must make extra efforts to look for and protect against the possible inadequacies in pre-adoptive placements.

2. Foster Care Agency and Child Protective Workers

The foster care agency worker has the unenviable responsibility of working with and advocating for three separate and sometimes conflicting objectives in cases involving children in foster care. The agency worker is responsible for safeguarding the well-being of the children and the provision of services to the children on their cases while in foster care. The worker is also responsible for providing services and support to the

[32] Around 2004, author Brian Zimmerman had contact with H.J., a wonderful and dynamic child he represented in the late 1980s and early 1990s. Like many, her mother suffered from crack addiction, and she was placed with an aunt who ultimately adopted her with her consent. When Mr. Zimmerman asked how things turned out, she first thanked him and then told him that she left the adoptive home and had since had little contact with her aunt. Mr. Zimmerman asked her why, and she reported that "her aunt put on a good front" but was mean, had at times hit her, and did not care enough about her. When Mr. Zimmerman asked why she had never disclosed it, she told him that even though they met regularly and he asked her routinely, amongst other things, how she was disciplined in the home and if there was anything negative, she felt that it would have been worse in another home. She accepted the devil she knew rather than the devil she did not.

foster parent who is the agent or contractee for their agency. Finally, the worker is charged with the responsibility of assisting the parents in reunifying with their child, yet must also report all transgressions by the parents that might move the case toward adoption and away from reunification. In conflict situations, does the worker support the foster parent who does not wish to come to the agency for visitation, or does the worker overlook a complaint the parent has about the foster parent? Does the worker push for return of the child even when the parent is only marginally cooperating? Does the worker understand the behaviors of the child in the foster home that are connected to a broken attachment to the parent? Does the worker make sure the child gets quality services at critical junctures in the case? As one can easily surmise, how the worker balances these competing interests can have a huge impact on the outcome of a case. As with the attorney for the child, the family court must make extra efforts to look for and protect against the inadequacies that may or may not be apparent in the way the foster agency handles these competing interests.

C. Specialties

In New York City, the cases are processed by specialty (as identified above) in family court. In September 2011, the N.Y.C. Family Court bench, Second Department assigned counsel panel,[33] and the office of Lawyers for Children,[34] all participated in an anonymous survey concerning broken adoptions.[35] The vast majority of the attorneys had greater than ten years of experience in family court and saw adoptive children returning to family court post adoption as an issue.[36]

- [O]ver the past [twenty] years I have represented thousands of children and handled many adoption proceedings. Anecdotally, I would say that at least 10% of foster care adoptions fail. In a large number of cases, a contributing factor is the precipitous diminution or cessation of services as soon as the adoption is completed.

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[33] The assigned counsel panels, depending on the county, can either represent the parent or the children who are subjects in the above referenced proceedings.

[34] Lawyers for Children (LFC) provides legal and social work advocacy to abused and neglected children, children in foster care, and children in high conflict custody cases in Manhattan Family Court. *See What We Do,* LAW. FOR CHILD., http://www.lawyersforchildren.org/sitecontent.cfm?page=whatwedo (last visited Dec. 26, 2011).

[35] The surveys asked for both numerical assessments as well as descriptive comments.

[36] Assigned Counsel Survey, *supra* note 15; LFC Survey, *supra* note 15.

> Although post-adoption services may have been put in place, the foster care agencies often drop out of the picture entirely, which I believe contributes to the adoptive parents' frequent failure to access or maintain those services for themselves [and] the adopted child. All adoptions from foster care should be viewed as a high risk for failure, [because of] factors that often include the profound impairment of a child's ability to attach to and trust a caregiver due to their pre- [and] post-placement experiences. Consequently, a seamless hand off to a service-rich post-adoption services coordinator [or] provider is critical.
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> - I am concerned that once the adoption is over the adoptive parent will be left swinging in the breeze without adequate support; much like the birth parents [who] all too frequently are without the resources needed which led the children into care in the [first] place.
> - I think in many cases there is this fantasy about permanency that often doesn't exist. Kids still run back to their parents despite being freed or adopted, and some adoptive parents never form the bonds with their adoptive children and give up on them or return them if they create problems.[37]

Seventy percent of the judge and referee responses indicated that they have seen cases return to family court after an adoption in their specialty.[38] A third of the responses reported that greater than 5% and as much as 25% or more of their cases involved adopted children coming back before the court on new cases.[39] The surveys tried to analyze the volume and specific type of case the attorneys experienced in cases involving children returned to family court post adoption. The aggregate of the assigned counsel attorney responses revealed that the majority believed disruptions occurred in the abuse or neglect specialty (37%), followed by custody or guardianship (30%), voluntary placements (27%), and delinquency or PINS (6%).[40] In the area of voluntary placements, in which Lawyers for

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[37] Assigned Counsel Survey, *supra* note 15; LFC Survey, *supra* note 15.

[38] Judges and Referees Survey, *supra* note 15.

[39] *Id.*

[40] Assigned Counsel Survey, *supra* note 15; LFC Survey, *supra* note 15. However, it must be noted that the numbers may be skewed in that the responses tended to track the specialty in which the attorneys appeared. For example, the attorneys for the child contact

(*continued*)

Children (LFC) contracts to provide the representation for children in Manhattan Family Court, the number of children being placed back into care was estimated to be between 25% and 50%, and accounted for more than 10% of their caseloads.[41]

D. Child Protective Abuse and Neglect Cases

When S.J. was around eight or nine years old she was burned by scalding water by her non-kinship adoptive mother's babysitter. The adoptive mother failed to seek medical attention and kept S.J. and her siblings away from the eyes of any authorities. When the injury was finally brought to light, the doctor who examined S.J. stated that the burn was so severe that she should have immediately been brought to a burn center. S.J. and her four siblings were removed and, after litigation, were placed in the custody of their paternal aunt. Criminal charges were brought against the adoptive mother and babysitter. To date, S.J. is still undergoing surgeries to her neck and one shoulder to cut the scar tissue to allow for her growth and she will need extensive cosmetic surgery in the future. The assigned counsel attorney who represented the paternal aunt during the original proceeding shared that there had been many red flags about the adoptive mother during the termination of parental rights phase of the case. There the paternal aunt had put herself forward as a resource to no avail. However, the agency was dismissive of the family's concerns, perhaps viewing their allegations solely as an effort to disrupt the termination process, and ultimately stood behind the adoptive parent. The issue of agency loyalty to its contractee foster parent will be discussed in further detail later in this article.

Although the physical abuse described above is an extreme example, allegations against adoptive parents for failure to provide adequate food, clothing, shelter, or medical care are quite common. Cases where children are left for long periods of time with no supervision and food ("home alone" and "inadequate guardianship" cases) are also common. For example, fifteen and sixteen year old brothers M. & M.K. presented at school as routinely dirty, unkempt, and hungry. Their clothing did not fit and was not appropriate for the weather. Ultimately, the school called in a report to the state central registry of N.Y.C. Children's Services and a case

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provider for PINS and delinquency in N.Y.C. were not surveyed, and it is anticipated that their responses would significantly change the data outcomes as to percentages of delinquency and PINS cases.

[41] LFC Survey, *supra* note 15.

was filed against the adoptive mother.[42] Initially, the adolescents were released to the care of the adoptive mother with supportive services. However, the situation escalated with the adoptive mother regularly locking them out of the home overnight. One night, in desperation, M. & M.K. broke the door down and the adoptive mother called the police. After an investigation, the boys were placed into foster care where they remain, while the adoptive mother continues to collect the subsidy provided for their care.

The authors do not intend to suggest that foster or adoptive parents are prone to commit acts of neglect or abuse. It has been reported that nationally, non-biological parents (such as adoptive or foster parents) represent 6.7% of perpetrators in reports of child abuse or maltreatment.[43] While this percentage should certainly raise alarm because the nation systematically entrusts children who have been harmed to foster parents, the authors also believe that some cases of reported abuse or neglect may be prevented by a better understanding of the particular needs of foster and adopted children.

Adoptive mother D.D. was arrested on charges that she excessively disciplined her eleven year old adopted child L.D. by punching and choking her, hitting her with plastic bats and spoons, and denying her food. Shortly thereafter, N.Y.C. Children's Services filed an abuse petition and, because L.D. did not want to return home, she was remanded to non-kinship foster care. Off the record, the N.Y.C. Children's Services

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[42] In New York, when a child is reported to be abused or neglected by the child's parent or guardian, the Department of Social Services local services office commences an investigation within twenty-four hours of receipt of the report. *See What Happens When I Report a Suspected Case of Child Abuse or Neglect?*, N.Y.C. ADMIN. FOR CHILD. SERVS. http://www.nyc.gov/html/acs/downloads/pdf/childsafety_proccess_mr.pdf (last visited Dec. 29, 2011). If the agency determines that the child cannot remain in the home of the parent, the agency will file a petition in family court alleging acts of abuse or neglect and seeking a release to the adoptive parent with services pending further proceedings, or an order to remove a child from the home if the agency can establish that the child would be at imminent risk of harm if the child remained. *See* N.Y. FAM. CT. ACT §§ 1027, 1033-b (McKinney 2010). A removal can also occur without court order if the situation presents such imminent risk that there is no time to seek the court's approval. *See* N.Y. FAM. CT. ACT §§ 1021, 1022, 1024 (McKinney 2010).

[43] OFFICE OF PLANNING, RESEARCH, AND EVALUATION, U.S. DEPT. OF HEALTH AND HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS–4): REPORT TO CONGRESS, § 6.2 (2010).

attorney stated that the caseworker suspected that L.D. made up the allegations to return to her biological mother whom she had seen a week before the allegations were made.

D.D. knew the biological mother as she had previously been in a relationship with the maternal uncle and, thus, knew how to find her. When L.D. was approximately nine years old, she began to have some increased but limited contact with her mother and mother's family. L.D.'s mother no longer had the same issues that led to L.D. being placed in the adoptive mother's home years earlier when she was approximately four years old. With the best of intentions, D.D. supported the relationship as she felt that it was important for L.D. to know her family to develop her own sense of self.

L.D. remained in care as the foster care agency would not approve her biological mother as a resource as she still had other children in foster care. L.D.'s behavior in care was problematic, and she was re-placed several times, including in a higher level of care at a residential treatment facility. L.D. remained resistant to visiting or returning to her adoptive mother despite D.D. remaining committed to her. Ultimately, the criminal case was dismissed for failure to prosecute. N.Y.C. Children's Services was also in a position that it similarly could not pursue the charges, particularly because L.D. refused to testify. At an agency meeting to explore her options, L.D. vacillated between remaining in care or returning to D.D.'s home. Because there was no legal basis for N.Y.C. Children's Services to keep her in care, a decision was ultimately made for L.D. to return home, even though there had only been sporadic visitation and no family therapy.

What this and many other cases highlight is the need for better and consistent services to support adoptive parents post-adoption. Indeed, a number of cases are filed in the abuse and neglect specialty that are ultimately withdrawn by N.Y.C. Children's Services because it cannot prove the allegations in the petition, or they accept a voluntary placement. These cases illustrate the complications of biological family involvement, as discussed more fully later in this article.

E. Voluntary Placements

Voluntary placements are controlled by New York Social Services Law, wherein a parent or guardian can entrust the child to an authorized social service agency under specified conditions and for a specified period of time.[44] If the period of time is to exceed or does exceed thirty days, the

[44] N.Y. SOC. SERV. LAW § 384-a (McKinney 2010).

agency must file a proceeding in family court to approve the voluntary placement agreement.[45] N.Y.C. Children's Services is not mandated to take a voluntary placement agreement. However, if it does and the case is brought to family court to approve the voluntary placement, the court must determine that it is contrary to the child's well-being to remain home at the time, and that reasonable efforts such as preventative services have been made to mitigate the need for the voluntary placement.[46] When accepting a voluntary placement, N.Y.C. Children's Services expects that the parent will remain actively involved and will work toward reunification.[47] Notably, the parent or guardian has an obligation to contribute to the support of the child while the child is placed in foster care if the parent or guardian is financially able.[48] If the family court approves the voluntary placement, it has continuing jurisdiction and must schedule the case for regular foster care reviews.[49] A large percentage of the voluntarily placed youth are the result of broken adoptions. As noted by the participants in the surveys:

- I believe it is a significant issue. Especially as to children who have been voluntarily placed into foster care by their [a]doptive [p]arents, who were previously their foster parents. Many of these children have been subject to significant neglect by their biological parents when they were initially placed into foster care, with many different emotionally [sic] and therapeutic needs. The replacement of these children into foster care can be interpreted by them as a second rejection by a parent.
- My primary work is with youth between the ages of [seventeen] and [twenty-one] years of age, and I would say at least a third to a half of my caseload is comprised of failed adoptions.
- Because some of these adoptions are by foster parents, they know immediately that there are vehicles and

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[45] *Id. §* 358-a.

[46] *Id.*

[47] N.Y.C. ADMIN. FOR CHILDREN'S SERVS., PARENT HANDBOOK: A GUIDE FOR PARENTS WITH CHILDREN IN FOSTER CARE, 11 (2010).

[48] *Id.* at 6. *See also* N.Y. SOC. SERV. LAW § 384-a(2)(c)(v)(D) (McKinney 2010).

[49] N.Y. SOC. SERV. LAW § 358-a(2)(a) (McKinney 2003).

> resources with which to place their child. They don't feel the same commitment to these children.[50]

Rather than share a case example to illustrate the plight of children in voluntary placements who are also the products of broken adoptions, the authors offer a startling and appalling fact: adoptive parents continue to receive the adoption subsidy even though the child was placed on a voluntary placement and is no longer in their physical care or receiving support from the adoptive parent. This practice was revealed during the course of the authors' research and discussions with the family court bench and practitioners. J.H.O. Bryanne Hamill, who presides over the Model Youth Transition Planning Court, previously made note of this practice on the record in open court has suggested that N.Y.C. Children's Services conduct an internal review of its procedures in these situations and take action. More recently, there appears to be discussions between various attorney groups and other interested parties within the state to develop a plan to investigate these issues and bring administrative proceedings to terminate these subsidies and end this fraud.

Pursuant to New York Rules and Regulations and Social Services Law, adoptive parents sign an adoption subsidy and non-recurring expenses agreement prior to adoption finalization. This agreement states:

> Pursuant to this Agreement, maintenance subsidy payments will remain in effect until the child's [twenty-first] birthday, provided that the child's adoptive parent(s) remains legally responsible for the support of the child or provides any support to the child. The adoptive parent(s) will receive an annual notice of the obligation to support the adopted child and to notify the social services district if the adoptive parent(s) is no longer providing any support or is no longer legally responsible for the support of the child. The annual notice will include the requirement for the adoptive parent(s) to provide certification of the education status of a school age adopted child. The adoptive parent(s) should complete, sign and return the form, according to the instructions on the form. Adoption subsidy payments must cease when the adoptive parent(s) is no longer legally responsible for the support of the child

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[50] Assigned Counsel Survey, *supra* note 15; LFC Survey, *supra* note 15.

> or the child is no longer receiving any support from the adoptive parent(s).[51]

The importance of the adoption subsidy is highlighted in the legislative intent of title nine of the social services law:

> The legislature intends, by the enactment of this title, to promote permanency of family status through adoption for children who might not otherwise derive the benefits of that status. By providing for an adoption subsidy program which will be applied uniformly on a statewide basis, the legislature also intends to eliminate, or at the very least substantially reduce, unnecessary and inappropriate long-term foster care situations which have proven financially burdensome to the state and, more importantly, inimical to the best interests of many children who have not been placed for adoption because of emotional or physical handicaps, age or other factors, in accordance with regulations of the department.[52]

Certainly, the legislature did not intend that the adoptive parents continue to receive subsidies for the care of these hard to place children when they returned to long-term foster care situations (precisely the situation that the subsidy was intended to avoid). However, because the adoptive parent continues to receive the adoption subsidy until the child's twenty-first birthday, even if the adolescent is placed, there is no incentive for the adoptive parent to work on services to keep the child or, following placement, to plan for their return.[53] As a result, a number of adolescents placed in a voluntary placement quickly have their goals changed to "another planned permanent living arrangement" (APPLA) and remain in care. It appears that the New York State Office of Children and Family Services (N.Y. OCFS) and N.Y.C. Children's Services interprets "legally

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[51] N.Y.S. OFFICE OF CHILDREN AND FAMILIES SERVS., ADOPTION SUBSIDY AND NON-RECURRING EXPENSES AGREEMENT, 7 (2009) (emphasis omitted). *See also* N.Y. COMP. CODES R. & REGS. tit. 18, §§ 421.24(c)(5), 421.24(c)(19) (2011); N.Y. SOC. SERV. LAW § 453(1)(c) (McKinney 2003).

[52] N.Y. SOC. SERV. LAW § 450 (McKinney 2003).

[53] In the alternative, it could be argued that from a policy point of view, the cessation of the adoption subsidy would have a greater effect of penalizing the adoptive parents who remain involved and are planning for the return of the adolescent, such that they would have no incentive to continue planning.

responsible" for the child to require a formal dissolution of the adoptive relationship, as discussed, or a termination of parental rights, to administratively suspend the adoption subsidy. While conceivably N.Y.C. Children's Services could sue the adoptive parent for child support, the authors were unable to find anyone who had ever heard of this actually occurring. The family court is constrained in that is does not have the authority to vacate the adoption subsidy as it is a court of limited jurisdiction.[54] As a result, unless the adoptive parent agrees to termination of the payments or voluntarily turns over the adoption subsidy to the agency or to a new caretaker, the adolescent's care is, in effect, paid for twice by the taxpayers of New York. This regular and visible abuse of the system is particularly concerning given the well-publicized case of Judith Leekin.

Leekin was charged in 2007 in Florida for abuse and maltreatment of her eleven adopted children, all of whom she adopted in New York City.[55] In addition to the abuse charges, Leekin was charged in New York federal court relating to her fraudulent obtainment of adoption subsidies received from the state.[56] Because the children adopted by Leekin all suffered from some physical or mental disability, she was eligible for and received an adoption subsidy for the care and maintenance of each child. In total, Leekin received a total of approximately $1.68 million in adoption subsidies from the N.Y. OCFS.[57] As reflected in the federal criminal complaint, Leekin's abuse and neglect of the children would have rendered her ineligible for the subsidy payments and the payments would have been suspended had N.Y. OCFS been aware of the treatment.[58] While many of the charges related to Leekin's use of aliases to adopt the children, the federal charges also arose from the fact that she removed one of the children from her home in 2000, yet continued to submit Certification Forms and receive subsidies on behalf of that child for approximately six years after the removal.[59]

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[54] Joseph Carrieri, *Practice Commentaries* (1999), *in* N.Y. SOC. SERV. LAW § 450 (McKinney 2003).

[55] Florida v. Leekin, No. 562007CF003270A (Fla. St. Lucie Cnty. Ct. 2009). *See* Complaint at 3, United States v. Leekin, No. 1:08-CR-00446-RMB (S.D.N.Y. 2008).

[56] *See* Complaint at 3, United States v. Leekin, No. 1:08-CR-00446-RMB (S.D.N.Y. 2008).

[57] *Id.* at 3–4.

[58] *Id.* at 4.

[59] *Id.* at 8–9.

Leekin subsequently pled guilty to all of the charges filed against her, and was sentenced to one hundred and thirty months in prison plus supervised release for a term of three years.[60] Judge Berman issued a highly suggestive decision noting that Leekin's case was a prime example of the system's failure to effectively monitor the conditions of adoptive families.[61] While the adoption subsidy, non-recurring expenses agreement, and related legislation and regulations all place responsibility on the adoptive parent to update the agency regarding the child's educational status when the parent is no longer legally responsible for the support of the child, they are silent as to what role, if any, is affirmatively placed upon the agency to track the progress of the family.[62] The agreement essentially assumes that the adoptive parent is going to be forthcoming about the parent's relationship with and care of the child. Although it is possible that the failure to provide the educational status update would alert officials to investigate an adoptive child's situation, it is not clear what would happen as a result and how that would occur. This lack of oversight allows individuals such as Leekin to submit fraudulent documents falsifying the children's school records to receive monetary support without actually providing for the adopted children in question.

The indictment against Leekin by federal authorities seemed to make clear that if N.Y. OCFS had been aware of Leekin's treatment of the children, as well as her abandonment of one of the children in particular, it would have ceased providing her with the adoption subsidy.[63] A civil lawsuit filed against the city in 2009 on behalf of ten of the children (the eleventh disappeared while in Leekin's care and is presumed dead) is focused on the city's failure to effectively monitor the children and Leekin,

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[60] Judgment in a Criminal Case at 1–3, United States v. Leekin, No. 1:08-CR-00446-RMB (S.D.N.Y. 2008).

[61] *See* Transcript of Sentencing Hearing at 34–38, United States v. Leekin, No. 1:08-CR-00446-RMB (S.D.N.Y. 2008) (describing some of the changes Judge Berman suggests to the adoption system moving forward).

[62] *See* Endorsed Letter at 2–4, United States v. Leekin, No. 1:08-CR-00446-RMB (S.D.N.Y. 2008), ECF No. 13 (discussing whether the mail and wire fraud could have been mitigated by greater involvement by the adoption agencies); Endorsed Letter (redacted version) at 1–2, United States v. Leekin, No. 1:08-CR-00446-RMB (S.D.N.Y. 2008), ECF No. 17 (describing responsibilities imposed upon adoptive parents who receive the adoption subsidy).

[63] Information at 4, United States v. Leekin, No. 1:08-CR-00446-RMB (S.D.N.Y. 2008).

and will address the extent of the city's liability in this matter.[64] It is nevertheless surprising that despite the information obtained from this well publicized case, N.Y. OCFS and N.Y.C. Children's Services has failed to impose stricter standards upon following up on adoptive parents and ensuring that children continue to live with the adoptive parents with whom they were placed. This is especially surprising given the very visible financial abuse that occurs in cases where children and adolescents are placed back into foster care.[65] Since the initial draft of this article, awareness of this issue and concern seems to be on the rise, with many of the interested parties expressing a commitment to finding a solution. However, many of these interested parties feel hamstrung by federal regulations, and the problem continues to occur.

F. Persons in Need of Supervision

A.B. was placed by his adoptive mother on a "Person in Need of Supervision" (PINS) case. While exploring placement resources as an alternative to foster care, the AFC found the biological father who claimed that he never knew that his child had been adopted and stepped forward as a placement resource. During the pendency of the case, the AFC learned that the adoptive mother had placed another adopted child on a PINS case at least once before, yet she was still allowed to subsequently adopt A.B. by the foster care agency. A.B. was ultimately released to his biological father in the PINS proceeding.

Recycling adolescents back into foster care through PINS proceedings is not uncommon. In another case reported to the authors, an attorney stated that he was currently representing a teenager who had been adopted with his brother. Their adoptive mother first placed the older brother on a

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[64] *See generally* Complaint at 1–2, S.W. v. City of New York, No. 09 CV 1777 (E.D.N.Y. 2009).

[65] Of course, there are situations where an adoptive parent who is not caring for the child may also be trying to do the right thing by a child while the adoptive parent continues to receive the subsidy. B.R. voluntarily placed D.A.R., because of her documented behavioral issues which were impacting the other younger children in the home. She remained a visiting resource for D.A.R., and regularly bought her clothing and necessities. When D.A.R. was accepted to a private college in South Carolina, the adoptive mother, through counsel and along with the child's attorney advocated only for the agency to reimburse D.A.R. for such things as college related expenses (including toiletries, bedding, transportation), which went above and beyond the subsidy. However, this case is representative of only a small minority of the voluntary placement cases.

PINS case and subsequently initiated a second proceeding to have the younger brother placed as well. In both cases, she continued to collect the adoption subsidies even though the boys were in state care.

A person in need of supervision, sometimes referred to in other states as a "Child in Need of Supervision" (CHINS), is governed by Article Seven of the Family Court Act of the State of New York.[66] In a PINS proceeding, a parent or guardian seeks the aid of the court when the parent's child is failing to obey the lawful commands of the parent by not keeping curfew, running away, not attending school, being violent, incorrigible, using drugs or alcohol, or similar behavior.[67] While access to the family court is no longer a matter of right because a petitioner parent or guardian must first participate in services that are designed to ameliorate the issues in the home, there are hundreds of PINS cases filed each year.[68] After a petition is filed, the court may release the adolescent or direct the adolescent's detention upon certain circumstances pending a fact-finding hearing.[69] If the court finds that the adolescent "did the acts alleged to show that he violated a law or is incorrigible, ungovernable or habitually disobedient and beyond the control of his parent or legal guardian,"[70] then the family court may order an investigation and report to determine what, if any, services can be put into place to correct the behaviors or the problems in the household.[71] The dispositional alternatives available to the family court include, among others, placement of the adolescent in foster care with the Commissioner of Social Services.[72]

In another case, S.O. was removed from her drug abusing and physically abusive mother when she was five years old. Following her adoption, she felt like the scapegoat in her adoptive family if anything went wrong in the home. When she was twelve years old she was placed back into foster care on a PINS proceeding. Her adoptive parent refused to plan for her and her teenage years were spent in the care of N.Y.C. Children's Services in group homes. On a few occasions when her

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[66] N.Y. FAM. CT. ACT LAW §§ 711–84 (McKinney 2009).

[67] N.Y. FAM. CT. ACT LAW § 712(a) (McKinney Supp. 2011).

[68] Claire Shubik & Ajay Khashu, *A Study of New York City's Family Assessment Program*, VERA INST. JUST., 10 (Dec. 2005), http://www.vera.org/download?file=51/323_595.pdf (approximately eighty per month in 2004).

[69] N.Y. FAM. CT. ACT LAW § 739(a) (McKinney Supp. 2011).

[70] *Id.* § 712(e).

[71] *Id.* § 750(2).

[72] *Id.* § 756(a)(i).

behaviors proved difficult, she was psychiatrically hospitalized in children's psychiatric centers. During this tumultuous time, she made a number of suicidal gestures. Following her exit from the foster care system, S.O. began engaging in prostitution as a means of supporting herself.

In broken adoption situations, AFCs frequently find themselves attempting to mediate between the adoptive parent and child to allow the child to remain at home. Despite their best efforts, they may not be successful. In the authors' experience, the adoptive parents usually identify themselves as the adoptive parents during the initial appearance and often evidence a strong desire to wash their hands of the adolescent, thus requiring detention if no other alternatives exist. Research has found that judges rely heavily upon the wishes of the parent when making detention determinations.[73] If the adoptive parents remain firm in their position throughout the pendency of the proceedings, the adolescent usually ends up placed with the Commissioner of Social Services in foster care unless another resource is located.

One assigned counsel attorney from Bronx County, with over twenty-five years of experience, commented that it seemed that almost all PINS clients were products of a broken adoption.[74] In the authors' experience, being present in family court on a daily basis, both on their own cases and observing others' cases, puts them in a unique position to see from a broader perspective what is occurring on a more global level in family court. For example, one of the authors was in the delinquency part one day and observed three cases in a row, all involving adopted children. Of the three, two of the adolescents were placed in foster care on PINS cases and one was detained on a delinquency case. A colleague in the courtroom who specialized in delinquency and PINS commented that in the colleague's estimation close to half of PINS cases involved adopted children. Although no official statistics are kept, it appears anecdotally that the numbers may be between one third and one half.

PINS cases, like voluntary placements, are not without restrictions. The adoptive parent may not file a petition and seek to place the child without first attempting services (such as preventive or respite) through a diversion program.[75] PINS and voluntary placements are somewhat interrelated in that if N.Y.C. Children's Services refuses to take the

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[73] Shubik & Khashu, *supra* note 68, at 12.

[74] Assigned Counsel Survey, *supra* note 15.

[75] *See* N.Y. FAM. CT. ACT LAW § 712(i) (McKinney Supp. 2011).

adolescent on a voluntary placement, the adoptive parent may still seek to have the child placed on a PINS case. Or in the reverse, parents insistent on placement in a PINS matter can be referred to a N.Y.C. Children's Services' field office for a critical case conference which may result in a voluntary placement.[76]

PINS cases, unlike voluntary placements, are adversarial between the parent and child in that the parent is the prosecutor and must prove the allegations which constitute PINS behavior. Parents are often told by social service providers, school officials, police officers, and others, to go to family court and file a PINS petition under the belief that the judge can direct orders that will change adolescent behaviors. Because PINS places the blame on the adolescent, and the proceeding is inherently adversarial in nature, the ability of an attorney to convince an adoptive parent to care for a difficult teenager is not easy. The situation is often made more difficult by the fact that the adolescent client may be mistrustful, suspicious, angry, or resistant, and the adoptive parent may be completely unwilling to reflect upon the family dynamics or the parent's response to the behaviors. More often, the adoptive parent is simply done dealing with the adopted child.

In the last decade, substantial changes took place in terms of the provision of services through a diversion program offered by N.Y.C. Children Services called Family Assistance Program (FAP). This assistance is offered before the cases reached family court. FAP offers information and appropriate services to help parents and adolescents make well-informed decisions about how to resolve problems such as running away, skipping school, or unruly behavior.[77] Despite the reduction in the number of filings of PINS cases, research shows that the family court still had an unusually high number of court ordered foster care placements in the cases that were filed.[78] As a result, a recommendation was made that "[a] more in-depth analysis of the current population of PINS youth in ACS placement could help frame strategies to decrease continuing high placement numbers. This research could examine the characteristics of those youth and their families and compare them to petitioned PINS cases that do not result in placement."[79] In reflecting upon these types of cases, one has to wonder whether the majority of PINS cases in which the family court ordered the adolescent placed into foster care involved adopted

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[76] Shubik & Khashu, *supra* note 68, at 5.

[77] *See id.* at 4–5.

[78] *Id.* at 23.

[79] *Id.* at 23 (emphasis omitted).

youth. Furthermore, one could wonder whether taking actions such as obtaining stable and committed placements prior to the adoption, identifying and continuing quality post-adoption services, and creating networks of support for adoptive parents would help prevent situations where behaviors become purportedly too hard for an adoptive parent to manage resulting in PINS placement.

Further, S.O.'s story is not only a case example of a child being returned to the system on a PINS proceeding but is also reflective of a trend that a number of attorneys identified in conversations with the authors: parents who had been adopted and subsequently suffered a broken adoption as a child, whose own children were or are placed into foster care. The issues in S.O.'s case, including early childhood abuse and neglect, being turned back into foster care on a PINS following adoption, ineffective treatment, lack of education, subsequent substance abuse related issues, poor choices in partners, and mental health issues including depression, all demonstrate the cyclical nature of the issues being discussed. As the authors' experience reveals, many cases in family court involve parents who were raised in the foster care system or placed back into the system after adoption. For the cycle to be broken, the authors believe that this issue demands more attention and requires data collection.

G. Juvenile Delinquency

D.C. was detained on a warrant for a violation of probation. W.T. gave her appearance as the adoptive mother and C.C. gave her appearance as the biological mother to D.C. W.T. had made a sworn statement that D.C. "does not listen to any of my commands; he feels he can do whatever he wants to do in the home. I am requesting that he be removed from my home and be placed in a facility where he can receive the educational structure and the help he needs." D.T. was detained pending a hearing.

Unlike other pathways into the world of broken adoptions, those that come to family court because of juvenile delinquency proceedings are, at the outset, initiated because it is alleged that the adolescent committed a crime. Except in a situation where the adoptive parent calls the police against the child for committing a criminal act against the parent or a family member, the arrest itself can only be attributable to circumstances in which it is believed the adolescent committed a crime. Yet, it is also known that many, though not all, of the more persistent juvenile delinquency offenders are also children from the foster care system.

A juvenile delinquent is defined as a child over the age of seven and under the age of sixteen who has committed an act that, had the child been an adult at the time of commission, would be a misdemeanor or felony

level crime under the Penal Law of the State of New York.[80] When youth are arrested, they are first brought to the family court to be assessed by the New York Department of Probation for purposes of determining whether the instant offense is one that can be adjusted by referrals for services, such as substance abuse treatment, counseling, youth court, mediation, or similar interventions, or through community service type programs, such as graffiti cleaning groups, park cleanup, and the like.[81]

It is at this juncture that an adoptive family may begin to receive services. The determination of what services or programs, if any, are appropriate is determined by an analysis of the juvenile's history, including interviews with the juvenile, the juvenile's parent or parents, school personnel, applicable child protective workers, the arresting officer, the complainant, or others with pertinent knowledge of the juvenile. The adjustment process encompasses two months and can be extended, with permission of a judge, for an additional two month period of time.[82]

In cases where adjustment is not possible, for example, a case where the complainant refuses to consent to adjustment services being offered to the juvenile or the youth is charged with a designated felony act, the matter will be forwarded to the juvenile prosecutor's office for prosecution.[83] If the prosecutor has sufficient grounds to file a petition, the juvenile will be summoned to family court for arraignment.[84] Some youths are brought directly to family court, primarily in instances where the parent refuses to take the child home from the precinct. In those cases, the prosecutor may file a request to hold the child until a petition can be filed.[85] It is during the pre-petition, initial appearance, or arraignment that the revolving door of family court may first come to light, when the parent gives an appearance as the adoptive parent.

At arraignment, the court must determine whether the juvenile can be released or paroled to the juvenile's parent or guardian. That determination is based upon the likelihood the juvenile will return to court and the likelihood that the juvenile will commit another offense pending

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[80] N.Y. FAM. CT. ACT LAW § 301.2 (McKinney Supp. 2011).

[81] *See* N.Y. FAM. CT. ACT LAW §§ 308.1(1)–308.1(2) (McKinney 2008).

[82] *Id.* § 308.1(9).

[83] In New York City, juvenile prosecution is handled by the New York City Corporation Counsel. However, in some jurisdictions, prosecutions are by the district attorney's office or the city or county attorney.

[84] N.Y. FAM. CT. ACT LAW § 307.1(1) (McKinney 2008).

[85] *Id.*§§ 307.4(4), 307.4(7).

trial if paroled.[86] In cases where the court may be considering detention or release, the juvenile's behavior at home will often be considered. That information is often obtained through the probation adjustment process or by the court inquiring of the adoptive parent about how the child is behaving at home in terms of curfew, school, and obedience. If the adoptive parent tells the family court that the adoptive parent cannot control the child, the chance of detention increases considerably. Like PINS cases, the judges may rely heavily upon the wishes of the adoptive parent not to take the child home or the parent's statements concerning the child's behavior when making detention determinations.

After arraignment, the matter is set down for a trial or fact-finding. If the juvenile is found to have committed an act that would be a crime had the juvenile been sixteen at the time, then the matter is adjourned for disposition to determine if the juvenile indeed would be adjudicated a juvenile delinquent.[87] At the dispositional proceeding, the family court would be provided with an investigation and report prepared by the same probation department as the one that initially met the juvenile at the adjustment phase. The family court may also order a mental health report to assess the needs of the juvenile and to assist the family court in fashioning a disposition. In both reports, the adoptive parent is interviewed regarding the juvenile's behaviors at home, and regarding what outcome the adoptive parent would like to see occur at disposition. The family court is charged with the responsibility of determining whether the juvenile requires treatment, supervision, or confinement.[88] In doing so, the family court must consider the least restrictive alternative that considers the best interests of the juvenile, "as well as the need for the protection of the community."[89]

The dispositional alternatives, depending on the severity of the offense, range from dismissal of the petition, an adjournment in contemplation of dismissal, a conditional discharge, the juvenile being placed on probation, or the juvenile being placed in a facility away from home for up to three

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[86] New York City uses a research based instrument called the Risk Assessment Instrument that measures the risk to the community that the juvenile will commit another offense or fail to appear in court if released. *See* Jennifer Fratello et al., *Juvenile Detention Reform in New York City: Measuring Risk Through Research*, VERA INST. JUST., 2 (Apr. 2011), http://www.vera.org/download?file=3226/RAI-report-v7.pdf.

[87] *See* N.Y. FAM. CT. ACT LAW §§ 340.1(4), 350.1(3) (McKinney 2008).

[88] *Id.* §§ 352.2(1)–352.2(2).

[89] *Id.*

years. If a juvenile is not placed, but remains in the community on probation, conditional discharge or adjournment in contemplation of dismissal, the juvenile could still face placement if a violation of any of these dispositional alternatives is filed.

One case involving an adopted child in a delinquency proceeding was M.C. M.C. was adopted when she was approximately six or seven months old. At the age of fourteen she had been found guilty of an act of juvenile delinquency, and the family court referred the case for evaluations to ascertain what might be an appropriate disposition for M.C. and what services to offer her. During this process, M.C. was told for the first time that she had been adopted and that her "Mother Malia" was really her great-aunt, and her "Aunt Brianna" was really her mother.

M.C.'s adoptive mother reported that she could not handle the child's behaviors. She alleged that M.C. was engaging in promiscuous behaviors with much older men, having violent outbursts at home, and failing to attend school. She also raised concerns that M.C. had possible gang involvement. Despite the possibility of in-home intensive services, the adoptive mother resolutely said she could not take M.C. back. As a result, M.C. was placed in a residential treatment facility.

M.C.'s story is not atypical of some juvenile delinquents where their behavior has deteriorated over time and the adoptive parents state that they simply cannot handle them. During the evaluative process, the parents, adoptive or biological, are asked what outcome they wish for the child, including removal from the home. Because alternative to placement programs require parental agreement to participate, this allows adoptive parents the opportunity to place their child into the system, just like a voluntary or a PINS.

Of particular note is how M.C.'s case highlights the cyclical nature of the issues often present in child welfare and the foster care system. M.C.'s grandmother was a drug abuser, with an unstable home and family, with five children who lived outside of her care. Her grandfather, Malia's brother, was in out of jail and lived most of his life on the street. M.C.'s biological mother Brianna was placed into foster care and was in and out of foster care settings, group homes, and the children's psychiatric ward at Ward's Island. During these hospitalizations, the trauma of her own life was of little focus and she was diagnosed with bi-polar and schizophrenia. When Brianna was approximately eighteen years old, she gave birth to M.C. while in foster care. Malia became M.C.'s foster mother, and adopted her by the time she was two years old. M.C. would sometimes visit her mother when she was in a hospital setting, although without a full understanding of her connection and the meaning of her situation. Today,

if M.C. is not provided quality services by the system, will the cycle repeat itself again?

H. Custody and Guardianship

1. Overview

A few years ago, one of the authors observed a custody case involving adoptive parents, a legal guardian, and a biological mother. It appeared that the child had been adopted from foster care when she was approximately three or four years old. When she reached adolescence, she began acting out, disobeying her adoptive parents' rules, and frequently staying out all night. The year prior, the adoptive parents arranged for her siblings' adoptive mother to file for guardianship for her. The case returned to family court because the legal guardian was seeking to vacate the guardianship as she no longer wanted the young woman in her home. While the three adults all argued and postured about how they did not want the teenager and should not be forced to take her back into their homes, a fourth woman—the biological mother—begged for the chance. She had overcome the addiction issues which originally led to her children to be removed from her care, had a stable residence, and was in fact employed as a peer counselor in a drug and alcohol rehabilitation facility. However, the court advised her that she had no standing to seek custody as her parental rights had been terminated. The court dismissed her custody petition. The court refused to vacate the letters of guardianship observing that the legal guardian had the right to decide where the teenager stayed and with whom, including the biological mother as an option. As the parties walked past the author and out of the courtroom, the legal guardian angrily proclaimed, "her ass ain't coming back to my house."[90]

Experience with cases like this informed the authors' decision to develop presentations on the issue of broken adoptions in family court and to explore the issue in a more systematic way. One of the authors began hearing anecdotally of more and more cases at CLCNY involving broken adoptions in custody and guardianship cases. As a result, it was determined that the CLCNY office was in a unique position to conduct a case study to capture the experience and stories of the child clients to provide context to the issue and offer a more complete picture of what happened to result in the broken adoptions and why it happened.

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[90] This quote and similar quotes are included in an attempt to display the reality of these cases and the reality for the children involved. The authors intend no offense.

2. The Study

From January 2011 through July 2011, CLCNY conducted a six month case study. While twenty-five of these cases were filed during the relevant time period, only fifteen were used for the purposes of this study due to the amount of information obtained. Many of these cases were dismissed without prejudice by the second court appearance due to the non-appearance of the petitioner. A series of questions were developed for the purposes of the study and information was compiled from the interview notes, court chronologies, and reports contained in the files. Follow-up telephone interviews were conducted during the weeks of July 1–15, 2011, by the Center for Public Interest Careers (CPIC) intern, staff attorneys, and volunteer interns. These interviews were conducted to obtain missing or incomplete information. During the summer of 2011, an intern from CPIC at Harvard University[91] worked at CLCNY exclusively gathering and sorting the information from the active cases.[92] She also conducted a cold case review of thirty-five closed guardianship cases which involved broken adoptions, into a spreadsheet from which data points could be run based upon a series of questions. Preliminary data was run on July 14, 2011, in preparation for a presentation at a national conference.[93] After the close of the study, the final data was run on August 5, 2011, and reported here with case examples and conclusions.

a. Underlying Cause of Broken Adoption

The underlying cause of the broken adoption in the majority of cases was due to either death (53%) or infirmity (22%) of the adoptive parent.[94] In the remaining cases, allegations of abuse and neglect[95] were cited either in the petition or raised during the petitioner and child's interviews as the

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[91] CLCNY was fortunate to host CPIC fellow Jasmine Omeke (class of 2014), whose work was invaluable in making the trend study a reality.

[92] Questions were developed as a result of a meeting held on July 7, 2011, where CLCNY attorneys, social workers, and interns reviewed the data, brainstormed about the trends and issues, and submitted proposed questions for the data points to be run on.

[93] Presentation at ABA Conference on Children and the Law on Preventing Adoption and Guardianship Failures by Dawn J. Post, Brian Zimmerman, BB Liu, and Diana Yu.

[94] Dawn J. Post, Trend Study Statistical Analysis (2011) (unpublished) (on file with author) [hereinafter Trend Study Statistical Analysis].

[95] Abuse and neglect refers to the allegations presented by the petitioner or the child and does not refer to an actual filing by N.Y.C. Children's Services of an abuse or neglect petition.

underlying cause of the broken adoption in 25% of the cases.[96] Physical abuse and punishment were described most frequently.[97]

- *Death or Infirmity*

In P.F.M's case, his sixty-eight year old maternal grandmother adopted him when he was an infant. P.F.M. often slept with his grandmother in the hospice bed when her health declined and his daily activities were affected. P.F.M. was born addicted to drugs and had been diagnosed with ADHD when he was five years old. Following the death of his grandmother, as he was dealing with untreated feelings of loss and grief, P.F.M. was passed from one adult to another amidst allegations of neglect.[98]

In another case, A.G.F. was placed in Madonna Heights Residential Treatment Center for psychiatric treatment and behavioral issues by the non-kinship adoptive mother when the mother became ill. It was assessed that A.G.F.'s behavioral issues coincided with the adoptive mother's physical decline. A social worker at Madonna Heights Residential Treatment Center located a biological aunt and arranged for her to be a discharge resource and to file for guardianship, because the adoptive mother was too ill to care for A.G.F. any longer and wanted to move to her biological daughter's home out-of-state leaving A.G.F. behind.[99] A.G.F. struggled with the sudden abandonment in the hospital and search for a placement resource, stating in a written note to her attorney, "I can be a good person if you get to know me. If I put my mind to something, I can do it."[100]

P.F.M.'s case was typical of other cases in the study, identifying a trend: with the death of the matriarch of the family, the family unraveled, and the children frequently started experiencing repeated and multiple

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[96] Trend Study Statistical Analysis, *supra* note 94. Allegations of physical abuse or punishment were followed by neglect (including abandonment), emotional abuse, sexual abuse, and then drug and alcohol abuse. *Id.*

[97] *Id.*

[98] Dawn J. Post, Trend Study Raw Data (2011) (unpublished) (on file with author) [hereinafter Trend Study Raw Data]. CLCNY represented P.F.M. on three separate guardianship petitions, and he lived with four different relatives over the course of four years. The petitioners on the various cases frequently alleged that P.F.M.'s ADHD went untreated, that his medication was not monitored by the previous caretakers, and that in one instance, the respondent was an alcoholic and mistreated him.

[99] *Id.*

[100] *Id.*

displacements.[101] Although the actual age of the adoptive parent was ascertained in only a minority of the cases, some of the specific ages of the adoptive parent in relation to the child at the time of the adoption were startling: a kinship sixty-six year old resource adopting a four year old;[102] a non-kinship sixty-seven year old resource adopting an infant;[103] and a non-kinship seventy-one year old resource adopting a nine year old.[104] Many children described taking care of their elderly adoptive parent when their health declined. For example, in K.M.'s case, her adoptive mother was in and out of the hospital undergoing various treatments and surgeries and was frequently on bed rest over the course of seven years following K.M.'s adoption at the age of six. The average age of the child at the time of the death of the adoptive parent was 12.5.[105]

The Adoption Assistance and Child Welfare Act of 1980 directs states to give preference to relatives of the adoptive child[106] which may frequently be a grandparent. In New York, the law is clear that the age of the adoptive parent shall not be the dispositive factor in determining whether a child's best interests would be served by the adoption. "[T]he age of the prospective adoptive parents is one of a number of factors considered, but it is not decisive. There is no statutory requirement in the law, nor any criterion established in the decided cases respecting the disqualification to adopt on account of age."[107] "Applicants accepted for adoption study shall be at least [eighteen] years old. The agency shall not establish any other minimum or maximum age for study or acceptance."[108] The policy arguments in favor of allowing older adults to adopt are integrally related to the determination of a child's best interests. Challenges to foster care placements and adoptions based upon age are, in

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[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] Trend Study Statistical Analysis, *supra* note 94 (out of thirty-two children).

[106] 42 U.S.C. § 671(a)(19) (2006) ("[T]he State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards.").

[107] *In re* Michael D., 322 N.Y.S.2d 532, 533–34 (N.Y. App. Div. 1971) (describing a case with adoptive parents who were fifty-nine and forty-seven years old). *See also In re* Infant S., 370 N.Y.S.2d 93, 94–96 (N.Y. App. Div. 1975) (describing a case with adoptive parents who were fifty-seven and sixty-three years old.).

[108] N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(b) (2011).

the authors' experience, frequently met with charges of discrimination and ageism. Accordingly, courts have reviewed actuarial life expectancy tables and considered the probabilities of the child being raised by the adoptive parent to majority[109] and reasoned that "'[a]ge is not a matter of chronology but of physiology'" and "[t]here are *young* older people just as there are *old* younger people."[110] In addition, the courts recognize the trauma to a child by removing the child from the only home the child has ever known.[111]

When adoptive parents are over the age of sixty years old, judges require that prior to the adoption the foster parent identify a "back-up" resource. A back-up resource is a person who expresses a willingness to be responsible for the child if the adoptive parent becomes unable to do so due to death, illness, or some other circumstance. However, this is a promise, not a legally binding commitment. Back-up resources go through the same criminal clearances as adoptive parents. The rationale is that the availability of strong backup caretakers, who may have substantial interaction with the child and would take the child and raise the child to majority should the adoptive parent not live long enough to see the child grown, eliminates the issue of age as being a bar to the adoption. When asked, "How do you balance an adoptive parent's age with their ability to parent a child to majority?" the responses by the N.Y.C. judges and referees illustrate their reliance on a back-up resource in their decision-making:

- [I have] no choice when this is the only home [the] child has ever known. [I] make sure there is an alternative resource.
- The Judge will have already reviewed the foster parent's age and health at dispo[sition] when the child is placed with that foster parent. The most substantive issue I explore at the permanency hearings on this issue is the fitness and age of the back-up resource.
- I look at several factors: health of the [adoptive parent], other potential individuals available to adopt the child, age of the child, bond of the child and [adoptive parent], length of time the child has resided with [adoptive parent], under

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[109] *In re Infant S.*, 370 N.Y.S.2d at 96.

[110] *In re* Jennifer A., 650 N.Y.S.2d 691, 692 (N.Y. App. Div. 1996).

[111] *Id.* at 693.

> what mechanism the child is freed—[termination of parental rights (TPR)] or surrender (conditional or not), needs of the child, family [and] friend back up support for the [adoptive parent,] etc.
>
> - I don't make that call. The children are placed in the pre-adoptive home by ACS. So far, there has not been an occasion where I had concerns about the adoptive parent's ability to parent the child until the child reached the [age of] majority. Usually the older pre-adoptive parents have been relatives with other relatives as the back[-]up.[112]

Similarly, the survey of the assigned counsel panel and LFC reflected that in their view adoptive parents tended to be older. Some of the issues related to age are noticeable prior to the adoption. As one survey participant related:

> I have found, with some exceptions, that children are placed in foster homes where the foster parents are older. One recent TPR proceeding that resulted in a suspended judgment, had the children removed from a long term foster home because the foster parent "decompensated"—apparently had been suffering from age related dementia (undisclosed) and was unable to continue caring for the children.[113]

To better understand the CLCNY case study result, the survey participants were asked the following questions:

- When advocating for a termination or an adoption, how do you balance an adoptive parent's age with [the parent's] ability to parent the child to majority?
- What factors do you consider before advocating for an adoption by an older adoptive parent?

Their responses included the following:

> - We do direct advocacy, so if our client is clearly bonded to the adopted parent, age is not an issue.

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[112] Judges and Referees Survey, *supra* note 15.

[113] Assigned Counsel Survey, *supra* note 15.

- I look at the child's age as related to that adoptive parent. I also look at the living standard (what type of things adoptive parent has been doing with child) while child has been in foster care with pre[-]adoptive parent. If there's a good fit I don't worry about age.
- I'm less concerned about [sic] age and more concerned about maturity and parenting skills.
- The same as in every adoption: degree of bonding, time in the home, adjustment to the home, integration into the pre-adoptive family, the foster parent's responsiveness to the child's needs, etc.
- One key is kinship, or not. I have been fairly fortunate in that the older [adoptive parents] have been kinship, often grandmothers.
- I keep it in mind but prefer the child to be with family. Unless the adoptive parent is too old to handle the child, I do not make it an issue.
- That balancing has to occur long before the termination or adoption stage. At these later stages, assuming the foster parent is healthy at the time of termination/adoption, the primary issue should be the child's psychological attachment to the pre-adoptive resource. It is simply cruel to allow a child to develop that attachment and then destroy that bond based on concerns over the resource's age.
- Add[itional] resources in the home . . . . However, I must say that this is usually decided. When [the] case finally comes to this [stage] and you raise concerns you are at looked at as the bad guy and that [you should] just leave the child there because they have been moved enough.[114]

Certainly, the vision of a back-up resource stepping forward to care for the child sometimes works out as intended. Upon the death of A.P.'s grandmother, who had adopted A.P. at the age of four when she herself was sixty-six years old, A.P.'s aunt immediately took over A.P.'s care and filed for guardianship. A.P. described her adoptive experience as

[114] Assigned Counsel Survey, *supra* note 15; LFC Survey, *supra* note 15.

"virtually growing up in two homes" and expressed "there is no place [I] would rather be" than at her aunt's home at the time of finalization of the guardianship. However, the reliability of the back-up resources is questionable. One survey participant observed:

> Often back up resources don't [p]an out. I once objected to an [eighty-six] year old adoptive parent for a [five] year old and was told that age wasn't a bar. She passed away before the adoption could be finalized and the person she listed as a backup had no interest in caring for the child.[115]

Significantly, considering the reliance on identifying and clearing a back-up resource for the finalization of the adoption, to ensure stability and permanency for children adopted by older caretakers, only around 20% of the petitioners from the study were the actual identified back-up resource from the adoption in the CLCNY case study.[116]

i. Abuse and Neglect

D.M.H. had lived with her adoptive mother since the age of six, and was officially adopted when she was nine years old. D.M.H. complained that she struggled to obtain basic necessities, including food and sanitary napkins, and frequently turned to friends and teachers for assistance when she was living with her adoptive mother. D.M.H. developed a mentoring relationship with a teacher in her school who exposed her to various cultural activities and programs and cared for her for months at a time when the adoptive mother travelled. When the adoptive mother failed to return from one trip, D.M.H.'s teacher allowed her to stay permanently in her home and ultimately filed for guardianship of her. While D.M.H. was staying with the petitioner, the adoptive mother continued to collect the adoption subsidy, yet provided little support for D.M.H.'s care, absent a few payments. By order of the court, an investigation was conducted and submitted by N.Y.C. Children's Services. The one paragraph report stated that the child protective specialist had made contact with the adoptive mother who confirmed that she had been residing in North Carolina for one year. It appeared that no further inquiry was made on the circumstances under which the adoptive mother left fifteen year old D.M.H. in New York. Instead, the report simply concluded, "None of the parties are currently residing in Bronx County." At the close of the case, D.M.H. was applying

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[115] Assigned Counsel Survey, *supra* note 15.

[116] Trend Study Statistical Analysis, *supra* note 94.

to college and in a follow-up interview stated that the petitioner was "everything I really wanted."

J.M.H. was adopted when she was fourteen years old by her foster mother who had cared for her since she was four years old. Her biological sister, who had previously lived with J.M.H. and the adoptive mother as a foster child until she turned eighteen years old, applied for guardianship when the adoptive mother lost her foster care license with New York Foundling following allegations of abuse and neglect. While the adoptive mother insisted that that the allegations of abuse and neglect by the foster children were false, and challenged the closure of her home, J.M.H. reported that she had always been treated "badly." She stated that her adoptive mother was "mean and abusive," and gave her biological daughter "preferential treatment." Subsequently, J.M.H. reported that through an informal arrangement, she was living with her biological mother and the petitioner withdrew her guardianship petition. The adoptive mother continues to receive the adoption subsidy for J.M.H.'s care.

Alarming media cases occasionally highlight extreme incidents of maltreatment by adoptive parents of their children. In addition to the federal fraud charges, discussed above, Judith Leekin was also charged with abusing the eleven children whom she adopted in New York City.[117] The children, who were mentally or physically disabled when adopted, were restrained with plastic ties, kept in the basement or a storage room abutting a garage where they slept on the floor, and kept away from school.[118] Leekin "pleaded guilty to federal fraud charges in Manhattan," and subsequently "pleaded no contest in Florida to state charges of aggravated abuse of children and of disabled adults."[119]

Questions have been raised whether the agencies charged with investigating allegations of abuse or neglect have a conflict of interest investigating foster or adoptive parents whom they have cleared and certified and further, whether, as a result of this conflict, incidents and reports are not properly documented and investigated.[120] In New York

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[117] Benjamin Weiser, *New Look at City Lapses in Adoption Abuse Case*, N.Y. TIMES, Aug. 26, 2011, at A24.

[118] Complaint at 4, 6–7, United States v. Leekin, No. 1:08-CR-00446-RMB (S.D.N.Y. 2008).

[119] Weiser, *supra* note 117.

[120] Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 137 (2001).

City, in a lawsuit against the child welfare system which was ultimately settled, Children's Rights Inc. found that, "'(a)buse or neglect by foster parents is not investigated because [agencies] tolerate behavior from foster parents which would be unacceptable by birth parents.'"[121] Certainly, some of the cases in the CLCNY study raised concern whether adoptive parents are viewed and treated differently than biological parents under the same set of circumstances as reflected in the case examples provided.[122] However, the consensus amongst the family court bar members who participated in the surveys was that broken adoptions were most frequently seen in the abuse and neglect specialty with cases filed by N.Y.C. Children's Services against the adoptive parent.[123]

b. Behavior and Mental Health

Born with a positive toxicology, V.B. was placed in foster care at the age of two. She was adopted by her foster mother three years later. As V.B. reached adolescence, she began displaying suicidal and violent tendencies which resulted in her adoptive mother dropping her off at a N.Y.C. Children's Services field office claiming her needs were too great to care for her any longer. Rather than offer services to stabilize the adoptive placement, V.B. was hospitalized while N.Y.C. Children's Services located a biological family and encouraged her to file for guardianship for V.B. The petitioner aunt terminated preventive and intensive case management services which had been put into place by Holliswood Hospital following V.B.'s hospitalization, raising concerns that she lacked the resources and skills to attend to V.B.'s mental health needs.

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[121] *Id.* (quoting Complaint at 75, Marisol A. v. Giuliani, No. 95-Civ-10533 (S.D.N.Y. 1995)).

[122] See, for example, the case of V.B., whose adoptive mother dropped her off at a New York City Children's Services field office claiming V.B.'s needs were too great for her to care for her any longer; the case of D.M.H., who was abandoned in New York by her adoptive mother when she fifteen years old when her adoptive mother moved to North Carolina; and the case of J.M.H., who remained in the home despite the fact that her adoptive mother lost her foster care license with New York following allegations of abuse and neglect.

[123] Trend Study Statistical Analysis, *supra* note 94. Although the survey results of the judges and referee counsel may be skewed in that the majority of participants practiced in the abuse and neglect specialty, the results of the other two surveys support it. Assigned Counsel Survey, *supra* note 15; LFC Survey, *supra* note 15; Judges and Referees Survey, *supra* note 15.

On three separate occasions the family court directed that N.Y.C. Children's Services convene a voluntary placement conference to explore whether V.B. was receiving appropriate mental health service and should be placed in foster care. For many months, N.Y.C. Children's Services failed to hold a conference. On one occasion, the court called a N.Y.C. Children's Services' legal manager into the courtroom to discuss the case. Upon being questioned off the record as to how it was acceptable for an adoptive parent to simply drop off a child at a field office, when under different circumstances a biological parent would be accused of neglect, the N.Y.C. Children's Services' legal manager replied, "What do you expect, she [the child] is crazy." The court ultimately finalized the guardianship after the petitioner aunt re-enrolled in preventive and intensive case management services with the assistance of CLCNY. However, soon after finalization of the guardianship, the aunt terminated the intensive case management and mental health services.

Several months later, V.B. contacted CLCNY and reported that she had not been staying with her aunt, but rather with her biological mother and sister who were suspected of trying to get her into prostitution. V.B. expressed a desire to return to her adoptive mother. She provided degrading Facebook messages that had been sent by her aunt and legal guardian that included: "don't look forward to your child support this month either . . . I wish I would have left you in the hospital . . . your nasty if I knew what I knew about you're hoe ass I would of left you there . . . do something about how your pussy and your ass stink fuck out of here go on finish fucking up your life up and let me live mine . . . go live your miserable life . . . ."(sic). In desperation and with little options before her, V.B. expressed that, if she was not going to be returned to her adoptive mother, she would rather be hospitalized than return to her legal guardian or to her biological mother. Following an unsuccessful meeting between V.B. and her adoptive mother to discuss V.B. returning home and after calling in a report of neglect to the State Central Registry of N.Y.C. Children's Services, V.B. has stopped communicating with CLCNY. Since the initial draft of this article, N.Y.C.'s Services filed a neglect claim against the biological aunt and V.B. was placed in foster care.

During the case study, the authors asked the parties what the primary reason for the broken adoption was as well as what contributory factors which affected the adoptive placement. Although behavior was not cited as the primary reason for the broken adoption, it was cited as a

contributory factor in 43% of the cases.[124] This may be due to the fact that the authors took a client-directed approach in information gathering or perhaps because adoptive parents did not want to acknowledge that it was their only reason for turning the child over to someone else. Unfortunately, in some cases what may have been normal adolescent behavior was seen as problematic and adoptive parents appeared unequipped with sufficient knowledge of adolescent development or lacked the patience to properly address them.[125] This was particularly true in cases in which the adoptive parent was older or had become infirm. This is not to minimize that some families were confronted with teenagers such as V.B. who presented with significant mental health issues. However, while many of the adoptive parents were aware that their children had a pre-existing physical, mental, or emotional disability prior to the adoption, they appeared unable or unwilling to handle the resulting behaviors as the child got older, resulting in, or contributing to, the broken adoption.[126]

c. Biological Family Involvement

A.M.H. had consistent contact with her biological mother following her placement into foster care and adoption by her non-kinship foster parent. In addition, all of her biological siblings who ranged in ages from fifteen to twenty-two years old, and had been adopted by other families, informally visited with their mother or had left their adoptive placements and moved back into their mother's home. A.M.H.'s eighteen years old biological sister C.M.H., who had also been adopted by the same adoptive mother, moved in with her biological mother after she was put out when she accused the adoptive mother's boyfriend of inappropriate sexual behavior. The adoptive mother continued to collect the adoption subsidy, but provided C.M.H. with no support. A.M.H. reported that she was constantly berated and told by her adoptive mother, "I can't wait until I wash my hands of you. I can't wait until I'm done." In June 2011, after thirteen year old A.M.H. got into a fight in school, her adoptive mother (who had been her caretaker for seven years) gave her a metro card for the

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[124] Trend Study Statistical Analysis, *supra* note 94.

[125] These percentages appear to be consistent with the survey responses where behavioral issues were the most frequently described cause for disrupted adoptions.

[126] LFC Survey, *supra* note 15. Twenty-seven percent of the children had a pre-existing physical, mental, or emotional condition prior to the adoption. Trend Study Statistical Analysis, *supra* note 94.

subway, made her pack her belongings in a garbage bag, sent her to her biological mother for the summer, and arranged for the maternal great aunt to file for guardianship. The maternal great aunt expressed concern that the biological mother was still using crack cocaine and that all of the children who were living with her would end up supporting themselves illegally through prostitution or drugs, while the adoptive families continued to collect subsidies for their care.

In 75% of the cases involving a broken adoption, the immediate biological family (parent, sibling, aunt, uncle, or grandparent) remained involved in the child's life, either consistently or intermittently.[127] This figure was startling because 58% of the cases involved non-kinship adoptions.[128] It is also startling because all of the adoptions would have taken place prior to the passage of the post-adoption contact agreements legislation in New York State, which allows for communication or visitation between the biological parent and child.[129] All of the children that the CLCNY attorneys interviewed informed them that, notwithstanding how young they may have been when they were adopted, they always knew who their biological family members were and where to find them. Curiously, even parents whose rights were terminated and who had not overcome the issues that had originally brought the children into foster care were used by the non-kinship adoptive parent as babysitters and as a visiting resource for children as they grew up. At the same time, many adoptive parents repeatedly referred to biological families, even in front of their child, as "bad" or "evil" and referred to the child as having "bad genes."[130] Undoubtedly, this was absorbed by children as a reflection of themselves and could have contributed to behavioral issues when they reached adolescence and struggled with issues around identity and unacknowledged feelings of grief and loss. When the authors looked at whom the petitioners were and their relationship to the child, biological

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[127] Trend Study Statistical Analysis, *supra* note 94.

[128] Trend Study Statistical Analysis, *supra* note 94.

[129] N.Y. SOC. SERV. LAW § 383-c(2)(b) (McKinney Consol. 2011); N.Y. DOM. REL. LAW § 112-b(2) (McKinney 2010). A voluntary surrender document executed by birth parents can be conditioned upon a particular person or persons adopting the child or continuing communication or contact between the birth parent and the child. N.Y. SOC. SERV. LAW § 383-c(2)(b) (McKinney 2011).

[130] For example, this occurred at a meeting between fifteen year old V.B. and adoptive mother L.B. The meeting was held to persuade adoptive mother to allow V.B. to return to her home after she tried unsuccessfully to live with biological family.

family members constituted the largest petitioning group at 62%, followed by adoptive family members or parents at 26%, and unrelated at 11%[131] In breaking the data down further, comparing the cases in which the children were adopted by non-kinship adoptions in which there was no agreement for continuing contact between the child and biological parent but in which a biological family member was the petitioner in the guardianship proceeding, 44% of the cases involved a petitioning biological parent or family member.[132] The attorney surveys, like the CLCNY case study, suggest that the presence of biological family may be a contributing factor or cause of broken adoptions, as can be seen from the following comments:

- Child reuniting with bio[logical] parent.
- Child not getting along with adoptive parent and wanting to live with bio[logical] parent.
- Child acting out or engaging in behaviors unacceptable to adoptive parent who then will allow bio[logical] parent to take charge.
- I have had cases with kids who either reunite with biological parents or who have had continued relationships with their biological parents who as they get older wish to live with their biological parents. I have been involved with cases where, as the adoptive children age into adolescence and have issues, the adoptive parent cedes authority to the bio[logical] parent/treats the adoptive child as though the child is not fully their problem.
- Adoption was "forced"—i.e., both family and child might have been happier with a long-term foster care situation where whatever ties the child had were not severed. The adoptive family may not be prepared, and may react negatively to the child's desire to reconnect with his/her biological family.
- Many children want to be with their real parents. If the resources were provided to birth parents (including

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[131] Trend Study Statistical Analysis, *supra* note 94.

[132] *Id.*

> financial) that are given to adoptive parents, fewer children would come into foster care.[133]

V.P. was born with a positive toxicology to cocaine and was immediately placed into non-kinship foster care. He was eventually diagnosed with cerebral palsy, was wheelchair bound, and required twenty-four hour care. After the biological mother was incarcerated for selling a controlled substance, she surrendered her parental rights and V.P. was adopted by his foster mother. Following the death of the adoptive mother, her daughter moved from Maryland, obtained custody of V.P., and remained in New York with him in the adoptive mother's apartment. However, when the adoptive mother's daughter was later diagnosed with terminal cancer and was being evicted from the apartment, the biological mother stepped forward and applied for guardianship. The biological mother had been clean since her release, had obtained a Bachelor's degree, and was about to start in a Master's program, and held a clerical job at the same company for five years. She had also maintained contact with V.P. following his adoption, visiting in the adoptive parent's home. During the pendency of the case, while V.P. was in his biological mother's care under a temporary order of guardianship and with the assistance of supportive services, the biological mother attended to all of V.P.'s special needs. Following an investigation by N.Y.C. Children's Services and drug testing of the biological mother, she was granted a final order of guardianship.

Although New York has a custody statute that does not restrict the category of individuals who may apply to the court for custody of a child, there are a line of cases in which the court has found that biological parents whose parental rights have been permanently terminated due to neglect lack standing to later seek custody.[134] In one instance, the court noted:

> Once Tiffany A.'s parental rights were terminated, she became a legal stranger to the children and they became wards of the state, and once the children were adopted by their foster mother, pursuant to DRL § 117(1)(a), the natural parent was "relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child[ren]." In the words of the Court of

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[133] Assigned Counsel Survey, *supra* note 15.

[134] *See, e.g.*, *In re* John Santosky, 557 N.Y.S.2d 473, 473 (N.Y. App. Div. 1990); *In re* Tiffany H., 656 N.Y.S.2d 792, 797 (Fam. Ct., Kings Cnty. 1996); *In re* T.C., 759 N.Y.S.2d 295, 297 (Fam. Ct., Kings Cnty. 2003).

> Appeals, adoption is unlike other custody proceedings because it "leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development. For all practical purposes, the parent no longer exists."[135]

Nevertheless, in 2007, a Kings County referee awarded guardianship to a biological mother nearly ten years after the child had been freed for adoption.[136] In that case, in which CLCNY represented the child, the court held that a biological parent could obtain this relief upon showing "that the circumstances precipitating the child's placement in foster care had been resolved."[137] Further, the petitioner had "establish[ed] by substantial evidence that the child would suffer serious harm if the parent was not awarded custody."[138]

In practice, while there may be some members of the bench who will automatically dismiss the case at the first appearance for lack of standing, there are many judges or referees who will allow the petition to survive and will grant an order of custody of the child notwithstanding the standing issue and prevailing case law. It simply depends on the judge or referee who handles the case.

For example, in another case that was handled outside of CLCNY, two boys were freed for adoption at the ages of six and seven and adopted shortly thereafter by their paternal grandmother. Just a few years later, when their adoptive mother passed away, the boys returned to live with their birth parents through informal arrangement. While the boys suffered yet another loss with the death of the biological mother, they were able to remain in the care of their biological father. When one of the boys sought to obtain working papers at the age of fourteen, he was unable to because he could not obtain a birth certificate as his father was no longer his legal father. As a result, his father filed for custody. After due consideration of the facts, the court awarded the father custody of his own two children and the right to obtain the necessary birth certificate.

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[135] *In re Tiffany H.*, 656 N.Y.S.2d at 795 (quoting *In re* Ricky Ralph M., 436 N.E.2d 491, 493 (N.Y. 1982)).

[136] *In re* Rasheed A., No. G19009/06, 2007 N.Y. Misc. LEXIS 5853, at *1–2 (N.Y. Fam. Ct. July 6, 2007).

[137] *Id.* at *1.

[138] *Id.*

Practically speaking, these are not cases in which an appeal is likely, as generally there is no one else who wants the child, or the adoptive parent consents. In fact, as demonstrated by CLCNY study, despite prior involvement by N.Y.C. Children's Services in a termination of parental rights proceedings, N.Y.C. Children's Services may in fact be involved later in placing the child in the biological parent's homes when a broken adoption occurs. As a result, judges or referees may be more likely to issue a custody order. N.Y.C. Children's Services has long recognized that birth parents may be a viable option for permanency for a child previously freed for adoption. A 2003 agency memorandum outlining the guidelines for adolescent cases recognized that:

> In certain special cases, the best permanency resource 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.[139]

C.V., a case discussed in more detail later in this article, was placed in nineteen additional foster homes since the first home of Mr. and Ms. Y. She has never been arrested, nor has she been pregnant, but she has had difficulty complying with curfew and finishing school. The sibling group has always remained close. The agency tried to facilitate placements so that the siblings could be close to each other. Notably, one fourteen year old sister, J.V., who was adopted by a non-kinship resource, spent one summer with her biological mother, who overcame the drug issues that resulted in her original placement. Only time will tell how this will affect J.V. and potentially her placement. C.V. who remains freed for adoption at age seventeen spends weekends with her biological mother, with the tacit permission of the agency.

In November 2010, New York implemented a provision to the termination of parental rights statute authorizing the family court to reinstate birth parents' parental rights under narrowly defined

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[139] William C. Bell, *Implementation of the Adoption and Safe Families Act, Part V: Family-Based Concurrent Planning for Youth with Goals of Independent Living*, N.Y.C. ADMIN. FOR CHILD. SERVS., 4 (June 12, 2003), http://home2.nyc.gov/html/acs/downloads/pdf/asfa_5.pdf.

circumstances.[140] These circumstances include when parental rights have been terminated for more than two years "prior to the date of filing," the child is at least fourteen years old, and "has not been adopted . . . [or] have a permanency goal of adoption."[141] The child, the child's attorney, and the social services district or agency to which the custody of the child was committed all have standing to file.[142] However, the biological parent does not.[143] The statute only permits a restoration of parental rights prior to the adoption finalization[144] and thus, would be inapplicable to a situation such as *In re Rasheed A.* or to the broken adoption cases in the CLCNY study discussed in this article.

The issues presented in the cases involving biological family are complex. Certainly, none of the families had support services, such as family counseling, to address any issues that arose as a result of the new or continued contact with the biological family or parents. The biological family's involvement could be viewed as a positive influence by keeping the child's relationships with the people the child knows and loves, by minimizing the child's loss and grief, and by the fact that many were ready and able to apply for guardianship upon the death of the adoptive parent.[145] It could also be argued that the biological family's involvement was a destabilizing influence, impacting the adoptive parent's opportunity to grow and develop a relationship with the child as well as the adoptive parent's ability to parent and make decisions. In the non-kinship adoptions, where the biological family was involved with the child, behavior was cited as a contributory factor to the broken adoption in over

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[140] N.Y. FAM. CT. ACT LAW §§ 635(a), 635(d) (McKinney 2011).

[141] *Id.*

[142] *See id.* § 636(a).

[143] *See id.* (biological parent not mentioned).

[144] *Id.* § 635(d).

[145] Relatedly,

> The goals of open adoption are: To minimize the child's loss of relationships; [t]o maintain and celebrate the adopted child's connections with all the important people in [the child's] life; [and t]o allow the child to resolve losses with truth, rather than the fantasy adopted children often create when no information or contact with their birth family is available.

Child Welfare Information Gateway, *Openness in Adoption*, U.S. DEP'T HEALTH & HUMAN SERVS., ADMIN. FOR CHILD. & FAM. (2003), http://www.childwelfare.gov/pubs/f_ openadopt .cfm.

50% of the cases.[146] A number of adoptive parents in the case study also accused the biological family of initiating false allegations or of causing the child to fabricate allegations of abuse or neglect to obtain guardianship of the child.[147] Studies have shown that adoptions by family members can be confusing to a child and families often need help dealing with parents who remain involved.[148] It is no less confusing when the child is adopted by a non-kinship foster care resource and the biological parents or family is present. Families and children should be provided services to navigate these challenging relationships.

i. Adoption Subsidy

On many occasions when participating in freed child permanency hearings, one of the authors has had cause to suspect that a foster parent's decision to adopt was, at least in part, motivated by the adoption subsidy. In New York City, the monthly basic rate ranges from $520 (ages zero to five), $613 (ages six to eleven), and $709 (ages twelve and over).[149] The special children rate increases to $1,140, and the exceptional children rate is up to $1,729.[150] The CLCNY case study reinforced these suspicions about the motives of the adoptive parents and also of prospective guardians. Like so many other cases in family court, money is frequently an incentive or issue in the broken adoption guardianship cases.

In the case of N.B., when the adoptive mother, who had adopted N.B. when he was nine years old when she herself was seventy-one years old, passed away, the back-up resource B.B., the biological daughter of the adoptive mother, stepped forward. At the time, B.B. had a yearly household income of approximately $125,000–$140,000. Allegedly, even though N.B. and two other adopted children were named in the adoptive

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[146] Trend Study Statistical Analysis, *supra* note 94.

[147] Trend Study Raw Data, *supra* note 98.

[148] Jeanne Howard, *An Examination of Postadoption Functioning and the Needs of Kin, Foster, and Matched Adoptive Families*, *in* THE POSTADOPTION EXPERIENCE: ADOPTIVE FAMILIES' SERVICE NEEDS AND SERVICE OUTCOMES 3, 11 (Martha Dore ed., 2006).

[149] *10 OCFS-ADM-15, Maxium State Aid Rates for Foster Care Programs and Residential Programs for Committee on Special Education Placements*, N.Y. ST. OFFICE CHILD. & FAM. SERVS. 8, (Nov. 24, 2010), http://www.ocfs.state.ny.us/main/policies/external/OCFS_2010/10-OCFS-ADM-15%20Maximum%20State%20Aid%20Rates%20for%20Foster%20Care%20Programs%20and%20Residential%20Programs%20for%20Committee%20on%20Special%20Education%20Placements%20-%20Effective%20Jul.pdf.

[150] *Id.*

mother's will, they received no part of the inheritance. The adoption subsidies of the three children were transferred to B.B. who also began collecting Supplemental Security Income for two of them totaling approximately $45,600 per year. B.B. purchased a second home in Stamford, Connecticut, leaving the adolescents in a private home in the Bronx. B.B. demanded that the children work to pay the two mortgages and support the household they were in, despite the fact that the B.B.'s yearly income by that point averaged $170,000–$186,000. Ultimately, a teacher who was familiar with N.B.'s situation stepped in and was granted guardianship of him.

N.B.'s case is unusual in the amount of money that was involved. Realistically, many of the families who are in family court, particularly kinship resources, may be unable to afford care of a child without the adoption subsidy. While some practitioners and members of the bench believe that it is insulting to adoptive parents to insinuate that they do it for the money when the subsidy cannot cover the actual cost of raising a child, others raise serious concerns about the adoptive parent's motivations and finances. Their responses include the following:

- Biological parents aren't paid to be parents, but adoptive parents are. It makes adoption attractive, but doesn't account for the fact an adoptive bond should be about love, trust, and family.
- I think that adoptive parents need a source of income other than [the adoption subsidy]. I had a case where adoptive parent was alleged to have neglected children. The adoptive parent's income was [$]1000 per month but adoption subsidy was over [$]3000.
- I believe that children very frequently think of themselves as a meal ticket for their adoptive parents. Older adopted clients have told me this repeatedly . . . . [F]requently after the adoption is finalized many of my young clients did not receive anything from their adoptive parents. Since there is no one checking up on the families post adoption, these children are then left out in the cold.
- The rules set for adoptive parents are unrealistic and many adopt out of monetary gain instead of love. Many children are kicked out of the home once the well runs dry.
- Frequently, the adoptive resource does not work[, and] is on public assistance, and it is obvious that the subsidy is

> an incentive to increase their income. Many have multiple children in the home. I have had cases where the adoption subsidy provided the family with $60,000[or more] per year tax free income. Many of my clients have shared rooms with [three] or more children. However, when the home is assessed on the home study, the family rearranges the room to make it look like the child is only sharing a room with one other child.[151]

When judges and referees were asked whether financial incentives create a climate for adoptions to fail, the responses ranged from "to a certain extent" to "medium" to a "great deal."[152] Nonetheless, the choices seemed to be too few to resolve that issue. The responses included the following:

- Very much, but I am not sure that a better alternative exists. I fear the same outcomes from kinship guardianships.
- I think if the adoptive parent cannot financially care for the child, given these economic times, it can greatly increase the chance of failure.
- It often seems that removing a child from a long-term home is only going to cause more pain. Also, we are realistic about the chances for these troubled, older minority children to be adopted by another family. Every year we see thousands of kids who have NOT been adopted age out of care into tenuous situations, often homelessness. Even an imperfect adoption usually looks better than that.
- The pool of foster parents is largely made up of family members who face the same economic and societal pressures as the parents from whom the child was removed. I don't know that more training would improve outcomes.[153]

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[151] Assigned Counsel Survey, *supra* note 15; LFC Survey, *supra* note 15.

[152] Judges and Referees Survey, *supra* note 15.

[153] Judges and Referees Survey, *supra* note 15.

While New York City regulations require that, upon the death of the adoptive parent, the subsidy transfers to the legal guardian until the child has attained the age of twenty-one,[154] many petitioners reported receiving inconsistent information about whether they could collect the subsidy when they called N.Y.C. Children's Services. Further, while the regulations do not allow for the transfer of the subsidy absent the death of the adoptive parent, some petitioners reported that they had received the adoption subsidy from N.Y.C. Children's Services nonetheless, perhaps with the consent of the adoptive parent. In the cases where the death of the adoptive parent was not at issue, petitioners frequently complained that the adoptive parent was keeping the subsidy even though the child had not been living with the adoptive parent for months or even years. They also noted instances where the adoptive parent was using the adoption subsidy for the parent's own use rather than for the care of the child. Frequently, judges or referees encouraged the adoptive parent to voluntarily send the subsidy to the petitioner, or suggested that the petitioner file for child support following the finalization of the guardianship.

Many of the teenagers interviewed were confused about why they, or the petitioner, could not receive the adoption subsidy directly when it was not being used by the adoptive parent for their benefit. This issue was illustrated by two college bound teenagers who no longer lived with the adoptive parent, yet the adoptive parent was collecting the adoption subsidy. The adoptive parent provided little to no money for their care and refused to provide financial information for them to complete college applications and financial aid packages, resulting in their delay or inability to attend school.

As discussed earlier in this article, the issues surrounding the adoption subsidy raises the question of whether there should be a mechanism for

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[154] N.Y. COMP. CODES R. & REGS. tit. 18, § 421.24 (2011). The regulations specifically state:

> Upon the death of the person(s) who adopted the child prior to the 21st birthday of the child, payments made pursuant to this subdivision must continue and must be made to the legal guardian . . . of the child . . . until the child has attained the age of 21 . . . . All provisions of this section applicable to maintenance payments made to the person(s) who adopted the child will be applicable to maintenance payments made to the legal guardian . . . of the child.

Id.

follow-up and tracking to ascertain whether children are remaining with their adoptive parents. In the context of broken adoptions in guardianship cases, it seems equally incongruent that the subsidy would not follow the child to be used for the child's benefit, not just in the event of the death of adoptive parent. Child welfare professionals should be doing their best to avoid instances in which adoptive parents are still receiving subsidies when the adoptive children are no longer in the home. Particularly concerning were instances where a child had special needs, and was not receiving the services that the child needed or required. The Leekin case discussed earlier highlights the need to provide continuous monitoring and assistance to families, rather than limiting direct interaction to annual mailings soliciting information that can easily be manipulated and based solely on self-reporting by the adoptive parent. As the case study emphasized, a number of children are living in alternate placements and are not receiving the care and support that they should be receiving from the adoptive parent. The difference for these children is that N.Y.C. Children's Services is not as readily aware of their new placements as the children are not in foster care.

ii. The Role of N.Y.C. Children's Services and Service Needs of Child or Family

Post-adoption services—defined either as services such as mental health treatment that continued from foster care and beyond the adoption finalization or a formal referral to an agency offering post-adoption services—were in place at the adoption finalization in 12% of the cases in the CLCNY case study.[155] However, 27% of the children in the case study had a pre-existing physical, mental, or emotional condition prior to the adoption, suggesting that 15% remained under served when the adoption was finalized.[156] While N.Y.C. Children's Services was involved in a large number of cases in the study, its role was strictly limited to finding a new placement for the child. The CLC attorneys did not see any efforts by N.Y.C. Children's Services in any of the CLC cases to offer services to stabilize adoptive placements. While N.Y.C. Children's Services priority appeared to be focused on identifying a resource to file for guardianship of the children, scant attention was paid to long-term stability. As a result, little to no effort was made to identify necessary services and offer referrals in the new homes.

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[155] Trend Study Statistical Analysis, *supra* note 94.

[156] *Id.*

This was clear in V.B.'s case discussed earlier. In another notable case, an adoptive sister took over the care of five children following the death of her mother, including a thirteen year old who could barely speak, could not clean himself after using the bathroom, and required constant supervision. The new legal guardian was reportedly denied help when she requested assistance from N.Y.C. Children's Services.[157] In this case as other closed cases, the legal guardian requested assistance during the follow-up telephone interviews that were conducted by CLCNY. In response to these requests, an attorney, a social worker, or the volunteer unit Client Management Liaison Unit (CMLU) of CLCNY followed up to provide necessary assistance and service referrals.

III. WHY ARE SO MANY CHILDREN RETURNING?

There are many reasons that children return to care, with perhaps no two cases being exactly alike. Generally, the reasons likely stem from the fact that child welfare professionals underestimate or fail to acknowledge the attachment, bonding, identification, and trauma issues these children experience, as well as the tremendous need to heal these children if child welfare professionals expect to minimize broken adoptions. Indeed, financial incentives and the legislative time frames that drive the system do not allow for psychologically-based decision making.

A. Understanding Attachment and Related Concepts

S.D. was placed into foster care during N.Y.C.'s crack epidemic when she was five years old and had consistent contact with her parents during her placement. While her parents overcame the drug issues that originally led to her placement, they struggled to obtain and maintain appropriate housing, and S.D. remained in foster care for eight years. Following the passage of the Adoption and Safe Families Act (ASFA), the foster care agency filed a termination of parental rights proceedings to free S.D. for adoption by her long term foster parents. S.D. was adamant that, while she loved her foster parents and wanted to remain with them, she did not want to be adopted and lose her relationship with her biological family. S.D.'s attorney retained a psychologist to assess if her best interests were served by being freed for adoption. Reports during S.D.'s foster care placement revealed that S.D. had a strong idealized attachment to her biological mother, in particular, as well as to her older siblings who were placed in group homes and other foster homes. This was juxtaposed with an

[157] Trend Study Raw Data, *supra* note 98.

apparently stable placement in the home of Mr. and Mrs. B, where she had resided throughout her eight year foster care placement with her younger brother. The evaluator opined that "[p]sychologically, [S.D.] appears as an emotionally young adolescent who maintains an internalized idealized connection to her mother, and cannot give voice to profound feelings of abandonment and loss. There is a strong suggestion of underlying isolation, and a need to be found, seen and fully connected." The evaluator concluded that because S.D. was an adolescent who did not embrace adoption, the court should not press it upon the child as "[t]o do so may cause even further upheaval in the formation of her identity."

Issues concerning attachment, bonding, identity, child development, loss, resilience, and trauma are frequently overlooked in the area of adoption, especially those adoptions that arise out of foster care. Although professionals are generally familiar with these concepts, they are hamstrung by budgetary constraints and the desire to achieve permanency outcomes that are the best interests of the child pursuant to the ASFA time frames, which were developed to be consistent with a child's sense of time. The law is often ill-equipped to deal with these very complicated concepts, especially given the inherent fact that no two children or people will experience a situation in the same way. Thus, an overburdened and underfunded system is expected to make judgments concerning children's stability and permanency without the necessary resources, and decisions may be made regarding children's relationships and placements without crucial information.

Throughout the life of a child protective case, advocates, judges, and referees seek to make decisions in the best interests of the child. In doing so, they are often faced with a steady stream of determinations that must be made. These determinations are ultimately focused on balancing the competing harm of removal against the harm of the child being home. Or, relatedly, as the proceeding continues, balancing the potential harm of return home versus the systemic need to achieve permanency through adoption where return to the home has not timely occurred. It is not uncommon to hear testimony from an agency caseworker during a termination of the parental rights proceeding or a permanency hearing that the child seems to be well adjusted to the pre-adoptive foster parent and has an attached and bonded relationship with them. Notably, the vast majority of caseworkers only have a Bachelor of Arts degree that more

often than not is unrelated to childhood development or welfare.[158] As noted by one survey participant:

> Every adoption report I've seen mentions the degree of bonding between the child and adoptive parent as piece of the overall report. Whether you'd call it an "evaluation" of the bonding, when it's by a case worker and not a mental health professional, is unclear. I have never seen a report or evaluation specifically concerning attachment and identify issues, and none provided by someone with mental health credentials.[159]

The results of the anonymous surveys showed that approximately 30% of the participants of the cases stated that they had never been provided with an attachment or bonding evaluation in a case.[160] Another 30% of the participants stated that they were provided in less than 5% of their cases, while only 17% of the participants stated that they were provided in between 5% and 10% of their cases.[161] However, the responses were almost universal that these evaluations were considered important if not crucial for the attorney in making decisions.[162]

In the absence of attachment and bonding assessments by mental health professionals, the family court bench and practitioners frequently rely upon inadequate agency caseworker reports and related testimony to make critical decisions. These decisions may, inadvertently, contribute to the concerns this article raises about the revolving doors of family court and broken adoptions.

The effect of these reports was clear with an adopted child named K.L. who was born addicted to cocaine. As an infant, she was placed with B.L. who became her primary attachment figure, and subsequently adopted her. As an adolescent, K.L. was voluntarily placed in foster care by B.L. due to health issues and an inability to control K.L.'s behavior problems. After a number of placements, K.L. was placed in the home of L.R., where she was reported by the agency caseworker to have adjusted well. Based upon the agency "assessment" and to provide new permanency to K.L., the

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[158] *See* Bureau of Labor Statistics, *Social Workers*, OCCUPATIONAL OUTLOOK HANDBOOK, 2010–11 EDITION (Dec. 17, 2009), http://www.bls.gov/oco/ocos060.htm.

[159] LFC Survey, *supra* note 15.

[160] Assigned Counsel Survey, *supra* note 15; LFC Survey, *supra* note 15.

[161] *Id.*

[162] Assigned Counsel Survey, *supra* note 15 (92%); LFC Survey, *supra* note 15 (100%).

adoptive parents surrendered their rights so L.R. could adopt. Soon after, a report was called in by K.L.'s school that she had been assaulted by L.R. and another foster child in the home. The report was substantiated and L.R. was arrested. K.L. spent the remainder of her teenage years in foster homes and group homes.

Issues in this placement were clear early on, yet overlooked in the agency's effort to seek permanency. In a subsequent review of the case, it was apparent that that the agency caseworker had ignored K.L's attachment issues to move her on to another track of permanency. In one case entry it was noted that K.L. "has been spending a lot of time with her previous adoptive mother. This has been problematic for everyone. K.L. is not spending enough time with [L.R.] to bond with her. [L.R.] was having second thoughts about adopting her." K.L. also kept asking why she could not live with her adoptive mother, to whom she was still very much attached. Yet, the report that was presented to the court by the agency caseworker advocated a surrender of parental rights for her to be adopted by L.R., stating that K.L was well adjusted and was bonding with the new resource. This case illustrates how the forming and breaking of attachments is not properly understood or addressed in family court. Perhaps better interventions in K.L.'s earlier placement, rather than the rush to find a new adoptive placement, would have better served her in the end. However, to comprehend the complexity of the decision making that faces the court, child protective agencies, attorneys for children, foster care, and adoptive agencies, a better understanding of certain psychological concepts is necessary.

1. Bonding and Attachment

The concepts of bonding and attachment are interrelated, as it is through the bonding process that one forms an attachment.[163] Attachment is the social and emotional relationship children develop early on with significant people in their lives (initially with their mother) and the quality of the attachment ultimately affects the child's ability to develop subsequent healthy relationships.[164] In other words,

> Attachment is [ultimately] a process made up of interactions between a child and [a] primary

[163] Bruce D. Perry, *Bonding and Attachment in Maltreated Children: Consequences of Emotional Neglect in Childhood*, CHILDTRAUMA ACADEMY, 1–3 http://childtraumaacademy.org/Documents/AttCar4_03_v2.pdf (last visited Nov. 27, 2011).

[164] Perry, *supra* note 163, at 2–3.

> caregiver . . . [that] begins at birth, helping the child develop intellectually, organize perceptions, think logically, develop a conscience, become self-reliant, develop coping mechanisms (for stress, frustration, fear, and worry), and form healthy and intimate relationships.[165]

Specifically, "an attachment bond is an enduring emotional relationship with a specific person; [] the relationship brings safety, comfort, soothing and pleasure; [and the] loss or threat of loss of the person evokes intense distress."[166]

Healthy attachments are clinically associated with healthy interpersonal relationships, while poor attachments are "associated with a host of emotional and behavioral problems" starting in childhood and lasting later in life.[167] Children who begin their lives with unhealthy attachments are at risk for serious problems in the future.[168] Abuse, neglect, or other forms of maltreatment can also compromise the ability of a child to securely attach to the child's parent or primary caregiver.[169] To compound that, when a child experiences loss or separation from the child's primary attachment figure, such as placement in foster care, the child's ability to bond and attach is further impacted.[170] The attachment issues are intensified by the myriad of problems that children may have owing to their maltreatment, including: health, physical growth, motor delays, compromised physiological systems, cognitive and socio-emotional

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[165] *Effects of Attachment and Separation*, CHILD. SERVS. PRAC. NOTES (N.C. Div. of Soc. Servs. & The Family & Children's Res. Program, Chapel Hill, N.C.), July 1997, at 5, *available at* http://www.practicenotes.org/vol2_no4/effects_of_separation_and_attachment.htm.

[166] Perry, *supra* note 163, at 2.

[167] Perry, *supra* note 163, at 2–3.

[168] *Attachment Explained*, EVERGREEN PSYCHOTHERAPY CENTER, ATTACHMENT TREATMENT AND TRAINING INST. PLLC, http://www.attachmentexperts.com/whatis attachment.html (last visited Sept. 28, 2011).

[169] Brenda Jones Harden, *Safety and Stability for Foster Children: A Developmental Perspective*, 14 CHILD. FAM. & FOSTER CARE 31, 34 (2004).

[170] Beth Troutman, *The Effects of Foster Care Placement on Young Children's Mental Health*, HEALTHCARE.UIOWA.EDU 1, http://www.healthcare.uiowa.edu/icmh/archives/reports/Foster_care.pdf (last visited Nov. 26, 2011).

disturbances, and psychopathology.[171] When children enter foster care, they may be unable to trust their caretakers and their relationships with them may be tenuous. This is further intensified if they experience multiple placements, which also contribute to acting out behaviors. In fact, "children's perceptions of the impermanency of their placements have . . . been [directly] linked to behavioral difficulties."[172] As a result,

1. Foster children often experience multiple placements, creating multiple disruptions in their relationships with primary caregivers. Disruption in these relationships leads to serious emotional and behavioral problems.
2. Foster children have often been abused and neglected and come from unstable family environments. These conditions are related to insecure attachments and attachment disorder.
3. Foster children entering a placement have experienced the loss of a primary caregiver. This separation constitutes a trauma, because it disrupts the attachment between the child and the primary caregiver.
4. Foster children's early experiences often cause them to have problematic attachments. The expectations and attachment strategies they have learned in their original attachment relationship are maladaptive in the context of new relationships.[173]

The resulting attachment issues may persist throughout their lifetime if untreated and if stressful life circumstances continue. Thus, a child who is neglected may have difficulty creating a healthy attachment as a result of the neglect the child has experienced. Children's attachment issues are further compounded by removal and subsequent placements, which results in future difficulty in their attachments with adoptive parents.[174]

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[171] Crystal Wiggins et al., *Literature Review: Developmental Problems of Maltreated Children and Early Intervention Options for Maltreated Children*, OFFICE ASSISTANT SECRETARY FOR PLANNING & EVALUATION, U.S. DEP'T HEALTH & HUMAN SERVS., 2 (Apr. 23, 2007), http://aspe.hhs.gov/hsp/07/Children-CPS/litrev/report.pdf.

[172] Harden, *supra* note 169, at 39.

[173] KATHLEEN I. W. BRUNDAGE & DEBORAH GERRITY, REDUCING SEPARATION TRAUMA: A RESOURCE MANUAL FOR FOSTER PARENTS, SOCIAL WORKERS, AND COMMUNITY MEMBERS WHO CARE FOR CHILDREN AND YOUTH (2005) (internal citations omitted).

[174] Susan Livingston Smith, *A Study of the Illinois Adoption/Guardianship Preservation Program*, *in* THE POSTADOPTION EXPERIENCE: ADOPTIVE FAMILIES' SERVICE NEEDS AND

(*continued*)

Attachment and bonding need to be better understood to create and ensure long standing placements. The authors' surveys received the following responses on this topic:

- Attachment issues . . . that interfere with a sense of commitment to support the child through "thick and thin" and "better and worse." I think that adoptive parents need to be coached on developing stronger attachments to the children they adopt, and that the adoption is as perpetual as the relationship between birth children and parents.
- One thing I'll say about attachment is that with adoptive parents, I'm much more likely to have cases in which the child, adoptive parent, or both want to completely cut off all contact and aren't willing at all to try to repair the relationship.
- It would be great if adopting parents were required to take courses on this issue [attachment] to help identify and deal with it early on. [175]

2. Loss, Separation, and Grief

"A child moved is a child in grief."[176] Children removed from a parent cannot plan for that event. Such an unanticipated separation may shatter all the child's existing emotional connections, including but not limited to the child's parents and siblings if they cannot be kept together. If not addressed appropriately, this separation or loss can cause fear and carry severe emotional and social consequences. The issues which children who have been placed into foster care face are compounded by the uncertainty that they confront every day about what will happen to them and their families. Anytime a child is removed, the child is, in essence, required to start over. The child's world may now include new and strange people

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SERVICE OUTCOMES 67, 77, 79 (Martha Morrison Dore ed., 2006). *See also* ANNETTE SEMANCHIN JONES & TRACI LALIBERTE, ADOPTION DISRUPTION AND DISSOLUTION REPORT 6–7 (2010), *available at* http://www.cehd.umn.edu/ssw/cascw/attributes/PDF/publications/AdoptionDissolutionReport.pdf.

[175] Assigned Counsel Survey, *supra* note 15; LFC Survey, *supra* note 15; Judges and Referees Survey, *supra* note 15.

[176] Deena McMahon, The Impact of Trauma on Attachment and Brain Development: Implication for Services and Interventions 6, 14th ABA Nat'l Conf. on Child. & the Law (July 15–16, 2011).

such as caseworkers, attorneys, agency security guards, foster parents, and the child must learn new routines and manage new daily expectations. The child's community and school will also likely change. In general, the child may "display low self-esteem, a general distrust of others, mood disorders (including depression and anxiety), socio-moral immaturity, and inadequate social skills."[177] Frequently, children in foster care experience multiple moves and placements, and each one represents yet another loss. This interferes with their ability to have healthy intimate relationships in the future.

3. Trauma

The DSM IV describes a "traumatic event" as one in which "the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the integrity of self or others."[178] The second critical component of a traumatic event is that "the person's response involved intense fear, helplessness, or horror."[179] Trauma may have many sources, including neglect, physical abuse, psychological abuse, sexual abuse, witnessing of domestic abuse and other violence, such as community and school violence.[180] The effects of trauma "may be mild or severe; disappear after a short period or last a lifetime; and affect the child physically, psychologically, behaviorally, or in some combination of all three ways."[181] Almost all children entering the child welfare system have suffered trauma at various states in their young lives, including upon removal and separation from their families. That trauma or removal may be further compounded by feelings of guilt related to the removal and abandonment if the birth family is unable to overcome their problems in a timely manner, especially if there is a lack of visitation by the parent. The importance of understanding trauma, and its resulting

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[177] *Effects of Attachment and Separation*, *supra* note 165, at 3.

[178] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 209 (4th ed. 1994).

[179] *Id.*

[180] *Types of Traumatic Stress*, NAT'L CHILD TRAUMATIC STRESS NETWORK http://www.nctsn.org/trauma-types (last visited Sept. 29, 2011).

[181] Child Welfare Information Gateway, *Long-Term Consequences of Child Abuse and Neglect*, U.S. DEP'T HEALTH & HUMAN SERVS., ADMIN. FOR CHILD. & FAM., 6 (2008), http://www.childwelfare.gov/pubs/factsheets/long_term_consequences.cfm.

impact upon children in foster care, was highlighted in the New York Court of Appeals case Nicholson v. Scopetta.[182]

Traumatized children and those with attachment issues do not easily develop positive reciprocal relationships with their new caregivers. Additionally, the loss of their birth parents may be unresolved, and the child may not be able to establish new relationships. As a result, children may be vigilant around their foster and future adoptive parents, demonstrating a lack of trust in them. This interferes with the children's ability to attach to anyone in a healthy way. One survey response on this topic noted the following:

> I have had three cases within the past six months where youth were voluntarily placed into care after acting out when they were told they were adopted. Adoptive parents need to understand that finding out you aren't blood related is a trauma and will result in some acting out as they test the limits of this person who has set themselves forth as the parent.[183]

4. Identity

Almost any parent will admit that adolescence can be a trying time for both teenagers and their families. The main challenge for teenagers is to form their own identity. As they go through this transformation, tensions often develop between themselves and their parents, particularly as they explore questions such as "Who am I?" or "Where do I belong?"[184] For adopted teenagers, the quest for identity can be particularly difficult. They may be unable to acknowledge feelings of grief and loss, or their feelings of continued connection to their birth family.[185] Frequently, adoptive

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[182] Nicholson v. Scoppetta, 820 N.E.2d 840, 846–47 (N.Y. 2004).

[183] LFC Survey, *supra* note 15.

[184] Janet L. Hoopes, *Adoption and Identity Formation*, *in* THE PSYCHOLOGY OF ADOPTION 144, 144 (David M. Brodzinsky & Marshall D. Schechter eds., 1990); Kathleen Lenerz et al., *Postadoption Services: A Study of Program Participants, Services, and Outcomes*, *in* THE POSTADOPTION EXPERIENCE: ADOPTIVE FAMILIES' SERVICE NEEDS AND SERVICE OUTCOMES 95, 108 (Martha Morrison Dore ed., 2006).

[185] Michael P. Grand, *Adoption Through a Retrospective Lens*, *in* THE POSTADOPTION EXPERIENCE: ADOPTIVE FAMILIES' SERVICE NEEDS AND SERVICE OUTCOMES 45, 54 (Martha Morrison Dore ed., 2006); Lenerz et al., *supra* note 185; Smith, *supra* note 174, at 75; Susan Livingston Smith, *The Nature of Effective Adoption Preservation Services: A* (*continued*)

parents demand undivided loyalty and cannot understand the child's underlying loyalties to the people and memories from the child's past, whether real or constructed. Adopted adolescents may feel like they have to choose and cannot integrate both into their life. If they are not already in contact, many seek out their biological family. In the CLCNY case study, the authors were particularly struck by one young adolescent who had been adopted when she was eight years old and struggled with the fact that she wanted to be called Melonie, her birth name, rather than the name given to her through adoption (Carolyn).[186] Does being adopted mean a compromise of your very identity? That certainly appeared to be the case for Melonie, who had clear memories of her mother from the first six years of her life. As one survey participant observed:

> [T]here should be more training and support post adoption to assist adoptive parents on how to address teens acting out behaviors generally and as it relates to their efforts to get information about their birth family. Training [should] include how to support the teen, and how not to over react and become defensive and feel rejected.[187]

With the advent of social media sites such as Facebook, adolescents have more access to information. It is not uncommon for adolescents to use social media resources to seek out their birth parents and other birth relatives, nor is it uncommon for birth relatives to use social media to locate adoptive family members.[188] The issues that result from unplanned and therapeutically unsupported contacts, whether through Facebook or another medium, can have a destabilizing impact on the adoptive home and contribute to broken adoptions. Although the CLCNY case study did not look specifically at this issue, it identified at least one adolescent who made contact with her biological sister through Facebook, which precipitated the filing of the custody petition.

Qualitative Study, *in* THE POSTADOPTION EXPERIENCE: ADOPTIVE FAMILIES' SERVICE NEEDS AND SERVICE OUTCOMES 159, 166–67, 170–71, 194 (Martha Morrison Dore ed., 2006).

[186] Trend Study Raw Data, *supra* note 98.

[187] Judges and Referees Survey, *supra* note 15.

[188] Lisa Belkin, *I Found My Mom Through Facebook*, N.Y. TIMES (June 24, 2011), http://www.nytimes.com/2011/06/26/fashion/i-found-my-birth-mother-through-facebook.html?pagewanted=all; Victoria Macdonald, *Adopted Children Face Anguish as Birth Parents Stalk Them on Facebook*, THE OBSERVER (May 22, 2010), http://www. guardian. co.uk/technology/2010/may/23/birth-parents-stalk-adopted-facebook.

S.B. had been removed from her biological mother when she was an infant due to drug issues. She was adopted by her long-term foster mother when she was two years old along with her older brother D.B. S.B. alleged that her adoptive mother was verbally and physically abusive to her and D.B. during their childhood. In fact, D.B. left the adoptive home when he was seventeen years old due to one such incident. When S.B. was thirteen years old, her adoptive mother gave her the name of a sixteen year old biological brother who was adopted by another family. S.B. "friended" him on Facebook. He, in turn, gave her additional names of biological family that she began to search for on Facebook. Soon after, S.B. learned from D.B. that an older biological sister had made contact with him on Facebook. S.B. found and "friended" her biological sister and they began speaking regularly on line as well on the phone during her lunch recess at school. Soon after becoming friends on Facebook, they arranged to meet in person. Two months later, S.B. ran away to her biological sister's home and met her biological father for the first time. S.B.'s biological sister then filed for custody of her.

Biological family contact through social media will no doubt be a growing concern in the field of child welfare and adoption in the years to come. Although the British Association for Adoption and Fostering has published two guides related to this issue,[189] it has received little attention in the United States. Rather, the focus in the United States appears to be on how to use social media to recruit foster and adoptive parents.[190] Child welfare and legal communities are simply unequipped to properly assess and address the issue of how the use of social media may be affecting adoptive families and contributing to broken adoptions. In terms of this discussion, the use of social media needs to be incorporated more generally into understanding the importance of a child's natural curiosity about the child's origins and how this new access to information, independent of an adoptive parent or an agency, may be disruptive. It is essential that foster

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[189] *See* EILEEN FURSLAND, FACING UP TO FACEBOOK: A SURVIVAL GUIDE FOR ADOPTIVE FAMILIES (2010); EILEEN FURSLAND, SOCIAL NETWORKING AND CONTACT: HOW SOCIAL WORKERS CAN HELP ADOPTIVE FAMILIES (2010).

[190] *See* Child Welfare Information Gateway, *Social Media in Adoption Recruitment*, U.S. DEP'T HEALTH & HUMAN SERVS., ADMIN. FOR CHILD. & FAM., http://www.childwelfare.gov/adoption/adopt_managers/social_media.cfm (last visited Dec. 29, 2011); Training and Technical Assistance Network Updates, *Who's Using Social Media*, CHILD. BUREAU EXPRESS (2011), http://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=125&articleid=3142.

and adoptive parents receive training and support about how to address the child's need for information, manage contact, and access therapeutic supports when questions and issues arise.

5. Behavior

Children adopted at older ages have often endured abuse or neglect, lived in several foster homes, or moved from relative to relative before finding a permanent family. Their sense of loss and rejection may be intense, and they may suffer, at the very least, low self-esteem, or more seriously, from severe emotional and behavioral difficulties as a result of early interruptions in the attachment process with their caregivers.[191] Children who appeared loving and stable when they were young may develop intense feelings of anger and sadness, and often have resulting behavior issues when they reach adolescence. Post-adoption studies have shown that the most frequently identified problems in adolescence for which adoptive parents sought services were almost always related to the child and specifically concerned behavioral and emotional problems.[192] In addition, families needed help long after adoptions were finalized, as adoption is a lifelong process with different issues related to ambiguous loss, grief, anger, and issues of identity at various developmental stages for the child.[193] This is clear to the judges and referees who were asked to discuss the reasons that they saw children returning to family court. One response was as follows:

> The child turns into a teenager and rebels. The adoptive parent, who feels she has sacrificed so much, is hurt and resentful and responds in anger or denial. Or, the child develops mental health issues or behavioral issues relating to their earlier abuse and the adoptive parent is unable to cope. [194]

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[191] Christopher G. Hudson et al., *The Development of Postadoption Services in Massachusetts*, *in* THE POSTADOPTION EXPERIENCE: ADOPTIVE FAMILIES' SERVICE NEEDS AND SERVICE OUTCOMES 135, 144–45 (Martha Morrison Dore ed., 2006); Smith, *supra* note 174, at 67, 77, 79; Smith, *supra* note 186, at 166–67, 170–71, 177.

[192] Smith, *supra* note 174, at 72–73; Smith, *supra* note 186, at 159, 166, 193.

[193] Hudson et al., *supra* note 192; Lenerz et al., *supra* note 185, at 108; Smith, *supra* note 186, at 170.

[194] Judges and Referees Survey, *supra* note 15.

In response to a similar question, the assigned counsel and LFC attorneys similarly noted:

- Perhaps the adoptive parent's commitment is not the same as a biological parent's commitment. For example, if the child has behavioral problems and things are becoming hard, the adoptive parent has the "I can return you" attitude.
- Child acting out or engaging in behaviors unacceptable to adoptive parent who then will allow bio[logical] parent to take charge.
- Children growing, just becoming teenagers but because the child is not seen as theirs it is easier to wash hands of situation than to grapple with teen issues.
- Cases I've seen involve when adopted child starts asserting themselves and adoptive parent feels that child is too much trouble and kicks the child out of the home or calls Children's Services to get the child.
- [Children's] behavioral issues will not magically go away, necessarily, just because the [biological] parents are out of the picture. With these behavioral issues persisting, it's not surprising that an adoption would be disrupted. If this truly is a repeating problem perhaps, the focus of the courts ought to be placed to a greater extent on addressing the needs of the [children] rather than a rush to permanency or adoption. Speed is not always best despite what is now (for this moment, anyway) politically correct in the industry.
- A child is adopted at a young age, and when the typical adolescent behaviors begin, they are voluntarily placed back into care.[195]

In terms of training needs around adolescent development and behavior issues, in which it appeared that adoptive parents lacked the patience, skills, or resources to properly respond or to address, the following comments were provided:

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[195] Assigned Counsel Survey, *supra* note 15; LFC Survey, *supra* note 15.

- I think more people need to be aware of the availability and helpfulness of mental health professionals and medication, if needed. That at times [] may be needed to get a parent or child through a difficult time. I have also heard foster parents say extremely mean things about the child such as "she's a compulsive liar" or "will never be anything . . . ."
- I think the adoptive parents should know that adoptive children will probably always be curious about where they come from or who their parents are and that it is not a rejection of the foster parent. I also don't know how much the foster parents have bonded with the children. To me some see it as a source of income and the child may be "cute" when they are 4, 6, [or] 10, but once they become a teenager, may experiment with drugs, may have questions about sex that's when the problems start.
- I don't think there's enough preparation for the opposition and defiance of late adolescence. Because there isn't the blood connection, the relationship must be even stronger for it to be worthwhile for the adoptive parents.
- I think foster parents and adoptive parents . . . could benefit from training—basic parenting skills, disciplining, etc. . . . I think a lot of adoptive parents fall in love with adorable babies and then can't deal with them once they've become cantankerous adolescents, and since there's no blood bond. . . . On a more pessimistic note . . . [I have] gotten the impression from the adoptive parent that they feel they don't get paid enough to deal with the teenager's behavior.[196]

6. Mental Health Treatment and Post-Adoption Services

It is undisputed that children in foster care have a disproportionately high prevalence of mental health disorders.[197] In one New York study, it was estimated "that 29%–80% of children in foster care have a mental health problem serious enough to warrant treatment, yet most remain

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[196] Assigned Counsel Survey, *supra* note 15; LFC Survey, *supra* note 15.

[197] *See* M. Schneiderman et al., *Mental Health Services for Children in Out-of-Home Care*, 77 CHILD WELFARE 29, 29–32 (1998).

undiagnosed and untreated."[198] Moreover, even children who have a diagnosis in foster care do not receive adequate or appropriate mental health services.[199] Post-adoption, the picture is even bleaker in terms of the provision of even adequate and consistent mental health treatment.[200]

> In one study, more than three quarters of adoptive families (77.3 percent) said that they needed one or more post-adoption clinical services: individual or family counseling, child guidance and mental health services, help with issues regarding a child's prenatal exposure to drugs or alcohol, and "someone to help with crisis." . . . When asked if they actually received services, there were marked discrepancies between the percentage of families who needed services and the percentage who actually received them. Almost 57 percent of the families, for example, said that they needed child guidance and mental health services, but only 26 reported actually receiving these services.[201]

In the post-ASFA years, "[a]s states have increased the numbers of adoptions with legislative mandates and fiscal incentives, this push for more timely permanence for children in foster care has not been accompanied by parallel mandates or incentives for states to support families once the adoption is legalized."[202] Even for those families who access mental health treatment post-adoption, they are generally restricted to one of many "Medicaid Mills" which are in the business of processing as many patients as possible.[203] Assuming they are given a block of time, they are frequently faced with practitioners who simply do not understand

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[198] CITIZENS' COMM. FOR CHILDREN OF N.Y. INC, BEFORE IT'S TOO LATE: ENDING THE CRISIS IN CHILDREN'S MENTAL HEALTH at 488 (1999).

[199] *See id.*

[200] *See generally Post-Adoption Services: Meeting the Mental Health Needs of Children Adopted from Foster Care*, N. AM. COUNCIL ON ADOPTABLE CHILDREN, 3–5, 8 (July 2007), http://www.nacac.org/adoptalk/postadoptpaper.pdf.

[201] *Id.* at 1, 3.

[202] CASEY FAMILY SERVS., THE CASEY CTR. FOR EFFECTIVE CHILD WELFARE PRACTICE, PROMISING PRACTICES IN ADOPTION-COMPETENT MENTAL HEALTH SERVICES 5, 16 (2003), *available at* http://www.caseyfamilyservices.org/userfiles/pdf/pub-2003-promising-practices-report.pdf.

[203] *See* Grand, *supra* note 186, at 55; Lenerz et al., *supra* note 185, at 109.

the dynamics of adoption and who can offer successful treatment and interventions.[204] Although there has been a great deal of research on the need for quality post-adoption services,[205] even years after the adoption finalization, programs in New York City have little funding and are not readily accessible. This is true, particularly for those families who may already have difficulties accessing services because of their own prior dependence on agencies. At the time of the adoption, the results of the anonymous surveys reflected that post-adoption services were only in place in a minority of cases, and there was a clear call for services to be strengthened.[206] Efforts to do so have not been successful. Recently, New York's Governor vetoed a legislative amendment which would have required local social services districts to compile and maintain updated resource directories of post-adoption services, and to provide these to family courts and to adoptive families at or before the finalization of adoptions.[207] The results of the CLCNY case study, anonymous surveys, and case examples all illustrate that with the increase in adoption rates, particularly of older and special needs children, it is critical to focus on quality mental health treatment and services that can support adoptive families well after the adoption to maintain stable homes for the children.

7. Discussion

The authors believe that the psychological concepts addressed at length in this article are critical to the discussion concerning broken adoptions. In keeping with the legislative goal of permanency and prescribed time frames, adoptions are often finalized without taking pause to consider the psychological impact on the child, including those emotional ties that cannot be severed by the legal process. When adoptions are finalized, does one believe that the children cease to feel an attachment to their biological families or that the children's memories of their biological families are suddenly erased? Of course not. Yet, any discussion of these psychological issues is often excluded from the legal process.

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[204] *See* Grand, *supra* note 186, at 55; Lenerz et al., *supra* note 185, at 109.

[205] *See* Smith, *supra* note 186, at 181, 186–87, 193–94.

[206] Assigned Counsel Survey, *supra* note 15; LFC Survey, *supra* note 15; Judges and Referees Survey, *supra* note 15.

[207] S.–Assemb. B. No. S00247A (N.Y. 2011) (vetoed Aug. 17, 2011). Since the initial draft of this article, the authors learned that a number of one-year Requests for Proposals were funded in N.Y.C. for post-adoption services.

When children are initially removed, children who have experienced trauma will respond very differently and, thus, there is no uniform means of identifying a traumatized child. For example, some children may suppress their feelings to protect themselves from further disappointment and rejection; other children may outwardly misbehave, whether because that is what they believe is expected of them or because they believe this act of sabotage will allow them to return home. Simply put, it may, in fact, be very difficult to identify from the child's outward behavior when a child is experiencing trauma. In addition, services often center on correcting the child's behavior in the foster home as reported by the foster parent. As a result, the behaviors are addressed without identifying and treating the root cause.

Later, when the case proceeds to a termination of parental rights, it is the authors' belief that to truly evaluate the best interests of the child, serious consideration must be given to the psychological experience of the child as discussed in this article and illustrated with S.D. Certainly, termination of a parent's parental rights may be warranted in many cases. However, the psychological harm and the daily attachments the child experiences are very real, and they are a necessary factor when considering the appropriateness of termination, as well as the attachment and commitment of the prospective adoptive parent and child, and the need for post-adoption services. Therefore, it is of the utmost importance that the family court bench and practitioners are educated about the relevant psychological issues and that in each case they are cognizant of the potential for psychological harm to the child.

As seen in the CLCNY case study and surveys, many of these issues lay dormant and only become apparent during adolescence. In the adoption of a younger child, there may be no outward signs of any psychological impact on the child; thus, the child welfare and legal communities servicing the child may falsely assume that the child has no unique psychological or emotional needs to consider. For example, V.B. was adopted at the age of three and yet, years later, demonstrated serious and unanticipated behavioral and psychological problems. Perhaps if there had been appropriate supportive services in place both for V.B. and her adoptive family they would have been better equipped to weather the emotional and psychological stress of adolescence. Behavioral problems, often a symptom of emotional trauma, were cited as a contributory factor to the broken adoption in 43% of the CLCNY's cases.[208] It follows that,

[208] Trend Study Statistical Analysis, *supra* note 94.

were the family court to seriously consider the relevant psychological issues, the family court could make more informed placement and service decisions, and these broken adoptions might be avoided.

With children of all ages, the family court should anticipate possible psychological harm to a child and take that into consideration when determining the appropriateness of the initial placement and the future needs of both the child and the adoptive parent. Unfortunately, the psychological needs of the child are often only given consideration years later when the child is already exhibiting behavioral problems. Even then, the focus is not on the child's emotional needs but rather is on the child's perceived deviant behavior. At that juncture, services tend to be directed at correcting the child's behavior rather than understanding and treating the underlying trauma that may be triggering that behavior. Thus, services are both grossly delayed and inadequate.

Certainly, this is no simple task. As stated, psychological symptoms manifest themselves very differently in each child and may only emerge years after the parties have left court. Thus, it is all the more important that the psychological impact on children is an active consideration in each and every case; a factor that the court anticipates and implements the necessary precautions—whether placement decisions or supportive services.

B. Financial Incentives

On the topic of financial incentives, one response from the surveys stated the following:

> I think some families are pressured to adopt, in light of federal reg[ulation]s, when continued "legal" relationship with bio[logical] parents would be beneficial. Adoption seems at times to be an artificial construct/legal fiction that is required because of federal [regulations] and funding issues and that adoption may have other negative consequences to the children.[209]

ASFA, which was passed in 1997, made it a requirement to move more quickly toward permanency, including TPR, and created new economic

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[209] Assigned Counsel Survey, *supra* note 15.

incentives for states to increase adoptions.[210] This legislation was substantially based on the Adoption 2002 report generated by the Department of Health and Human Services in response to President Clinton's executive memorandum from December 1996.[211] This memorandum mandated increased adoption and foster care goals to double the number of children adopted or permanently placed by 2002.[212] As an incentive, the legislative and administrative changes included the use of adoption bonuses: $4,000 for every child adopted from foster care, plus an additional $2,000 for every special needs child adopted over the Title IV-E baseline.[213] In 2008, President Bush signed the Fostering Connection to Success and Increasing Adoptions Act which doubled incentive payment amounts for special needs adoptions to $4,000 and older child adoptions to $8,000.[214] In October 2010, "38 states and Puerto Rico were rewarded" $39 million dollars for reaching the "adoption incentives set by the Department of Health and Human Services."[215] "Texas led the group, receiving $7,468,475, followed by Florida with $5,718,271, and Michigan in third with $3,511,033."[216]

Thinking of adoption in economic terms is an uncomfortable and rarely discussed reality. Rather, the hyperbole centers around locating loving, safe, and permanent homes for children. However, the reality is that adoption bonuses places value on adoption for the agency above all other forms of permanency, even when adoption may not be the most appropriate option for some families. As a result, some contend that agencies should receive bonuses for all successful outcomes, including

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[210] *A Carrot Among the Sticks: The Adoption Incentive Bonus*, CORNERSTONE CONSULTING GROUP, INC., 1 (2001), http://www.fosteringconnections.org/tools/assets/files/carrot_among_sticks.pdf [hereinafter *The Adoption Incentive Bonus*].

[211] *See id.*

[212] *See id.*

[213] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, 2123 (codified in scattered sections of Chapter 42 of the United States Code).

[214] Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949, 3973–74 (codified in scattered sections of Chapter 42 of the United States Code); 42 U.S.C. § 673b (Supp. 2011).

[215] Brooke Dunbar, *Health & Human Services Awards $39 Million to States for Reaching Adoption Goals*, EXAMINER.COM (Sept. 19, 2010), http://www.examiner.com/parenting-politics-in-national/health-human-services-awards-39-million-to-states-for-reaching-adoption-goals.

[216] *Id.*

return to a parent, to balance the perception that adoption is the best outcome for children in foster care.[217] In addition, by rewarding states for increased numbers rather than for better outcomes, inappropriate or poor placement decisions may result. As a result, caseworkers may ignore signs of problems in an adoptive placement and may tend to overstate the strengths of the adoptive family. They may also tend to overstate the child's attachment to the pre-adoptive parent, as with K.L, without taking the time to analyze if the child is properly attached and the foster parent is similarly connected, as well as attuned and responsive to the child's needs.

An interesting dichotomy of the Fostering Connections to Success Act was that it also authorized grants to "[S]tate, local or [T]ribal child welfare agencies and private nonprofit organizations . . . for the purpose of helping children who are in, or at-risk of entering foster care, to reconnect with family members" through: "kinship navigator program[s]"; efforts to find biological family and reestablish relationships; "family group decision-making meetings"; and "residential family treatment programs."[218] This is perhaps due to recognition of the fact that ASFA's emphasis on terminating parental rights even before an adopting family has been found may be enlarging the group of children who have no parental ties and may not be adopted, thereby creating "legal orphans" who grow up in foster care. For example, in 2008 there were 79,000 instances of a TPR in the nation, but only about 55,000 adoptions from foster care.[219] While the children adopted would have been freed in prior years, between 2002 and 2010, the difference in the number of children freed versus adopted ranged between 11,000 and 29,000.[220] Logically, many of these children are remaining in foster care as "legal orphans." Illogically, many may have been freed without first being placed in a pre-adoptive home, or were freed despite the fact that they expressed that they would not consent to the adoption, like in the CLCNY case of fifteen year old TJ and seventeen year old BJ. Despite the fact that they had a strong relationship with their mother, who had been deported and was living in Jamaica, and their opposition to adoption, the agency was pursuing a termination of parental

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[217] *See The Adoption Incentive Bonus*, *supra* note 211, at 6.

[218] *Family Connection Grants*, U.S. DEP'T HEALTH & HUMAN SERVS., ADMIN. FOR CHILD. & FAM. (2011), http://www.acf.hhs.gov/ebrochure2011/ACYF_CBPage6.htm.

[219] *Trends in Foster Care and Adoption, FY 2002–2010,* U.S. DEP'T HEALTH & HUMAN SERVS., ADMIN. FOR CHILD. & FAM. (2011), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends_june2011.pdf.

[220] *Id.*

rights as the caseworker believed that they should be freed "in case they change their minds."[221]

Similarly, children may be freed even though the agency knows that it will ultimately not clear a foster parent for adoption. In another case, T.W. was freed despite the fact that the agency had already communicated that the agency would not support an adoption by his long term kinship foster parent because of past shoplifting arrests.

C. Identification and Matching

The reality is that for many children little thought has been put into making individualized placement decisions when a child is freed for adoption. This is in part due to the fact that children are not matched with pre-adoptive parents when they are initially placed into foster care. Upon the initial removal of the child from the biological parent, the law requires the child protective agency to seek a placement with a relative if possible.[222] If a relative is unavailable to be a foster parent or caretaker, the agency must find a home for the child to be placed into that night. The expectation that children be placed within twenty-four hours of removal frequently leads to foster home selection based upon availability of a bed, rather than suitability. When children are initially placed, no one is thinking about whether it will be an appropriate adoptive placement if the child remains in care and a termination of parental rights proceeding is commenced. Once a child is placed in a home, the placement may or may not be reevaluated unless the home that was found is an emergency home placement or the foster parent asks for removal. Subsequently, the court will receive reports from the foster care agency about the status of the case, including how the child is adjusting to foster care. Not uncommonly, a report may state that the child is adjusting to the foster home and there appears to be a bond between foster parent and the child. As time goes on, the reports may state that should the parent not complete the service plan, the foster parent would be willing to adopt. As a result, as cases proceed to a TPR track, the foster parent that the child has lived with to that point—and children are incredibly lucky if they have only had only one foster care placement—are generally the de facto choice, even if the foster parent may not be the best choice.

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[221] Following extensive negotiation with the agency attorney over the next several months, TPR was not pursued.

[222] *See* N.Y. FAM. CT. ACT LAW § 1017 (McKinney 1999).

The case of C.V. is one example of this. C.V. was one of ten siblings placed into foster care during N.Y.C.'s crack epidemic. After three unsuccessful placements, C.V. and three of her sisters were placed in the home of Mr. and Mrs. Y. Five months later, one of the children was observed at school to have a blistered burn on her fingers, and the children were removed due to inadequate supervision and lack of medical care by the foster parents. Conflicting accounts about how the burn occurred were provided, including that it happened accidently while Mrs. Y was cooking and that it was done intentionally as punishment for allegedly stealing money. Mr. and Mrs. Y appealed the removal. The agency supported the children being returned as the home was considered to be pre-adoptive, despite the very short time that the girls had been there (five months), perhaps due to the fact that they had already been through a series of placements. In denying Mr. and Mrs. Y's request, the reviewer noted:

> [T]hese children have a history of being moved from home to home due to their aggressive behavior and their special needs. It is the understanding of this reviewer that the children had progressed well in this home and that the foster parents care deeply about them. However, the Review Officer has significant concerns regarding the safety of the children in this home . . . and how . . . J.V. sustained a burn to her fingertips. The Review Officer also understands that these child present significant behavioral problems, which could cause any caretaker to be overwhelmed and frustrated. This Review Officer must give serious consideration to the ability of the foster parents to provide a safe environment for the children. These children deserve to live in a home where they can feel safe and accepted for who they are.

In addition, foster parents are routinely expected to declare they are pre-adoptive within months of placement to meet ASFA time frames. With respect to kinship placements, preference by regulation for kinship and sibling unification may result in placement decisions that may be inappropriate due to age and disabilities. Finally, the foster parent, prior to the adoption, is required to ask the agency's permission anytime before acting on a child's needs. In fact, many agencies require the children to be seen by their own medical or therapeutic staff, rather than outside providers. In some instances, this may enhance the care of the child because the services are readily available; in other situations, it creates an atmosphere of forced dependence because the practitioners are contracted

to the agency. Critically, these services frequently are not continued after the adoption is finalized, and adoptive parents must then seek providers on their own. Alternatively, foster parents may assess a need for a child but may still have to wait until the agency can approve it. As a result, the foster parent becomes reliant on the agency to do it all, and thus the adoptive parent may be ill-equipped to locate and obtains services for the child if and when problems arrive post-adoption.

D. Stretching and Conditional Commitment

Frequently, when children are placed in pre-adoptive foster homes, there is a discrepancy between the adoptive parent's idea of the child they plan to adopt and the child they do adopt. As attorneys for children, the authors have frequently participated in permanency hearings where the focus was on stabilizing the adoptive home long enough for the adoption to be finalized. Caseworkers, social workers, and attorneys for children are all guilty of asking foster parents when they take older and special needs children into their home to "try it, to see how it works out." Little expectation is placed on the adoptive parent and the placement is made conditional.[223] When the adoptive parents say that it is not working out and the commitment to adopt is waning, child welfare professionals ask them to "just hang in there." Frequently, the agency will hold multiple placement preservation conferences to try and maintain the placement. For many of these children and teenagers, the reality is that if these conferences fail, there are no other options, except perhaps a higher level of care when the foster care placement disrupts. However, this phenomenon of encouraging adoptive "parents to 'stretch' their original preferences and accept a child that the adults do not possess the skills and resources to raise" contributes to broken adoptions.[224] If adoptive parents question their commitment prior to the adoption finalization, there is no reason why they would remain committed after, particularly when issues arise.

IV. CONCLUSIONS AND RECOMMENDATIONS

The N.Y.C. Family Court is made up of many stakeholders from the legal and child welfare communities. Undeniably, all stakeholders

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[223] Pat O'Brien, *Unconditional Commitment: The Only Love that Matters to Teens*, FOSTERING FAMILIES MAGAZINE (2001), http://emagazine.adoption.com/articles/702/unconditional-commitment-the-only-love-that-matters-to-teens.php.

[224] *What's Working for Children*, *supra* note 16, at 22.

approach this work with the best of intentions to achieve positive outcomes for the children who come through the doors of family court. Moving children to permanency, whether through return to a parent or through an adoption, is an important goal. However, although many adoptions are successful, the results of the CLCNY survey and this article highlight that many children, the exact number of which is unknown, are returning through the revolving doors of family court as a result of broken adoptions. During the last few years, city wide discussions have centered on streamlining the adoption process. The authors are not suggesting that efforts and discussion toward that end should not occur. To the contrary, the authors believe that focusing on the issues identified in this article in the discussions will help improve the long term outcomes for children who are adopted. Accordingly, the authors make the following recommendations to assess and address the important, but as yet unacknowledged, issue of broken adoptions.

1. Create a City Wide Broken Adoption Review Board

To assess the breadth of the issue, provide recommendations to the larger legal and child welfare communities, and provide a framework and support to agencies for data collection, a Broken Adoption Review Board should be created. This diverse group of members could be committed to modifying or eliminating the conditions which lead to the broken adoptions.

2. Data Collection by N.Y.C. Legal and Child Welfare Institutional Stakeholders

To assess the number of children who were previously adopted returning to family court or to the foster care system as subjects in subsequent cases (whether abuse and neglect, custody or guardianship, voluntary placements, persons in need of supervision (PINS), or delinquency cases) all the N.Y.C. legal and child welfare institutional stakeholders should collect data about the number of children that are returning. They should also collect data on the factors related to the broken adoption to inform meaningful discussion and change.

3. Ensure Children Remain with Adoptive Parents and Termination of Adoption Subsidy by N.Y. OCFS and N.Y.C. Children's Services

N.Y. OCFS and N.Y.C. Children's Services should explore stricter standards requiring the agencies to follow up on adoptive parents and ensure that children continue to live with the adoptive parent they were placed with. In addition, N.Y. OCFS and N.Y.C. Children's Services

should create administrative procedures to suspend the adoption subsidy when children are placed back into care or, in the alterative, pursue collecting child support on behalf of the child that is no longer in the care of the adoptive parent receiving the subsidy.

4. Look More Critically at Cases with an Older Adoptive Parent

The state should evaluate more critically adoptions of young children by elderly adoptive parents to ensure that they will be available to raise the child to the child's majority. This way, the child will not be put in a position of taking care of the adoptive parent through physical or emotional decline.

5. Make the Role of the Back-up Resource More than a Promise but a Legally Binding Commitment

Significantly, considering the reliance on identifying and clearing a back-up resource for the finalization of the adoption to ensure stability and permanency for children adopted by older caretakers, only 20% of the petitioners from the study were the actual identified back-up resource from the adoption in the CLCNY case study.[225] As a result, efforts should be made to make the role of the back-up resource a legally binding commitment rather than just a promise.

6. Provide Ongoing Trainings for Pre-adoptive and Adoptive Parents on How to Address Children's Physical, Mental, or Emotional Disabilities in Relation to Adolescent Behavior and Development

Although many of the adoptive parents in the CLCNY trend study were aware that their children had a pre-existing physical, mental, or emotional disability prior to the adoption, they appeared unable or unwilling to handle the resulting behaviors as the child got older. This resulted in, or contributed to, the broken adoptions. Pre-adoptive and adoptive parents should be provided with ongoing support and training on how to address children's physical, mental, or emotional disabilities in relation to adolescent behavior and development.

7. Provide Ongoing Trainings for Pre-adoptive and Adoptive Parents on Adolescent Behavior and Development

In the CLCNY trend study, in some cases what may have been normal adolescent behavior was seen as problematic and adoptive parents were

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[225] Trend Study Statistical Analysis, *supra* note 94.

either unequipped with sufficient knowledge of adolescent development or lacked the patience to properly address them. This was particularly true in cases in which the adoptive parent was older or had become infirm. Pre-adoptive and adoptive parents should receive ongoing support and trainings on how to address adolescent behavior and development.

8. Provide Support and Services to Families and Children to Understand and Navigate New or Ongoing Relationships with Biological Family Members

Studies have shown that adoptions by family members can be confusing to a child and families often need help with how to deal with parents who remain involved.[226] As illustrated by the CLCNY trend study, it is no less confusing when the child is adopted by a non-kinship foster care resource and the biological parents or family is present. Families and children should be provided support and services to navigate these challenging relationships.

9. Expansion of Restoration of Parental Rights to Post-adoption Finalization

The Restoration of Parental Rights statute permits only a restoration prior to the adoption finalization and thus would be inapplicable to the broken adoption cases in the CLCNY study discussed in this article. In addition, biological parents whose parental rights have been permanently terminated due to neglect lack standing to seek custody. The restoration of parental rights statute should be expanded to include children post-adoption.

10. N.Y.C. Children's Services Should Create a Best Practices Approach to Handling Broken Adoptions to Include Providing Supportive Services to Adoptive Families to Stabilize Adoptive Placements

In the CLCNY trend study, while N.Y.C. Children's Services' priority appeared to be focused on identifying a resource to file for guardianship to care for the children, scant attention was paid to long-term stability. As a result, little to no effort was made to identify necessary services and offer referrals in the new homes. A best practices approach should be created to address broken adoptions by N.Y.C. Children's Services and to provide supportive services to stabilize adoptive placements. Caseworkers should

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[226] Howard, *supra* note 148.

receive training on attachment and emotional issues related to the adoption. They should help adoptive parents understand the dynamics of adoption from the child's point of view, the child's feelings and behaviors to help the adoptive parents parent to the child's needs, and the impact of genetics and negative life experience on the children. This type of understanding would best serve adoptive families who are destabilizing.

11. Post-adoption Services Should Be Made Accessible to Adoptive Families Long After Adoption Finalization

Post-adoption studies have shown that the most frequently identified problems in adolescence for which adoptive parents sought services were almost always related to the child and specifically concerned the child's behavioral and emotional problems.[227] In addition, families needed help long after the adoptions were finalized, as adoption is a lifelong process with different presenting issues related to ambiguous loss, grief, anger, and issues of identity at various developmental stages for the child. To effectively serve these children and their families long after the adoption finalization, service providers must be identified that understand the developmental impact of neglect, abuse, and interrupted attachment on children, and the emotional and mental health needs of children who have been adopted.

12. Children Should Receive Comprehensive Evaluations When They Are Initially Placed into Foster Care

More comprehensive evaluations of the child should be performed when a child comes into foster care. These evaluations should be performed by an evaluator trained in the issues of attachment, identity, trauma, and child development. These issues affect all children who are removed, even where necessary to safeguard them from neglect or abuse by their biological family. In the short term, more thorough evaluations may assist in the creation of a treatment plan that can best help the children through the trauma of broken attachments and may heal their feelings of separation and loss. In the long term, these evaluations can provide important information for cases in which a court orders a later forensic evaluation to determine if and when adoption is in the psychological best interests of a child. Also, these evaluations can help the court determine if the adoptive parent is indeed equipped to handle the needs of the child who is being freed for purposes of adoption.

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[227] Smith, *supra* note 174, at 72–73; Smith, *supra* note 186, at 159, 166, 193.

13. Forensic Evaluations Should Be Ordered During the Dispositional Phase of the Termination of Parental Rights Proceeding to Aid the Family Court in Its Decision Making

Where appropriate, the family court should order a comprehensive forensic evaluation at the dispositional phase of the termination of parental rights proceeding. This evaluation should consider the following issues, among others: the issue of the child's attachment or bonding to the proposed adoptive parent; the child's recovery from the trauma of the child's neglect; the trauma from the child's separation from the child's parent; issues of identity; and an evaluation of the capacity of the adoptive parent to meet the child's long terms needs.

14. Quality and Consistent Mental Health Treatment Must Be Secured to Provide to Children Pre- and Post-adoption

It is undisputed that children in foster care have a disproportionately higher prevalence of mental health disorders. Moreover, even children who have a diagnosis in foster care do not receive adequate or appropriate mental health services. Emphasis must be placed on identifying and securing quality and consistent mental health services for children in foster care. In addition, the results of the CLCNY case study, anonymous surveys, and case examples, clearly illustrate that with the increase in adoption rates, particularly of older and special needs children, it is critical to focus on quality mental health treatment and services that can support adoptive families well after the adoption to maintain stable homes for children.