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Marcia Lowry

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FOSTER CARE & ADOPTION REFORM LEGISLATION: IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT OF 1997

MARCIA LOWRY*

* Marcia Robinson Lowry graduated from Northwestern University with a B.S. in Journalism (1962), during which time she also studied at the London School of Economics and Political Science at the University of London (1961-62). After spending some time as a journalist (1963-66), Ms. Lowry obtained her J.D. from New York University School of Law (1969).

In 1995, Ms. Lowry founded Children's Rights, Inc., a national, non-profit organization, where she serves as its Executive Director. Using advocacy, negotiation, litigation and public education to reform the foster care, juvenile justice and mental health systems, Ms. Lowry is expanding on work she initiated at the ACLU, directing a national effort to ensure that appropriate and comprehensive services are provided to vulnerable children and their families as mandated by law.

As Executive Director of Children's Rights, Inc., Ms. Lowry directs class action litigation on behalf of thousands of children nationwide and is recognized in legislative and public forums as a leading advocate for children. In *Marisol v. Giuliani*, 95-Civ-10533 (S.D.N.Y. 1995), 126 F.3d 372 (2d Cir. 1997), for example, a class action filed against New York City and New York State for failure to comply with federal constitutional, federal statutory, state constitutional, state statutory and state regulatory standards regarding all aspects of New York City's child welfare system, she obtained a settlement on the eve of trial, requiring: (1) vigorous monitoring of the City's operations by the state agency, and (2) creation of a panel of experienced national experts to recommend and assist in reform or, if reform is not implemented, to become plaintiffs' experts in further court proceedings.

Ms. Lowry previously served as Special Assistant to the Commissioner of New York City's Human Resources Administration, Special Services for Children (1972-73). She was also the Reginald Heber Smith Community Law Fellow and General Staff Attorney for Community Action for Legal Services (1969-72).

Ms. Lowry was the recipient of the 1998 Foundation for Improvement of Justice Award. She has been a guest speaker for many organizations around the country, including: Loyola University (1997); the Casey Journalism Center (1997 & 1995); Child Welfare Legal Services, Florida State Department (Keynote Address, 1995); the NACC (1995); the National Council for Crime and Delinquency (1995); the Subcommittee on Human Resources, House Ways & Means Committee, and the Early Childhood, Youth, and Families Subcommittee, House Economic & Educational Opportunities Committee Concerning Child Care and Child Welfare (Testimony, 1995); Johns Hopkins University (1994); the Child Welfare League of America (Keynote Address, 1994 & 1993); Prentice Hall Law & Business (1994); NYU School of Law (1994 & 1989); the National Symposium on Child Victimization (1992); the American Bar Association (1992 & 1990); the National Association for Family-Based Services (1991); McGill-Loyola Universities (1991); the Senate Committee on Ways & Means, Subcommittee on Human Resources (Testimony, 1991); the National Court Appointed Special Advocate Association (1990); the Practising Law Institute (1990); the University of Tennessee and Tennessee Bar Association (1989);

There have been a lot of very thoughtful things said this afternoon. I want to give a little context about this statute, which was important but unnecessary if the government agencies responsible for taking care of children had applied existing statutes with even a modicum of common sense or reasonable professional judgment. What I think a lot of people do not recognize is that in 1980 Congress passed reform legislation called the Adoption Assistance and Child Welfare Act of 1980,¹ which was intended to provide permanence for children. ASFA was passed as a new attempt to provide permanence. However, because people who provide child welfare services in this country, for reasons that are difficult to really document, but one can hypothesize, are not able to hold more than one idea in their head at the same time.

When the Adoption Assistance Act was passed in 1980, based on a study having to do with permanence for children, it had a couple of really important concepts in it. First, the family should be supported and reasonable efforts made to preserve families, because foster care should be something that was a matter of last resort.² Secondly, children should have permanence either by going back to their own parents, or if that were not possible, through adoption.³ That was a very radical standard.

That is not what happened in the application and the

the AFSCME (1989); the National Association of Public Welfare Administrators (1989); the Association of Child Advocates (1987); the National Conference of State Legislators (1986); the Senate Labor and Human Resources Committee (Testimony, 1985); and the ABA National Resource Center (1985).

Ms. Lowry's numerous publications include articles and book reviews in law journals and periodicals such as: *The Daily News*; *The New York Law Journal*; *The Flint Journal*; *Asbury Park Sunday Press*; *Detroit Free Press*; *Fort Worth Telegram*; *The ABA Journal*; *New York Newsday*; *Family Law Quarterly*; *Readings in Public Policy*; *Manhattan Lawyer*; *The New York Times*; *The Journal of Psychiatry and the Law*, and *New York University Law Review*. She has also written *Legal Strategies to Facilitate Adoption of Children in Foster Care*, in *FOSTER CHILDREN IN THE COURTS* (Butterworth Legal Publishers 1983) and *When the Family Breaks Down: Massive and Misapplied Intervention by the State*, in *CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES* (Teacher's College Press 1978).

Ms. Lowry has dedicated her life to protecting the rights of poor children. As Director of the Children's Rights Project of both the New York Civil Liberties Union (1973-79) and the American Civil Liberties Union (1979-95), Ms. Lowry has a long history of fighting for the rights of poor children in the custody of child welfare systems. As a result of her efforts, Ms. Lowry has been instrumental in creating an entirely new body of law to protect children whose lives are affected by governmental systems.

¹ Pub. L. No. 96-272, 94 Stat. 500; 42 U.S.C.A. §§ 670-77 (1995) [*hereinafter* *Child Welfare Act*].

² See 42 U.S.C. § 671(15)(B)(i).

³ See 42 U.S.C. § 671(15)(C).

implementation of that statute. It was applied in an incredibly distorted way. As we look at ASFA, a very legitimate concern is expressed about how this statute will be applied and whether there is going to be any modulation here. As a general matter, some children should be taken away from families and adopted; some children ought to stay in families; some children ought to go back to families. There is no one answer. But these statutes that govern child welfare systems are interpreted as if there is only one answer.

That was what happened with the "reasonable efforts" requirement of the 1980 Adoption Assistance Child Welfare Act.⁴ What was that interpreted to mean? In system after system, it meant that you had to keep a child attached to a family, no matter what was going on.

My organization and I, over the years, have represented a lot of children. We do not represent a lot of individual children, the way Legal Aid does. However, among our clients are the surviving siblings and the estate of Adam Mann, who was killed by his parents when he was five years old. Mann's family had been the subject of not one, but two documentaries: a documentary in 1985, called "The Child Savers,"⁵ in which the filmmaker accompanied workers on child investigations and happened on the Mann family, and in 1990 called "Who Killed Adam Mann?"⁶

Despite a widespread pattern of abuse when the investigation was done in 1985, child welfare officials never removed the children. The children were removed when the documentary aired on PBS, but were later returned. No services were given to the family even though these children were in serious danger.

In 1990, the parents killed the second youngest child, Adam, and the children went back into foster care; then came the second documentary. One would think these children were the subject of a lot of attention. When they returned to foster care after this horrible history, what was the plan for these children?

⁴ *Child Welfare Act*, *supra* note 1.

⁵ See Prial, Frank J., *3 Brothers of Boy Killed in Bronx Were Also Mistreated, Police Say*, N.Y. TIMES, Mar. 8, 1990, at B4 (noting that Mann family had been subject in 1985 documentary on public television).

⁶ See *Frontline: Who Killed Adam Mann?* (PBS television broadcast, Dec. 3, 1991) (examining death of Adam Mann).

Reunification with their parents. What service was going to be provided? Parenting classes. This kind of planning is a distortion of what the "reasonable efforts" requirement in the statute meant or what the concept of family preservation meant.

I have taken the deposition of worker after worker who has been responsible for cases where the child has been in custody six or seven years, with the parent either gone or only appearing intermittently. When I ask the workers "how come you do not terminate parental rights here?" "How come there has not been any effort to get this child adopted?" The workers have often said to me, "Because we have to make reasonable efforts to preserve the family." There was no family. The result has been that children were staying in foster care longer, even as younger children were entering foster care and the population increasing. From 1986 to 1996, the population increased 65 percent,⁷ abuse and neglect also increasing.

There was a tremendous absence of common sense in the application of the statutory requirements. The "reasonable efforts" requirement of the 1980 statute was really used as an excuse to do nothing. It is hard to get a child adopted. It is easy to say you are complying with the requirements. It simply translates into a plan for a child and family that enables the workers to do absolutely nothing. You do not have to move toward adoption because you have got to preserve the family, and then nobody makes you do anything to actually provide services or to decide whether you can provide services to the family and restore the family.

Monica referred to this New York case, which I will talk about very briefly. The named plaintiff in that case, a little girl by the name of Marisol, which is not her real name, had been in foster care for three and a half years; with a neighbor, as a matter of fact. She was returned to her mother despite warnings that the mother would abuse her. The child was terribly abused and was

⁷ See, e.g., CHILDREN'S DEFENSE FUND, THAT STATE OF AMERICA'S CHILDREN (1992) (noting that in 1982 foster care population was 243,000); HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 1ST SESS., OVERVIEW OF ENTITLEMENT PROGRAM 942 (Comm. Print 1993) (noting that in 1991 foster care population reached 429,000); 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, 138 (1995) (noting that number of children in foster care increased from 280,000 in 1987 to more than 460,000 in 1992).

rescued within an inch of her life. She had been left in a closet for about eight months. You do not want to hear all the details; a very horrible story. She came back into foster care, and she too was a story in the Daily News.⁸ When the child came back into foster care, the plan for her was to be returned to the parent. The child's mother was on Rikers and the services to facilitate reunification were parenting classes.

That child was adopted only because she was the named plaintiff in a very visible federal lawsuit⁹ and because real efforts were made. In this particular case, a lot of pressure was put on the city administration to change the plan and the happy ending to that story was that Marisol went back to the same foster family. They have adopted her and we have very big pictures of her in our office of the day that she was adopted, with a grin out to here. This family is totally committed to this child and will help nurture her. I hope that psychologically she will survive this. However, this child could have had a plan of returning home until she was 12 years old; at which time somebody would have finally gotten around to terminating parental rights; at which time she would have been so damaged that if she had not been lucky enough to wind up with a wonderful foster family she would have been un-adoptable.

That is, I think, the context in which ASFA was passed; because the first statute, the 1980 legislation, enabled child welfare agencies to do a reasonable job and they chose to do nothing. We had these kinds of abuses in which there was no permanence for kids. Despite the purposes of the statute, kids stayed in care. The intent of the 1980 legislation was that a child would stay in care at most 18 months. Thereafter, there would be a dispositional hearing to determine finally what was going to happen to the child. Instead, many states viewed the 18 month limit as the beginning of the planning process, because they believed they were not required to use any kind of reasonable common sense.

The basic premise that should have been operative in the system was that government should not raise kids. Government

⁸ See Russ Buettner, *Both Sides Claim ACS Suit Win, But City Keeps Reins*, DAILY NEWS, Dec. 3, 1998, at 38 (discussing suit involving 11 children allegedly injured as result of New York City failures).

⁹ See *Marisol v. Giuliani*, 126 F.3d 372 (2d Cir. 1997).

should not be a child's parent. The child ought to be raised by its own parents, if possible; that is the best choice if it could work. If not, children should have new parents and that decision should be made within a reasonable period of time so that it is meaningful for the child.

Now, because of what we have seen in the application of the last reform statute, people like Bernadine and Monica are justly concerned about what this is going to mean, whether this new statute is going to be applied with the same lack of common sense with which the previous statute was applied. The concern is that now we are going to get terminations of parental rights, now we are going to get a lot of kids freed, but that is all we are going to do. We are not, in fact, going to work with the families that could have their children safely returned to them.

Now, why is it radical that there is a statute that says children should be safe with their families? Why is this a big sea change? What could be more stupid than to think that we want children in families where they are not going to be safe? Nevertheless, this is a very revolutionary and controversial part of the statute.

I think that is in part because people fear how the statute is going to be applied, because of the system's incapacity to apply these principles in a way consistent with any common sense, and because these systems are so poorly run. These are systems that are unaccountable. Most people do not know what is going on in them. Those people who do know, with the exception of the advocates, can not do anything about it, and the advocates can do precious little. These are systems in which we spend about \$8 billion a year nationally to do more damage to kids.¹⁰ These are also systems which have the potential for becoming involved in families at a critical point in the family's history and making a tremendous difference for these kids and, in many instances, their families, and really helping people a great deal.

It is my personal view that the reason ASFA was passed was because of the really foolish application of the previous statute and because of the really foolish and blind application of the "reasonable efforts" provisions in the statute, not to help families, but simply to do nothing and to justify things like a plan for

¹⁰ See, e.g., Richard Whitmire, *American Trends Child Foster Care Becoming Permanent Solution*, GANNETT NEWS SERVICE, Nov. 11, 1993, at 794 (discussing amount spent on each child).

either the Mann children or Marisol, of return home with parenting classes. In my view, it was passed because Congress was very unhappy that people on welfare continued to have babies, although Congress did not want them to, and because there were too few adoptions under the old statute, which was intended to increase adoptions, but it did not happen because getting children adopted is hard work and there was no pressure to make these child welfare systems do that hard work.

I testified at one of the legislative hearings on an early version of ASFA., and all the people at that hearing wanted to talk about was welfare reform. Bernadine is absolutely right. That was very much what was on the minds of at least those people that I heard talking. The comments were about too few adoptions, too many rotten families abusing their children, too many out of wedlock babies. We are going to do something about it. We are going to take people off welfare. We are going to take these children away from their families.

Now, I am a big proponent of early and timely adoption. Nevertheless, I think we have to fear that this statute will not accomplish that aim. The benefits of the statute are that people who run child welfare systems cannot be left to their own devices. They will not use reasonable standards, they do have to be told "first, you put your left foot in front of your right foot, then you put your right foot in front of your left foot, then you do it again." They do have to be told that, unfortunately.

With a statute that says you have to have a plan, the plan has to be specific, you have to get children free for adoption. If the plan is to free the child for adoption you have to have a plan for how you are going to get the child adopted if the child is free for adoption you have to find a family for the child. I think that kind of a statute is important.

However, it can be misapplied. What we have seen in the past makes me as concerned as others; although I think we do need some sort of a correction of the total passivity with which these systems have treated children. The statute is a better vehicle for people like me to try to reform these systems if it is enforceable. It is very specific. I do not think there is a child welfare system in the country that is capable of complying with it, not a one, and I think that we will see massive non-compliance.

As a general matter, child welfare systems around this country

are so bad that if I had the staff and if the statutes are enforceable, which is a big if, we could sue every one of them, because they are not in compliance with the law, or reasonable professional standards, or constitutional principles of not harming people who are in government custody. Based on what I have seen around the country, and my organization does class action lawsuits nationally, we have seven child welfare systems under some form of court supervision, and two more systems under very active investigation, these systems will not change by themselves because they are so unaccountable. Lawsuits are very powerful devices to force these systems to comply with the law.

I think this statute is one which, if it is enforceable, can be used very constructively. However, the statute can have bad consequences if it is applied stupidly. Understanding that, we need to use the statute to I ensure that its "good parts" are actually implemented.

Monica referred to the lawsuit that we have in New York City. My organization brought suit in *Marisol v. Giuliani*.¹¹ *Marisol* is a big class-action lawsuit concerning every aspect of the child welfare system. Like many systems, one of the areas that the New York child welfare system did most poorly is permanence. They did not know anything about permanence and they did not know what the concept was. One of my more pleasurable pieces of work on the case was taking the deposition of the person who was the head of permanence and adoption for the agency. I asked him if there was any time period within which they wanted to get permanence for a child, within which they thought it was okay to leave open a plan of return home, and whether or not there was any time period within which they wanted to move a child toward adoption if the child could not be returned home. I can not tell you how the man's eyes glazed over. Then I took the deposition of the guy who was in charge of running that part of the agency. This guy was sort of the policy management guy, and I asked him what the policies were, and he clearly got very nervous and said that there probably were some policies.

I said, "Well, who on your staff would you ask? If you don't know what the policies are, who on your staff would you ask to

¹¹ *Marisol v. Giuliani*, 126 F.3d 372 (2d Cir. 1997).

find out what your policies are?" These are the senior management people and they did not know. They were not sure. "Probably there are policies, maybe there aren't policies."

That was the context, I think, within which the legislation was passed. The result of the lawsuit was that on the eve of trial we decided to settle it. We settled it in a very unusual and, I hope, an innovative and constructive way. Rather than have a very prescriptive settlement which says things like you have to have a meeting about whether or not the kid is going to get adopted within the first 30 days, and you have to do this, etc., it basically said there was going to be a super-duper expert panel created, and it really is a terrific expert panel, some of the smartest and toughest and most sophisticated people in the area nationally that I have met. This panel was to study four areas of the agency's operations, basically all of the agency's operations, to make recommendations about what the agency should be doing in these areas, and then monitor the agency to see whether it is doing it. Then if it does not do it, if it fails to exercise good faith in accomplishing the reforms, then we go back to court with the expert panel as our experts to prove: first, that it is not happening; second, that it is doable; and, third, what should be done?

The first area they looked at was the area of permanence, and found the City did not even know what it's policy was. One of the first tasks set for the City in this area was to articulate a permanence policy. It is pretty pathetic that that is where the City is; but this is the context in which the ASFA legislation was passed. The systems around the country on which these children's lives depend do not have plans for these children, and these children are totally subject to the control of these agencies. They do not get the children returned to their families, they do not get these children adopted. These kids drift from one place to another. That is not acceptable. We are going to spend a great deal of money to raise very damaged human beings.

One of my early clients really typified that. He was a young man who had come into the foster care system when he was 13 months old, never got adopted, went from one placement to another. I remained in touch with him, closer touch than I would have necessarily liked. He came to see me before he was getting married to a mentally handicapped young woman and I said to

him, "I hope that you're going to be using birth control." This is part of the lawyer's representation that you did not talk about, Marvin, but it is an important part of the representation. He replied, "No, I'm not. I want to have children right away because I never knew my parents. I never had a family. I was separated from my birth sister and I never saw my parents. I don't even know where my father is buried and so I want to have children so I can create my own family." Well, we had done such a good job with that young man that he and his wife did have children and these children grew up in the foster care system. So that is what we have got to avoid repeating because that is what is happening to kids who do not have families, who do not have these connections, and who we are raising at very great government expense.

This legislation is intended to address this issue. It can be very badly misapplied. It is all a question of how it is applied and people who care about these things have to keep the pressure up to make sure that its potential and not its harm is realized. Thank you.