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(RE-)GRASPING THE OPPORTUNITY INTEREST: *LEHR V. ROBERTSON* AND THE TERMINATED PARENT

By LaShanda Taylor Adams\*

I. INTRODUCTION

In 1997, an Ohio court terminated Peggy Fugate's parental rights to her six-year-old daughter, Selina. At the time, Ms. Fugate, an incarcerated drug abuser, did not fight the order, believing her daughter would be adopted into a clean, stable home.<sup>1</sup> However, Selina was never adopted. For the next seven years, Selina had trouble with the police and ran away from her foster home numerous times.

While Selina's life was going downhill in many respects, her mother was rehabilitating. She entered recovery, married, obtained full-time employment and was living in stable housing with enough room for her daughter. Recognizing the strides that Ms. Fugate had made, the juvenile court allowed Selina to visit her. Wanting some legal recognition of the parent-child relationship that they had now developed, in 2003, Ms. Fugate petitioned the court for custody of Selina.

While the lower courts found no bar to Ms. Fugate's custody petition, the Supreme Court of Ohio held that "a parent who has lost permanent custody of a child does not have standing as a nonparent to file a petition for custody for that child."<sup>2</sup> The judges, in issuing the opinion, empathized with Selina and made it clear that the decision was based solely on the current understanding of the law, stating: "[W]e recognize that Selina's situation is not ideal . . . . In denying standing to [her mother] . . . we are following the statute as written."<sup>3</sup>

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1. *In re McBride*, 850 N.E.2d 43, 44 (Ohio 2006).

2. *Id.* at 47.

3. *Id.*

At the conclusion of the case, Selina was left in legal limbo- one of over 3,033 children under legal guardianship of the State of Ohio due to the termination of their biological parents' rights.<sup>4</sup> Despite having a biological mother who was willing and able to care for her, Selina exited the foster care system as a legal orphan – a youth without legal parents.<sup>5</sup> The court's decision not only deprived Selina of the emotional, financial and legal support that a parent-child relationship provides, it deprived Ms. Fugate of the chance to re-grasp her opportunity interest in her daughter.

Unfortunately, Selina and Ms. Fugate are not alone. Nearly 59,000 legally-free youth in the United States foster care system are waiting to be adopted.<sup>6</sup> Some of these youth have biological parents who have rehabilitated and can provide care for them,<sup>7</sup> but the prevailing view that the parents are legal strangers to their children – persons with no legal rights or responsibilities – creates unnecessary roadblocks in their attempt to regain custody.<sup>8</sup>

This article seeks to eliminate that barrier by relying on the Supreme Court's decision in *Lehr v. Robertson* to assert that terminated parents retain an opportunity interest in their un-adopted biological children and cannot be prohibited from "re-grasping" that interest. As such, states must clearly set forth a process by which the interest can be converted into a legally-recognized right. Currently, parents in 19 states can look to state reinstatement statutes for such a

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4. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD WELFARE OUTCOMES 2003-2006 (2010), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cwo03-06/cwo03-06.pdf>.

5. 47 AM. JUR. 2D *Juvenile Courts, Etc.* § 63 (2008) (defining a "legal orphan" as a child whose parents' rights have been terminated, but has not yet been adopted). The term "legal orphan," in the sense in which it is used in this article, seems to have been originated by Professor Martin Guggenheim. See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care – An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995).

6. U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT #21 (2014), available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport21.pdf> [hereinafter AFCARS REPORT #21]. There over 100,000 youth in the United States foster care system waiting to be adopted.

7. It is impossible to estimate the number of biological parents who would be suitable caretakers for their children if permitted post-termination reunification. However, some cases have been reported. See Kendra Hurley, *When You Can't Go Home*, 15 CHILD WELFARE WATCH 18, 20 (2008) (showing uncertainty in the number of reversed parental rights in New York prior to enactment of the restoration statute. One child advocate approximates the total number to be in the hundreds while others estimate the number to be less than ten); Barbara White Stack, *Teen in Flight in the Public Care System but on the Lam, 14-year-old Longs for Someone Who Cares*, PITTSBURGH POST-GAZETTE (Sept. 12, 2004), <http://www.post-gazette.com/frontpage/2004/09/12/In-the-public-care-system-but-on-the-lam-a-teen-longs-for-someone-who-cares/stories/200409120205> (showing that parental rights have been restored in Pennsylvania, which does not have a restoration statute); *Brothers' Case to Petition for Parental Rights will go to Trial*, KOMO NEWS, (Sept. 17, 2007), <http://www.komonews.com/news/local/9840602.html> (last visited Aug. 25, 2015) (discussing first case filed under Washington reinstatement statute).

8. See, e.g., *In re the Dependency of G.C.B.*, 870 P.2d 1037 (Wash. Ct. App. 1994), *Ex rel. R.N.R.R.*, 2007 WL 2505629 (Tex. App. 2007), *In re John Santosky*, 161 A.D.2d 908 (N.Y. App. Div. 1990), *Tiffany A. v. Margaret H.*, 171 Misc.2d 786 (N.Y. Fam. Ct. 1996), *In re T.C.*, 759 N.Y.S.2d 295 (N.Y. Fam. Ct. 2003).

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process.<sup>9</sup> However, this article sets forth reasons why those laws are legally insufficient.

To provide context, the article begins with a discussion of the constitutional rights of parents to the care, custody and control of their children, how those rights are terminated, and the consequences of termination. Section IV introduces the concept of a retained opportunity interest and explains how that interest can be re-grasped. Lastly, Section V discusses how amending the federal Adoption and Safe Families Act (ASFA)<sup>10</sup> to include post-termination reunification as a permanency option will satisfy the constitutional mandate.

## II. TERMINATION OF PARENTAL RIGHTS

The Supreme Court has identified specific categories of rights that are protected by the Constitution, including the fundamental right to the care, custody and control of one's children. Though not articulated in the United States Constitution, the right of parents to direct the education and upbringing of their children has been continuously upheld by the Supreme Court, starting in 1923 with *Meyer v. Nebraska*.<sup>11</sup> Since that time, the constitutional status of parenthood has continued to develop. "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"<sup>12</sup>

When a countervailing state interest does exist, parents are entitled to due process before the state can interfere with the parent-child relationship. If the level of care being provided by the parent fails to meet established standards, the *parens patriae* authority of the state enables it to intervene.<sup>13</sup> Intervention begins with an agency response to a report of suspected child abuse or neglect and can include adjudication, disposition, termination of parental rights and adoption hearings.

If the court finds the child to be abused or neglected, in many cases, the child is placed in the custody of the state, which then decides where the child will live. When a child is in the custody of the state and before parental rights are terminated, biological parents retain "residual parental rights and responsibilities."<sup>14</sup> These rights include the right to visit, consent to adoption, make major medical and educational decisions, and determine religious

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9. Unless permitted to move the court for post-termination visitation, terminated parents are hampered in their ability to re-establish their parental rights. See Section IV(B)(2)(b).

10. 45 C.F.R. § 1356.21(h) (2015).

11. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

12. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

13. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972).

14. Those rights and responsibilities remaining with the parent after transfer of legal custody or guardianship. See, e.g., D.C. CODE §16-2301(22) (2012).

affiliation.<sup>15</sup> Residual responsibilities include the responsibility to pay child support.<sup>16</sup>

Once the court decides that the family cannot be preserved and the child cannot safely return home, every state provides a statutory mechanism for the involuntary termination of parental rights.<sup>17</sup> Because all other rights have already been taken from the parent, the issue before the court at a termination proceeding is whether residual parental rights should be terminated. To prevail in a termination of parental rights proceeding, the state must prove by at least clear and convincing evidence<sup>18</sup> that the parent is “unfit” and that termination is in the child’s best interest.<sup>19</sup>

### III. LEGAL ORPHANS

There is no guarantee, however, that a child will be adopted after his parents’ rights have been terminated<sup>20</sup> and states have minimal insight into when a termination will lead to an adoption. Research shows that between 10% and 25% of anticipated adoptions do not finalize.<sup>21</sup> When a pre-adoptive placement disrupts and permanent legal connections are not created, the youth is left in legal limbo.<sup>22</sup> In his article *The Effects of Recent Trends to Accelerate the*

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15. *Id.*

16. *Id.*

17. See Rebecca E. Hatch, *Cause of Action for Termination of Parental Rights Based on Abuse or neglect*, 53 CAUSE OF ACTION 2D 523 (2012) (finding that actions for the termination of parental rights in the context of abuse, neglect, or dependency proceedings are the centerpiece of the child welfare adjudication system).

In most states only the state has standing to seek termination of parental rights; however, some states grant standing to individuals, including those seeking to adopt the child. See, e.g., DKM v. RJS, 924 P.2d 985, 988 (Wyo. 1996).

18. Santosky v. Kramer, 455 U.S. 745, 769 (1982).

19. See CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (2007), available at <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf>.

20. See Parkinson, *infra* note 189, at 159 (expressing concern over the number of children in the United States who have had parental rights terminated, but have not found alternative families to provide long term care).

21. Hurley, *supra* note 4, at 19 (citing national studies). One study found that the most frequent reasons for ambivalence regarding adoption are: lack of resources to meet the child’s needs (28%), loss of financial support (20%), loss of casework services or support (19%), family not ready (18%), and child’s behavior (17%). See Gretta Cushing & Sarah B. Greenblatt, *Vulnerability to Foster Care Drift After the Termination of Parental Rights*, 19 RES. ON SOC. WORK PRAC. 694, 699 (2009). See also Rosemary J. Avery, *Perceptions and Practice: Agency Efforts for the Hardest-to-Place Children*, 22 CHILD. & YOUTH SERV. REV. 399, 408 (2000) (finding that the major reasons for the disruption of an adoptive placement to be: child’s behavior, foster parents’ inability to provide services, abuse by foster parents or other children in the pre-adoptive home, reappearance of a birth parent, and reconsideration by foster parents). When the family with whom the child was living at the time of the termination proceeding does not adopt, the likelihood of adoption is reduced by 66%. See Gretta Cushing & Sarah B. Greenblatt, *Vulnerability to Foster Care Drift After the Termination of Parental Rights*, 19 RES. ON SOC. WORK PRAC. 694, 701 (Nov. 2009).

22. AFCARS trends indicate that when waiting children reach between 8 and 9 years old,

*Termination of Parental Rights of Children in Foster Care – An Empirical Analysis in Two States*, Martin Guggenheim began referring to these youth as “legal orphans.”<sup>23</sup> Studies have concluded that the loss of the legal relationship can mean a loss of the physical and emotional relationship between the parent and child, which is important to their social and emotional development.<sup>24</sup> “Children who age out of the foster care system without permanent homes or legal connections experience dire outcomes in an array of well-being indicators, including homelessness, criminal involvement, mental and physical health, education level, and reliance on public assistance. These problems are particularly acute for the legal orphans who are not adopted and who exit the foster care system through emancipation at the age of 18 or 21.”<sup>25</sup> Currently, nationwide, there are approximately 59,000 legal orphans in the foster care system.<sup>26</sup>

On the state level, the “legal orphan problem” has been recognized by legislatures, judges and child advocates. In 2012, the National Council of Juvenile and Family Court Judges (NCJFCJ) issued a “Resolution Calling for Judicial Action to Reduce the Number of Legal Orphans at Risk of Aging Out of Foster Care in the United States.”<sup>27</sup> That resolution acknowledges that “all 50 states have what the federal government calls ‘legal orphans’ aging out of foster care each year” and resolved that “every child should have a permanent, legal relationship with a caring and safe adult.”<sup>28</sup> It further resolves that “the NCJFCJ recommends that judges exercise frequent and diligent judicial

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they are more likely to continue to wait for a family than be adopted. More than one quarter of the youth waiting for adoption are between the ages of 13 and 17. Data suggest, however, that youth who enter foster care as teenagers are highly unlikely to be adopted. Studies conclude that the absence of a legal parent has negative social, emotional, and financial effects. See LaShanda Taylor, *Un-Terminating Parental Rights: Resurrecting Parents of Legal Orphans*, 17 VA. J. SOC. POL’Y & L. 318 (2010).

23. 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).

24. There is a connection between loss due to foster care placement, termination of parental rights and negative behaviors in children. “Children who experience such losses may be particularly vulnerable to angry behavior and disrespect toward adults and are at risk of falling into a cycle of negative behavior and weakened connections with adults.” Marcy Viboch, *Childhood Loss and Behavioral Problems: Loosening the Links*, VERA INST. JUST. Dec. 2005, at 5 available at [http://www.vera.org/sites/default/files/resources/downloads/Childhood\\_loss.pdf](http://www.vera.org/sites/default/files/resources/downloads/Childhood_loss.pdf) (citing Francine Courson, *The Trauma of Profound Childhood Loss: A Personal and Professional Perspective*, 73 PSYCHIATRIC Q. 145 (2002)). Studies further reveal that ties to extended family are integral to the development of cultural and personal identity as well as emotional well-being. R.S. Eagle, *The Separation Experience of Children in Long Term Care: Theory, Research, and Implications for Practice*. 64 AM. J. ORTHOPSYCHIATRY 421 (1994).

25. Taylor, *supra* note 22, at 328–29.

26. AFCARS REPORT #21, *supra* note 6, at 1. See also Appendix A.

27. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOLUTION CALLING FOR JUDICIAL ACTION TO REDUCE THE NUMBER OF LEGAL ORPHANS AT RISK OF AGING OUT OF FOSTER CARE IN THE UNITED STATES (2012), available at [http://www.ncjfcj.org/sites/default/files/Resolution\\_LegalOrphans\\_fnl-3-21-12.pdf](http://www.ncjfcj.org/sites/default/files/Resolution_LegalOrphans_fnl-3-21-12.pdf).

28. *Id.* at 1.

oversight to ensure that the child does not remain a legal orphan and that the child achieves permanency” and calls for judicial action to reduce the number of legal orphans in foster care.<sup>29</sup> One way to reduce the number of legal orphans is by recognizing the opportunity interest that the terminated parent retains and by allowing that interest to be “re-grasped” when in the child’s best interest.

#### IV. “RE-GRASPING” THE POST-TERMINATION OPPORTUNITY INTEREST

##### A. *The Post-Termination Opportunity Interest*<sup>30</sup>

Since 1923, the rights of parents vis-à-vis their biological children has continued to develop. In the 1983 case *Lehr v. Robertson*, the United States Supreme Court drew a clear distinction between a parental right and an opportunity interest.<sup>31</sup> A parental right is afforded constitutional protection; an opportunity interest is not. In *Lehr*, a putative father argued that the Due Process and Equal Protection Clauses of the Fourteenth Amendment gave him an absolute right to notice and an opportunity to be heard before his child could be adopted.<sup>32</sup> The Court determined that, since the father had not established a custodial, personal or financial relationship with the child, no parental right was created.<sup>33</sup> As such, he was not entitled to any due process.

The Supreme Court determined that a biological parent, by virtue of biology, possesses an interest in having an opportunity to enjoy a relationship with her children. That interest can be converted to a parental right as a result of her actions. “The significance of the biological connection is that it offers the natural [parent] an opportunity that no other [person] possesses to develop a relationship with his [or her] offspring. If he [or she] grasps that opportunity and accepts some measure of responsibility for his [or her] child’s future, he [or she] may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development.”<sup>34</sup> The parental right, once created, can only be terminated by death, relinquishment or involuntary termination.<sup>35</sup> While the right can be terminated by these means, relinquishment

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29. *Id.*

30. See Appendix C.

31. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983). In their book *Beyond the Best Interest of the Child*, Goldstein, Freud and Solnit define “opportunity interest” as the interest in developing the important psychological parent-child relationship by continuous parental nurturing of the child. J. GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 11 (1973). An opportunity interest has also been defined as “the claim made on the strength of the biological connection alone.” Elizabeth Buchanan, *The Parent-Child Relationship and the Current Cycle of Family Law Reform: The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313, 352 (1984) (examining constitutional attitudes toward the parent-child relationship).

32. *Lehr*, 463 U.S. at 248.

33. *Id.* at 262.

34. *Id.*

35. *In re B.C.*, 582 A.2d 1196, 1199 (D.C. 1990) (“parental responsibilities do not terminate absent the death of the parent or a court order.”); see, e.g., ARK. CODE ANN. § 9-9-220(a) (Repl. 2009).

and involuntary termination have no effect on the opportunity interest. As the *Lehr* court stated, “the actions of judges neither create nor sever genetic bonds.”<sup>36</sup> Thus, terminated parents retain the inherent opportunity interest afforded to them by the “biological connection.”

The opportunity interest exists before a parent develops an enduring relationship with the child and is present even when no such relationship is established. To permit the parent to develop a relationship/parental right, biological parents are afforded certain interests and responsibilities, including an interest in visitation and the responsibility to pay child support.<sup>37</sup> Those interests and duties exist at birth and are not dependent on the establishment of a parental right. Additionally, in some jurisdictions, the child can inherit from his parent irrespective of whether a constitutionally protected parental right is ever established.<sup>38</sup> In short, the aforementioned rights and responsibilities attach at birth and have their basis in biology rather than relationship.

When parental rights have been terminated, the biological connection remains intact, and a legally recognizable parent-child relationship continues to exist.<sup>39</sup> Even state statutes that declare the parent and child legal strangers to one another after an order terminating parental rights has been issued recognize some residual connection. For example, Alaska statute 25.23.130 states that “a decree terminating parental rights . . . voids all legal relationships between the child and the biological parent so that the child is a stranger to the biological parent and to relatives of the biological parent for all purposes.”<sup>40</sup> That same statute provides that inheritance rights between a child and a biological parent are not voided by the termination order.<sup>41</sup> Furthermore, Washington law states that a termination order severs and terminates “all rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support existing between the child and parent.”<sup>42</sup> Meanwhile, state law permits the restoration of those rights under certain circumstances.<sup>43</sup> In other states, statutes and case law allow for post-termination visitation,<sup>44</sup> continue the

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36. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

37. *See, e.g., Ex rel. Matchett v. Dunkle*, 508 N.W.2d 580 (Neb. 1993) (holding that the duty to pay child support begins at the time of the child’s birth).

38. Megan Pendleton, *Intestate Inheritance Claims: Determining A Child’s Right to Inherit When Biological and Presumptive Paternity Overlap*, 29 *CARDOZO L. REV.* 2823, 2826 (“some statutory schemes treat the fact of biology as dispositive in establishing paternity and allow a child with a presumed father to inherit from a separate biological father’s intestate estate, regardless of whether the biological parent had a role in the child’s upbringing.”).

39. The fact that the child’s birth certificate is not amended after parental rights are terminated further supports the argument that a relationship continues to exist. While a new birth certificate is issued reflecting a change in the parent-child relationship after an adoption decree is entered, no changes are made to birth certificates after a termination order. “Most fundamentally, the birth certificate certifies and proves parenthood: the person or persons on the birth certificate are the child’s legal parents.” Annette Appell, *Certifying Identity*, 42 *CAP. U. L. REV.* 361, 396 (2014).

40. ALASKA STAT. § 25.23.130(d) (2015).

41. *Id.* at (e).

42. WASH. REV. CODE § 13.34.200(1) (2007).

43. WASH. REV. CODE § 13.34.215(1) (2007).

44. FLA. STAT. ANN. § 39.811(7)(b) (West 2013) (providing for post-termination contact, in

responsibility to pay child support,<sup>45</sup> and preserve intestate succession.<sup>46</sup> Furthermore, the fact that parental rights have been terminated does not affect a child's eligibility for Social Security survivor's benefits based on a biological parent's wage record.<sup>47</sup>

Courts have also allowed parents to retain rights to notice if their child is not adopted. In *In re Lara S.*,<sup>48</sup> for example, a mother voluntarily relinquished her parental rights to her three sons. In her relinquishment, she stated that if the current foster placement were to disrupt, she retained "the privilege to be notified that the placement is no longer available."<sup>49</sup> Specifically, she requested that notification be sent to her by regular and certified mail. Pursuant to state statute, the trial court incorporated the provisions into its order terminating her parental rights and, once the placement disrupted, the mother was provided with notice.<sup>50</sup>

A bill introduced in Utah in 2014 further supports the argument that biology alone creates an interest that is not severed when parental rights are terminated. H.B. 418 changes the statutory definition of grandparent to include children whose parental rights have been terminated.<sup>51</sup> The law will allow grandparents to petition the court for visitation rights, even over the objection of an adoptive parent. "It would be unjust and unnecessary to say that a grandparent no longer has standing to petition for visitation rights simply because parental rights were

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some circumstances, by statute); TEX. FAM. CODE ANN. § 161.2061 (West 2003).

45. See *Campbell v. Davison*, DR-03-20.01 (Ala. Ct. of Civ. App., 2008), available at <http://alabamaappellatewatch.com/uploads/file/2070465.PDF> (providing overview of state case law deciding whether a parent's obligation to pay child support ends when parental rights are terminated); Theresa M. Pelfrey, *Is the Termination of Parental Rights the Termination of Parental Responsibility?*, 13 GLOBAL J. HUM. SOC. SCI. ARTS & HUMAN. 13, 14 (2013).

46. See Richard Lewis Brown, *Underserving Heirs?—The Case of the "Terminated" Parent*, 40 U. RICH. L. REV. 547 (2006); Richard L. Brown, *Disinheriting the "Legal Orphan": Inheritance Rights of Children After Termination of Parental Rights*, 70 MO. L. REV. 125 (2005) (noting that in some states, termination of parental rights statutes expressly provide that the right of the child to inherit from the biological parent survives termination). See also, HAW. REV. STAT. § 571-63 ("No judgment of termination of parental rights . . . shall operate to terminate the mutual rights of inheritance of the child and the parent or parents involved, or to terminate the legal duties and liabilities of the parent or parents, unless and until the child has been legally adopted.").

47. See SOCIAL SECURITY ADMINISTRATION, PROGRAM OPERATIONS MANUAL SYSTEM (POMS), PR 01215.028 Missouri (June 14, 2006), available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/1501215028>.

48. *In re Lara S.*, 209 P.3d 120 (Alaska 2009).

49. *Id.* at 122.

50. ALASKA STAT. § 25.25.180 (2015) ("In a relinquishment of parental rights . . . a parent may retain privileges with respect to the child, including the ability to have future contact, communication, and visitation with the child. A retained privilege must be stated in writing with specificity. Not less than 10 days after the relinquishment is signed, the court may enter an order terminating parental rights if the court finds that termination of parental rights under the terms of the agreement is in the child's best interest. If a parent has retained one or more privileges, the court shall incorporate the retained privileges into the termination order with a recommendation that the retained privileges be incorporated in an adoption or legal guardianship decree.").

51. H.B. 418, 60th Leg., Gen. Sess. (Utah 2014), available at <http://le.utah.gov/~2014/bills/static/HB0418.html>.

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terminated.”<sup>52</sup> Such bills and similar statutes, case law and policies recognize that parents, and by extension grandparents, retain an interest in their biological child and have some continued responsibility for their well-being.

At least two appellate courts have recognized the existence of a parent-child relationship after parental rights have been terminated. In *Wynn v. The Superior Court of Fresno County*, the Court of Appeals, Fifth District of California held that “a superior court has the authority to adjudicate the existence of a biological mother-child relationship even when the child has been adopted.”<sup>53</sup> In that case, the appellant filed a petition in a superior court seeking an order correcting her original birth certificate, which had been sealed when she was adopted. The court concluded that “the law recognizes some relationships between a child and his or her biological parents even after an adoption has occurred.”<sup>54</sup> The court noted the existence of general legal duties and obligations that are established based on blood relationships.<sup>55</sup> In *In re Adoption/Guardianship Nos. 11387 and 11388*, the Court of Appeals of Maryland acknowledged “that a natural parent whose parental rights have been terminated has some level of interest in the status of her biological children.” The court further explained that the interest “is greater than a third party unrelated to the children or uninvolved in the matter.”<sup>56</sup> Thus, it is clear that the opportunity interest retained by the biological parent is superior to any interest that a third party, such as a foster parent, may assert.

In fact, when the issue of whether a child’s placement with a foster parent created a liberty interest in that relationship came before the Supreme Court, the Court failed to resolve the question. In *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*, foster parents asserted a liberty interest protected by the 14<sup>th</sup> Amendment.<sup>57</sup> They contended that “when a child has lived in a foster home for a year or more, a psychological tie is created between the child and the foster parents which constitutes the foster family the true ‘psychological family’ of the child.” That family, they argued, has a “liberty interest” in its survival as a family protected by the 14<sup>th</sup> Amendment. This argument has since been rejected by some U.S. circuit courts.<sup>58</sup>

While the opportunity interest is greater than any asserted third party interest, Supreme Court jurisprudence suggests that it is subordinate to a right. In *Michael H. v. Gerald D.*, the Supreme Court refused to recognize a biological father’s opportunity interest when in direct conflict with the parental right

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52. Amy McDonald, *Bill: Grandparents Retain Rights after Parental Termination*, THE SALT LAKE TRIBUNE (Mar. 5, 2014, 2:57 PM), <http://www.sltrib.com/sltrib/politics/57636975-90/adoptive-bill-court-family.html.csp>.

53. *Wynn v. Superior Court*, 176 Cal. App. 4th 356, 355 (Cal. Ct. App. 2009).

54. *Id.* at 354.

55. *Id.*

56. *In re Adoption/Guardianship Nos. 11387 and 11388*, 731 A.2d 972, 984 (Md. 1999).

57. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 839 (1977).

58. *See, e.g., Procopio v. Johnson*, 994 F.2d 325 (7th Cir. 1993); *Kyees v. Cty. Dep’t of Pub. Welfare*, 600 F.2d 693 (7th Cir. 1979); *Drummond v. Fulton Cty. Dep’t of Family & Children’s Servs.*, 563 F.2d 1200 (5th Cir. 1977).

possessed by the legal father.<sup>59</sup> In that case, the Court confronted a claim of parental rights by a biological father, whose child was born to the wife of another man. While the plurality found that the biological father had no liberty interest and rejected his constitutional challenge to the statutory presumption of legitimacy, four members of the Court agreed that he had an interest in his relationship with his daughter.<sup>60</sup> Had the plurality recognized that interest, it would have been subordinate to the legal father's fundamental right.

The Constitution does not compel a state to respect a terminated parent's opportunity interest when the child has an adoptive parent or a legal custodian. Nor is the terminated parent entitled to notice and opportunity to be heard in proceedings to establish parental or custodial rights.<sup>61</sup> When a child is adopted, he or she becomes the legal child of the adoptive parent. "The effect of the adoption decree is to transfer to the adoptive parent all legal rights, duties, and consequences of the parental relationship; accordingly, the adoption decree transfers the right to custody of the child, the right to control the child's education, the duty of obedience owing by the child, and all other legal consequences and incidents of the natural relation in the same manner as if the child had been born of such adoptive parents in lawful wedlock."<sup>62</sup> A custody order grants "[t]he legal right to make major decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions."<sup>63</sup> When an adoption decree or custody order is in place, the parent's opportunity interest lies dormant and cannot be "re-grasped."

Similarly, the interest becomes dormant when the child is placed in a pre-adoptive home.<sup>64</sup> While courts have failed to find a liberty interest when a child is in a foster home, some courts have recognized an interest when parental rights have been terminated and there is an intention to adopt or create a permanent legal relationship. For example, in *Rodriguez v. McLoughlin*, the Plaintiff asserted that she had a constitutionally protected liberty interest in the integrity and stability of her pre-adoptive foster care relationship. Finding that an interest did exist, the court's decision relied on the fact that the Plaintiff had entered into an Adoptive Placement Agreement, *inter alia*. "Thus, unlike the foster parents in decisions subsequent to *OFFER* that have found that foster parents do not have a liberty interest in their relationships with their foster children, as a prospective adoptive parent who had entered into an Adoptive Placement Agreement, [Plaintiff] cannot be said to have expected her relationship with [the child] to end."<sup>65</sup>

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59. Michael H. v. Gerald D., 491 US 110, 118–31 (1989).

60. *Id.* at 136 (Brennan, J., dissenting).

61. *But see In re Adoption/Guardianship Nos. 11387 and 11388*, 731 A.2d 972, 984 (Md. 1999).

62. 2 AM. JUR. 2D *Adoption* § 170 (2009).

63. *See, e.g.*, 23 PA. CONS. STAT. § 5302 (2009) (repealed 2011).

64. This argument is supported by and consistent with current reinstatement statutes that require the court to find that the minor is not currently in placement likely to achieve permanency. *See, e.g.*, 705 ILL. COMP. STAT. 405 / 2-28 (2010); 705 ILL. COMP. STAT. 405 / 2-34 (2010).

65. *Rodriguez v. McLoughlin*, 49 F. Supp. 2d 186, 196 (S.D.N.Y. 1999).

When no actual interest exists, however, and there is no likelihood that one will be created<sup>66</sup> or if the adoption or custody arrangement is terminated, the state must provide a process by which the opportunity interest can be “re-grasped.” “The delay in adoption acts in some sense to permit a ‘renewed’ legal interest of natural parents in their children with respect to whom their parental rights have been terminated.”<sup>67</sup> Since 2005, 17 states have enacted reinstatement of parental rights statutes which, with some modifications, could satisfy this constitutional mandate.

## ***B. “Re-Grasping” the Opportunity Interest Through Reinstatement of Parental Rights***

### **1. Reinstatement Statutes**

In 2005, the move towards allowing terminated parents the opportunity to restore their parental rights began in California.<sup>68</sup> The law was enacted in response to a case in which the First District Court of Appeals implored the California Legislature to consider allowing the juvenile courts limited discretion to reinstate parental rights where the child would otherwise be left a legal orphan.<sup>69</sup> “To avoid such an unhappy consequence, legislation may be advisable authorizing judicial intervention under very limited circumstances following the termination of parental rights and prior to the completion of adoption.”<sup>70</sup> Two years later, Nevada passed a statute that allows a Nevada court to restore parental rights if a child is not likely to be adopted and if such reinstatement is in the child’s best interest.<sup>71</sup> Washington enacted a similar law, RCW 13.34.215, permitting a child who has not achieved permanency within three years after the termination of parental rights to petition to have his or her parents’ rights reinstated.<sup>72</sup>

Following the trend, the Louisiana Children’s Code was amended in 2008 to permit parental rights to be reinstated upon motion by the department or a child who is over the age of fifteen.<sup>73</sup> That following year, Oklahoma<sup>74</sup> and Illinois<sup>75</sup> modified their state statutes to provide a mechanism by which parental rights could be restored. New York enacted its law in 2010,<sup>76</sup> followed by

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66. A change in permanency goal from adoption to APPLA means that a right to the child will not be divested in any other person. See Section V(B).

67. *In re Adoption/Guardianship* Nos. 11387 and 11388, 731 A.2d 972, 983 (Md. 1999).

68. A.B. 519, 2005 Reg. Sess. (Cal. 2005) (as passed Oct. 7, 2005); CAL. WELF. & INST. CODE § 366.26(i)(3) (2015) (providing a method for reinstating parental rights over a child who has not been adopted).

69. *In re Jerred H.*, 121 Cal. App. 4th 793, 799 (Cal. Ct. App. 2004).

70. Susan Getman & Steve Christian, *Reinstating Parental Rights: Another Path to Permanency*, 26 AM. HUMANE ASS’N 1, 64 (2011) (citing *id.* at 799).

71. NEV. REV. STAT. ANN. §128.190(3)(a)–(b) (LexisNexis 2013).

72. WASH. REV. CODE § 13.34.215(1) (2011).

73. LA. CHILD. CODE ANN. art. 1051 (Supp. 2012).

74. OK. STAT. tit. 10A, § 1-4-909 (2014).

75. 705 ILL. COMP. STAT. § 405 / 2-34 (2013).

76. N.Y. FAM. CT. ACT §§ 635–37 (McKinney Supp. 2012).

Hawaii,<sup>77</sup> Alaska,<sup>78</sup> Maine,<sup>79</sup> North Carolina,<sup>80</sup> Virginia,<sup>81</sup> Delaware,<sup>82</sup> and Utah.<sup>83</sup> More recently, Minnesota enacted the Family Reunification Act of 2013, Georgia passed its 2013 Juvenile Justice Reform Legislation<sup>84</sup> and, in 2014, the governor of Colorado signed into law an act allowing for reinstatement of the parent-child relationship.<sup>85</sup> In 2015, acts concerning restoration of parental rights were introduced in the Connecticut and Iowa legislatures.<sup>86</sup>

Notwithstanding the trend towards post-termination reunification, some state legislatures have not yet passed laws despite having bills introduced.<sup>87</sup> Although reinstatement statutes were enacted to address issues related to legal orphans, these statutes implicitly recognize the continued relationship that terminated parents have with their children. While they are focused exclusively on the rights of the child,<sup>88</sup> parents' interests are also implicated when the parent-child legal relationship is restored. The restoration statutes as written do not provide an adequate means by which terminated parents can "re-grasp" their retained opportunity interest. With some modifications, however, these statutes could provide the necessary process.

## 2. Recommendations for Improving Reinstatement Statutes

The National Council of Juvenile and Family Court Judges (NCJFCJ), in its April 2013 Technical Assistance Bulletin, "Forever Families: Achieving Permanency for Legal Orphans," stated that "state laws should authorize reinstatement of parental rights in appropriate cases."<sup>89</sup> Despite NCJFCJ's support for these statutes, they are not perfect. In her article, *Parsing Parenthood*, Cynthia Godsoe argues that "the reinstatement statutes . . . reflect a somewhat desperate attempt by states to circumvent the harsh mandate of the ASFA timelines without sacrificing federal funding."<sup>90</sup> She further argues that although this policy trend at first appeared promising, implicit bias, both on a

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77. HAW. REV. STAT. § 571-63 (2006).

78. ALASKA STAT. § 47.10.089 (2010).

79. ME. REV. STAT. tit. 22, § 4059 (2011).

80. N.C. GEN. STAT. § 7B-1114 (2013).

81. VA. CODE ANN. § 16.1-283.2 (2013).

82. DEL. CODE ANN. tit. 13, § 1116 (2013).

83. UTAH CODE ANN. § 78A-6-1404 (LexisNexis 2013).

84. MINN. STAT. § 260C.329 (2013); GA. CODE ANN. § 15-11-323 (2014).

85. S.B. 62, 40th Gen. Assemb., 2d Reg. Sess. (Colo. 2014) (as passed March 27, 2014).

86. H.B. 6562, Gen. Assemb., Jan. Sess. (Conn. 2015); H.B. 333, 86th Gen. Ass., 1st Sess. (Iowa 2015).

87. See e.g., S.B. 994, 97th Leg., 2014 Reg. Sess. (Mich. 2013) (not signed); S. 65, 187th Gen. Ct., 2011-2012 Reg. Sess. (Mass. 2011) (not signed).

88. See Getman & Christian, *supra* note 70, at 64 (noting that the impetus for the first reinstatement statute was "the plight of youth in foster care who had been legally freed for adoption but who were likely to emancipate without achieving legal permanency.").

89. Hon. Sharon McCully, *Forever Families: Improving Outcomes by Achieving Permanency for Legal Orphans*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES TECHNICAL ASSISTANCE BULLETIN, Apr. 2013, at 1, 19, available at [http://www.ncjfcj.org/sites/default/files/LOTAB\\_3\\_25\\_13\\_newcover.pdf](http://www.ncjfcj.org/sites/default/files/LOTAB_3_25_13_newcover.pdf).

90. Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 144 n.190 (2013).

systemic level and through individual workers, prevents reinstatement laws from being “crafted or implemented to address the widespread economic and social factors underlying child maltreatment or to expand the notion of permanency beyond adoption.”<sup>91</sup> This bias is both evident in the criteria set forth in the statutes for restoring parental rights and the lack of policies that support the laws.

While not all of the reinstatement statutes are identical, they contain common features that undermine their intended purpose and serve as barriers to terminated parents seeking to restore their parental rights. First, the majority of the statutes exclude the parent by only allowing the child or the child placing agency to petition the court to restore parental rights; furthermore, in many states neither the child nor the parent is appointed independent counsel. Second, most statutes require a certain amount of time to elapse between the termination of parental rights and reinstatement. Alternatively or in concert, the statutes require that the child must have reached a specific age before a petition for reinstatement can be filed. Third, statutes may not apply to children who have experienced a disruption in their permanency and are re-entering the foster care system. Additionally, the statutes lack the necessary support to make them effective, including a requirement for post-termination visitation and the establishment of registries to ensure that biological parents can be located and notified.

**a. Terminated Parents are Generally Excluded from the Process and Not Provided Counsel**

Early reinstatement statutes were initially opposed by the adoption community. In California, for example, adoption proponents “argued that families would be reluctant to adopt children from foster care knowing that a former parent might seek to interfere with a pending adoption by means of the reinstatement process.”<sup>92</sup> As a result, very few state statutes permit the biological parent to petition the court for the reinstatement of parental rights, grant the parent party status or provide for the appointment of legal representation for the parent.<sup>93</sup> In most jurisdictions, terminated parents are, therefore, systematically excluded from the process. “This exclusion not only reflects a negative, even biased, view of the parents in these cases, but is also impractical since the parents’ exclusion makes it more difficult for courts and child welfare agencies to adequately assess the parents’ capabilities and the best interests of the children.”<sup>94</sup>

Under the current structure, a terminated parents’ right to participate in the hearing determining whether the parent-child relationship should be restored is identical to that of unrelated caregivers and other third parties in other hearings

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91. *Id.* at 144.

92. Getman & Christian, *supra* note 70, at 65.

93. *See, e.g.*, ALASKA STAT. § 47.10.089 (2010) (permitting a parent who voluntarily relinquished parental rights to request a review hearing to reinstate those rights); NEV. REV. STAT. ANN. §128.100(2) (LexisNexis 2013) (granting the court discretion to appoint an attorney for indigent parents in restoration proceedings); and N.Y. FAM. CT. ACT §§ 636(d) (McKinney Supp. 2012) (providing attorney for the parent in proceeding to restore parental rights).

94. Godsoe, *supra* note 90, at 153.

affecting the child. The Adoption and Safe Families Act provides that notice and the opportunity to be heard be provided to the foster parents of a child and any pre-adoptive parent or relative providing care for the child prior to any review or hearing held with respect to the child.<sup>95</sup> This right, however, does not convey party status.<sup>96</sup> Similarly, in Georgia, for example, terminated parents have a right to be heard but are not parties and the hearing can be conducted in their absence.<sup>97</sup> States must recognize that the interests are not equal<sup>98</sup> and grant party status to parents once a petition has been filed. Terminated parents must be afforded more procedural protections than third parties and should be appointed counsel to assist them in “re-grasping” that opportunity interest.

The Minnesota Family Reunification Act of 2013 specifically states that “the parent does not have the right to appointed counsel as part of the reunification proceeding.” In *Lassiter v. Department of Social Services*, the Supreme Court found no violation of the right to due process where an indigent parent was not appointed an attorney in a termination of parental rights proceeding. Despite this ruling, at least 48 states, recognizing the fundamental interest at stake, have created a statutory right to counsel.<sup>99</sup> That statutory right should extend to all proceedings affecting a parent’s parental rights, including hearings on whether those rights should be reinstated.<sup>100</sup>

#### **b. Waiting Periods Are Unnecessary and Lead to Foster Care Drift**

Many state statutes have a requisite number of years which must elapse before a petition can be filed;<sup>101</sup> others require the child to have attained a certain age;<sup>102</sup> still others require both conditions to be met.<sup>103</sup> This required waiting period is unnecessarily harmful to children. Petitions for reinstatement cannot be filed if a child is living in a pre-adoptive home<sup>104</sup> and the waiting periods bear

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95. Adoption and Safe Families Act (ASFA), Pub. L. No. 105-89, § 104(3)(G), 111 Stat. 2115, 2119 (1997).

96. *Id.*

97. GA. CODE ANN. § 15-11-323 (2015).

98. *But see* Cassandra S. Haury, Note, *The Changing American Family: A Reevaluation of the Rights of Foster Parents When Biological Parental Rights Have Been Terminated*, 35 GA. L. REV. 313, 324 (2000).

99. VIVEK SANKARAN, A NATIONAL SURVEY ON A PARENT’S RIGHT TO COUNSEL IN TERMINATION OF PARENTAL RIGHTS AND DEPENDENCY CASES (2010), <http://youthrightsjustice.org/Documents/SurveyParentRighttoCounsel.pdf>.

100. *See In re Adoption/Guardianship* Nos. 11387 and 11388, 731 A.2d 972, 984 (Md. 1999) (extending right to counsel to terminated parent participating in post-termination hearing).

101. Hawaii requires 1 year; New York requires 2 years; Illinois, Oklahoma and Washington require 3 years to pass between the issuance of the order terminating parental rights and a petition for reinstatement.

102. *See* COMMONWEALTH OF VA. COMMISSION ON YOUTH, RESTORATION OF PARENTAL RIGHTS, REPORT DOCUMENT 12 at 7–8 (2013), *available at* <http://vcoy.virginia.gov/pdf/Restoration%20of%20Parental%20RightsFINAL0114.pdf> (providing a state-by-state comparison of restoration laws).

103. *Id.* at 22.

104. *Id.* at 14.

no relationship to the median age of a foster child at adoption, 5.1 years old,<sup>105</sup> or the median time between termination and adoption, 8.6 months.<sup>106</sup> Furthermore, requiring a parent and child to wait years before a petition can be filed can lead to “foster care drift.”<sup>107</sup>

In 1959, Maas and Engler published *Children in Need of Parents*, a landmarks study on the plight of child who “drifted aimlessly in foster care without a case plan for their permanent care.”<sup>108</sup> The study found that “staying in care beyond a year and a half greatly increases a child’s chances of growing up in care.”<sup>109</sup> Although research methods have improved in the intervening decades, more recent studies have reached the same conclusion: as children get older, their chances of being adopted, or their “adoptability,”<sup>110</sup> diminish.<sup>111</sup>

Youth whose parents’ rights have been terminated are particular vulnerable to foster care drift. A recent study found that the likelihood of adoption is reduced by 80% for each year that the youth spends in foster care after parental rights are terminated.<sup>112</sup> When a child is not adopted by the family with whom he lived at the time of the termination proceeding, it is likely that he will move around from home to home.<sup>113</sup> It is also likely that the youth will experience a change in permanency goal – from adoption to a goal that does not require parental rights to be terminated.<sup>114</sup> As the Mass and Engler study provided the foundation for the pre-termination timeframes codified in the federal legislation,<sup>115</sup> more recent studies should prompt states to eliminate the waiting

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105. AFCARS REPORT #21, *supra* note 6, at 5. The mean age is 6.3 years old.

106. *Id.* The mean time elapsed from termination of parental rights to adoption is 12.3 months.

107. Foster care drift is the term used to describe the situation where foster children would remain out of the home, in the custody of the state, moving from placement to placement without any real plan to move them into a permanent situation.

108. NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING, NO. 19: RISK OF LONG-TERM FOSTER CARE PLACEMENT AMONG CHILDREN INVOLVED WITH THE CHILD WELFARE SYSTEM (2013), available at [https://www.acf.hhs.gov/sites/default/files/opre/nscaw\\_ltfc\\_research\\_brief\\_19\\_revised\\_for\\_acf\\_9\\_12\\_13\\_edit\\_clean.pdf](https://www.acf.hhs.gov/sites/default/files/opre/nscaw_ltfc_research_brief_19_revised_for_acf_9_12_13_edit_clean.pdf) (citing Henry S. Maas & Richard E. Engler Jr., *Children in need of parents* (COLUMBIA UNIVERSITY PRESS 1959)).

109. *Id.*

110. *See, e.g., In re R.C.*, 169 Cal. App. 4th 486, 492 (2008) (stating that determining adoptability, the focus is on whether a child’s age, physical condition and emotional state will create difficulty in locating a family willing to adopt).

111. Cushing & Greenblatt, *supra* note 21, at 695. This phenomenon is known as “negative duration dependence” and it means that children are progressively less likely to leave care as their time in care increases.

112. *Id.* at 700.

113. *Id.* at 698 (finding that only 30% of children who were not adopted by family that they lived with prior to termination remained in that home).

114. *Id.* at 700. In that study, permanency goal changes were experienced by 29% of the children who had not been adopted. 8% had a goal change to independent living, 15% had a goal change to long-term foster care, 1% had a goal change to subsidized guardianship, less than 1% had a goal change to reunification and 2% had a goal change to “other” with indication that transfer to a long-term care facility was planned.

115. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.).

periods in their reinstatement statutes and/or allow for more discretion, especially in cases where it is clear that adoption is no longer the goal.<sup>116</sup>

In *CC v. Commissioner of Social Services of Schenectady County*, a biological mother filed motions to restore her parental rights three years after they had been terminated.<sup>117</sup> Without reaching the merits or considering the children's best interests, the family court dismissed the petitions on the ground that the children were not "[14] years of age or older." There, the lower court failed to exercise any discretion and the appellate court affirmed the strict interpretation of the restoration statute. Such flexibility is important in cases where it is clear that the child will not achieve permanency within the waiting period. In *In re Ronald V.*, for example, the birth mother's rights were terminated in anticipation of an adoption by the mother's former boyfriend.<sup>118</sup> A year after the termination order was entered and before the adoption was completed, the former boyfriend died. Similarly, in *In re Jerred H.*, parental rights were terminated so that the child could be adopted by his stepfather.<sup>119</sup> Within eight months of the termination order, the child had been removed from his pre-adoptive home. In such cases, statutes must permit parents to begin efforts to restore their parental rights prior to the expiration of an arbitrary time period and before a child reaches a specified age.

A bill before the Utah legislature would eliminate the age requirement for reinstating parental rights. Currently, rights can only be restored for children who are 12 years of age or older. The new law, once passed, would permit an authorized representative acting on behalf of a child of any age to file a petition to restore parental rights if certain conditions are met. While the new law would retain the waiting period of 24 months since the termination order, eliminating the age requirement allows for more discretion and diminishes foster care drift.

### **c. Reinstatement Statutes Do Not Apply to All Terminated Parents**

Studies show that between 1% and 5% of finalized adoptions dissolve<sup>120</sup> and legal guardianships established following an adjudication of child abuse or neglect have a permanency disruption rate of 29%.<sup>121</sup> As a result, some youth who exit foster care to "permanency" will return to state care. Despite this fact, only two reinstatement statutes explicitly addresses this phenomenon. An Illinois law specifically states that minors returning to state care after the dissolution of a private guardianship or adoption are eligible to have their

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116. Some states allow the waiting period to be waived if the child placing agency stipulates that the adoption is no longer the permanent plan for the youth. See, e.g., CAL. WELF. & INST. CODE § 366.26(i)(3) (2015).

117. *In re Shelia CC. v. Comm'r of Soc. Servs. of Schenectady Cnty.* 98 A.D.3d 1200 (N.Y. App. Div. 2012).

118. *In re Ronald V.*, 17 Cal. Rptr. 2d 334, 335 (Cal. Ct. App. 1993).

119. *In re Jerred H.*, 17 Cal. Rptr. 3d 481, 483 (Cal. Ct. App. 2004).

120. CHILDREN'S BUREAU, ADOPTION DISRUPTION AND DISSOLUTION 6 (2012), available at [https://www.childwelfare.gov/pubs/s\\_disrup.pdf](https://www.childwelfare.gov/pubs/s_disrup.pdf).

121. James Henry, *Permanency Outcomes in Legal Guardianships of Abused/Neglected Children*, 80 FAMILIES SOC'Y 561 (1999).

parents' rights reinstated.<sup>122</sup> Similarly, a Utah statute permits parental rights to be reinstated when a child who was previously adopted following a termination of a parent-child legal relationship returns to foster care after a dissolved adoption.<sup>123</sup>

While it is unclear how other states will interpret their statute as it relates to youth returning to care after a disruption in their permanency, at least one case suggests that the laws will be deemed not to apply. In *In re the Interest of J.R.*, the Washington court held that the reinstatement statute did not apply to cases where a child returned to foster care after achieving permanency through legal guardianship.<sup>124</sup> In that case, the guardianship was terminated upon the request of the guardians ten years after it was ordered. The child, then 15 years old, petitioned for reinstatement of his mother's parental rights under RCW 13.34.215. At the threshold hearing, the State argued that the child did not meet the statutory criteria for filing a reinstatement petition. The State argued that the child had, in fact, achieved permanency within three years of the termination order.<sup>125</sup> The court recognized that reinstatement might be in the child's best interest but denied the petition.<sup>126</sup>

Once these youth return to care, they should be permitted to avail themselves of the same legal options available to those youth who remained in foster care following the termination of their parents' rights. The current interpretation creates a class of biological parents who, although similarly situated to those whose children never achieved permanency, are unable to benefit from reinstatement statutes. As such, these terminated parents have no legal mechanism to "re-grasp" their opportunity interest, which revived when the adoption or guardianship was terminated.<sup>127</sup>

In addition to the issues with the statutes themselves, implementation of the laws has been hampered by policies and laws that do not support a terminated parent's efforts to "re-grasp" her retained opportunity interest. Specifically, reinstatement statutes would be more effective if post-termination visitation was required and if states established birth parent registries.

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122. 705 ILL. COMP. STAT. § 405/2-34(b)(i)-(iii) (1987).

123. UTAH CODE ANN. § 78A-6-1403(1) (LexisNexis 2013).

124. *In re J.R.*, 230 P.3d 1087, 1093 (Wash. Ct. App. 2010) (holding that its reinstatement law does apply to a youth whose adoption dissolves); *In re T.H.*, 438 P.3d 1089 (Okla. 2015) (summarizing the child filed an application to reinstate her biological mother's parental rights twelve years after being adopted. The child's adoptive parents had relinquished their parental rights and the child wished to restore the legal relationship with her mother. The Court found that the phrase "has not achieved his or her permanency plan" includes "situations where permanency through adoption or other proceedings has failed.")

125. *In re J.R.*, 230 P.3d at 1091 (arguing that "permanent" does not mean "forever" but simply means "intended to last").

126. WASH. REV. CODE § 13.34.215 (2015). The Washington Legislature subsequently amended its statute to include children whose permanent guardianship had failed.

127. See Section IV(A).

#### d. Post-Termination Visitation is Necessary

The traditional notion that parents become legal strangers to their children once parental rights have been terminated justifies prohibiting post-termination contact.<sup>128</sup> The severance of legal and social ties between the terminated parent and the child is believed to support a child's need for stability, predictability and permanence.<sup>129</sup> Studies have shown, however, that maintaining emotional connections with birth family is important to many foster youth, especially those who age out of care.<sup>130</sup> "Post-termination contact allows children to retain their social relationships with terminated birth parents when birth parents are unable to care for their children but still play a positive role in their children's lives."<sup>131</sup> Further, for parents and children wishing to reunify post-termination, parent-child contact is especially important. Such contacts should include indirect communication as well as direct contact and visitation.<sup>132</sup>

Although some courts have ordered post-termination visitation when in the child's best interests,<sup>133</sup> in most cases, courts have denied requests for continued contact after parental rights have been terminated<sup>134</sup> or the post-termination

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128. See, e.g., *C.R.H. v. C.H.*, 620 N.W.2d 175, 178–79 (S.D. 2000) (holding that governing statutes do not vest any discretionary authority upon a court entering a decree of parental termination to provide visitation rights or other privileges to terminated parent); *In re Jacob E.*, 18 Cal. Rptr. 3d 15 (Cal. Ct. App. 2004) (voiding trial court order granting birth mother post-termination visitation).

129. In an effort to achieve permanency for foster care youth, ASFA establishes strict timelines to initiate proceedings to terminate parental rights. 42 U.S.C. § 675(4)(E) (2000).

130. See Mark E. Courtney, *The Difficult Transition to Adulthood for Foster Youth in the Us: Implications for the State as Corporate Parent*, 23 SOC. POL'Y REP. 3, 4 (2009) (finding that almost all of "aged out" foster youth in their sample maintained at least some family ties). Ninety-four percent of those studied reported feeling somewhat or very close to at least one biological family member. *Id.* Eighty-three percent reported having contact with one or more biological family members at least once a week. *Id.*; See also Mary E. Collins, Ruth Paris & Rolanda L. Ward, *The Permanence of Family Ties: Implications for Youth Transitioning From Foster Care*, 78 AM. J. ORTHOPSYCHIATRY 54 (2008) (providing an overview of recent study findings of former foster youth living with family after care); Katharine Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 905 (1984).

131. Alexis T. Williams, Note, *Rethinking Social Severance: Post-Termination Contact Between Birth Parents and Children*, 41 CONN. L. REV. 609, 609 (2008).

132. See CHILDREN'S BUREAU, FAMILY REUNIFICATION: WHAT EVIDENCE SHOWS (2011) available at [https://www.childwelfare.gov/pubs/issue\\_briefs/family\\_reunification/](https://www.childwelfare.gov/pubs/issue_briefs/family_reunification/) (supporting the significance of parent-child visitation as a predictor of family reunification).

133. See, e.g., *In re Elise K.*, 654 P.2d 253 (Cal. 1982) (recognizing that it would have been detrimental to the child to completely sever her ties with her mother and ordered bimonthly visits pending a final decree of adoption) and *In re Kahlil S.*, 35 A.D.3d 1164, 1165 (2006) (holding that the Family Court has discretion to order post-termination contact with a mentally ill or mentally retarded biological parent).

134. In most states, once parental rights are terminated, the parent is no longer a party to the proceeding and has no right to appear or move the court for visitation. See, e.g., *Amber R. v. Superior Court of Orange County*, 43 Cal. Rptr. 3d 297, 298–99 (Cal. Ct. App. 2006) (holding that birth mother lacked standing to seek visitation after her rights were terminated). In other cases, the parent does not present sufficient evidence to support the granting of post-termination visitation. See, e.g., *In re Alyssa W.*, 619 S.E.2d 220, 224–25 (W. Va. 2005) (denying post-termination

visitation order has been vacated on appeal.<sup>135</sup> This is true even in states with reinstatement statutes, such as New York. Two years after New York enacted its reinstatement statute, the Court of Appeals of New York affirmed a lower court's finding that "the request for post-termination visitation was properly denied as unavailable in a contested termination proceeding."<sup>136</sup> The New York Court of Appeals found no statutory support for post-termination contact outside the context of a voluntary relinquishment of parental rights.<sup>137</sup> The prohibition against post-termination visitation harms foster care youth, undermines reinstatement statutes and affects a terminated parent's ability to "re-grasp" her retained opportunity interest.

The Virginia reinstatement statute, for example, requires that the court, during the hearing on the motion, find, based upon clear and convincing evidence, that the parent is willing and able to have a positive, continuous relationship with the child. In such proceedings, the court determines whether the parent has formed or has the ability to form the requisite relationship with the child.<sup>138</sup> Such a finding would be purely speculative unless post-termination visitation is permitted or mandated prior to the filing of the petition.

Without clear direction from the state legislature or the court, the decision whether to allow contact is left within the discretion of the child placing agency. "[A]necdotal evidence suggests that many case workers and others working with families in the child welfare system are firmly entrenched in the belief that 'once a bad parent, always a bad parent.'<sup>139</sup> "The attitudes of . . . child welfare workers toward birth parents can affect the engagement and involvement of parents; when engagement affects birth parent-child visitation, outcomes for children are affected as well."<sup>140</sup> If their discretion is exercised improperly, foster youth may be foreclosed from reuniting with their terminated parent, even when the parent, if given the chance, could re-establish her parental right.

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visitation where there was no close emotional bond and where visits would have interfered with child's permanent placement); *A.W. v. Dep't of Child. & Families*, 969 So. 2d 496, 505 (Fla. Dist. Ct. App. 2007) (upholding trial court order prohibiting mother from having post-termination visitation or contact with child where no parent-child relationship existed).

135. See, e.g., *C.R.H. v. C.H.*, 620 N.W.2d 175, 178–79 (2000) (holding that governing statutes do not vest any discretionary authority upon a court entering a decree of parental termination to provide visitation rights or other privileges to terminated parent); *In re Jacob E.*, 18 Cal. Rptr. 3d 15 (2004) (voiding trial court order granting birth mother post-termination visitation).

136. *In re Hailey ZZ*, 19 N.Y.3d 422, 429 (2012).

137. *Id.* (noting in a dissent that "As to the question whether a hearing court has the authority to order contact between a parent and his or her child, after parental rights have been terminated . . . , I believe the hearing court has the authority to do so— not because the parent retains rights over the child, but in the exercise of proper discretion by the court.").

138. See *Lara S. v. Dep't of Health & Soc. Servs.*, 209 P.3d 120 (Alaska 2009) (denying a terminated mother's motion because her affidavit failed to establish: (1) that it was in the children's best interests that her parental rights be reinstated, (2) that she had successfully addressed her substance abuse problem, and (3) that she was capable of caring for her children).

139. Godsoe, *supra* note 90, at 39.

140. Tyler Corwin, *Strategies to Increase Birth Parent Engagement, Partnership, and Leadership in the Child Welfare System: A Review*, CASEY FOUND. (July 2012), <http://www.casey.org/media/BirthParentEngagement.pdf>.

Furthermore, some states have erected barriers that prevent terminated from forming such a relationship, either through statute or case law. In *In the Interest of Hughes*, the birth mother argued that a Texas statute that prohibited “a former parent whose parent-child relationship with the child has been terminated by court decree” from filing a petition to adoption violated equal protection under both the state and federal constitutions.<sup>141</sup> Since biological parents whose parental rights have been terminated are not a suspect class, the court applied the “rational basis test” to determine the legality of the statute.<sup>142</sup> The court found that legitimate state interests relating to the child and the public policy favoring the finality of judgments are both served by the statute.<sup>143</sup> Some courts have held that a parent whose rights have been terminated may not relitigate that issue through a petition for adoption, or through any other legal proceeding.<sup>144</sup> In these jurisdictions, amending the ASFA to include post-termination reunification would create the necessary structure to allow terminated parents to “re-grasp” their opportunity interest.<sup>145</sup>

**e. Birth Parent Registries Must Be Established**

Once the permanency goal changes from reunification, the child placing agency is no longer required to work with the parent. While visitation may continue, as discussed above, it is usually discontinued after parental rights are terminated. Several states have established adoption reunion registries, which assist adoptees and birth parents who want to reconnect.<sup>146</sup> Few states maintain registries that can be utilized by child placing agencies to assist legal orphans and biological parents in locating and reconnecting with one another.<sup>147</sup>

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141. *Ex rel. Hughes*, 770 S.W.2d 635, 636–37 (1989).

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

143. *Hughes*, 770 S.W.2d at 637.

144. *In re G.C.B.*, 870 P.2d 1037 (Wash. Ct. App. 1994) (stating that married couple Megan and Wade Lucas sought to adopt Mrs. Lucas’ biological child nearly a year after she voluntarily relinquished her parental rights. The Court of Appeals of Washington, Division 1, rejected the Lucas’ argument that Mrs. Lucas possessed the same rights as any other person to petition to adopt the child and held that “a parent whose rights have been terminated may not relitigate that issue through a petition for adoption, or through any other legal proceeding.”); *In the Interest of R.N.R.R.*, 2007 WL 2505629 (2007) (affirming the trial court’s dismissal of a biological father’s adoption petition).

145. See Section IV.

146. See DCF Press Office, *Florida Department of Children and Families, Recognizing that Adoption is a Lifelong Journey, Florida’s Adoption Reunion Registry Helps Adoptees, Birth Parents Reunite*, FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES (Nov. 12, 2014), <http://www.myflfamilies.com/press-release/recognizing-adoption-lifelong-journey-florida%E2%80%99s-adoption-reunion-registry-helps>.

147. Despite not having formal mechanisms for locating biological parents, reinstatement statutes require that terminated parents receive notice and allow for the dismissal of the petition if

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The federal government has acknowledged the need to engage in intensive family finding efforts that would benefit legal orphans and other youth in foster care. In 2008, Congress enacted the Fostering Connections to Success and Increasing Act. The Act authorized grants to State, local, or Tribal child welfare agencies and private nonprofit organizations for the purpose of helping children who are in foster care reconnect with family members through kinship navigator programs and efforts to find biological parents and re-establish relationships.<sup>148</sup> The Act also expanded the Office of Child Support Enforcement's authority to share information with State child welfare agencies for child welfare purposes.<sup>149</sup> Although the purpose of this expansion is to facilitate "more informed and timely decisions about permanency," these "locate only" requests can only be made for "an individual who has or may have parental rights."<sup>150</sup> While terminated parents retain an opportunity interest, as discussed above, it is not a right. Thus, terminated parents are not included in search requests and child placing agencies cannot take advantage of the parent locator databases to find them.

The District of Columbia passed the Adoption Reform Amendment Act of 2009, which establishes a Voluntary Foster Care Registry.<sup>151</sup> Current and former foster care youth (who are at least 18 years of age) and their immediate birth family members are eligible for enrollment. "Even if people were in the system a long time ago or only for a short time, this may be a way to get back in touch with family."<sup>152</sup> The Voluntary Foster Care Registry does not search for relatives; however, similar registries could be used to assist states in locating terminated parents if the child is not adopted.<sup>153</sup> Once located, these parents could begin the process of re-establishing their relationship and converting their retained opportunity interest into a parental right.

In 2015, a bill was introduced in the Utah legislature to amend provisions of its Restoration of Parental Rights Act.<sup>154</sup> That bill proposes a process by which a terminated parent who has remedied the circumstances that resulted in

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the parent cannot be located. *See, e.g.*, OKLA. STAT. tit. 10A, § 1-4-909(F) (2014), LA. CHILD. CODE ANN. art. 1051(D) (Supp. 2012).

148. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949, 3959 (2008). Fostering Connections establishes a new competitive grant program, under Title IV-B, Subpart 1 of the Social Security Act named Family Connection Grants. Under this program, public child welfare agencies (state, local or tribal), and non-profit private organizations may seek federal funding to help children connect or reconnect with birth parents or other extended kin.

149. *Id.*

150. CHILDREN'S BUREAU, REQUESTS FOR LOCATE SERVICES, REFERRALS, AND ELECTRONIC INTERFACE BETWEEN CHILD WELFARE AND CHILD SUPPORT INFORMATION SYSTEMS (2012), available at <http://www.nrcpfc.org/downloads/wu/ACYF-CB-IM-12-06.pdf>.

151. D.C. CODE § 4-1303.08 (2010).

152. *New Database Helps Reconnect Families Separated by Child Welfare*, CHILD AND FAMILY SERVICES AGENCY (May 13, 2013), <http://cfsa.dc.gov/release/new-database-helps-reconnect-families-separated-child-welfare>.

153. In addition, child welfare agencies should develop policies encouraging the use of social media to locate and contact birth parents.

154. H.B. 334, 2015 Gen. Sess. (Utah 2015).

the termination to notify the child-placing agency of her desire to have parental rights reinstated. At which time that reinstatement becomes a viable option, the “former parent’s request . . . shall be fully and fairly considered . . . for appropriate submittal to the court.”<sup>155</sup> While not establishing a formal registry, the proposed changes to the current law allows parents to register their interest in post-termination reunification.

**f. Judicial Training is Necessary**

In addition to the amendments discussed below, judicial training is necessary to prevent the possibility that reinstatement statutes might serve to increase, rather than decrease, the number of terminations granted each year. In *In re Deandre D.*, the Appellate Court of Illinois failed to reach the issue of whether a court could give consideration to the possibility that parental rights might be reinstated in the future when determining whether termination of parental rights was in a child’s best interest.<sup>156</sup> Without definite guidance, there is the possibility that judges, when faced with difficult decisions, will view the reinstatement statutes as a “safety net” and err on the side of terminating parental rights.

Some states require the court to find, by clear and convincing evidence, that the child is adoptable prior to terminating parental rights.<sup>157</sup> Generally, making such a finding makes it less likely that a child will remain a legal orphan for a time period longer than necessary to secure a stable and permanent home. As such, in states like California, youth should have protection on both sides of the termination process. However, the presence of the reinstatement statute has been noted in recent cases where the adoptability finding was challenged. “The concern about ‘legal orphaning’ of children . . . is outmoded, however, in that the statute was amended in 2005 . . . . Thus, under the current statute, there is no danger of any child becoming a legal orphan.”<sup>158</sup> This is interpretation of the statute and weakening the requirement fails to take into consideration the fact that the statutes are rarely used. Further, it does not take into account the problems with the current reinstatement statutes.

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155. *Id.*

156. *In re Deandre D.*, 940 N.E.2d 246 (Ill. App. Ct. 1<sup>st</sup> Dist. 2010).

157. A child’s adoptability relates to whether his or her age, physical condition, and emotional state make it difficult to find a person willing to adopt him or her. *See, e.g. In re: R.C.*, 86 Cal. Rptr. 3d 776, 780–81 (stating that determining adoptability, the focus is on whether a child’s age, physical condition and emotional state will create difficulty in locating a family willing to adopt.)

158. *In re S.O.*, 2010 WL 570491 (Cal. Ct. App., Feb. 18, 2010) (No. E048744). Even without reinstatement statutes, some judges have little concern with the possibility that children whose parental rights are terminated will become legal orphans. In a 2009 study of 20 judges representing 18 different states, 55% of judges reported not being concerned. Of those judges, some “reported being less concerned because the main reasons why children whose parental rights have been terminated are not subsequently adopted are out their control.” RAQUEL ELLIS ET AL., THE TIMING OF TERMINATION OF PARENTAL RIGHTS: A BALANCING ACT FOR CHILDREN’S BEST INTERESTS, CHILD TRENDS RESEARCH BRIEF (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).

### g. All States Must Enact Reinstatement Statutes

Although reinstating parental rights may be concerning to some, “states are beginning to consider that the illusive concept of legal risk or fear . . . should not be allowed to justify overlooking this important avenue in preventing legal orphanage.”<sup>159</sup> Despite this, several states have failed to enact reinstatement statutes despite having bills introduced.<sup>160</sup> Still others have not made efforts to enact laws that would permit terminated parents to be considered as a placement resource for their biological children.

Some states, such as Ohio, New Jersey and Florida have recognized a need to address the legal problem but have not passed legislation permitting parental rights to be restored. In 2011 these states were selected to participate in a legal orphans project sponsored by the National Council of Juvenile and Family Court Judges (NCJFCJ). The project will have “a strong focus on achieving permanency for legal orphans through vigilant judicial oversight, adoption, guardianship, kinship placement, and building strong skills for transition to adulthood.”<sup>161</sup> Each participant state must identify the number of children who are 12 and older with termination of parental rights regardless of whether their plan is adoption and who have been in foster care for at least one year, produce a written report about the problem, propose solutions, and start a national dialogue among child welfare professionals and the judiciary, and build a national curriculum around permanency counseling for children who identify as not interested in being adopted.<sup>162</sup> These states, and others that are similarly situated, must recognize that terminated parents are constitutionally entitled to an established process to “re-grasp” their opportunity interest.

As that entitlement is based on the Constitution, the federal government should ensure that all states have a legal mechanism in place. Although issues related to family law and child welfare are traditionally left to the states, Congress has enacted laws regulating family relationships related to children. “Congress has enacted an extensive legislative program in family law since 1974, based on its spending and commerce powers under Article I, its power under the Full Faith and Credit Clause in Article IV, and its enforcement power

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159. Debbie F. Freitas, et al., *From Foster Drift to Legal Orphans: The Need for Statutes That Reinstatement Terminated Parental Rights*, 28 AM. J. FAM. L. 88 (2014).

160. In 2010, S.B. 1587 was introduced in Michigan. S.B. 1587, 95th Leg., Reg. Sess. (2010). The reinstatement bill did not pass. A similar bill, S.B. 994, was introduced in 2014. S.B. 994, 97th Leg., Reg. Sess. (2014). In 2011, an act relative to the reinstatement of parental rights was introduced in the Senate and House of Representatives of the Commonwealth of Massachusetts. The bill was referred to Senate Ways and Means Committee, where no action was taken. S.B. 65, 187th Gen. Ct., 2011-2012 Reg. Sess. (Mass. 2011) (not signed).

161. Sharon McCully, *Legal Orphans Permanent Families: Improving Outcomes by Achieving Permanency for Legal Orphans*, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES (Dec. 13, 2012), [http://www.ncjfcj.org/sites/default/files/LEGAL%20ORPHANS%20Webinar%20PP\\_Final.pdf](http://www.ncjfcj.org/sites/default/files/LEGAL%20ORPHANS%20Webinar%20PP_Final.pdf).

162. Sharon McCully and Elizabeth Whitney Barnes, *Forever Families: Improving Outcomes by Achieving Permanency for Legal Orphans*, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES 19 (April 4, 2013), <http://www.ncjfcj.org/resource-library/publications/forever-families-improving-outcomes-achieving-permanency-legal-orphans>.

under Section 5 of the Fourteenth Amendment.”<sup>163</sup> Such laws include the Indian Child Welfare Act of 1978, the Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1997.

The federal Adoption and Safe Families Act (ASFA) should be amended to include post-termination reunification as a permanency goal. A new goal will provide a federally-mandated process by which terminated parents can actively pursue reunification. This amendment would be consistent with the trend towards post-termination reunification and respect the interests of terminated parents. While federal law cannot control state child welfare programs, funding incentive and penalties contained within the ASFA would encourage compliance and help ensure that terminated parents are provided an ability to “re-grasp” their retained opportunity interest.

## V. THE ADOPTION AND SAFE FAMILIES ACT AND POST-TERMINATION REUNIFICATION

### A. Overview of the ASFA and Permanency Goals

The Adoption and Safe Families Act (ASFA) was signed into law by President Bill Clinton on November 19, 1997.<sup>164</sup> The ASFA establishes three national goals for children in foster care: safety, permanency, and well-being.<sup>165</sup> Five principles underlie the ASFA and apply to professionals working with families through public and private agencies as well as state courts. These principles are: (1) Safety is the paramount concern that must guide all child welfare services; (2) Foster care is temporary; (3) Permanency planning efforts should begin as soon as the child enters care; (4) The child welfare system must focus on results and accountability; and (5) Innovative approaches are needed to achieve the goals of safety, permanency, and well-being.<sup>166</sup>

The ASFA’s primary goal is to expedite permanency for children in out-of-home care by setting specific timeframes in which the state must act on a child’s permanency plan. It established five permissible permanency goals: return to parent, adoption, legal guardianship, permanent placement with a fit and willing relative, and “another planned permanent living arrangement” (APPLA).<sup>167</sup> The

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163. Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 Cornell J.L. & Pub. Pol’y 267 (2009).

164. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

165. KASIA O. MURRAY & SARAH GESIRIECH, A BRIEF LEGISLATIVE HISTORY OF THE CHILD WELFARE SYSTEM (2004), available at [http://www.pewtrusts.org/~media/legacy/uploaded\\_files/wwwpewtrustsorg/reports/foster\\_care\\_reform/LegislativeHistory2004pdf](http://www.pewtrusts.org/~media/legacy/uploaded_files/wwwpewtrustsorg/reports/foster_care_reform/LegislativeHistory2004pdf) (last visited Oct. 11, 2015).

166. Mickey J. W. Smith, *ASFA and Substance Abuse: Understanding the Issues Impacting Two Systems of Care*, NAT’L ASS’N OF SOC. WORKERS (Oct. 2003), available at <http://www.naswdc.org/practice/children/cws1003.pdf>.

167. AFCARS REPORT #21, *supra* note 6, at 1. On September 30, 2012, there were an estimated 397,122 children in foster care in the United States. More than half (53%) had a permanency goal of reunification with parents or principal caretaker; 24% had a goal of adoption; 5% had a goal of long-term foster care; 5% had a goal of emancipation; 4% had a goal of

ASFA requires that a permanency hearing be held once a child has been in care for 12 months and at 12-month intervals thereafter. During these hearings, the court decides the child's permanency goal and inquires whether reasonable efforts are being made to accomplish that goal. While permanency for children is the overarching principle, how permanence is defined has a significant effect on how the law is implemented.

*A Call to Action: An Integrated Approach to Youth Permanency and Preparation for Adulthood* puts forward a comprehensive definition of permanence: "having an enduring family relationship that is (1) safe and meant to last a lifetime; (2) offers the legal rights and social status of full family membership; (3) provides for physical, emotional, social, cognitive and spiritual well-being; and (4) assures lifelong connections to extended family, siblings, other significant adults, family history and traditions, race and ethnic heritage, culture, religion, and language."<sup>168</sup> Permanency has also been described by foster care youth as consisting of relational permanence, physical permanence, and legal permanence.<sup>169</sup> Relational (or psychological) permanence consists of long-term, loving and accepting relationships and includes relationships with parental figures such as biological parents; physical permanence consists of stability in community; and legal permanence consists of a legal relationship between the youth and a caretaker.<sup>170</sup>

"The primary goal of the child welfare system is to pursue legal permanence. While this goal can create both relational permanence and [physical] permanence, the pursuit of legal permanence at the expense of relational and [physical] permanence may be contributing to a state of impermanence among foster care youth."<sup>171</sup> "It is inconsistent to argue that a child's need for legal permanency justifies shortened timelines for permanency hearings and TPR efforts, then downplay the importance of legal permanency once parental rights are terminated."<sup>172</sup> Expanding the number and type of permanency options available to legal orphans supports the ASFA's goal of achieving permanency for all foster care youth. The best interests of these youth require the state to explore the possibility that a terminated parent may provide the youth's best chance for a permanent and stable home.

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guardianship; and 5% had no established goal.

168. LAUREN FREY ET AL., CASEY FAMILY SERVS., *A CALL TO ACTION: AN INTEGRATED APPROACH TO YOUTH PERMANENCY AND PREPARATION FOR ADULTHOOD 4* (2005), available at [http://www.aecf.org/upload/PublicationFiles/casey\\_permanency\\_0505.pdf](http://www.aecf.org/upload/PublicationFiles/casey_permanency_0505.pdf).

169. REINA M. SANCHEZ, CAL. PERMANENCY FOR YOUTH PROJECT, *YOUTH PERSPECTIVE ON PERMANENCY* (2004), available at [http://familyfinding.org/uploaded\\_files/fck/files/Youth\\_Perspectives.pdf](http://familyfinding.org/uploaded_files/fck/files/Youth_Perspectives.pdf).

170. Tonia Scott & Nora Gustavsson, *Balancing Permanency and Stability for Youth in Foster Care*, 32 CHILD. & YOUTH SERV. REV. 619 (2010).

171. *Id.* at 619.

172. Brenda D. Smith, *After Parental Rights are Terminated: Factors Associated with Exiting Foster Care*, 25 CHILD. & YOUTH SERV. REV. 965, 980 (2003).

**B. Post-Termination Reunification Permanency Goal Under APPLA**

One way to expand permanency options for legal orphans is to interpret APPLA to include post-termination reunification. APPLA is formally defined as “any permanent living arrangement not enumerated in the statute.”<sup>173</sup> “[It] is meant to be a permanent placement for the child, not just a foster care placement that can be indefinitely extended.”<sup>174</sup> A child welfare agency may choose, and a court may approve, APPLA when it has been documented to the court that compelling reasons exist that make more a preferred permanency option unacceptable.<sup>175</sup> APPLA traditionally includes long-term family foster care, placement in a group foster home, or placement in an institution such as a hospital or mental health facility.<sup>176</sup> As such, it has become the “euphemistic replacement” for “long-term foster care”, which is no longer a legally permissible permanency goal.<sup>177</sup> As of September 20, 2013, 10% of youth in foster care had an APPLA goal.<sup>178</sup> Youth with APPLA goals are often at higher risk of exiting the foster care system without the possibility of establishing legal and permanent connections.<sup>179</sup>

While post-termination reunification could fall within a broad interpretation of the definition of APPLA, amending the ASFA would recognize the difference between the needs of children with a more traditional APPLA goal who have very limited family connections and those who have a placement resource. A distinct post-termination reunification goal would signal to the child welfare agency and the judges that different levels and types of services are necessary to facilitate post-termination reunification. Furthermore, since the ASFA makes no distinctions between or prioritize among APPLA options, post-termination would not be given precedence over the more traditional APPLA outcomes such long-term foster care or emancipation if a separate goal is not created.

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173. 42 U.S.C. § 675(5)(C) (2012).

174. 45 C.F.R. §§ 1355–1357 (2015).

175. 42 U.S.C. § 675(5)(C) (2012).

176. See Emily W. McGill, *Agency Knows Best? Restricting Judges' Ability to Place Children in Alternative Planned Permanent Living Arrangements*, 58 CASE W. RES. L. REV. 247 (2007).

177. See CECILIA FIERMONTE & JENNIFER L. RENNE, ABA CTR. ON CHILDREN & THE LAW, MAKING IT PERMANENT: REASONABLE EFFORTS TO FINALIZE PERMANENCY PLANS FOR FOSTER CHILDREN (2002), available at [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/2002\\_Making\\_It\\_Permanent.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/2002_Making_It_Permanent.authcheckdam.pdf).

178. AFCARS REPORT #21, *supra* note 6, at 1. 5% had a case plan of long term foster care and 5% had a case goal of emancipation.

179. One study found that the predominant individual-level factors leading to an APPLA designation include youth factors such as resistance to adoption and challenging mental health and behavioral issues, including juvenile delinquency and teen pregnancy. Family-level factors were birth parents' inability or unwillingness to reunify; difficulty locating relatives and hesitancy of relatives to become involved in the foster care system. Karen W. Tao, et al., *Improving Permanency: Caseworker Perspectives of Older Youth in Another Planned Permanent Living Arrangement*, 30 CHILD ADOLESCENT SOCIAL WORK JOURNAL 217, 224 (2013).

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***C. Post-Termination Permanency Goal Under The Adoption and Safe Families Act***

The ASFA requires the court find that reasonable efforts to finalize a permanency plan have been made.<sup>180</sup> Establishing a “post-termination reunification” permanency goal would require judges to make inquiries about the appropriateness of reuniting the youth with his biological parent and appropriateness of the agencies’ efforts to achieve that goal. Reasonable efforts to accomplish a post-termination reunification goal would include locating the parents, accessing their suitability for reunification and providing necessary services to help them ameliorate any barriers to reunification. Also, the agency would be required to provide visitation to the parent so that the relationship with the child can be reestablished. Lastly, vacating the termination order or seeking to reinstate parental rights would be necessary.

This new permanency goal would be preferred over APPLA. Therefore, before an APPLA goal could be established, the ASFA should require courts to make specific findings as to why “post-termination reunification” is not appropriate. Currently, the ASFA requires that, prior to setting APPLA as a goal, the court find “compelling reasons” why reunification, adoption, guardianship and relative placement are not in the child’s best interest.” Such compelling reasons include circumstances when an older teen specifically requests emancipation as his or her permanency plan or when child has a significant bond to a parent unable to care for the child because of an emotional or physical disability. In respect to post-termination reunification, compelling reasons would include circumstances when parental rights have not been terminated, the birth parent has not rehabilitated and an older youth does not wish to be reunited with his parent.

The court could further point to circumstances that would exempt the agency from making reasonable efforts to achieve reunification at the onset of the case. The ASFA permits the court to waive reasonable efforts to reunify when certain aggravating circumstances exist.<sup>181</sup> Similarly, the Minnesota legislature included in its reinstatement statute two conditions in which parents will not be able to reestablish their rights: when rights were terminated due to sexual abuse or conduct resulting in the death of a minor, and when the parent has been convicted of any crime that falls under the definition of “egregious harm” (e.g. felony malicious punishment or sex trafficking of a minor).<sup>182</sup> Although the ASFA waives the reasonable effort requirement when “the parent has previously had parental rights to another child involuntarily terminated,” this would not be a sufficient reason for not ordering post-termination reunification. To apply this justification, the court would need to make a determination that

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180. 45 C.F.R. § 1356.21(b)(2) (2015).

181. 45 C.F.R. 1356.21(b)(3)(i)–(iii) (2015).

182. MINN. STAT. § 260C.329(4) (2013).

the parent had not resolved the issues that led to the termination of her parental rights to the sibling.<sup>183</sup>

Once “post-termination reunification” has been established as the goal, the court would be required to appoint or re-appoint counsel for the parent and child and grant the parent party status. Within the dependency proceeding, any party would have standing to file a petition to reinstate parental rights or a motion to vacate the underlying neglect case. In states with reinstatement statutes, a hearing would then be held to determine whether the parent has met the applicable legal standard to have rights restored. In states without reinstatement statutes, a hearing would be held to determine whether the original termination order should be vacated based on post-judgment evidence.<sup>184</sup>

Once parental rights are reinstated, the parent and child should be eligible for supportive services to prevent the reunification from disrupting. “Reunification, although a positive milestone for the family, is also a time of readjustment, and a family already under stress can have difficulty maintaining safety and stability.”<sup>185</sup> While some reinstatement statutes currently require a period of monitoring after parental rights have been restored and after the child has been placed in the home, others do not.<sup>186</sup> “Families being ‘restored’ need assistance with housing, child care or substance abuse treatment to avoid breaking down because of the same poverty-related or other risk factors which resulted in a termination in the first instance. As a result, reinstatement is a hollow promise, since families will face many of the strains and lack of resources which led to their initial involvement with the child welfare system . . . . The failure to provide parents whose rights are being reinstated with services is in stark contrast to the treatment of adoptive families, who are entitled both to services and financial assistance so they do not fail.”<sup>187</sup>

While parents who reunite with their children pre-termination are oftentimes eligible for services after a child is returned,<sup>188</sup> post-termination

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183. See, e.g., GA. CODE ANN., § 15-11-203(a)(8) (2014).

184. See, e.g., *In re Darrell V.*, 284 A.D.2d 247, 247 (N.Y. App. Div. 2001), the foster parent’s decision not to adopt within a year after the termination prompted the court to reevaluate the best interests of the children. See also *In re Alasha E.*, 8 A.D.3d 375, 375 (N.Y. App. Div. 2004) (describing how the biological mother’s progress towards overcoming barriers to reunification served as the impetus for the court’s reconsideration); *In re Tony H.*, 28 A.D.3d 379, 379 (N.Y. App. Div. 2006) (describing how the court’s decision was based on the inaction of the foster parent and the positive steps that the birth parent had made); *In re D.G.*, 583 A.2d 160, 169 (D.C. 1990) (describing how the appellate court vacated the termination order and remanded the case when adoption was no longer a realistic possibility).

185. CHILDREN’S BUREAU, *supra* note 132, at 11.

186. Oklahoma and Washington authorize or require a trial home visit of up to six months before a final order of reinstatement may be granted. See, e.g., OKLA. STAT. tit. 10A, § 1-4-909(I) (2014) and WASH. REV. CODE § 13.34.215(9) (2011).

187. Godsoe, *supra* note 90, at 38.

188. See, for example, Michigan’s Family Reunification Program, which provides four to six months of services to strengthen families and reduce the need for children to reenter foster care. *Family Reunification Program*, MICH. DEP’T OF HEALTH & HUM. SERVS., [http://www.michigan.gov/mdhhs/0,5885,7-339-73971\\_7119\\_7210-282166--,00.html](http://www.michigan.gov/mdhhs/0,5885,7-339-73971_7119_7210-282166--,00.html) (last visited Oct. 11, 2015).

reunification must receive the same type and level of support. In fact, it is arguable that these parents need more supportive services because (1) the youth are older, (2) the parent and child have been separated for longer periods of time, and (3) the youth may have psychological issues stemming from the termination.<sup>189</sup> “Research suggests that follow-up services that enhance parenting skills, provide social support, connect families to basic resources, and address children’s behavioral and emotional needs must be provided if reentry into foster care is to be prevented.”<sup>190</sup>

## VI. CONCLUSION

Creating a process by which terminated parents can restore their parental rights and be reunited with their biological children is not merely a matter of public policy. United States Supreme Court cases examining the rights of parents vis-à-vis their biological children provide constitutional underpinning to argue that permitting post-termination reunification is required. Specifically, the Supreme Court’s holding in *Lehr v. Robertson* suggests that parents, even after a judicial order of termination, retain an opportunity interest in their biological children. By challenging the prevailing notion that parents become legal strangers to their children once parental rights are terminated, an argument can be made that terminated parents have a constitutional right to post-termination reunification once it has been determined that their child will not be adopted.

Currently, the foster care system, as a whole, has no established mechanism for addressing and permitting placement with rehabilitated biological parents after their parental rights have been terminated. Although reinstatement statutes are a promising approach, the effectiveness of these statutes has been hampered by laws and policies that undermine their goal of providing permanence for legal orphans. Amending these statutes, in addition to providing policy support, would benefit foster care youth and help ensure that they do not exit the system without permanent legal connections. To ensure that states consider terminated parents as placement resources when it is the child’s best interest, the federal Adoption and Safe Families Act should also be amended to include post-termination reunification as a permanency goal. This amendment would also create the necessary process for a biological parent to “re-grasp” her retained opportunity interest, when in the best interest of her child.

Had the court been required to recognize the relationship between Ms. Fugate and her daughter, Selina’s life might have been very different. After her mother’s bid for custody was denied, Selina continued to move from foster home to foster home, eventually being sent to boot camp after an altercation with a

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

190. CHILDREN’S BUREAU, supra note 132, at 11.

caseworker.<sup>191</sup> At age eighteen, she was informed that she had been emancipated—no longer a ward of the state. ““When it happened, I was terrified. I didn’t know the first thing about being on my own. I’ve slept under bridges and [in] abandoned building, outside on park benches. And so there were some nights when I just didn’t sleep.”<sup>192</sup> With no legal connections, Selina has “just been struggling. You know, kind of lost.”<sup>193</sup>

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191. *Ohio AG Wants to Make it Easier for Foster Children to Make it On Their Own*, WBNS-10TV (Nov. 19, 2012, 6:38PM), <http://www.10tv.com/content/stories/2012/11/19/columbus-foster-care-system-changes.html>. See also Daniel A. Starett, *A Plea for Permanence after Termination of Parental Rights: Protecting the Best Interests of the Child in Ohio*, 56 Clev. St. L. Rev. 419 (2008).

192. *Id.*

193. *Id.*

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## VII. APPENDIX

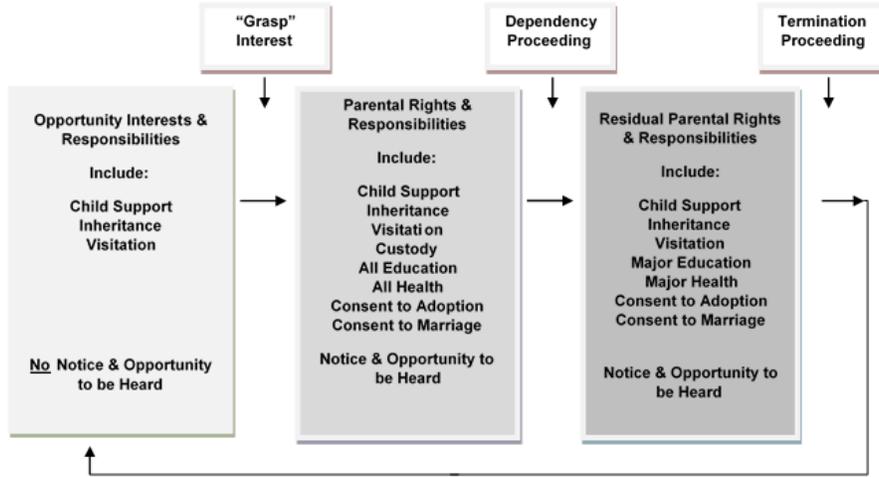
### A. NUMBER OF LEGAL ORPHANS<sup>194</sup> BY STATE WITH REINSTATEMENT STATUTE (LISTED IN ORDER OF ENACTMENT)<sup>195</sup>

STATE	2005	2006	2007	2008	2009	2010	2011	2012	2013
<b>Cal.</b>	<b>10197</b>	10842	10644	9836	12035	12091	6920	6195	6094
<b>Nev.</b>	728	810	<b>766</b>	884	1306	1297	1241	821	689
<b>Wash.</b>	1810	1933	2121	<b>2406</b>	2139	1784	1360	1337	1500
<b>La.</b>	809	722	789	<b>749</b>	755	750	820	692	568
<b>Okla.</b>	1892	2127	3651	2547	<b>2294</b>	1919	1871	1609	1757
<b>Ill.</b>	2811	2,545	2477	2657	<b>2472</b>	2746	2970	2694	2839
<b>N.Y.</b>	4987	4622	4308	3947	3470	<b>3421</b>	3406	3119	2852
<b>Haw.</b>	945	778	695	545	414	<b>314</b>	272	205	138
<b>Alaska</b>	104	254	268	431	432	<b>430</b>	380	330	417
<b>Me.</b>	704	623	571	561	514	494	<b>452</b>	413	512
<b>N.C.</b>	1654	1637	1750	1612	1499	1274	<b>1169</b>	1047	990
<b>Va.</b>	942	966	992	1372	1098	1327	1007	1140	<b>1085</b>
<b>Del.</b>	141	155	143	175	143	149	145	148	<b>113</b>
<b>Utah</b>	142	194	258	360	338	311	339	307	<b>329</b>
<b>Minn.</b>	1277	1186	1332	1189	1138	1,007	907	953	<b>1021</b>
<b>Ga.</b>	1409	1570	1708	1639	872	838	845	902	<b>819</b>
<b>Colo.</b>	988	1322	1086	1131	1261	777	587	543	490

194. AFCARS REPORT #21, *supra* note 6. This number does not include youth 16 years old and older whose parents' parental rights have been terminated and who have a goal of emancipation. Thus, legal orphans who are in most need of services are not included.

195. Bolded year is year of enactment of the statute. Data for 2014-present is currently unavailable.

**B. OPPORTUNITY INTERESTS, PARENTAL RIGHTS, AND RESIDUAL PARENTAL RIGHTS**



**C. THE OPPORTUNITY INTEREST RETAINED BY TERMINATED PARENTS**

