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## **BIO FAMILY 2.0: CAN THE AMERICAN CHILD WELFARE SYSTEM FINALLY FIND PERMANENCY FOR “LEGAL ORPHANS” WITH A STATUTE TO REINSTATE PARENTAL RIGHTS?**

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Meredith L. Schalick, JD, MS\*

*The American child welfare system terminates parental rights for thousands of children each year even though adoptive families have not yet been identified for the children. Every year, there are more than 100,000 of these “legal orphans” waiting for new families. Given the lower rates of adoptions for children of color and older children, and the poor outcomes for most youth who age out of the foster care system, the American child welfare system must start to think differently about permanency options for children. This Article proposes a model statutory provision to reinstate parental rights under certain circumstances to give these “legal orphans” a second chance with their rehabilitated biological parents.*

*Although several states have enacted reinstatement provisions, the criteria and processes for reinstating parental rights differ significantly among their statutory schemes. The model statute outlined in this Article uses child welfare data reported by each state to determine when and how reinstatement of parental rights should be evaluated by the courts.*

### LISA’S STORY

My client Lisa<sup>1</sup> was turning sixteen, and the next court date was a big one for her. In addition to celebrating her birthday, I was taking her out to dinner to discuss whether she wanted to ask the court to

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\* Clinical Associate Professor of Law at Rutgers School of Law – Camden. Christina Congdon, Kelly Grant, Rebekah Lederer, Khushboo Shah, and Heather Stolinski provided research assistance for this Article. I thank Dean Rayman Solomon and the Clinical Scholarship Work Group at the Rutgers School of Law – Camden for their support and encouragement. I would also like to thank my parents, George and Luellen Schalick, for showing me what good parenting is. Finally, I am forever grateful that my precious Emilia gave me the opportunity to be a parent.

1. Lisa is not the real name of my client. In the hope that this Article inspires or informs efforts to enact or amend statutes to reinstate parental rights, it is dedicated to her.

change her permanency goal<sup>2</sup> from adoption to independent living.<sup>3</sup>

Lisa's parents' rights were terminated<sup>4</sup> when she was nine, and she had been placed with two families that, unfortunately, decided not to adopt her.<sup>5</sup> After the second "pre-adoptive placement"<sup>6</sup> did not work out three years earlier, Lisa lived in group homes and residential programs for adolescent girls.

Lisa had previously acknowledged that her age and past behavioral problems made it very unlikely that her caseworker would find another pre-adoptive placement.<sup>7</sup> Accordingly, for the last year or

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2. See Adoption and Safe Families Act of 1997, An Act to Promote the Adoption of Children in Foster Care, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. (1997)) (requiring that state child welfare agencies provide reasonable efforts to reunify families but then file for termination of parental rights if the problems still exist and reunification is not feasible). The child welfare system requires that children in placement have a permanency goal, which for most children starts out as reunification with their parent(s). See *id.* § 101. However, within twelve months after placement, there must be a permanency hearing where a judge decides whether the goal remains reunification or changes to another permanency option, such as termination of parental rights followed by adoption. *Id.* § 302.

3. See 42 U.S.C. § 675(5)(C) (2000). For some older children involved with the child welfare system, a court may approve a permanency goal of "Another Planned Permanent Living Arrangement," or "APPLA." In some states, like where Lisa lived, APPLA translates into a goal of "independent living" for the child. In other words, children with the goal of independent living are provided services to help them prepare for adulthood (such as budgeting, job searching, cooking, etc.) and often live in semi-supervised programs that help the children transition to living on their own. See, e.g., MICH. DEP'T OF HUMAN SERVS., FOM 722-7, CHILDRENS FOSTER CARE MANUAL: FOSTER CARE—PERMANENCY PLANNING 14–20 (2012), available at <http://www.mfia.state.mi.us/olmweb/ex/fom/722-7.pdf>.

4. To establish termination of parental rights and thus allow for adoption of a child, there must be a showing that termination is in the best interest of the child, in addition to a showing that the child cannot be returned home. These criteria may be required by statute or by case law. See, e.g., FLA. STAT. §§ 39.802, .806 (2013). In many states, the first step in the analysis involves the court determining whether there is clear and convincing evidence of parental misconduct or inability. See, e.g., *id.* § 39.806. Second, the court determines whether termination is in the best interest of the child. See, e.g., *id.* § 39.810. Thus, there must first be jurisdictional grounds for termination that relate to parental misconduct or incapacity of the child's parent(s). If jurisdictional grounds are found, then the inquiry turns to dispositional grounds, which relate to the best interest of the child. See DONALD T. KRAMER, 3 LEGAL RIGHTS OF CHILDREN § 28:18 (2d ed. 2005).

5. Data collection is not done to track broken adoptions, but attorneys who work in the foster care system find that these broken adoptions result from the age of the child or adoptive parent, the child's behavioral and emotional issues, prior placement history, sexual abuse, attachment of sibling groups, prenatal drug or alcohol abuse, and/or attachment to biological parents. Dawn Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437, 440 (2012).

6. See 42 U.S.C. § 673b(i)(2)(E) (2008). A "pre-adoptive placement" is a term commonly used in the child welfare system to describe the placement of a child on a trial basis with a family that is considering adopting the child.

7. Post & Zimmerman, *supra* note 5, at 440 (explaining that older children and children with special needs are less likely to be adopted in the child welfare system); see also *infra* Part I.B.

so, Lisa had been talking about getting into an independent living program. Her plan was to get a part-time job at a hair salon, finish high school, and then go to cosmetology school to “do hair.”

As we talked about the pros and cons of asking the court to change her permanency goal to independent living, Lisa became quiet and pensive. Given that this teen very rarely stopped talking, I knew something was troubling her. Lisa looked up at me from her burger and fries and said, “If they aren’t going to be able to find me a new family, why can’t I just go back and live with my mom again?”

It was a perfectly logical question. Lisa went on to share that she had learned from cousins<sup>8</sup> that her mother was had finally quit drugs, had moved to another state, and had a baby with her new husband.

The questions exploded in my mind. Could Lisa’s mother get her parental rights back? Could we undo the termination order somehow?<sup>9</sup> What about her mother applying for custody or even adopting Lisa?<sup>10</sup> How could I find out if her mother really turned her life around enough for the child welfare system to give them a second chance at being a family? Does the child welfare agency have to agree to reconsider Lisa’s mother, or could I just file a motion in advance of the upcoming permanency hearing?

Unfortunately, the American child welfare system usually does not provide straightforward answers to these questions. As I would have to explain to Lisa, the child welfare system’s efforts at finding permanency options for children are often far from logical.

## INTRODUCTION

The federal Adoption and Safe Families Act (ASFA) was enacted in 1997 in response to concerns about the length of time children were living in foster care while waiting for reunification with their

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8. Older youth and youth who leave the child welfare system regularly report contact with biological family members even after their parents’ rights have been terminated. *See infra* text accompanying notes 78–79. The fact that Lisa was in touch with family members is not surprising, particularly in a world where children can use the internet and social media to find and communicate with relatives. *See generally* Mary E. Collins et al., *The Permanence of Family Ties: Implications for Youth Transitioning from Foster Care*, 78 AM. J. ORTHOPSYCHIATRY 54 (2008) (providing an overview of recent studies finding that former foster youth live with biological family members after exiting the child welfare system).

9. *See infra* note 19 and accompanying text.

10. *See* LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL’Y & L. 319, 337–44 (2010); *see also* Randi O’Donnell, *A Second Chance for Children and Families: A Model Statute to Reinstate Parental Rights After Termination*, 48 FAM. CT. REV. 362, 367–70 (2010).

biological parents.<sup>11</sup> Congress intended for ASFA to promote adoption and other permanency options so children did not spend extended time in foster care.<sup>12</sup> ASFA created a fifteen-month window for parents to appropriately remedy the problems that led to their children being removed from their custody and placed into foster care.<sup>13</sup> If, after receiving services from the child welfare system, the problems or conditions still exist after the fifteen months, the child welfare system may then pursue other permanency options for the child, such as termination of parental rights followed by adoption.<sup>14</sup> This focus on permanency generally, and adoption specifically, is evidenced by the federal Adoption Incentive Program, which ASFA also created. The Adoption Incentive Program rewards states for increasing the number of children adopted from foster care.<sup>15</sup>

Despite ASFA's intentions and child welfare agencies and courts' efforts, many children do not find a permanent family after their parents' rights are terminated. ASFA's limited timeframe for reunification and its push towards other permanency options has created a crisis where more than 100,000 children have had their parents' rights terminated but no adoptive family has been identified.<sup>16</sup> As the years pass for these children who have not yet been adopted, the limbo status can be very difficult, as many children lose their sense of security and permanency.<sup>17</sup> In the meantime, the children's parents may have successfully remediated the issues that led to the termination of their rights, a process that may take more than the approximately one year ASFA allows. Indeed, in a survey of

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11. See 42 U.S.C. § 671 (2012) (explaining that child's health and safety shall be paramount concerns and that reasonable efforts shall be made to preserve and reunify families); 143 CONG. REC. H10787 (daily ed. Nov. 13, 1997) (statement of Sen. Kennelly) ("This legislation we can all agree on is putting children on a fast track from foster care to safe and loving permanent homes.").

12. See 143 CONG. REC. H10787 (daily ed. Nov. 13, 1997) (statement of Sen. Kennelly).

13. See 42 U.S.C. § 675(5)(E) (2012) (requiring that states move forward with terminating parental rights when children have been in foster care for fifteen of the most recent twenty-two months unless the child was placed with a relative or there are compelling reasons not to terminate parental rights, like the child is over the age of twelve and does not want to be adopted).

14. See *id.*

15. Penelope L. Maza, *Using Administrative Data to Reward Agency Performance: The Case of the Federal Adoption Incentive Program*, 79 CHILD WELFARE 444, 444-54 (2000).

16. See Richard Wexler, *Take the Child and Run: Tales From the Age of ASFA*, 36 NEW ENG. L. REV. 129, 145 (2001); Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995) (finding that even before the ASFA, legal orphans were being created with no ties to biological parents, but without an adoptive home to go to); *infra* note 25.

17. See Patrick Parkinson, *Child Protection, Permanency Planning and Children's Right to Family Life*, 17 INT'L J.L. POL'Y & FAM. 147, 159 (2003).

twenty judges spanning eighteen states, half of the judges reported that twelve months is not a sufficient amount of time for substance-abusing parents to rehabilitate. Two judges specifically echoed these concerns in relation to parents with mental health challenges.<sup>18</sup> As such, in those instances when biological parents have later successfully resolved their problems, they should be revisited as viable permanency options.

The process of reinstating parental rights involves parents who have had their rights voluntarily or involuntarily terminated and children with no legal parents who are wards of the child welfare agency. Reinstatement is allowable if, after a period of time, the child has not been adopted and a biological parent has remediated the issue(s) that led to the prior termination. Under the most common scenario, both the child and biological parent want to reunify, and a court determines that reinstatement and reunification is in the child's best interest. Although reinstatement of parental rights

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18. In an attempt to address these concerns, a few judges reported approving six-month extensions of reunification services to parents who were making steady progress but needed more time to achieve their case plan goals. Racqual Ellis et al., *The Timing of Termination of Parental Rights: A Balancing Act for Children's Best Interests*, in CHILD TRENDS RESEARCH BRIEF 9 (Publ'n No. 2009-40, 2009), available at [http://childtrends.org/wp-content/uploads/2009/09/Child\\_Trends-2009\\_09\\_09\\_RB\\_LegalOrphans.pdf](http://childtrends.org/wp-content/uploads/2009/09/Child_Trends-2009_09_09_RB_LegalOrphans.pdf). Child abuse and neglect due to parental substance abuse is prevalent in the United States. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS 98-40, PARENTAL SUBSTANCE ABUSE 4 (1997) (finding that, depending on the area of the country examined, substance abuse was involved in up to ninety percent of all child abuse or neglect cases. The study also showed that drug treatment may last up to two years); SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., BLENDING PERSPECTIVES AND BUILDING COMMON GROUND: A REPORT TO CONGRESS ON SUBSTANCE ABUSE AND CHILD PROTECTION 6 (1999), available at <http://www.dcsacw.samhsa.gov/files/BlendingPerspectives.pdf> (noting that nearly one-third of drug users obtain permanent abstinence from their first attempt at recovery. An additional one-third have brief periods of substance use but eventually achieve long-term abstinence, and one-third have chronic relapses that result in premature death from chemical addiction and related consequences. These statistics are consistent with the life-long recovery rates of any chronic lifestyle-related illness); Mary O'Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL'Y 243, 258 (1999) (arguing that drug dependency is a chronic, relapsing condition for which there is no fast cure. Instead, it is a lifetime process of recovery, and expedited hearings present problems for some parents seeking substance abuse treatment because permanency decisions may be required before a parent is even admitted to a treatment program and long before it can be determined whether a parent is likely to succeed in substance abuse treatment). See generally Katherine A. Hort, *Is Twenty-Two Months Beyond the Best Interest of the Child? AFSA's Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L.J. 1879 (2001). Incarceration is also not solved within eighteen months. About 1.7 million children have a parent in prison, and the average sentence length for non-violent criminal offenses for state prisons is 51.6 months. Stephanie Sherry, *When Jail Fails: Amending the ASFA to Reduce Its Negative Impact on Children of Incarcerated Parents*, 48 FAM. CT. REV. 380, 380 (2010).

may not be the best permanency solution for every child, it has helped some children.<sup>19</sup>

This Article proposes a model statutory provision that would reinstate parental rights under certain circumstances to give children a second chance with their biological parent(s). In most jurisdictions, litigants who have had their parental rights terminated can try to undo the termination by filing a motion to vacate the court order. However, creating a statutory right to apply for reinstatement is preferable because it delineates a clear process and criteria for courts to weigh when deciding whether a child should be placed back with his rehabilitated biological parents. Further, a statutory approach may account for the difficulties that many parents have in persuading the court that reinstatement is legally justified.<sup>20</sup>

As demonstrated in this Article, it is worthwhile to look at all options for permanency for legal orphans created by the child welfare system's practices and timeframes, including the possibility that, after a designated period of time, the biological parents would be able to provide a safe and permanent family for their biological children. Although thirteen states have enacted reinstatement provisions, the criteria for reinstating parental rights differs among their statutory schemes. After reviewing the child welfare data reported by each state, including the known outcomes for children who either do not find permanency or age out of the system,<sup>21</sup> this Article suggests that certain choices and timeframes are optimal for a model statute.

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19. As of this writing, no state permitting reinstatement of parental rights has released any official data about the number of reinstatements in their jurisdictions. However, according to qualitative information from Los Angeles, California, courts in that county review about one reinstatement petition per month. Susan M. Getman & Steve Christian, *Reinstating Parental Rights: Another Path to Permanency?*, 26 PROTECTING CHILDREN, no. 1, 2011, at 58, 64.

20. Taylor, *supra* note 10, at 331, 343; see Diane Riggs, *Permanence Can Mean Going Home*, ADOPTALK (N. Am. Counsel on Adoptable Children, St. Paul, Minn.), Spring 2006, available at <http://www.nacac.org/adoptalk/permanence.html> (outlining process used in several New York cases to vacate the order terminating parental rights). Notably, North Dakota law explicitly states that general modification principles do not apply to orders terminating parental rights. N.D. CENT. CODE § 27-20-37 (2013). An order terminating parental rights may be vacated by the court upon motion of the parent if the child is not in an adoptive placement and the person having custody of the child consents in writing to the vacation of the decree. *Id.*; see also Barbara White Stack, *Teen in Flight in the Public Care System but on the Lam, 14-Year-Old Longs for Someone Who Cares*, PITTSBURGH POST-GAZETTE, Sep. 12, 2004, at C1 (showing that similar reverse terminations have been performed in Pennsylvania, where no restoration statute exists. "A radical solution has been pursued for a few . . . teens by the Child Advocacy Unit of the Defender's Association of Philadelphia . . . It has persuaded judges to reverse termination in two cases and send the teens back to parents.").

21. The federal data collection system categorizes these youth who exit the child welfare system largely due to turning eighteen as "emancipated." See *infra* note 25.

I. THE LACK OF PERMANENCY FOR CHILDREN IN THE AMERICAN CHILD WELFARE SYSTEM

The American child welfare system has over 100,000 children whose parental rights have been terminated but for whom no adoptive family has been found.<sup>22</sup> In addition, an increasing number of adolescents are aging out of the child welfare system with no family or adult support.<sup>23</sup> With fewer adoption prospects for older children and children of color,<sup>24</sup> reunification with biological parents may be the most viable permanency option for some children.

A. *Creating a Class of Legal Orphans: Lisa and Many Others Like Her*

According to data submitted by state child welfare agencies to the U.S. Children's Bureau, Administration for Children, Youth and Families, in 2011 there were 104,000 children in the American child welfare system waiting to be adopted.<sup>25</sup> These waiting children are also known as legal orphans. They are children whose ties to biological parents have been legally severed and have the goal of adoption but have not yet been adopted.<sup>26</sup>

Although the number of adoptions in the American child welfare system has increased, the data shows that there are twice as many children waiting to be adopted in a given year. For example, in 2011, there were 104,000 waiting children and 51,000 adoption finalizations.<sup>27</sup> Older children have an especially difficult time finding families. Indeed, in recent years, the percentage of older children waiting for adoptive families has increased. In 2002, five percent of children waiting to be adopted were ages sixteen and

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22. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., NO. 19, THE AFCARS REPORT, PRELIMINARY FY 2011 ESTIMATES AS OF JULY 2012, at 1 (2012), *available at* <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf> [hereinafter AFCARS REPORT 2011].

23. Getman & Christian, *supra* note 19, at 61.

24. *See infra* notes 44–54 and accompanying text.

25. AFCARS REPORT 2011, *supra* note 22, at 1. AFCARS collects case-level information on children in foster care and those who have been adopted with public agency involvement. The 2011 data of approximately 104,000 waiting children does not include children like Lisa because her goal was no longer adoption and instead was changed to "Independent Living," which is often referred to as an "Another Planned Permanent Living Arrangement" (APPLA) or "Emancipation." In 2011, five percent of children in placement, which equals roughly 20,000 children, had APPLA or emancipation as their goal. They would not be considered waiting children under the federal data collection system. *Id.*

26. *Id.* at 4.

27. *Id.* at 1.

seventeen.<sup>28</sup> By 2011, that percentage had increased to seven percent of waiting children.<sup>29</sup>

The 2011 child welfare data also shows that only twelve percent of the waiting children lived in pre-adoptive homes.<sup>30</sup> Even though these children have adoption as their permanency plan,<sup>31</sup> the child welfare system placed most of these waiting children in foster homes, group homes, and residential facilities rather than with families considering adopting them.<sup>32</sup> Although most waiting children were placed in foster homes (seventy-seven percent), almost ten percent were placed in group homes and institutions.<sup>33</sup> According to Melinda Atkinson, these group homes are an especially poor placement for youth because they “often hinder the development of relationships with members of the community and give youths fewer opportunities to become adopted or develop adult mentors.”<sup>34</sup>

Additionally, the 2011 data indicates that, on average, twenty-three months had elapsed since the rights of waiting children’s parents had been terminated.<sup>35</sup> In other words, legal orphans in the American child welfare system were still waiting for a new family two years after their parents’ rights were terminated.<sup>36</sup>

It may seem that these children are better off as legal orphans, without ties to their biological parents. However, research shows

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28. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH AND HUMAN SERVS., NO. 12, THE AFCARS REPORT, FINAL ESTIMATES FOR FY 1998 THROUGH FY 2002, at 10 (2006), available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport12.pdf> [hereinafter AFCARS REPORT 1998–2002].

29. See AFCARS REPORT 2011, *supra* note 22, at 4.

30. *Id.*; see also Getman & Christian, *supra* note 19, at 58, 59–61 (discussing how large percentage of waiting children live in group homes).

31. See 42 U.S.C. § 675 (5)(C) (2012) (contemplating adoption as one such “permanency plan”); see also Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 8 (2001) (discussing four potential permanency plans considered at a child’s permanency hearing).

32. See AFCARS REPORT 2011, *supra* note 22, at 4.

33. *Id.*

34. Melinda Atkinson, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183, 188–89 (2008); see also Alice Bussiere, *Permanence for Older Foster Youth*, 44 FAM. CT. REV. 231, 236 (2006). In the United States, only five percent of children in foster care are adopted. The remaining children are often placed in congregate care setting. See Erwin A. Blackstone et al., *Market Segmentation in Child Adoption*, 28 INT’L REV. L. & ECON. 220, 220 (2008).

35. See AFCARS REPORT 2011, *supra* note 22, at 5.

36. Gretta Cushing & Sarah B. Greenblatt, *Vulnerability to Foster Care Drift After the Termination of Parental Rights*, 19 RES. ON SOC. WORK PRAC. 694, 697–98 (2009); see also Patrick Parkinson, *Child Protection, Permanency Planning and Children’s Right to Family Life*, 17 INTL J.L. POL’Y & FAM. 147, 159 (2003) (suggesting that having rights terminated and becoming “legally freed” for adoption, but “not chosen,” is one of the worst outcomes for children because it undermines their sense of self-worth and security).

that legal orphans have numerous disadvantages in comparison to their peers who are still connected to their biological parents. These disadvantages include loss of emotional support, inheritance rights, and health insurance coverage.<sup>37</sup>

### B. More Adoptions, Even More Waiting

Although the passage of ASFA in 1997 led to an increase in adoptions, the overall adoption prospects remain bleak for most children in the American child welfare system, particularly for Black children and children over the age of eight.<sup>38</sup>

In 1998, the first year after ASFA took effect, 37,000 children were adopted through the child welfare system.<sup>39</sup> By 2011, the number of adoptions increased to nearly 51,000.<sup>40</sup> However, as detailed above, the 51,000 adoptions in 2011 still meant that less than half of the 104,000 waiting children in the American child welfare system found a “forever family.”<sup>41</sup> Moreover, the rate of adoptions in the American child welfare system has declined recently, with a high of 57,000 adoptions in 2009, 54,000 in 2010, and 51,000 in 2011.<sup>42</sup>

For those children in the child welfare system who are fortunate enough to be adopted, they must wait a long time for their adoption to be finalized. The 2011 data shows that, on average, nearly fourteen months elapsed between the termination of parental rights and adoption.<sup>43</sup>

The data also shows that race and age significantly impact a child’s chance of being adopted. The data suggests that Black waiting children are adopted at a disproportionately lower rate than Hispanic and White children.<sup>44</sup> Between 2000 and 2011, the adoption percentage of Black children has consistently been between

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37. See generally Richard L. Brown, *Disinheriting the “Legal Orphan”: Inheritance Rights of Children After Termination of Parental Rights*, 70 Mo. L. REV. 125 (2005); *infra* Part I.C.

38. See *infra* notes 44–54.

39. See AFCARS REPORT 1998–2002, *supra* note 28, at 1.

40. See AFCARS REPORT 2011, *supra* note 22, at 1.

41. “Forever family” is a term commonly used by the child welfare system to describe families willing to adopt and care for a child forever. CHRISTINE ADAMEC & WILLIAM L. PIERCE, *THE ENCYCLOPEDIA OF ADOPTION* 107 (3rd ed. 2007).

42. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH AND HUMAN SERVS., *TRENDS IN FOSTER CARE AND ADOPTION—FY 2002–FY 2011*, at 1 (2012), available at [http://www.acf.hhs.gov/sites/default/files/cb/trends\\_fostercare\\_adoption.pdf](http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption.pdf).

43. See AFCARS REPORT 2011, *supra* note 22, at 5.

44. See Kerry DeVooght et al., *Number of Children Adopted from Foster Care Increases in 2009*, in *TRENDS IN ADOPTIONS FROM FOSTER CARE IN THE WAKE OF CHILD WELFARE REFORMS* 7 (Analysis No. 4, 2011), available at [http://s3.amazonaws.com/zanran\\_storage/www.fosteringconnections.org/ContentPages/2466875399.pdf](http://s3.amazonaws.com/zanran_storage/www.fosteringconnections.org/ContentPages/2466875399.pdf).

five and nine percentage points lower than the percentage of waiting Black children.<sup>45</sup> For example, in 2011, Black children comprised twenty-eight percent of children waiting but only twenty-three percent of children adopted.<sup>46</sup> This is in contrast to White children, who were forty percent of waiting children and forty-five percent of adoptions, as well as Hispanic children who were twenty-two percent of waiting children and twenty-one percent of adoptions in 2011.<sup>47</sup>

Moreover, the disproportionately lower rates of adoption for Black children are further demonstrated by comparing racial distributions for children in the general population, foster care population, and adoption finalizations. In 2011, fifty-three percent of children in the general population were White, but White children represented forty-one percent of children in foster care and forty-five percent of all children adopted.<sup>48</sup> On the other hand, Black children comprised fourteen percent of children in the general population, but represented twenty-seven percent of children in foster care and twenty-three percent of children adopted.<sup>49</sup> Lastly, in 2011, Hispanic children comprised twenty-four percent of children in the general population and twenty-one percent of children in foster care and finalized adoptions.<sup>50</sup> The 2011 data stands in stark contrast to the data from 2000, when Black and White children each represented thirty-eight percent of adoptions, and Hispanic children represented fifteen percent of adoptions.<sup>51</sup> These 2000 adoption rates were almost identical to the percentage of children in foster care by race: Black children were thirty-nine percent of the foster care population, White children were thirty-eight percent, and Hispanic children were fifteen percent.<sup>52</sup>

Finally, adoption data also suggests that older children are less likely to be adopted now than before ASFA's passage.<sup>53</sup> Research

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45. See *id.*; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., NO. 18, THE AFCARS REPORT, PRELIMINARY FY 2010 ESTIMATES AS OF JUNE 2011, at 5, 7 (2011), available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport18.pdf>; AFCARS Report 2011, *supra* note 22, at 4–5.

46. See AFCARS Report 2011, *supra* note 22, at 4–5.

47. *Id.*

48. See AFCARS REPORT 2011, *supra* note 22, at 2–5; *Child Population By Race*, KIDS COUNT DATA CENTER, <http://datacenter.kidscount.org/data/tables/103-child-population-by-race?loc=1&loct=2#detailed/1/any/false/867/66,67,12/424> (last updated May, 2012).

49. See sources cited *supra* note 48.

50. See sources cited *supra* note 48.

51. See AFCARS REPORT 1998–2002, *supra* note 28, at 12.

52. *Id.* at 4.

53. Penelope L. Maza, *A New Look at the Role of ASFA and Children's Ages in Adoption*, 23 THE ROUNDTABLE, no. 1, 2009, at 1–2 (discussing the large percentage of children over nine-years-old waiting to be adopted).

highlights an alarming adoption trend for older children: a critical tipping point occurs at age nine, after which the prospects of being adopted decrease dramatically.<sup>54</sup>

Since the implementation of ASFA, and even as children over the age of nine have started to comprise a larger percentage of the waiting children, older children have continued to represent the same percentage of overall adoptions.<sup>55</sup> For instance, in 1998, children ages nine through seventeen were thirty-nine percent of all waiting children and twenty-eight percent of all adoptions.<sup>56</sup> However, in 2006, older children represented forty-four percent of all waiting children but still only twenty-eight percent of adoptions.<sup>57</sup> In 2011, children ages nine to seventeen represented forty-two percent of waiting children and just twenty-six percent of adoptions.<sup>58</sup>

Given the sheer number of children who do not get adopted, along with the lower adoption rates for Black children and children over the age of eight, the American child welfare system should start looking at rehabilitated biological parents as the solution for some of these children who desperately want a family to love and care for them. One concern over reinstating parental rights as a permanency option may be the possible impact that reinstatement will have on the rate of adoptions. However, the proposed and existing statutes allowing reinstatement of parental rights would only impact children with no viable adoption prospects.<sup>59</sup> Moreover, there appears to be no adverse impact on the rate of public child welfare adoptions in states that allow reinstatement of parental rights.<sup>60</sup> Thus, reinstatement of parental rights is and should be considered a viable option for these children.

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54. *Id.* at 1 (“Early analyses of AFCARS data showed that age at waiting is the most critical characteristic related to the likelihood that waiting children will be adopted. These early analyses and all analyses conducted since that time have consistently shown that between the ages of 8 and 9, waiting children are more likely to continue to wait than to be adopted.”).

55. *Id.* at 2.

56. *Id.* at 2–3; *see also* AFCARS REPORT 1998–2002, *supra* note 28, at 10, 12.

57. Maza, *supra* note 53, at 2–3; *see also* CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH AND HUMAN SERVS., NO. 14, THE AFCARS REPORT, PRELIMINARY FY 2006 ESTIMATES AS OF JANUARY 2008, at 6–7 (2008), *available at* <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport14.pdf>.

58. *See* AFCARS REPORT 2011, *supra* note 22, at 4–5.

59. *See* Getman & Christian, *supra* note 19, at 66.

60. For example, according to the AFCARS reported data for Washington and Nevada, states that both enacted their reinstatement provisions in 2007, the number of children adopted who were involved with the child welfare system was not subsequently adversely impacted. *See* CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH AND HUMAN SERVS., CHILD WELFARE OUTCOMES 2008–2011, at 220, 349 (2012), *available at* [http://www.acf.hhs.gov/sites/default/files/cb/cwo08\\_11.pdf](http://www.acf.hhs.gov/sites/default/files/cb/cwo08_11.pdf); CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH AND HUMAN SERVS., CHILD WELFARE OUTCOMES 2006–2009, at 220, 350 (2010), *available at* <http://archive.acf.hhs.gov/programs/cb/pubs/cwo06-09/cwo06-09.pdf>.

*C. Don't Forget About Us: Youth Aging Out of the System*

In addition to the 104,000 children waiting to be adopted in the American child welfare system, thousands of children age out of the system each year. These are youth, age eighteen or older, who are no longer eligible for continued child welfare services or who voluntarily have chosen to leave the system.

Although the total number of children in foster care in the American child welfare system has declined steadily over the past ten years,<sup>61</sup> the number of youth aging out of the system each year has increased dramatically.<sup>62</sup> In 2002, 20,358 youth aged out of the child welfare system.<sup>63</sup> By 2011, this number had increased by almost one-third to 26,286 youth.<sup>64</sup>

The increasing number of youth who age out of the system, instead of finding permanency with a family, is problematic on several fronts. Research over the past three decades suggests that, as a group, former foster youth, including those who age out of the system, struggle more than their peers across a variety of domains, including education, homelessness, employment, substance abuse, mental health, early parenthood, involvement with the criminal justice system, economic difficulties, and public assistance usage.<sup>65</sup> Also, and unlike other young adults who may have the option of returning home to parents during difficult times, foster care youth do not have the option of reentering or relying on the supports, financial and otherwise, of the foster care system once they age out.<sup>66</sup>

Numerous studies demonstrate that youth who age out of the child welfare system are more likely to:

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Number of Children Adopted Involved with Public Child Welfare Agency by Year

	2006	2007*	2008	2009	2010	2011
Nevada	446	466	470	525	644	818
Washington	1195	1291	1261	1634	1633	1568

\* Reinstatement provision enacted in 2007 in both states.

*Id.*

61. See TRENDS IN FOSTER CARE AND ADOPTION, *supra* note 42, at 1, 3.

62. See Getman & Christian, *supra* note 19, at 61.

63. AFCARS REPORT 1998–2002, *supra* note 28, at 8.

64. AFCARS REPORT 2011, *supra* note 22, at 3.

65. Atkinson, *supra* note 34, at 183; see also Casey Family Programs, Improving Outcomes for Older Youth in Foster Care, at 1 (2008), available at [http://www.casey.org/research/publications/pdf/WhitePaper\\_ImprovingOutcomesOlderYouth\\_FR.pdf](http://www.casey.org/research/publications/pdf/WhitePaper_ImprovingOutcomesOlderYouth_FR.pdf).

66. Atkinson, *supra* note 34, at 183.

- Become homeless;<sup>67</sup>
- Drop out of high school;<sup>68</sup>
- Be underemployed;<sup>69</sup>
- Have problems with drugs and alcohol;<sup>70</sup>
- Struggle with mental illness;<sup>71</sup>
- Become young parents;<sup>72</sup>
- Become involved with the criminal justice system.<sup>73</sup>

In an effort to aid the youth who age out of foster care, Congress passed the Foster Care Independence Act in 1999, which increased the money offered to states to use for independent living programs and transitional services for young people between the ages of eighteen and twenty-one.<sup>74</sup> Even with this program, depending upon which state they live in, eighteen-year-olds aging out of foster care may receive substantially less financial support, housing services, and Medicaid health insurance coverage than they did at seventeen.<sup>75</sup> Ensuring access to whatever aging-out or transitional programs are available is even more difficult in states that have eliminated court jurisdiction for youth over eighteen.<sup>76</sup>

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67. *Id.*; see also OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP'T OF HOUS. AND URBAN DEV., HOUSING FOR YOUTH AGING OUT OF FOSTER CARE 4 (2012), available at [http://www.huduser.org/publications/pdf/HousingFosterCare\\_LiteratureReview\\_0412\\_v2.pdf](http://www.huduser.org/publications/pdf/HousingFosterCare_LiteratureReview_0412_v2.pdf).

68. See MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 19, at 22 (2005) (finding that approximately fifty-eight percent of youth who had lived in foster care had a high school diploma at age nineteen, compared to eighty-seven percent of their same-age peers in a comparable national sample).

69. See OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., COMING OF AGE: EMPLOYMENT OUTCOMES FOR YOUTH WHO AGE OUT OF FOSTER CARE THROUGH THEIR MIDDLE TWENTIES 7 (2008), available at <http://aspe.hhs.gov/hsp/08/fosteremp/report.pdf>.

70. See COURTNEY ET AL., *supra* note 68, at 40, 45 (finding that former foster youth report more than twice the need for hospitalization due to use of illegal drugs than their peers and are three times more likely to need substance abuse treatment than their peers).

71. *Id.* at 45 (finding that more than twenty percent of former foster youth reported requiring psychological counseling compared to only nine percent of nineteen-year-olds nationwide).

72. *Id.* at 56 (finding that almost one-third of the young women in the study reported having children by age nineteen compared to only twelve percent of the nineteen-year-old females nationwide and that nearly fourteen percent of former foster youth males had a child compared to only six-and-a-half percent of nationwide nineteen-year-old males).

73. See *id.* at 60–64.

74. Keely A. Magyar, *Between and Between but Being Booted Nonetheless: A Developmental Perspective on Aging Out of Foster Care*, 79 TEMP. L. REV. 557, 561 (2006); see also Atkinson, *supra* note 34, at 196.

75. Magyar, *supra* note 74, at 563; see also Atkinson, *supra* note 34, at 197–98.

76. See American Bar Association, Center on Children and the Law, *Continuing Court Jurisdiction in Support of 18 to 21 Year-Old Foster Youth*, at 3–6, 16 (2008), available at

By failing to properly support these older youth and help them find a forever family, the American child welfare system is sending more than 25,000 young adults into the world each year with tremendous challenges to overcome on their own. Although some youth who age out of the child welfare system avoid the many social and legal problems discussed above and go on to become successful and productive adults, the data shows that these courageous young men and women are, by far, the exceptions among their peers.<sup>77</sup>

Research also shows another important reason for considering reinstatement of parental rights for youth who are on track to age out. Youth who exit the child welfare system are often already in contact with relatives in their biological families, including their parents.<sup>78</sup> In a 2007 study of former foster youth, eighty-three percent of twenty-one-year-olds who had aged out of care reported having contact with one or more biological family members at least once a week.<sup>79</sup> The data suggests that because most of these youth are already connected with their biological families, the American child welfare system should explore a policy to reunify at least some of these older youth with their biological parents.

## II. REINSTATING PARENTAL RIGHTS BY STATUTE

Before the child welfare system can consider reunifying or returning children to biological parents whose rights were previously terminated, there must be a mechanism under the law to reinstate or restore the parent-child relationship. Although in some states there may be several options under current law to reunify children with biological parents whose rights were terminated,<sup>80</sup> the recent

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[http://www.americanbar.org/content/dam/aba/publications/center\\_on\\_children\\_and\\_the\\_law/empowerment/court\\_jurisdiction.doc](http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/empowerment/court_jurisdiction.doc).

77. See *supra* notes 67–73 and accompanying text; see also Wendy Ruderman, *Replanting the Family Tree*, PHILLY.COM, (Aug. 22, 2013), [http://articles.philly.com/2013-08-22/news/41433616\\_1\\_hand-sanitizer-lasagna-foster-care](http://articles.philly.com/2013-08-22/news/41433616_1_hand-sanitizer-lasagna-foster-care) (profiling a youth who aged out of the Philadelphia child welfare system and is now pursuing a doctorate in chemistry at New York University). Given the known outcomes for youth exiting the child welfare system, the efforts to assist older youth and prepare them for adulthood need to be evaluated and improved. See generally Alena M. Hadley et al., *What Works for Older Youth During the Transition to Adulthood: Lessons from Experimental Evaluations of Programs and Interventions*, in CHILD TRENDS FACT SHEET (Publ'n No. 2010-05, 2010), available at [http://www.childtrends.org/wp-content/uploads/2013/03/Child\\_Trends2010\\_03\\_09\\_FS\\_WWOlderYouth.pdf](http://www.childtrends.org/wp-content/uploads/2013/03/Child_Trends2010_03_09_FS_WWOlderYouth.pdf).

78. Getman & Christian, *supra* note 19, at 62–63. See generally Collins et al., *supra* note 8, at 54 (providing an overview of recent studies finding that former foster youth live with biological family members after exiting the child welfare system).

79. MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 21, at 17 (2007).

80. See *supra* notes 19–21 and accompanying text.

trend among states is to enact a statutory provision that sets forth required criteria and a clear process for courts to reinstate parental rights.

By year, the following thirteen states have enacted statutes that permit the reinstatement of parental rights:

- California (2005);<sup>81</sup>
- Nevada<sup>82</sup> and Washington<sup>83</sup> (2007);
- Louisiana (2008);<sup>84</sup>
- Illinois<sup>85</sup> and Oklahoma<sup>86</sup> (2009);
- Hawaii<sup>87</sup> and New York<sup>88</sup> (2010);
- Maine<sup>89</sup> and North Carolina<sup>90</sup> (2011);
- Delaware,<sup>91</sup> Minnesota,<sup>92</sup> and Utah<sup>93</sup> (2013).<sup>94</sup>

By enacting a provision in 2005, California served as a trailblazer in recognizing that a statute could help some waiting children find permanency with their rehabilitated biological parents.<sup>95</sup> However,

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81. CA. WELF. & INST. CODE § 366.26(i)(3) (2008).

82. NEV. REV. STAT. § 128.170 (2011).

83. WASH. REV. CODE ANN. § 13.34.215 (2013).

84. LA. CHLD CODE ANN. art. 1051 (2013).

85. 705 ILL. COMP. STAT. ANN. 405/2-34 (2013).

86. OKLA. ANN. STAT. tit. 10A, § 1-4-909 (2011).

87. HAW. REV. STAT. § 587A-34 (Supp. 2011).

88. N.Y. JUD. CT. ACTS LAW § 635 (2011).

89. ME. REV. STAT. ANN. tit. 22, § 4059 (2012).

90. N.C. GEN. STAT. § 7B-1114 (2011).

91. DEL. CODE ANN. tit. 13, § 1116 (West, Westlaw through 79 Laws 2013, chs. 1–185).

92. MINN. STAT. § 260C.329 (2013). Although the Family Reunification Act of 2013 became effective on August 1, 2013, similar versions had not gained final passage in the prior 2009 and 2011 legislative sessions in Minnesota. *See* H.R. 1462, 2009 Leg., 86th Sess. (Minn. 2009), and H.F. 0749 and S.F. 1339, 2011 Leg., 87th Sess. (Minn. 2011).

93. UTAH CODE ANN. § 78A-6-1401 (LexisNexis 2013).

94. Some states have statutes that permit reinstatement of parental rights, but only for parents whose rights were voluntarily terminated. *See* ALASKA STAT. § 47.10.089(h) (2007); VA. CODE ANN. § 16.1-241(K) (2009). In other words, the parents had consented to the termination and did not oppose the action in court. In addition, some states limit when and who may file a motion to vacate an order terminating parental rights. *See* W. VA. CODE § 49-6-6(c) (2013); IOWA CODE § 232.117(10) (2013).

95. California enacted a statute to reinstate parental rights shortly after the California Court of Appeals invited the legislature to consider allowing juvenile courts limited discretion to reinstate parental rights where a child would otherwise be a legal orphan. *See* CAL. WELF. & INST. CODE § 366.26(i)(2) (West 2008); *see also In re Jerred H.*, 17 Cal. Rptr. 3d 481 (Cal. Ct. App. 2004). In that case, Jerred, a fourteen-year-old, filed a petition to reinstate parental rights after his adoption by his stepfather fell through. Problematically, the termination order had been finalized, so there was no legal basis for relief. In affirming the father's inability to resurrect the relationship, the Court of Appeals noted:

We join the trial court and county counsel in observing the harshness of the result we reach . . . In all likelihood, Jerred will be left a “legal orphan” . . . To avoid such an unhappy consequence, legislation may be advisable authorizing judicial intervention

the statutes subsequently adopted by other states are arguably more sophisticated and comprehensive in their approach to defining the criteria and processes involved with reinstating parental rights. As detailed below, each state has a different approach to reinstating parental rights, including provisions about the filing processes; required timeframes; and roles for the courts, public agencies, parents, and children.

### A. Moving Party

One of the most important aspects for states to consider when contemplating a reinstatement statute is which party (or parties) has standing to file a petition with the court for reinstatement of parental rights. As different states' bills have moved through the legislative process, there have been discussions about whether the child, public agency, and/or the parents should have standing in these actions.<sup>96</sup>

These discussions have led states to different conclusions. Most states allow the child<sup>97</sup> or legal custodian to file a petition requesting reinstatement of parental rights. However, the reinstatement statutes in California,<sup>98</sup> Oklahoma,<sup>99</sup> Washington,<sup>100</sup> and Utah<sup>101</sup> specify that only the child or the child's attorney, guardian ad litem, legal representative, or legal custodian can be the moving party. A

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under very limited circumstances following the termination of parental rights and prior to the completion of adoption.

*Id.* at 485–86; *see also* Getman & Christian, *supra* note 19, at 64–65 (explaining the sequence of events leading to the passage of California's law).

96. Getman & Christian, *supra* note 19, at 65 (discussing how California's bill was reportedly amended to only allow children to file petitions for reinstatement to overcome objections from adoption advocates and concerns that parents might try to interfere with a pending adoption by filing a petition).

97. Not every state provides counsel to children in all child welfare court proceedings. *See generally* CHILDREN'S ADVOCACY INSTITUTE & FIRST STAR, A CHILD'S RIGHT TO COUNSEL (2d ed. 2009), available at [http://www.cachildlaw.org/misc/final\\_rtc\\_2nd\\_edition\\_lr.pdf](http://www.cachildlaw.org/misc/final_rtc_2nd_edition_lr.pdf) (reviewing the state laws that provide counsel to children in child welfare court proceedings and finding that some states only provide counsel on a discretionary basis). As such, in order for a child to petition the court and the court to effectively evaluate whether reinstatement of parental rights is appropriate for certain families under a statutory scheme, counsel for children is needed. Some of the existing statutes include a provision appointing counsel for children. *See, e.g.*, WASH. REV. CODE ANN. § 13.34.215(3) (West 2013) (appointing free counsel for child wishing to petition for reinstatement).

98. *See* CAL. WELF. & INST. CODE § 366.26(i)(3) (West 2008).

99. OKLA. STAT. ANN. tit. 10A, § 1-4-909 (West 2011).

100. WASH. REV. CODE ANN. § 13.34.215 (West 2013).

101. UTAH CODE ANN. § 78A-6-1403 (LexisNexis 2013).

few states, such as Hawaii<sup>102</sup> and North Carolina,<sup>103</sup> permit both the agency and the child to petition, whereas Illinois,<sup>104</sup> Maine,<sup>105</sup> and Minnesota<sup>106</sup> only allow the public child welfare agency to file petitions. As of this writing, only New York permits biological parents to petition the court for reinstatement. New York's statute, however, contains language that suggests that compromises were made to address concerns that parents might try to misuse the reinstatement process. For example, the statute requires the parents to obtain the consent of the original petitioner from the prior termination proceeding (usually the public child welfare agency) or to secure a finding that such consent is being withheld without good cause.<sup>107</sup>

### B. Age of the Child

A second policy choice for states to consider is whether there should be a minimum age for children to be considered for reunification with their rehabilitated parents. Most statutes set forth a minimum age for a child before reinstatement will be considered. Of those statutes that set a minimum age, most fall into a range of twelve to fifteen years old.<sup>108</sup> However, California<sup>109</sup> and Nevada<sup>110</sup> have no age requirements. In addition, even some of the states with an age minimum allow younger children to petition with a showing of extraordinary circumstances.<sup>111</sup>

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102. HAW. REV. STAT. § 571-63 (2006).

103. N.C. GEN. STAT. § 7B-1114(a) (2011) (the guardian ad litem attorney or a county department of social services with custody of a juvenile may file to reinstate if several conditions are satisfied).

104. 705 ILL. COMP. STAT. ANN. 405/2-34(1) (West 2013) (providing that the motion may be filed only by Department of Children and Family services).

105. ME. REV. STAT. ANN. tit. 22, § 4059 (2012) (allowing only the agency to file for reinstatement).

106. MINN. STAT. § 260C.329 (2013) (permitting only the agency counsel to file a petition).

107. N.Y. JUD. CT. ACTS LAW § 635(c) (McKinney 2011); *see also* Getman & Christian, *supra* note 19, at 66.

108. *See, e.g.*, MINN. STAT. § 260C.329(6) (2013) (requiring children to be at least fifteen years old); N.C. GEN. STAT. § 7B-1114(a)(1) (2011) (requiring children to be at least twelve years old).

109. CAL. WELF. & INST. CODE § 366.26(i)(2) (West 2008).

110. NEV. REV. STAT. § 128.70 (2007).

111. *See, e.g.*, N.C. GEN. STAT. § 7B-1114(a)(1) (2011); *see also* UTAH CODE ANN. § 78A-6-1403 (2)(b) (permitting siblings over the age of twelve years old to include their siblings who are under twelve years old in their petition for restoring parental rights).

### C. Amount of Time Since Termination

Third, by requiring a period of time to pass before reinstatement can be considered, states are trying to ensure that adoption prospects have been fully explored prior to returning a child to their biological parents as a permanency option. The majority of the enacted statutes require between one and three years<sup>112</sup> to pass from the termination of parental rights before a petition for reinstatement can be filed.<sup>113</sup> On the other hand, Louisiana<sup>114</sup> and Nevada<sup>115</sup> chose not to require any waiting period before reinstatement can be considered, and although California requires that three years pass before a court can consider reinstatement, it also provides that the time requirement can be waived if it is demonstrated that it is in the best interest of the child.<sup>116</sup>

### D. Court Process

A fourth important aspect for states to consider is the court process that occurs when reinstating parental rights, such as how many and what type of hearings will be held, which evidentiary standard applies, and which party has the burden of proof. Of the thirteen states with statutes that allow for reinstatement of parental rights, all require that the court find that reinstatement is in the best interest of the child at a finalization hearing before the reinstatement process can proceed. Twelve of the thirteen states<sup>117</sup> require a finding by clear and convincing evidence, which is the evidentiary burden to terminate parental rights as established by the U.S. Supreme Court in *Santosky v. Kramer*.<sup>118</sup>

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112. Some have argued that three years is a reasonable amount of time for a parent seeking to make appropriate changes to do so and demonstrate the change. MELISSA CARTER & KIRSTEN WIDNER, REINSTATEMENT OF PARENTAL RIGHTS: AN IMPORTANT STEP TOWARDS SOLVING THE PROBLEMS OF LEGAL ORPHANS (2008), available at [http://bartoncenter.net/uploads/fall2011updates/juv\\_code\\_rewrite/CarterWidnerReinstatingParentalRights.pdf](http://bartoncenter.net/uploads/fall2011updates/juv_code_rewrite/CarterWidnerReinstatingParentalRights.pdf).

113. See, e.g., ME. REV. STAT. tit. 22, § 4059 (8)(C)(1) (2011) (requiring at least one year to pass before a parent's rights can be reinstated); see also OKLA. STAT. tit. 10A, § 1-4-909 (A)(3) (West 2011) (allowing a parent to petition for rights three years after his or her rights were terminated if the child has not received a permanency plan).

114. See LA. CHILD CODE ANN. art. 1051 (2008) (stating that when children are fifteen or older there is no required amount of time that must pass for parental rights to be reinstated).

115. NEV. REV. STAT. § 128.70 (2007).

116. CAL. WELF. & INST. CODE § 366.26(i)(3) (West 2008).

117. Nevada has a preponderance of the evidence standard for reinstatement proceedings. NEV. REV. STAT. ANN. § 128.190(3) (Lexis-Nexis 2007).

118. *Santosky v. Kramer*, 455 U.S. 745, 746 (1982) (holding that the Due Process Clause of the Fourteenth Amendment requires more than a preponderance of the evidence standard in a termination of parental rights hearing).

Some of the more recent statutes require the court to consider, at a preliminary hearing, whether certain threshold criteria to reinstate parental rights are met.<sup>119</sup> States requiring a preliminary hearing usually insist that the court make certain findings before the child can start to visit or live with the biological parent on a trial basis.<sup>120</sup> These findings may include, for instance, whether the prescribed amount of time has passed since the termination of parental rights, whether the child cannot be adopted in a reasonable amount of time, and whether both the biological parent and child are willing to consider reinstatement.<sup>121</sup>

### *E. Role of Child Welfare Agency*

Another area where the statutes vary is how they define the role for the public child welfare agency in the reinstatement process. Although some contain only minimal information about what the agency is required to do, the more recent statutory schemes tend to be more specific about the expectations for, and responsibilities of, the agency. As discussed above, some states permit the agency to file the petition to reinstate parental rights.<sup>122</sup> Other statutes require the public child welfare agency to submit reports to the court detailing, among other things, how the parent remediated the issues leading to the prior termination of parental rights and the progress made towards reinstatement.<sup>123</sup> In those states permitting or requiring trial placements with the biological parents, the statutes usually clarify that the public child welfare agency is responsible for placing the child with the biological parents, as well as supervising the placement.<sup>124</sup>

Some statutes also require that the public child welfare agency provide services to both the child and biological parent to assist with the reinstatement or, as some states refer to it, “transition” process for the family.<sup>125</sup> Most statutes that require such assistance

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119. HAW. REV. STAT. § 587A-34(3) (Supp. 2011).

120. *See, e.g., id.*

121. N.C. GEN. STAT. § 7B-114(a), (g) (2011).

122. *See* OKLA. ANN. STAT. tit. 10A, § 1-4-909 (West 2009); HAW. REV. STAT. § 587A-34 (Supp. 2011).

123. *See* HAW. REV. STAT. § 587A-34(d) (Supp. 2011) (requiring a report to be prepared by the child welfare agency for the court prior to the preliminary hearing).

124. *See, e.g.,* N.C. GEN. STAT. § 7B-1114(i)(2) (2011).

125. *See, e.g.,* HAW. REV. STAT. § 587A-34(f)(2) (Supp. 2011).

include language that the services or other relief be deemed “necessary” or “in the best interest” of the child before they are provided.<sup>126</sup>

Finally, some statutes specify that the public child welfare agency has a duty to provide notice to children if they meet the reinstatement criteria<sup>127</sup> or if their biological parent contacts the agency to inquire about the child.<sup>128</sup> This requirement for the child welfare agency is included in some of the more recent statutes and is likely aimed at addressing concerns arising from statutes that do not allow the biological parents to file a petition for reinstatement. By requiring the public child welfare agency to contact the child and the child’s attorney if a biological parent inquires about the child, the statutes are ensuring that children eligible for reinstatement are aware that their parent is interested. With that knowledge in hand, the child’s attorney can facilitate a discussion about whether the child wants to file a petition for the court’s consideration.

### III. PROPOSED MODEL STATUTE TO REINSTATE PARENTAL RIGHTS— “LISA’S LAW”

This Section proposes a model statute to reinstate parental rights. It combines the lessons learned from the data about permanency in the child welfare system (see Section I) and the existing reinstatement statutes (see Section II).<sup>129</sup>

As for the former, the data about permanency in the child welfare system provides useful information about the age when children are likely to get adopted, how long they may wait for that adoption to occur, and what may happen to children if they never find a permanent family. With regard to the latter, and as discussed above, the provisions, criteria, and court processes vary significantly among the thirteen states whose statutes currently permit reinstatement of parental rights.

The model statute uses the child welfare data to inform its criteria for when reinstatement of parental rights is permissible and to outline the rights and responsibilities for the child, parent, child

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126. See, e.g., N.C. GEN. STAT. § 7B-1114(g)(8) (2011).

127. See, e.g., UTAH CODE ANN. § 78A-6-1404 (West 2013). The Utah statute also requires the agency to contact the child’s biological parent(s) and explain the rights and responsibilities of reinstatement.

128. WASH. REV. CODE § 13.34.215(2) (2012).

129. See Appendix A, *infra*, for the text of the proposed model statute; see also Randi J. O’Donnell, Note, *A Second Chance for Children and Families: A Model Statute to Reinstate Parental Rights after Termination*, 48 FAM. CT. REV. 362, 364–75 (2010) (proposing some provisions for a statute to reinstate parental rights).

welfare agency, and court. The provisions of the model statute ultimately provide guidance in assessing whether reinstatement of parental rights is a viable permanency option and in the best interest of the child.

*A. When Should Reinstatement of Parental Rights Be Considered for Children?*

First, based upon the data from the American child welfare system, a statute should allow petitions requesting reinstatement of parental rights to be filed beginning two years after the termination proceeding. Given that the average time for adoptions is around fourteen months after termination of parental rights, having a two-year timeframe provides sufficient opportunity for the child welfare system to find an adoptive family for the child.<sup>130</sup> However, the model statute also creates judicial discretion for rare instances when waiting the two years before considering reinstatement may not be in the best interest of the child. Such discretion may be exercised when extraordinary circumstances can be proven by a preponderance of the evidence.

Second, the data is very clear about the age when children become less likely to be adopted; children age nine and older have drastically reduced chances of finding a permanent family.<sup>131</sup> As such, the model statute proposes a minimum age of ten for children who want to have their parent's rights reinstated. By selecting age ten, the statute incorporates both data about the tipping point at age nine for adoptions and the average fourteen-month time period for adoption finalizations. However, as with the time period for filing, the model statute provides judicial discretion to override the minimum age of ten in extraordinary circumstances.

Finally, the model statute proposes that both the child and agency should be able to file petitions requesting that the court consider reinstating parental rights. As the outcome data for youth who age out of the child welfare system shows, children clearly have the most at stake in the system's efforts to find permanency.<sup>132</sup> As such, the child and/or the child's attorney should be able to petition the court for possible parental rights reinstatement. The agencies should also be able to file petitions because they often

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130. See AFCARS REPORT 2011, *supra* note 22, at 5.

131. See *supra* notes 53–58 and accompanying text.

132. See *supra* notes 62–73 and accompanying text.

have access to information and resources that may make reinstatement a viable permanency option for the children in their custody. Moreover, since agencies are charged with legal guardianship of the children and the responsibility to find them a permanent family, having the ability to petition the court for any viable permanency option is important—whether that permanency is found with adoptive parents or a return to the biological parents.

The model statute does not allow biological parents to petition in order to quell concerns about the misuse of the reinstatement mechanism by biological parents seeking to interfere with or stop pending adoptions.<sup>133</sup> In addition, if biological parents were able to file petitions seeking their own reinstatement after a termination of parental rights proceeding, they arguably would have less incentive to comply with services or court orders at the beginning of the child welfare case.<sup>134</sup>

*B. How Should Reinstatement Petitions be Processed, Evaluated, and Finalized?*

By laying out a clear process for courts and parties to follow when exploring reinstatement of parental rights, the model statute attempts to keep the focus on the biological parent's rehabilitation as well as whether reunification is in the best interest of the child.

The model statute requires a preliminary hearing to assess whether the petitioner has met the threshold requirements of the reinstatement process by clear and convincing evidence. For instance, the petitioner must prove that both the parent and child consent to the reinstatement and that the biological parent can provide a safe and stable home for the child. If the petitioner meets all of the requirements, the model statute suggests that the court can then order visitation between the child and biological parent or move directly to a trial placement, depending upon the best interest of the child.

During the required six-month trial placement, the child remains in the agency's custody. Thus, the agency supervises the placement and offers any services needed to support the child and biological parent. However, the model statute provides that, if the

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133. See *supra* note 96 and accompanying text.

134. See *supra* note 107 and accompanying text. Although New York is the only state currently allowing parents to file petitions to reinstate parental rights, other states might be willing to grant parents the right to file with similar or additional compromises about the scope of reinstatement and what kinds of prior abuse or neglect render the child and parent ineligible for reinstatement as a permanency option.

child has to be removed from the biological parent due to proven abuse or neglect, the petition is automatically dismissed. After the trial placement, the agency must produce a report to the court that assesses, among other things, the biological parent's change in circumstances since the termination of parental rights and the child and biological parent's ability to clearly express that they support the reinstatement.

After a successful trial placement and positive agency report, the court holds a finalization hearing for the reinstatement of parental rights. At the finalization hearing, the court can grant the request to reinstate parental rights, dismiss the petition, or extend the trial placement if it is in the best interest of the child. If, after reviewing the agency report, the court finds by clear and convincing evidence that the preliminary criteria are still met, the trial placement was successful, and that reinstatement is in the best interest of the child, the court will reinstate parental rights. However, the model statute provides that reinstatement does not vacate the prior termination of parental rights order and does not impact the rights of the other parent as applicable.

Finally, the model statute addresses two other important issues that states should clarify in their provisions: notice and right to counsel. The statute requires that, if biological parents contact the agency about their child, the agency must notify the child and her counsel about the parental contact and the right to petition for reinstatement.<sup>135</sup> Additionally, the model statute requires that counsel be provided for all children and for parents who meet the income guideline for public defense. By requiring that the parties have counsel, the model statute tries to ensure that the courts have accurate and complete information about the possible reinstatement and that the hearings are efficient.<sup>136</sup>

## CONCLUSION

As the American child welfare system struggles each year to find adoptive families for more than 100,000 legal orphans and to meet the needs of an increasing number of youth who age out of the system, policymakers and courts should consider the possibility that

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135. This provision may also help address some concerns about the model statute prohibiting parents from being able to file for reinstatement.

136. See Nina Ingwer Van Wormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 993–97 (2007) (discussing the challenges that pro se parties bring to litigation and court efficiency).

rehabilitated biological parents may be the only option for a loving and safe forever family for some of these children.

By enacting a comprehensive statute with criteria reflecting available child welfare data and clearly defining the reinstatement legal standard and court processes, state legislatures can provide clarity and safeguards for revisiting biological parents as a permanency option for some children who do not have viable adoption prospects.

## APPENDIX A—PROPOSED MODEL STATUTE

## § Reinstatement of parental rights

(a) A child whose parent's rights have been involuntarily or voluntarily terminated, the child's attorney, or the public child welfare agency with custody of the child may file a motion to reinstate the parent's rights if all of the following conditions are satisfied:

(1) the child is at least ten years of age, or, if the child is younger than ten, the motion alleges extraordinary circumstances requiring consideration of the motion;

(2) the child does not have a legal parent, is not in an adoptive placement, and is not likely to be adopted within a reasonable period of time; and

(3) the order terminating parental rights was entered at least two years before the filing of the motion, unless the motion alleges extraordinary circumstances requiring consideration of the motion or the court has found, or the child's attorney and the public child welfare agency with custody of the child stipulate, that the child's permanent plan is no longer adoption.

(b) If a motion could be filed under subsection (a) of this Section and the parent whose rights have been terminated contacts the public child welfare agency with custody of the child regarding reinstatement of the parent's rights, the public child welfare agency shall notify the child and the child's attorney within thirty days with the name and address of the former parent who has contacted the agency, in addition to notifying the child that he has a right to file a motion for reinstatement of parental rights.

(c) The party filing a motion to reinstate parental rights shall serve the motion on each of the following non-movants:

(1) the child;

(2) the child's attorney;

(3) the public child welfare agency with custody of the child;

(4) the former parent whose rights the motion seeks to have reinstated; and

(5) the child's tribe if applicable.

(d) If the child served under subsection (c) no longer has an attorney, the court will appoint an attorney to represent the child upon the filing of the motion described in subsection (a). The former parent who is served under subsection (c) is only entitled to appointed counsel if he or she meets the income eligibility criteria for public counsel as defined by the Office of the Public Defender.

(e) The movant shall ask the clerk to calendar the case for a preliminary hearing on the motion for reinstatement of parental rights within sixty days of the filing of the motion at the appropriate session of family court. The movant shall give at least twenty-one days notice of the hearing and state its purpose to the other persons listed in subsections (c)(1) through (c)(4) of this section. In addition, the movant shall send a notice of the hearing to the child's placement or foster care provider if applicable. Nothing in this section shall be construed to make the child's placement or foster care provider a party to the proceeding based solely on receiving notice and the right to be heard.

(f) At least seven days before the preliminary hearing, the public child welfare agency shall provide to the court and the other parties as listed in subsection (c) a report that addresses the factors specified in subsection (g) of this section.

(g) At the preliminary hearing and any subsequent hearing on the motion, the court shall consider information from the public child welfare agency with custody of the child, the child, the child's attorney, the child's former parent whose parental rights are the subject of the motion, the child's placement or foster care provider, and any other person or agency that may aid the court in its review. The court may consider any evidence, including hearsay evidence as permitted by law, that the court finds to be relevant, reliable, and necessary to determine the needs of the child and whether reinstatement is in the child's best interest. The court shall consider the following criteria and make relevant written findings regarding:

(1) what efforts were made to achieve adoption or permanent guardianship;

(2) whether the former parent whose rights the motion seeks to have reinstated has remedied the conditions that led to the child's removal and termination of the parent's rights;

(3) whether the child would receive proper care and supervision in a safe home if placed with the former parent;

(4) the age and maturity of the child and the ability of the child to express the child's preference;

(5) the former parent's willingness to resume contact with the child and to have parental rights reinstated;

(6) the child's willingness to resume contact with the former parent and to have parental rights reinstated;

(7) services that would be needed by the child and the former parent if the parent's rights were reinstated; and

(8) any other criteria the court deems necessary.

(h) At the conclusion of the preliminary hearing, the court shall either dismiss the motion or enter an order finding that a preponderance of the evidence shows that the child's permanent plan should be the reinstatement of parental rights. If the court does not dismiss the motion, the court shall conduct interim hearings at least every six months until the motion is granted or dismissed. Interim hearings may be combined with post-termination of parental rights review hearings as required by law. At each interim hearing, the court shall assess whether the plan of reinstatement of parental rights continues to be in the child's best interest and whether the public child welfare agency made reasonable efforts to achieve the permanent plan.

(i) At any hearing under this section, after making proper findings of fact and conclusions of law, for any of the following the court may:

(1) enter an order for visitation between the child and former parent whose rights the motion seeks to reinstate;

(2) order that the child be placed in the former parent's home whose rights the motion seeks to reinstate and that such placement be supervised by the public child welfare agency either directly or, when the former parent lives in a different state, through coordination with the Interstate Compact, or by other personnel as may be available to the court, subject to conditions applicable to the former parent as the court may specify;

(3) order the public child welfare agency to provide any transitional or supportive services for the child and former parent whose rights the motion seeks to be reinstated, or other relief deemed in the best interest of the child; or

(4) enter other relief as deemed in the best interest of the child.

(j) Prior to the court granting the motion for reinstatement, the child must be successfully placed with the former parent for at least six months.

(k) If the child must be removed from the former parent due to abuse or neglect allegations prior to the motion for reinstatement being granted, the court shall dismiss the petition for reinstatement of parental rights if the court finds the allegations have been proven by a preponderance of the evidence.

(l) The court shall either dismiss or, by a finding of clear and convincing evidence, grant the motion for reinstatement of parental rights within twelve months from the date the motion was filed, unless the court makes written findings why a final determination cannot be made within that time. If the court makes such findings, the court shall specify the time frame in which a final order shall be entered.

(m) An order reinstating parental rights restores all rights, powers, privileges, immunities, duties, and obligations of the parent as to the child, including those relating to custody, control, and support of the child. This reinstatement is a recognition that the situation of the parent and child have substantially changed since the time of the termination of parental rights and reunification is now appropriate. If a parent's rights are reinstated, the court shall be relieved of the duty to conduct periodic reviews.

(n) The granting of a motion for reinstatement of parental rights does not vacate or otherwise affect the validity of the original order terminating parental rights.

(o) The granting of a motion for reinstatement of parental rights for one former parent does not restore or otherwise impact the rights of the other former parent.

(p) A parent whose rights are reinstated pursuant to this section is not liable for child support or the costs of any services provided to the child for the period from the date of the order terminating the parent's rights to the date of the order reinstating the parent's rights.

(q) This section is retroactive and applies to any child who is under the jurisdiction of the family court at the time of the hearing regardless of the date parental rights were terminated.