

Empowering Children: Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings

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NOTES

EMPOWERING CHILDREN: GRANTING FOSTER CHILDREN THE RIGHT TO INITIATE PARENTAL RIGHTS TERMINATION PROCEEDINGS

The status of a foster child, particularly *for* the foster child, is a strange one. He's part of no-man's land. . . . The child knows instinctively that there is nothing permanent about the setup, and he is, so to speak, on loan to the family he is residing with. If it doesn't work out, he can be swooped up and put in another home. It's pretty hard to ask a child or foster parent to make a large emotional commitment under these conditions

-Art Buchwald¹

INTRODUCTION

In 1636, less than thirty years after the founding of Jamestown Colony, seven-year-old Benjamin Eaton became America's first foster child.² Over 350 years later, significant numbers of American children continue to require foster care. At present, over 500,000 children around the United States receive out-of-home care;³ of these, approximately 429,000 are recipients of foster family care.⁴ Studies predict that because of deteriorating economic conditions,⁵ an in-

¹ Joseph Goldstein, *Finding the Least Detrimental Alternative: The Problem for the Law of Child Placement*, in PARENTS OF CHILDREN IN PLACEMENT: PERSPECTIVES AND PROGRAMS 188, n.9 (Paula A. Sinanoglu & Anthony N. Maluccio eds., 1981) (quoting speech given by Art Buchwald in celebration of 150th Anniversary of the Jewish Child Care Association, April 1972).

² NATIONAL ACTION FOR FOSTER CHILDREN: A SURVEY OF ACTIVITIES BASED ON REPORTS SUBMITTED BY STATES AND COMMITTEES, NOVEMBER 1974-DECEMBER 1975, at 121, 122 (1975) (statement of David T. Evans, President, National Foster Parent Association, Before the Senate Subcommittee on Children and Youth and the House Select Subcommittee on Education on December 1, 1975).

³ HOUSE SELECT COMM. ON CHILDREN, YOUTH & FAMILIES, NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA, H.R. REP. NO. 395, 101st Cong., 2d Sess. 5 (1990) [hereinafter DISCARDED CHILDREN]. Out-of-home placement figures include children in the foster care system, in the juvenile justice system, and in the mental health system. *Id.* at 14-15.

⁴ This figure reflects a 53% increase since 1986. Warren Cohen et al., *The Year That Was: 1992*, U.S. NEWS & WORLD REP., Jan. 4, 1993, at 96, 104.

⁵ Joan H. Hollinger & Alice Bussiere, *The Child's Rights in Adoption and Foster Care*, in CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 259, 276 (Cynthia P. Cohen & Howard A. Davidson eds., 1990) [hereinafter CHILDREN'S RIGHTS]; see also U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY 17 (1990) [hereinafter CRITICAL FIRST STEPS] (noting that "the evidence is strong that poverty makes child maltreatment much more likely. . . . [C]hild maltreatment [is] seven times

Children who remain adrift in foster care for long periods often suffer severe emotional trauma.¹⁶ Moving from place to place without the chance to experience stable care from any adult, such children may experience frequent bouts of insecurity and loneliness.¹⁷ Even when children remain in the same foster home for many years, many still regard it as a temporary arrangement¹⁸ and are apt to define their foster homes as "part-time home[s]"¹⁹ where they feel "a bit uncertain."²⁰

Methods of coping with the unstable world of foster care vary considerably. For example, while growing up as a foster child in Hollis, Long Island, humorist Art Buchwald "survived" by becoming the class clown and inventing elaborate fantasies.²¹ Other children, however, exhibit extreme responses to foster care. They may succumb to violence, promiscuity, depression and defiance in an effort to deal with the fear and confusion that they experience as foster children.²²

During the summer of 1992, a twelve-year-old boy named Gregory Kingsley exhibited a unique response to his "limbo" status in the Florida foster care system: legal self-help. Claiming he just wanted "a place to be,"²³ Gregory filed a complaint with a Florida circuit court seeking to terminate relations with his natural parents and facilitate adoption by his foster parents. Headlines proclaimed "Boy Wants Divorce from Parents[!],"²⁴ television movie deals were negotiated,²⁵ and

¹⁶ JOSEPH E. PERSICO, NATIONAL COMM'N ON CHILDREN IN NEED OF PARENTS, WHO KNOWS? WHO CARES? FORGOTTEN CHILDREN IN FOSTER CARE 9 (1979) [hereinafter NATIONAL COMM'N REPORT]. The National Commission Report concluded that the effect of impermanence upon foster children was "devastating," and caused them great pain, frustration, and fear. *Id.* Testifying before the Commission, one child revealed: "[t]he thing that hurt the most was that foster care made me nobody's child." *Id.*

¹⁷ *Id.*

¹⁸ Malcolm Hill & John Triseliotis, *The Transition from Long Term Care to Adoption, in THE STATE AS PARENT: INTERNATIONAL RESEARCH PERSPECTIVES ON INTERVENTIONS WITH YOUNG PERSONS* 420 (Joe Hudson & Burt Galway eds., 1989).

¹⁹ *Id.*

²⁰ *Id.*

²¹ For example, Mr. Buchwald fantasized that he was really the son of a Rothschild, kidnapped by gypsies when he was six months old, and sold to a couple on their way to America. Goldstein, *supra* note 1, at 188 n.9. Buchwald also dreamt that the Rothschilds had hired France's foremost detective to find him and that it was only a matter of time before he would be rescued from his foster home. *Id.*

²² Almeda R. Jolowicz, *A Foster Child Needs His Own Parents, in PARENTS OF CHILDREN IN PLACEMENT: PERSPECTIVES AND PROGRAMS, supra* note 1, at 55-56.

²³ First Amended Complaint at 7, *In re Gregory Kingsley* (Fla. Cir. Ct. Oct. 13, 1992) (No. JU90-5245), *rev'd sub nom. Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

²⁴ *See, e.g.,* Christina Cheakalos, *11-year-old Florida Boy Sues Parents for Divorce*, ATLANTA J. & CONST., June 7, 1992, at A1.

²⁵ The ABC television network aired a movie about the Gregory Kingsley case on February 8, 1993.

the American public was mesmerized.²⁶ Many reporters and commentators misconstrued Gregory's case, characterizing it as a child "divorcing" his parents and heralding it as a novel legal event indicating the decline of the traditional American family.²⁷ Still others hailed him as the "Rosa Parks of the movement to expand the rights of children against the traditional prerogatives of biological parents."²⁸

Apart from providing fodder for the family values debate that raged during the 1992 presidential campaign,²⁹ Gregory's case demonstrates the importance of granting children the right to have their voices heard in courtrooms. Foster children need to be given direct access to the judicial system so that they can adequately protect their rights and address their needs—something that the foster care system has consistently failed to do.³⁰ Indeed, Gregory's plight provides a good example of the foster care system's failure to properly address the needs of the children under its care. Had it had not been for Gregory's own efforts, the court probably never would have known of his desires, his problems, or his needs.³¹

This Note argues that foster children should be granted the right to initiate termination proceedings, and hence the opportunity to make out a prima facie case for severing the rights of their natural parents when those responsible for their welfare fail to do so. To sup-

²⁶ Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents Rights*, 14 CARDOZO L. REV. 1836 (1993). Despite the fact that numerous research studies and reports have catalogued the serious faults of the United States foster care system since the 1950s, Gregory's lawsuit exposed many Americans to these problems for the first time. Additionally, with the media hailing him for his heroism and courage, Gregory became a symbol for all in a year in which the overriding theme was "taking responsibility for your own future." *Sonya Live* (CNN television broadcast, Dec. 31, 1992) available in LEXIS, Nexis Library, transcript no. 208. People Magazine even named Gregory one of the "25 Most Intriguing People of 1992." *The 25 Most Intriguing People of 1992: Gregory K.*, PEOPLE, Dec. 28, 1992-Jan. 4, 1993, at 65 [hereinafter *Intriguing People*].

²⁷ Woodhouse, *supra* note 26, at 1836-37 (noting that the "media misconstrued a relatively ordinary case . . . as a pathbreaking legal event"); see *A Boy's Divorce is Upheld in Court*, N.Y. TIMES, Aug. 20, 1993, at A21 (calling this "the case of Gregory K., the boy who 'divorced' his mother"); see also Anthony DePalma, *Mother Denies Abuse of Son Suing to End Parental Tie*, N.Y. TIMES, Sept. 25, 1992, at A20 (stating that the "trial . . . could substantially alter the legal rights of children and broaden the debate over the structure of contemporary American families").

²⁸ Andrew L. Shapiro, *Children in Court—The New Crusade*, THE NATION, Sept. 27, 1993, at 301.

²⁹ At the 1992 Republican Convention, speaker Patrick Buchanan cited cases like Gregory's as examples of Democratic Party support for the right of children to sue their parents, which, he argued, would undermine the traditional family. See DePalma, *supra* note 27, at A20; see also Shapiro, *supra* note 28, at 317 (quoting Professor Martha Fineman as saying "[t]here are many conservative and reactionary uses of children's rights"). Ironically, Gregory's main purpose in filing a termination petition was to provide himself with a "traditional" family of his own. See Woodhouse, *supra* note 26, at 1837.

³⁰ See *infra* notes 86-104 and accompanying text.

³¹ See *infra* notes 210-15 and accompanying text for a discussion of the foster care system's failure in Gregory's case.

port the argument that such new rights are necessary, Section I of this Note briefly explores the current foster care crisis in America.³² Section I focuses on the plight of foster children who are unable to return to their unfit natural parents but are denied adoption because legal ties to their natural parents remain unsevered. Section II of this Note surveys the debate over children's rights, focusing on various arguments for and against granting foster children the right to initiate termination proceedings,³³ and concludes that this right must be granted. Granting foster children the right to initiate parental rights termination proceedings will enable them to help themselves to a better life, complete with loving and permanent adoptive parents. Section III of this Note surveys the legal status of American foster children and proposes several arguments in support of guaranteeing foster children the right to initiate termination proceedings.³⁴ Finally, Section IV demonstrates the important role that effective counsel can play in the success of termination proceedings and argues that the right to initiate termination proceedings is meaningless unless foster children are also guaranteed the right to counsel.³⁵

I

FOSTER CARE IN AMERICA: A NATIONAL CRISIS³⁶

A. Children, Foster Care & the Law

Although both children and adults legally may be considered United States citizens, children possess far fewer rights than their adult counterparts. Commentators frequently cite the special needs of children as a basis for limiting children's rights.³⁷ Ironically, however, in limiting children's rights, and entrusting what limited legal rights they do possess to understaffed and underfunded institutional decisionmakers, society has placed children in a state of legal limbo from which it is often difficult to escape.

The legal rights of children in this country have developed slowly. Early American courts adopted the English common law view that children possessed virtually no legal rights and were comparable to chattel or prized possessions of their fathers.³⁸ The idea that children

³² See *infra* notes 36-151 and accompanying text.

³³ See *infra* notes 152-215 and accompanying text.

³⁴ See *infra* notes 216-380 and accompanying text.

³⁵ See *infra* notes 381-432 and accompanying text.

³⁶ Numerous commentators have described the state of the U.S. child welfare system as one of "crisis." See, e.g., CHILDREN'S RIGHTS IN AMERICA 276 (Cynthia P. Cohen & Howard A. Davidson eds., 1990); CRITICAL FIRST STEPS, *supra* note 5.

³⁷ Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 488 (1973).

³⁸ Florence Kelley, *On Some Changes in the Legal Status of the Child Since Blackstone*, INT'L REV., August 1882, reprinted in THE LEGAL RIGHTS OF CHILDREN 83, 85 (Robert H. Bremner ed., 1974). Conversely, mothers were not entitled to any legal power over their children.

had rights was considered "revolutionary,"³⁹ and it was not until this century that special legal rights for children emerged.⁴⁰ Although modern courts gradually have enlarged the legal privileges of children,⁴¹ historically, federal and state judges sought to avoid situations involving intervention in day-to-day family life.⁴² In fact, the application of constitutional jurisprudence to legal battles involving children and families is a relatively recent development.⁴³ The Supreme Court has developed a body of constitutional law that touches on children's rights. For example, the Court has recognized Fourteenth Amendment due process rights for juveniles in judicial proceedings,⁴⁴ as well as First Amendment rights for children who donned black armbands in protest of the Vietnam War⁴⁵ and children who refused to salute the flag in public school for religious reasons.⁴⁶ The Court also has held that a state cannot place undue procedural burdens on a minor's ability to exercise her constitutional rights.⁴⁷

Beyond these narrow constitutional holdings, however, the law's concern for children is generally limited to juvenile delinquency hearings and cases in which the state seeks to limit parental rights, particularly in cases involving abuse, neglect or the transfer of custody.⁴⁸ During the last two decades, however, courts have become increas-

According to Florence Kelley, "[s]o absolute was the paternal possession that . . . the father could give or bequeath away his child's custody despite its mother, though it were an infant in arms, or even before its birth." *Id.* Indeed, the state would only intervene in family matters involving extreme violence by the parents against their children. NOAH WEINSTEIN, *LEGAL RIGHTS OF CHILDREN* 1 (1974).

³⁹ Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 256 (1979).

⁴⁰ Robert M. Horowitz, *Children's Rights: A Look Backward and a Glance Ahead*, in *LEGAL RIGHTS OF CHILDREN* 4 (Robert M. Horowitz & Howard A. Davidson eds., 1984).

⁴¹ Rodham, *supra* note 37, at 489.

⁴² See Lisa A. Richette, *Children and the Future*, in *EMERGING RIGHTS OF CHILDREN: HOW FAR SHOULD WE GO?* 46, 51 (U. Va. Conference 1976) [hereinafter *EMERGING RIGHTS OF CHILDREN*] ("Judges tread uneasily on . . . terrains involving children, foster parents, and social workers. Solutions are better reached outside the judicial arena . . ."); WALTER WADLINGTON ET AL., *CHILDREN IN THE LEGAL SYSTEM* 48 (1983) (noting that, with the exception of divorce cases, courts are reluctant to interfere).

⁴³ WADLINGTON ET AL., *supra* note 42, at 48.

⁴⁴ See *In re Winship*, 397 U.S. 358 (1970) (holding that a juvenile was entitled to procedural safeguards contained in the Fourteenth Amendment); *In re Gault*, 387 U.S. 1 (1967) (extending those adult procedural protections guaranteed in criminal trials to children involved in delinquency proceedings); *Kent v. United States*, 383 U.S. 541 (1966) (requiring that a waiver from juvenile court to adult court meet certain minimum due process requirements); *Haley v. Ohio*, 332 U.S. 596 (1948) (recognizing the Fourteenth Amendment right of a fifteen-year-old child to be protected against coerced confessions).

⁴⁵ *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution . . . possessed of fundamental rights which the state must respect . . .").

⁴⁶ *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁴⁷ *Bellotti v. Baird*, 443 U.S. 622 (1979).

⁴⁸ Rodham, *supra* note 37, at 490.

ingly concerned with defining the rights of foster children, as well as those of state officials and parents who participate in foster care programs.⁴⁹ Yet, despite this increase in litigation and judicial concern, foster children still have neither a recognized right nor the means to take legal action against a destructive or non-existent family relationship.

B. A Nation of Children in Limbo

1. *Welfare Systems in Crisis*

The objective of foster care is to provide temporary care for neglected children and to eventually reunite them with their natural parents,⁵⁰ yet numerous studies indicate that many of our nation's foster care systems fail to accomplish these goals.⁵¹ The primary problem with modern foster care systems is that they must deal with an enormous number of displaced children, most of whom are from low-income or minority families.⁵² For example, in our nation's capital,

⁴⁹ The increase in foster care litigation is due, in part, to the myriad of problems that have gripped state agencies across the country. See *infra* part I.B.

⁵⁰ The Supreme Court defines foster care as a "child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period, and when adoption is neither desirable nor possible." *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 823 (1977) [hereinafter *Smith v. OFFER*] (emphasis added) (quoting CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR FOSTER FAMILY CARE SERVICE 5 (1959)). The Court also enumerated the following distinctive features of foster care: "[I]t is care in a family, it is noninstitutional substitute care, . . . [and] it is for a planned period—either temporary or extended." *Id.* at 824 (quoting ALFRED KADUSHIN, CHILD WELFARE SERVICES 355 (1967)). The Court concluded that "unlike adoptive placement . . . [foster care does not] impl[y] a permanent substitution of one home for another." *Id.* (quoting KADUSHIN, *supra*, at 355).

⁵¹ See, e.g., LEROY H. PELTON, FOR REASONS OF POVERTY 54-64 (1989); Evans, *supra* note 2, at 122; KNITZER & ALLEN, *supra* note 13, at 24; ALAN R. GRUBER, CHILDREN IN FOSTER CARE: DESTITUTE, NEGLECTED, BETRAYED 15 (1978).

⁵² A study conducted by the Children's Defense Fund revealed that "children whose families are in poverty are more likely to be at risk of foster care placement, as a result of both the financial and psychological stresses poverty imposes." KNITZER & ALLEN, *supra* note 13, at 49 n.57. The study also found that "minority families are disproportionately poor," and as a result, minority children are also over-represented in foster care programs. *Id.* at 49. The Supreme Court also noted the prevalence of minority children in the foster care system:

It is certainly true that the poor resort to foster care more often than other citizens. For example, over 50% of all children in foster care in New York City are from female-headed families receiving Aid to Families with Dependent Children Minority families are also more likely to turn to foster care; 52.3% of the children in foster care in New York City are black and 25.5% are Puerto Rican. . . . This disproportionate resort to foster care by the poor and victims of discrimination doubtless reflects in part the greater likelihood of disruption of poverty-stricken families The poor have little choice but to submit to state-supervised child care when family crises strike.

Smith, 431 U.S. at 833-34 (citations omitted). See also Shirley Jenkins, *Child Welfare as a Class System*, in CHILDREN AND DECENT PEOPLE 3, 11-12 (Alvin L. Schorr ed., 1974) (citing several

some social workers are responsible for as many as one hundred children, a figure significantly in excess of a court-approved ratio of twelve to twenty cases per worker.⁵³ A recent study determined that some Washington, D.C. social workers were so overwhelmed by their caseloads that they failed to investigate cases for extended periods and removed children from their homes without making reasonable efforts to provide the families with services that would preclude removal actions.⁵⁴

The length of time spent in foster care is also increasing for most children.⁵⁵ In Texas, for example, forty-four percent of nearly 8000 foster children remain in foster care eighteen months longer than recommended.⁵⁶ The Texas welfare system is also flawed in that it removes foster children from homes and replaces them again an average of four times per year, a practice that fails to provide a stable environment for those receiving foster care.⁵⁷

Even in Arkansas, where “child advocate” President Bill Clinton served as governor for five terms, the child welfare system is in a “state of emergency.”⁵⁸ In 1991 a class action suit was filed on behalf of 1536 Arkansas foster children seeking to reform the state welfare system.⁵⁹ The complaint alleged that “[a]bused and neglected children . . . [were] removed from their homes and placed voluntarily in unlicensed homes,” only to be subsequently “abandoned” by the Arkansas child welfare program.⁶⁰ The suit resulted in a consent decree signed by Clinton that acknowledged professional and medial neglect and provided \$15 million worth of emergency reform.⁶¹

studies which show that disadvantaged families more often had children placed in foster homes); Martin Rein et al., *Foster Family Care: Myth and Reality*, in CHILDREN AND DECENT PEOPLE 24, 25-29 (discussing foster care as a class-bound system).

⁵³ Marcia S. Greene, *D.C. Hires 94 Social Workers As Child Welfare Load Rises*, WASH. POST, Sept. 28, 1992, at D3 (discussing how Washington, D.C. recently added new social workers in an attempt to improve these ratios).

⁵⁴ *Id.*

⁵⁵ See DISCARDED CHILDREN, *supra* note 3, at 18 (“There is . . . evidence emerging from state and local studies indicating that the median length of stay of children in the child welfare system is on the rise again.”).

⁵⁶ Deborah Tedford, *Texas Children Often Languish in Foster Care; Study Reveals Flaw in System*, HOUS. CHRON., Sept. 27, 1992, at A1 (children remain more than two years; six months is recommended).

⁵⁷ Such stability and continuity is considered by many child experts to be a critical element of a child’s healthy development. See *infra* notes 63-73 and accompanying text.

⁵⁸ George Archibald, *Class-Action Suit Forced Reforms in Foster Care Program*, WASH. TIMES, July 26, 1992, at A6.

⁵⁹ *Id.* (discussing *Angela R. v. Clinton*, an unpublished opinion). The consent order approved in the case was subsequently vacated. See *Angela R. v. Clinton*, 999 F.2d 320 (8th Cir. 1993).

⁶⁰ Archibald, *supra* note 58.

⁶¹ *Id.*

2. *Examining Permanency Planning*

Research studies dating as far back as 1959 expose serious flaws in the foster care system.⁶² The tenacity of these problems suggests an urgent need to reexamine the practices that were developed to protect American children. Perhaps the most significant of these practices is permanency planning, a scheme developed in the 1970s by child advocates who sought to address some of the system's most serious problems.⁶³ Under permanency planning, child welfare authorities attempt to place each child in a permanent family and home.⁶⁴ As a matter of priority, the authorities try to return children already in foster care to their natural parents. In cases where such a reunion cannot be effected, permanency planning seeks to free children for adoption.⁶⁵

Freeing a foster child for adoption requires either that the natural parents voluntarily relinquish the child or that a court of law formally terminate parental rights. Although termination proceedings vary by jurisdiction, all states require separate hearings based on a special petition or motion, usually filed by a child's court-appointed attorney or a case worker on behalf of the state and the foster child.⁶⁶

⁶² See PELTON, *supra* note 51, at 53-54; see also DAVID FANSHIEL & EUGENE B. SHINN, CHILDREN IN FOSTER CARE: A LONGITUDINAL INVESTIGATION (1978) (detailing the only longitudinal study of foster children ever taken); GRUBER, *supra* note 51; MAAS & ENGLER, *supra* note 13 (discussing "children in limbo"); ANN W. SHYNE & ANITA G. SCHROEDER, NATIONAL STUDY OF SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES (1978) (detailing a survey of public social services to children and their families); Henry S. Maas, *Children in Long-Term Foster Care*, 48 CHILD WELFARE 321 (1969) (reporting a study on the lives of children in foster care for 10 or more years); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976) (discussing the inadequacies of laws regarding the removal of children and proposing new standards for removal determination).

⁶³ It is broadly accepted in the fields of child development and psychology that children need to be raised in a permanent family setting in order to be emotionally healthy. See Mark A. Hardin & Ann Shalleck, *Children Living Apart from Their Parents*, in LEGAL RIGHTS OF CHILDREN, *supra* note 40, at 371-73; see also PELTON, *supra* note 51, at 54. A 1987 report indicates that programs designed to promote permanency planning have been implemented by at least 25 states including the following: Alabama, Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Iowa, Kentucky, Louisiana, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, and Wisconsin. *Id.*

⁶⁴ Hardin & Shalleck, *supra* note 63, at 371.

⁶⁵ It is widely accepted that temporary foster care placements, even if they are long-term placements, do not provide children with the permanence that they require. See Hardin & Shalleck, *supra* note 63, at 371-73; see also PELTON, *supra* note 51, at 54 (discussing permanency planning as a response to professional criticism of the foster care system).

⁶⁶ Most jurisdictions recognize parental abandonment, neglect or abuse of the child, or mental deficiency of the parent, as grounds for involuntary termination. See COMMITTEE ON THE OFFICE OF THE ATT'Y GEN., NATIONAL ASS'N OF ATT'YS GEN., LEGAL ISSUES IN FOSTER CARE 5-6 (1976) [hereinafter LEGAL ISSUES IN FOSTER CARE]; Vincent De Francis, *Termina-*

Successful termination proceedings sever all remaining legal ties between the natural parent and the child, completely abolishing parental rights to receive information about the child or to communicate with her.⁶⁷ Although drastic, termination constitutes a necessary step toward adoption for foster children who are unable to return to the home of their unfit parents.

For these foster children, termination provides the hope that their "critical, formative years [will not be spent] adrift in foster care, needlessly deprived of the adoption that would give permanence to their lives."⁶⁸ Studies by child experts conclude that "children need to feel wanted and accepted[:] . . . they need continuity in their relationships with biological or psychological parents; they need guidance to cope with the demands of growing up; and they need to have some sense that there is a regular, dependable quality to the world."⁶⁹ But children who are frequently shuffled between foster homes never experience the stable family environment so vital to their healthy development.⁷⁰ Child advocates contend that impermanence devastates the lives of foster children, causing them great pain, frustration and anxiety.⁷¹ Indeed, studies have shown that long-term placement in foster care, where acceptance, continuity and regularity are not readily found, can severely retard a child's development.⁷² Thus, when all reasonable efforts to return children to their families have failed, it

tion of Parental Rights—Balancing the Equities, in LEGAL RIGHTS OF CHILDREN 98, 106-11 (1973).

⁶⁷ De Francis, *supra* note 66, at 99-101. Termination also rescinds the parents' duty to support the child. *Id.*

⁶⁸ NATIONAL COMM'N REPORT, *supra* note 16, at 10. The Commission noted: A [1977] study by the New York City Comptroller's office revealed that 97 per cent of the children in foster care were there because of parental abuse, neglect, "inability to cope," illness and other reasons not the fault of the child. Far less often the child was in foster care for being incorrigible at home or for having a physical or emotional handicap which parents could not handle.

Id. at 9.

⁶⁹ KNITZER & ALLEN, *supra* note 13, at 1; *see also* ADVISORY COMM'N ON CHILD DEVELOPMENT, TOWARD A NATIONAL POLICY FOR CHILDREN AND FAMILIES (1976); JOINT COMM'N ON MENTAL HEALTH OF CHILDREN, CRISIS IN CHILD MENTAL HEALTH: CHALLENGE FOR THE 1970's (1969); ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968).

⁷⁰ Janeen Shannon, *Foster Care Practicalities*, in EMERGING RIGHTS OF CHILDREN, *supra* note 42, at 13 (describing the gap between ideal foster care and the reality of foster care).

⁷¹ NATIONAL COMM'N REPORT, *supra* note 16, at 9.

⁷² *See, e.g.*, KNITZER & ALLEN, *supra* note 13, at 40-42; Jolowicz, *supra* note 22, at 55; *see also* Marcia Lowry, *Derring-Do in the 1980's: Child Welfare Impact Litigation After the Warren Years*, 20 FAM. L.Q. 255, 257 (1986) (contending that foster care systems are often responsible for "destroying salvageable human beings and producing yet another generation of the economically dependent and socially and psychologically unfit . . . [who will] fill our mental hospitals, our jails and our welfare rolls"); John J. Musewicz, *The Failure of Foster Care: Federal Statutory Reform and the Child's Right to Permanence*, 54 S. CAL. L. REV. 633, 638 n.8 (1981) (noting that "[t]he effects of foster care on children can be devastating").

will generally serve the child's best interests⁷³ to terminate parental rights and free him for adoption, rather than to allow him to languish in long-term foster care.

Although such determinations may seem easy, identifying the "best interests of the child" has actually proven difficult for judges and caseworkers. Courts have failed to devise a uniform standard to guide their placement decisions; therefore, decisionmaking proceeds on an ad hoc basis. Additionally, battles waged between natural parents, foster parents, and state agencies often distract participants from the primary reason for the termination proceeding: concern for the health and happiness of the foster child.⁷⁴ Permanency planning guidelines were developed to improve the quality of decisionmaking in termination proceedings by helping foster care officials and judges understand and address the complex issues that arise in termination cases. In 1975 a Children's Defense Fund (CDF) study recommended the implementation of a three-step process to ensure the availability of permanent homes for those foster children who are unable to return to their natural parents:

- (1) timely identification of the children by workers or as a result of independent periodic review procedures;
- (2) timely initiation of proceedings to determine if legal severing of the rights of the natural parent is appropriate, either by voluntary relinquishment of the child or by court ordered termination; and
- (3) timely adoption of the child by a new parent or parents.⁷⁵

⁷³ The obligation of the state when acting in its *parens patriae* capacity is to require the courts to do "what is best for the interest of the child." See, e.g., *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925). The decisionmaker is required to take the perspective "of a 'wise, affectionate, and careful parent' and make provision for the child accordingly." *Id.* (citation omitted). See also *Chapsky v. Wood*, 26 Kan. 650 (1881) (introducing the notion of the child's interest). Thus, "placement decisions should reflect what is in the best interest of the child." ROBERTA GOTTESMAN, *THE CHILD AND THE LAW* 113 (1981).

Although no uniform standard for determining the best interests of the child has been formulated, courts tend to presume incorrectly that the best interests of the child are served by being with the natural parents in the absence of unusual or countervailing circumstances. See *LEGAL ISSUES IN FOSTER CARE*, *supra* note 66, at 19 (noting that courts have been criticized for utilizing the indefinite "best interests" standard in a manner that focuses exclusively on a child's physical well being, while failing to understand or acknowledge "the necessity of safeguarding a child's psychological well being"); see also JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 6 n.4 (1979) (recommending that courts seek the "least detrimental alternative" for each child, which is defined as the specific placement that will allow each child to experience a continuous relationship with "at least one adult who is or will become his psychological parent"). Despite the lack of consensus over the precise content that should be attributed to the "best interests" standard, the "phrase has rightfully retained its place in American law as an expression of the need to keep the interests and perspective of the child foremost in the minds of adult decisionmakers." Jane Ellis, *The Best Interests of the Child*, in *CHILDREN'S RIGHTS IN AMERICA*, *supra* note 5, at 3, 4.

⁷⁴ NATIONAL COMM'N REPORT, *supra* note 16, at 7.

⁷⁵ KNITZER & ALLEN, *supra* note 13, at 26.

The CDF study also suggests several factors for judges to consider during termination proceedings (step (2)):

- The length of time the child has been out of the home
- The strength of the child's past relationship with the natural parent
- The child's response to current visits and trial stays at home
- The strength of the child's psychological relationship with foster parent(s) if such a relationship has been formed
- The child's wishes, depending on his age⁷⁶

Permanency planning advocates hoped that such recommendations and guidelines would facilitate the adoption of permanency planning throughout the nation.

3. *The Limited Success of Permanency Planning*

Although many states have implemented permanency planning standards and guidelines over the past twenty years, the permanency planning movement has enjoyed only limited success in achieving its goals.⁷⁷ Some child welfare experts have conducted surveys that indicate a marked decrease in long-term foster care. For example, the 1975 CDF survey, which was distributed to 140 county welfare agencies across the country, reported that twenty percent of the foster children residing in those counties had been in foster care for over six years.⁷⁸ Twelve years later, a study of child welfare programs in twenty-seven states indicated that permanency planning had improved the situation: only ten percent of all foster children remained in foster care for six years or more.⁷⁹

Other experts, however, have compiled less favorable survey results. A 1978 study of New York children placed in foster care for longer than ninety days found that fifty percent of the two-year-old children, and forty-seven percent of the African American children, remained in foster care five years later.⁸⁰ A 1980 survey revealed no significant improvements: the average length of stay in New York foster care was 4.4 years,⁸¹ and fifty-seven percent of all foster children had been in the system for over two years.⁸² Gregory Kingsley's home state of Florida has also failed to reap the expected benefits of permanency planning. A 1979 study found that Florida's foster children

⁷⁶ *Id.* at 30.

⁷⁷ DISCARDED CHILDREN, *supra* note 3, at 1-2.

⁷⁸ KNITZER & ALLEN, *supra* note 13, at 3-4, 25. *Id.* at 26 n.45. A national study conducted in 1977 produced similar results: Approximately 23% of children in foster care remained there for at least six years. See SHYNE & SCHROEDER, *supra* note 62, at 119-20.

⁷⁹ PELTON, *supra* note 51, at 55 (citing a 1937 study based on data from 27 states).

⁸⁰ *Id.* at 54-55.

⁸¹ *Id.* at 55.

⁸² *Id.*

spent an average of thirty-four months in foster care.⁸³ Fourteen years later, child advocates in Florida can argue that no significant improvements have been made because approximately two-thirds of the state's foster children still remain in foster care beyond the eighteen months permitted by law.

The limited success of permanency planning⁸⁴ can be explained, in part, by a contradiction which lies at the heart of the foster care problem. The underlying principle of permanency planning is that a child's right to a permanent, stable home should take precedence over the rights of neglectful or incompetent parents. In practice, however, permanency planning systems succumb to societal pressure to protect the rights of natural parents, even at the expense of the child. As a society, we hold fast to the belief that the best place for children is with their natural parents.⁸⁵ Consequently, judges and social service agents are reluctant to terminate parental rights even when faced with lengthy histories of severe child abuse and neglect.⁸⁶

The decision to terminate a parent's rights has been described as "one of the most painful a judge makes."⁸⁷ Judges must predict whether termination will be in a child's long-term best interests—a prediction made especially difficult when the desires of the natural parent are in direct conflict with those interests.⁸⁸ Seeking to avoid the "extreme act"⁸⁹ of termination, judges often cling to the hope that "something might happen in the future to make the [natural] parents more adequate,"⁹⁰ such as a remission in alcohol-related violence, overall improvements in parenting, or the abatement of chronic mental illness. One study found that "[t]he faintest 'flicker of interest' [offered by natural parents] often deters judges from severing the rights of persons who have for years demonstrated unfitness, disinterest or an inability to be responsible parents."⁹¹ Thus, judges tend to

⁸³ NATIONAL COMM'N REPORT, *supra* note 16, at 32, Table 1.

⁸⁴ Regardless of the gains achieved through permanency planning, the fact that 20% of foster children across the nation remain in "temporary" foster homes for periods exceeding six years indicates that termination of parental rights occurs too rarely. See KNITZER & ALLEN, *supra* note 13, at 25. See also Tedford, *supra* note 56.

⁸⁵ NATIONAL COMM'N REPORT, *supra* note 16, at 7.

⁸⁶ *Id.* Professor Judith Areen observed:

[N]o one likes to decide to take a child from his or her parents—judges no more than anyone else. Given the chance to pretend there is a possible compromise, they will continue to extend what is labelled "temporary" foster care, even though five or six years is surely not temporary.

Judith Areen, *Foster Care and the Law*, in EMERGING RIGHTS OF CHILDREN, *supra* note 42, at 9 (1976).

⁸⁷ NATIONAL COMM'N REPORT, *supra* note 16, at 9.

⁸⁸ *Id.*

⁸⁹ KNITZER & ALLEN, *supra* note 13, at 27.

⁹⁰ *Id.*

⁹¹ NATIONAL COMM'N REPORT, *supra* note 16, at 6.

overemphasize biological ties⁹² or “require extensive, time-consuming searches for putative fathers who have shown no interest in their children.”⁹³

Caseworkers also contribute to the problem because they often fail to initiate termination proceedings when they should.⁹⁴ One reason for this failure is that caseworkers are poorly paid and often professionally unprepared,⁹⁵ as well as overworked and overwhelmed by a system that is overflowing with foster children.⁹⁶ Although the Child Welfare League of America recommends a caseload of twenty to thirty cases per worker, the national average ranges from seventy-five to ninety cases.⁹⁷ Thus, “[a] case worker’s actual direct face-to-face contact with the child and family may total under two work days per year.”⁹⁸

A second reason for caseworkers’ failure to initiate appropriate termination proceedings is a lack of motivation. Studies have shown that caseworkers, like judges, tend to overemphasize the importance of the biological ties of natural parents;⁹⁹ thus, they too may erroneously believe that termination does not benefit children. Even if they do believe in the benefits of termination, caseworkers may think that initiating proceedings is a waste of time, given the strong reluctance to terminate natural parents’ rights exhibited by judges.¹⁰⁰ Furthermore, when caseworkers have not made repeated efforts to work with children’s natural parents (a common situation, due to social workers’ burdensome caseload), natural parents can easily defeat a termination motion by arguing that they were not given a chance to remedy their problems.¹⁰¹ Even when caseworkers have made such repeated efforts, natural parents may defeat the motion due to a lack of docu-

⁹² KNITZER & ALLEN, *supra* note 13, at 27.

⁹³ *Id.*

⁹⁴ A 1987 report by the Select Committee on Children, Youth, and Families found that “[a] majority of States noted that staff-related problems remain significant barriers to serving children and families.” H.R. REP. NO. 260, 100th Cong., 1st Sess. 83 (1987). Specific concerns expressed by state agencies were a “lack of staff to handles cases . . . ; inadequate resources to hire and retain qualified staff . . . ; inadequate staff training . . . and high turnover” *Id.*

⁹⁵ NATIONAL COMM’N REPORT, *supra* note 16, at 6.

⁹⁶ CRITICAL FIRST STEPS, *supra* note 5, at 36-38 (listing among the deficiencies within the child protection system “major shortcomings in the status, recruitment, training, supervision, and caseloads of . . . caseworkers”).

⁹⁷ NATIONAL COMM’N REPORT, *supra* note 16, at 6.

⁹⁸ *Id.*

⁹⁹ *Id.* See also Rein et al., *supra* note 52, at 42-44 (contending that social workers tend to favor continued placement in foster care with middle class families rather than return children to their original families and noting that such preferences may reflect a bias that treats the natural parents’ poverty and lifestyle as prejudicial to the best interests of the child).

¹⁰⁰ KNITZER & ALLEN, *supra* note 13, at 27-28.

¹⁰¹ *Id.*

mentation.¹⁰² Finally, if caseworkers feel that they have made mistakes in their handling of a case, they may not wish to initiate termination proceedings which would expose their errors.¹⁰³

4. *Addressing the Limbo Problem*

Experts have offered solutions and recommendations for decreasing the number of foster children who grow up in the unstable and unhealthy environment of long-term foster care. Some critics assert that *no* foster care at all is better than long-term foster care.¹⁰⁴ They recommend foster care placement only if either all reasonable efforts have been made to protect the child from severe harm in the home, or the risk of severe harm within the home outweighs any harm that may be occasioned by long-term foster care.¹⁰⁵ Others claim that the guidelines and standards employed by agencies and caseworkers require greater specificity.¹⁰⁶ These critics maintain that this vagueness makes it difficult for officials to identify properly otherwise remediable harm to the child, to select services appropriate for the problems specific to the case, and to determine the necessary conditions for establishing a permanent home.¹⁰⁷

Some child advocates recommend subsidized adoption¹⁰⁸ and mandatory, periodic review of each foster child's case by the courts or an independent administrative body.¹⁰⁹ Other obvious, but costly, solutions include increased staffing,¹¹⁰ more extensive training for caseworkers¹¹¹ and increased state and federal funding.¹¹² Although their suggestions and methods vary, these experts are unified in their agreement that changes must be made.

C. *In re Gregory K.*: Recognizing a Child's Right to Permanency

When a young foster child named Gregory Kingsley filed a termination suit against his natural parents in July 1992, he inspired another proposal for reform: granting foster children the right to initiate parental termination proceedings.¹¹³ Although caseworkers,

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ PELTON, *supra* note 51, at 73-74.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 76.

¹⁰⁷ *Id.*

¹⁰⁸ NATIONAL COMM'N REPORT, *supra* note 16, at 8.

¹⁰⁹ *Id.*

¹¹⁰ PELTON, *supra* note 51, at 77.

¹¹¹ *Id.*

¹¹² NATIONAL COMM'N REPORT, *supra* note 16, at 6-7.

¹¹³ First Amended Complaint at 7, *In re Gregory Kingsley* (Fla. Cir. Ct. Oct. 13, 1992) (No. JU90-5245), *rev'd sub nom. Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

foster parents or guardians normally initiate termination proceedings on behalf of foster children, Gregory hired an attorney and independently entered a plea to sever the rights of his natural parents.¹¹⁴

Many Americans who followed the case sympathized with Rachel Kingsley, the natural mother, fearing that giving children the right to independently bring termination proceedings would result in frivolous suits or parent-shopping.¹¹⁵ Gregory's decision to terminate relations, however, was far from impulsive. Indeed, many years of maltreatment at the hands of a mother addicted to drugs and alcohol prompted his decision.¹¹⁶ Gregory's chemically dependent mother had placed him in foster care four separate times before he was twelve. Gregory spent only seven months out of the previous eight years with his mother.¹¹⁷ He lamented that he "didn't know . . . [his] mom"¹¹⁸ and insisted that he "wanted a family."¹¹⁹ Neither natural parent communicated with him in any way during his last twenty months in foster care, even though for eight of those twenty months Rachel Kingsley lived only thirty minutes from her son's foster home.¹²⁰ Gregory spent most of his young life in a tumultuous and unstable environment, and was plagued by feelings of insecurity and low self-esteem.¹²¹ Given the uncertainty of the foster environment and the memories of past abuses at home, Gregory did not want to return to his natural parents, hoping instead to be adopted or at least to remain in foster care.¹²²

Gregory finally found a family of his own when he moved into the home of George and Lizabeth Russ in October 1991.¹²³ Several months after entering the stable and positive environment of the Russ home,¹²⁴ Gregory asked George and Lizabeth to adopt him. When

¹¹⁴ *Neglect Debated at Child "Divorce" Trial*, HOUS. CHRON., Sept. 25, 1992, at A6 ("Never before has a child been granted permission to hire his own attorneys to pursue a lawsuit of this nature against his parents.").

¹¹⁵ See *Larry King Live: Parents' Rights vs. Children's Rights—The Dilemma* (CNN television broadcast, Aug. 20, 1993), available in LEXIS, Nexis Library, SCRIPT file; see also *infra* notes 153-58 and accompanying text; Shapiro, *supra* note 28, at 317 ("Gregory K.'s case . . . shows how the effort to broaden children's legal rights can unfairly affect 'undesirable' parents, many of whom are poor, nonwhite or single mothers."). Ralph Kingsley, Gregory's natural father, also had his rights terminated, but he was not the focus of national attention because he consented to such termination when Gregory first filed his petition. First Amended Complaint at 7, *In re Gregory Kingsley* (No. JU90-5245).

¹¹⁶ First Amended Complaint at 7, *In re Gregory Kingsley* (No. JU90-5245).

¹¹⁷ *Intriguing People*, *supra* note 26, at 65.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ First Amended Complaint at 7, *In re Gregory Kingsley* (No. JU90-5245).

¹²¹ *Id.* at 9.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ While living with the Russ family, Gregory excelled in school and developed a loving relationship with his foster parents and siblings. *Id.*

they expressed a desire to do so, Gregory hired an attorney to help him file a petition for termination with the Florida circuit court.

1. *The Right to Initiate Parental Rights Termination Proceedings*

Before the Florida circuit court would hear Gregory's petition, Gregory had to establish that he had the right to initiate a termination proceeding. Florida law does not explicitly grant minors the right to file a termination petition. Section 39.461 of the Florida Statutes merely provides that any "person who has knowledge of the facts alleged" may file a petition for termination of parental rights.¹²⁵ In his complaint, Gregory asserted that he had the right to bring the action as both the real party in interest and a natural person and citizen under the United States Constitution and the Florida Constitution.¹²⁶ Gregory also argued that he had a right to initiate a termination proceeding because the Florida Department of Health and Rehabilitative Services (HRS), his guardian ad litem and his natural parents had "all failed and refused to take appropriate action"¹²⁷ to protect his constitutional and legal rights as they were required to do under section 39.001 of the Florida Statutes.¹²⁸ In his complaint, Gregory also alleged that HRS had "taken positions directly contrary to . . . [his] claimed legal rights, wishes and desires. . . ."¹²⁹

a. *The Right to Initiate Termination Proceedings under the Florida Constitution*

In an order that attracted widespread interest,¹³⁰ Circuit Judge Thomas A. Kirk ruled that Gregory had standing, thereby recognizing his right to independently initiate a parental rights termination proceeding.¹³¹ Kirk concluded that Gregory was a natural person entitled to the rights set forth in Article I of the Florida Constitution, includ-

¹²⁵ FLA. STAT. ANN. § 39.461 (West 1990).

¹²⁶ First Amended Complaint at 7, *In re Gregory Kingsley* (Fla. Cir. Ct. Oct. 13, 1992) (No. JU90-5245), *rev'd sub nom. Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

¹²⁷ *Id.* at 2.

¹²⁸ FLA. STAT. ANN. § 39.001 (West 1990).

¹²⁹ First Amended Complaint at 2, *In re Gregory Kingsley* (No. JU90-5245).

¹³⁰ *See supra* notes 26, 114, 115.

¹³¹ Judge Kirk departed from the common-law notion that children are nonpersons without individual rights or obligations.

ing:¹³² the right to pursue happiness,¹³³ the right to due process of law,¹³⁴ the right of access to the courts of the state,¹³⁵ and the right to make private choices.¹³⁶ The court order also expressly noted that the right to privacy described in the Florida constitution extends to all natural persons, including minors.

b. *The Florida Statutes*

The court also held that Gregory's right to initiate the termination proceeding was supported by chapter thirty-nine of the Florida Statutes, which addresses child custody issues.¹³⁷ Judge Kirk noted that this chapter provides for judicial and non-judicial proceedings whereby children and other interested parties can receive fair hearings and the recognition, protection and enforcement of their constitutional rights. The court found particular support in section 39.461, which provides that any "person who has knowledge of the facts alleged" may file a petition for termination of parental rights.¹³⁸ The court concluded that as Gregory had knowledge of facts that could support a claim for parental rights termination, section 39.461 gave him the right to file his petition in Florida.¹³⁹

¹³² The circuit court held that Gregory was a natural person entitled to the rights set forth in Article I of the Florida Constitution. *Gregory K. v. Ralph K.*, No. CI92-5127, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992). Under Article I, all natural persons are guaranteed the right to pursue happiness, the right to due process of law, the right of access to the courts of the state, and the right to make private choices. FLA. CONST. art. I, §§ 2, 9, 21 and 23.

The court also reaffirmed that the right to privacy set forth in the Florida Constitution extends to all natural persons, including minors. *Gregory K.*, No. CI92-5127, 1992 WL 551488 (quoting *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) which cites *Planned Parenthood v. Danforth*, 428 U.S. 53, 74 (1976)). The court explained that "[c]onstitutional rights do not mature and come into being magically only when one attains the state defined age of majority." *Id.*

¹³³ FLA. CONST. art. I, § 2.

¹³⁴ FLA. CONST. art. I, § 9.

¹³⁵ FLA. CONST. art. I, § 21.

¹³⁶ FLA. CONST. art. I, § 23.

¹³⁷ The Florida circuit court also held that recognizing Gregory's standing to sue for parental rights termination was consistent with Florida statutory law. *Gregory K.*, No. CI92-5127, 1992 WL 551488. Chapter 39 of the Florida Statutes provides for judicial and nonjudicial proceedings whereby children and other interested parties can receive fair hearings and the recognition, protection and enforcement of their constitutional rights. FLA. STAT. ANN. § 39.001(2)(a) (West 1990). Public safety interests are also protected under Chapter 39.

Section 39.461 of the Florida Statutes provides that any "person who has knowledge of the facts alleged" may file a petition for termination of parental rights. FLA. STAT. ANN. ch. 39.461 (West 1990). Because Gregory was a person with knowledge of facts that could form the basis for a claim for parental rights termination, the court concluded that he consequently had standing to file a petition under the Florida Statutes.

¹³⁸ FLA. STAT. ANN. § 39.461 (1990).

¹³⁹ *Gregory K.*, No. CI92-5127, 1992 WL 551488.

2. *Terminating the Rights of Rachel Kingsley*

In subsequent proceedings the court held that Rachel Kingsley had "permanently forfeited"¹⁴⁰ all of her rights to Gregory.¹⁴¹ The court based its decision on a number of factors, including the Russ family's superior ability to provide for Gregory's needs, the greater prospect of permanency with the Russ family, and the length of time Gregory had spent in foster care.¹⁴² In making the decision to terminate, the court also considered Gregory's preference in living arrangements. Observing that Gregory was "intelligent, mature . . . [and possessed] sufficient understanding and experience to express a reasonable preference," the court noted that he had consistently and repeatedly expressed a desire to live with the Russ family.¹⁴³ After finding "clear and convincing evidence"¹⁴⁴ of all of the criteria for termination contained in section 39.46(2) of the Florida Statutes,¹⁴⁵

¹⁴⁰ Final Judgment Terminating Parent/Child Relationship, *In the Interest of Gregory K.*, Case No. JU90-5245, at 11.

¹⁴¹ Ralph Kingsley, Gregory's father, also had his rights terminated. Mr. Kingsley is not discussed in this section because he consented to such termination when Gregory first filed his termination petition. See First Amended Complaint at 7, *In re Gregory Kingsley* (Fla. Cir. Ct. Oct. 13, 1992) (No. JU90-5245), *rev'd sub nom.* *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

¹⁴² Final Judgment, *supra* note 140, at 9.

¹⁴³ *Id.* at 9, 10.

¹⁴⁴ *Id.* at 9.

¹⁴⁵ The court found that the following criteria had been proven by clear and convincing evidence:

- a. The inability of the mother to provide for the child's needs.
- b. The endangerment of the child's health and well-being if returned to the mother.
- c. The special developmental needs of the child and how those needs are best met with the Russ family.
- d. The lack of any bond with the natural parents or natural siblings.
- e. The length of the placement of the twelve year old child in foster care for approximately 34 months of the past 36 months.
- f. The availability of a permanent family placement for the child with the Russ family.
- g. The length and stability of the placement of the child with the Russ family for approximately 11 months and the bond he has formed with the foster parents and the foster siblings.
- h. The preference the child has expressed consistently and repeatedly to be placed with the Russ family for adoption and that it is the preference of a child who is an intelligent, mature, twelve year old, who has sufficient understanding and experience to express a reasonable preference.
- i. The recommendation of the guardian ad litem that the parental rights be terminated and that it is in the child's best interests to be placed with the Russ family for adoption.
- j. The lack of any suitable permanent custody arrangement with a relative of the mother because of the prolonged absence of the mother and her family from any significant role in the child's life and the importance and strength of the bond he has formed with the foster family.

Id. at 9-10.

the court concluded that termination was “manifestly in the best interests of . . . Gregory Kingsley.”¹⁴⁶

3. *Kingsley v. Kingsley: The Appellate Court’s Partial Reversal*

The trial court’s final order should have been a happy ending to Gregory’s long journey through Florida’s foster care system. However, Rachel Kingsley, Gregory’s natural mother, immediately filed a notice of appeal.¹⁴⁷ She brought her case before the Florida District Court of Appeal alleging five separate grounds for appeal, including the contention that Gregory, as a minor child, did not have the capacity to bring a parental rights proceeding in his own right.¹⁴⁸

Notwithstanding the fact that the appellate court affirmed the lower court’s finding that Rachel Kingsley had abandoned Gregory, the appellate court agreed with her position that Gregory lacked the capacity to initiate a parental rights termination proceeding. Citing Florida Rule of Civil Procedure 1.210(b), the court explained that “unemancipated minors do not have the legal capacity to initiate legal proceedings in their own names.”¹⁴⁹ Instead of petitioning the court directly, a child must be represented by a guardian or next friend who acts on the child’s behalf. The court noted that representation of a minor by a guardian ad litem or next friend “is required by the orderly administration of justice and the procedural protection of a minor’s welfare and interest by the court.”¹⁵⁰ Accordingly, “the fact that a minor is represented by counsel, in and of itself, is not sufficient.”¹⁵¹

Although the appellate court’s reversal undermines *Gregory K.*’s usefulness in the effort to establish a foster child’s right to initiate termination proceedings, the basic arguments that initially persuaded the Florida circuit court to recognize such a right may be more successful in other states. Furthermore, several criticisms discredit the appellate court’s reasoning in *Kingsley*. Part III of this Note enumerates these criticisms and also explores federal, state and common-law alternatives for recognizing a foster child’s right to initiate termination proceedings.

¹⁴⁶ *Id.* at 10. The court also noted that Rachel Kingsley had not been a credible witness and that the Florida Department of Health and Rehabilitative Services had acted wrongfully in failing to file a petition for termination prior to April, 1992. *Id.* at 10.

¹⁴⁷ *Kingsley v. Kingsley*, 623 So. 2d 780, 782 (Fla. Dist. Ct. App. 1993).

¹⁴⁸ *Id.* at 783.

¹⁴⁹ *Id.* at 783-84.

¹⁵⁰ *Id.* at 784.

¹⁵¹ *Id.*

II

THE DEBATE OVER GRANTING CHILDREN THE RIGHT TO
INITIATE PARENTAL RIGHTS TERMINATION
PROCEEDINGS

In the wake of the circuit court's initial order granting Gregory the right to initiate a termination proceeding, family law experts and child advocates engaged in fervent debates over children's rights. Although at least one expert contended that Gregory's case was actually "less revolutionary than it sounds,"¹⁵² others strongly criticized the court's ruling. The following section evaluates several arguments against granting children the right to initiate termination proceedings,¹⁵³ concluding that although some of these arguments raise valid concerns, these concerns are outweighed by the countervailing needs of foster children.

A. Evil Ramifications and Frivolous Claims

Some critics fear that granting children the right to independently initiate proceedings to terminate parental relationships will undermine traditional family values.¹⁵⁴ They predict that recognizing such a right will result in " 'evil and frightening' ramifications for families."¹⁵⁵ Other critics are quick to envision disgruntled children filing claims of misparenting over "insufficient allowances or too much spinach for dinner."¹⁵⁶ They fear that the recognition of such a right will

¹⁵² Pat Wingert & Eloise Salholz, *Irreconcilable Differences*, NEWSWEEK, Sept. 21, 1992, at 84 (quoting commentary by Robert Mnookin, a family law expert at Stanford Law School). These experts point out the regularity with which foster parents or guardians ad litem initiate termination proceedings on behalf of foster children. *See id.*; *see also* Bryanna Latoof, *The New Children of Divorce*, ST. PETERSBURG TIMES, Oct. 7, 1992, at 1D, 3D (quoting Professor Martin Guggenheim as saying that "[t]he only thing about . . . [the Gregory K. case] that was interesting is that Gregory had to go out and get his own lawyer to bring an action that served . . . as the catalyst for HRS changing its mind and recommending that the child be removed from his mother's custody").

¹⁵³ *See infra* notes 154-206 and accompanying text.

¹⁵⁴ *Id.* *See also* Cheakalos, *supra* note 24, at A4 (quoting Rachel Kingsley's attorney as saying that allowing a child to initiate termination proceedings "could undermine fundamental family values"); Keith Goldschmidt, *Boy, 11, Seeks "Divorce" From Parents*, Gannett News Service, May 4, 1992 available in LEXIS, Nexis Library) (quoting Gary Bauer, president of the Family Research Council, as saying that if children are granted such constitutional privileges it would lead to "the destruction of the family unit").

¹⁵⁵ Mark Hansen, *Boy Wants "Divorce" From Parents*, A.B.A. J., July 1992, at 24 (quoting Jim Sawyer, a lawyer for the Florida Department of Health and Rehabilitative Services). According to a spokesperson for the Family Research Council in Washington, D.C., Gregory K. "sends out the unfortunate message to children that 'your parents may not protect you, so don't worry, you've got this out.' To tell children there's a divorce option out there—that does not lend itself to strong families." Latoof, *supra* note 152, at 3D.

¹⁵⁶ Bob Cohn, *From Chattel to Full Citizens*, NEWSWEEK, Sept. 21, 1992, at 88, 89. *But see* Wingert & Salholz, *supra* note 152, at 84 ("Legal experts scoff at the idea that Gregory's case would pave the way for frivolous lawsuits—for example, by teens who bridle at turning down the stereo.").

encourage an overwhelming number of fringe claims that are “best left to the give-and-take of the home.”¹⁵⁷ Others argue that families will be hurt because *Gregory K.*’s “ultimate message . . . is that parents in trouble may avoid turning to the state for help for fear of losing their child.”¹⁵⁸

What these arguments fail to consider, however, is that the right advocated in this Note, and recognized in *Gregory K.*, is the limited right of a child to file a petition and initiate a proceeding, in accordance with statutory requirements, for the termination of parental rights. Predictions by critics that the recognition of such a limited right will result in the downfall of the American family and an onslaught of frivolous claims are misguided.¹⁵⁹ By equating the right of foster children to petition a court for parental rights termination with frivolous suits about allowances, these critics fail to appreciate the seriousness of the problems faced by children in long-term foster care. Jack Levine, executive director of the Florida Center for Children and Youth, and a supporter of the *Gregory K.* ruling, eloquently refutes many of the protests voiced by “family values” critics:

[I]t’s essential to say what this case is not. This case is not a divorce case. This case is not a situation of a child rejecting the spinach that his parents served and taking them to court. This is not frivolous. This is not about promoting disrespect of children for their parents. And the last thing this is not is a wide-open door for children to get their way from a judge where they haven’t gotten their way from a parent. What this case is, is a cry of desperation from a child who has lived the majority of his life in a state of legal limbo. It is a desperate attempt to find some security and stability for a child who

¹⁵⁷ Cohn, *supra* note 156, at 89.

¹⁵⁸ Latoof, *supra* note 152, at 3D (paraphrasing Professor Martin Guggenheim). According to Professor Guggenheim, *Gregory K.* creates a situation that is similar to a house fire in which

a mother stands amid the flames holding her child as she looks out of a window at people holding a net. There’s an implicit understanding that if she throws her child to safety, the child’s savers will return the baby to her when she gets out herself. But if you change the rules so that parents can’t be confident they’ll get their kids back, they ain’t going to turn to the system in the first place.

Id. It is unclear, however, why Guggenheim believes that the *Gregory K.* holding will serve to instill such reluctance, because termination can and, ideally, should be achieved without action by the foster child. Perhaps he means to suggest that mothers who place their children in foster care are justifiably relying on the general inability of state welfare systems to meet statutory requirements and pursue the goals and policies underlying the laws and permanency planning. Guggenheim seems to be saying that allowing children to take action when the state fails to meet their needs and protect their rights is somehow unfair to the parents of these children, who assume that the state welfare agencies will ignore their children, keeping them in foster care as long as it takes for the parents to become fit, competent adults capable of caring for their children.

¹⁵⁹ See *supra* notes 143-46 and accompanying text.

has known neither since his toddlerhood. And it is, in every sense of the word, a very strict case of law enforcement.¹⁶⁰

Additionally, the critics forget that foster children seeking to file a petition for parental rights termination must comply with the same substantive and procedural requirements that are imposed upon adult petitioners.¹⁶¹ Sanctions that deter attorneys from filing frivolous lawsuits on behalf of adult clients should also deter those representing children from filing irresponsible claims.¹⁶² Furthermore, the right to file a petition is not the last step: a foster child must convince a court that termination is in her best interests. A judge reviews the merits of a child's claim and also considers arguments proffered by both the state and the natural parents.¹⁶³ These substantive and procedural requirements are more than adequate to ensure that the right to initiate termination proceedings is unlikely to be abused if placed in the hands of foster children.

B. Decisionmaking and Psychological Trauma

Some legal scholars worry that involving children in these critical and emotionally-charged decisions might harm them psychologically.¹⁶⁴ Others argue that it is inappropriate for children to determine whether a given family or living arrangement is harmful for them insofar as children could be "satisfied with circumstances that are not in their best interest."¹⁶⁵ Another concern is that later in life these children may not only experience tremendous guilt but also realize that they sought termination merely to retaliate against their parents for placing them in foster care.¹⁶⁶

These critics tend to overlook several important facts. First, in any termination proceeding, whether initiated by the foster child or a caseworker, the judge is responsible for the final decision. Allowing a child to initiate termination proceedings should not be equated with relying upon a child to determine what living arrangement is in her

¹⁶⁰ Latoof, *supra* note 152, at 3D.

¹⁶¹ See, e.g., *supra* note 138 and accompanying text.

¹⁶² See, e.g., FED. R. CIV. P. 11.

¹⁶³ See, e.g., FLA. STAT. ANN. § 39.467(2) (West Supp. 1993) (requiring that in "determining the manifest best interests of the child, the court shall consider and evaluate all relevant factors").

¹⁶⁴ Cohn, *supra* note 156, at 89 (referring to Professor Martin Guggenheim's observation that it would be "terrible . . . if Gregory gets what he wants and 10 years later suffers an emotional breakdown" because he chose one set of parents over the other"). See also Shapiro, *supra* note 28, at 318 ("What will Gregory feel in five or ten years when he reflects upon his high-profile case, including his public rejection of his birth mother?"). Additionally, some child experts fear that "even mediagenic kids like Gregory can be psychologically harmed by too much publicity." *Id.*

¹⁶⁵ LAURA M. PURDY, IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN 139 (1992).

¹⁶⁶ Shapiro, *supra* note 28, at 318.

best interests. Additionally, even state-initiated termination proceedings involve foster children, albeit less directly, in the decision to sever parental rights.¹⁶⁷ Finally, the instability of foster care can intellectually and emotionally damage foster children.¹⁶⁸ Indeed, the psychological trauma that a foster child might experience as a result of filing a termination petition may be no greater than that which the child would have suffered during a state-initiated termination proceeding or through continued, long-term foster care.

C. Termination and Adoption: Are They In the Best Interests of Foster Children?

Some family law experts argue generally that emphasizing termination of parental rights and adoption are inappropriate vehicles for addressing the foster care crisis.¹⁶⁹ Termination of parental rights, they contend, does not ensure that a child will receive more stable placement.¹⁷⁰ For support, they point to the fact that children "freed" by termination proceedings must often wait over a year for adoption.¹⁷¹

Noting that the average age of children in foster care is higher than it used to be,¹⁷² these experts also maintain that it is unrealistic to expect twelve-year-old children to simply forget their natural parents and to start over with a new family.¹⁷³ By that age ties with the natural parents may be too firmly established. The vast majority of foster children have lived with, and have memories of, their natural parents.¹⁷⁴ As older children with more substantial ties to their natural parents have moved into the "adoption marketplace," there has been a corresponding increase of instances wherein prospective adoptive parents decide to return the child after placement but before adoption.¹⁷⁵

¹⁶⁷ See PURDY, *supra* note 165, at 139.

¹⁶⁸ See Leon Eisenberg, *The Sins of the Fathers: Urban Decay and Social Pathology*, 32 AM. J. OF ORTHOPSYCHIATRY 5, 14 (1962); Wald, *supra* note 62, at 667-74.

¹⁶⁹ Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 455-74 (1983).

¹⁷⁰ *Id.* at 472-73. This Note assumes that these experts would argue against parental rights termination irrespective of whether a child, the state or a guardian ad litem initiated the termination proceeding.

¹⁷¹ NEW YORK STATE CHILD WELFARE INFO. SERV., SUMMARY OF CHARACTERISTICS OF CHILDREN IN CARE OR RECENTLY DISCHARGED (1980).

¹⁷² CRITICAL FIRST STEPS, *supra* note 5, at xiv. See also KNITZER & ALLEN, *supra* note 13, at 186 (according to a 1976 national survey, 51% of the children in out-of-home care were 12 or older, and 31% were 15 or older).

¹⁷³ Garrison, *supra* note 169, at 472.

¹⁷⁴ *Id.* at 471.

¹⁷⁵ See Celia Bass, *Matchmaker-Matchmaker: Older Child Adoption Failures*, 54 CHILD WELFARE 505, 507 (1975).

These experts also cite studies revealing that adopted children often suffer the same confused identity, insecurity and guilt that trouble children in long-term foster care.¹⁷⁶ They argue that these studies strongly suggest that adoption, by itself, "does not resolve the insecurity that results from not 'belonging' to a natural parent."¹⁷⁷

Adoption, however, is neither intended to be a complete cure nor a quick fix for the psychological problems of foster children. The fact that adoption does not immediately instill foster children with a feeling of complete security is certainly not surprising. Recovery from the psychological wounds of a childhood filled with turmoil and instability may be a slow and painful process. A stable adoptive family environment is more conducive to the healing process than long-term foster care, which often heightens a child's feelings of insecurity and inadequacy. Furthermore, the studies relied on by these experts are not universally accepted; other sources report that it is unclear whether adoptees actually have a higher rate of mental disturbance than the general population.¹⁷⁸ Finally, the failure of some welfare agencies to place children with adoptive parents immediately following a termination proceeding does not justify preventing children from seeking termination and adoption.

According to some critics, however, even if it can be assumed that termination and adoption are viable practices, such practices are by no means the best methods for providing children in foster care with stable, loving homes.¹⁷⁹ These critics contend that permanency planning goes beyond what is necessary to provide continuity and stability for foster children.¹⁸⁰ Continuity of care, they argue, can be ensured through permanent custody arrangements that, unlike adoption, do not disrupt parental visitation.¹⁸¹ They maintain that alternative solutions might assure stable placements without requiring the complete severance of parental rights.¹⁸² They fear that espousing termination

¹⁷⁶ Garrison, *supra* note 169, at 469-72. In part, Garrison relies on Marshall D. Schechter et al., *Emotional Problems in the Adoptee*, 10 ARCHIVES GEN. PSYCHIATRY 37 (1964); Robert Schwam & Albert Tuskan, *The Adopted Child*, in 1 BASIC HANDBOOK OF CHILD PSYCHIATRY 342, 343 (J. Noshpitz ed., 1979).

¹⁷⁷ Garrison, *supra* note 169, at 471 (citing Schwam & Tuskan, *supra* note 176, at 343, for the proposition that an adopted child may fear being given away again).

¹⁷⁸ See Delores A. Taylor & Philip Starr, *The Use of Clinical Services by Adoptive Parents*, 11 J. AM. ACAD. CHILD PSYCHIATRY 384, 386-87 (1972) (criticizing methodology).

¹⁷⁹ See Garrison, *supra* note 169, at 425. See generally Mark Hardin, *Legal Placement Options to Achieve Permanence for Children in Foster Care*, in FOSTER CHILDREN IN THE COURTS 128, 139-78 (Mark Hardin et al. eds., 1987) (providing a detailed analysis of legal placement options other than adoption that are available for children in foster care).

¹⁸⁰ Garrison, *supra* note 169, at 425.

¹⁸¹ *Id.* at 425, 474.

¹⁸² Garrison explains that:

A guardianship order, for example, would enable the child to remain in a single foster home where he may have developed ties, while permitting con-

of parental rights as the sole solution to the foster care drift provides a disincentive to improve the poor services currently available to parents and foster children.¹⁸³

The debate over permanency planning and the wisdom of parental rights termination may never be resolved. Currently, however, an overwhelming majority of family law experts, child advocates, legislators and child psychologists favor permanency planning.¹⁸⁴ Because it is unlikely that parental termination statutes and current child welfare schemes will be eliminated at any time in the near future, it is more practical to formulate solutions to the current foster care problem that can be implemented within the existing framework of the child welfare system. Granting children the right to initiate termination proceedings will help improve already existing permanency planning programs.

D. The Rights of Natural Parents

Courts face a difficult task when attempting to differentiate the rights of parents and children. In the past, commentators have criticized the judiciary for restricting the rights of parents who have placed their children in foster care.¹⁸⁵ It is arguable that extending the right to file termination petitions to foster children will contribute to the limitation of parental rights.

Some critics maintain that courts, guided by permanency planning standards, adopt an implicit presumption that foster children are better off without their natural parents.¹⁸⁶ According to these critics, this presumption is unsupported by any evidence, causes unnecessary foster care placements which result in lengthy separations, and ignores the important role that the natural parents of children in long-term foster care can and do play in their children's development.¹⁸⁷

Some also criticize expanding children's rights to include the ability to initiate termination proceedings because doing so will serve only to further curtail the rights of natural parents who are indigent

tinued visitation by the natural parents and other family members. A long term foster care contract could accomplish a similar result; the contract could prohibit child welfare agency from removing the child from the foster home and could clarify the rights of both foster and natural parents.

Id. at 444; *see also* Hardin, *supra* note 179, at 139-78.

¹⁸³ Garrison, *supra* note 169, at 473.

¹⁸⁴ *See id.* at 449; *see also* NATIONAL COMM'N REPORT, *supra* note 16, at 10; VICTOR PIKE ET AL., PERMANENT PLANNING FOR CHILDREN IN FOSTER CARE: A HANDBOOK FOR SOCIAL WORKERS 1-5 (1977); *cf.* Wald, *supra* note 62, at 667-76 (assessing evils of temporary placements).

¹⁸⁵ *See, e.g.*, Garrison, *supra* note 169, at 472; Shapiro, *supra* note 28, at 318.

¹⁸⁶ Garrison, *supra* note 169, at 472.

¹⁸⁷ *Id.* at 473.

or people of color.¹⁸⁸ According to this argument, those advocating children's legal rights are not only paternalistic but will only succeed in "giving 'racist and classist judges' more power to control parents and kids under the guise of doing what is in the best interests of the child."¹⁸⁹

Critics also postulate that the emphasis placed on termination by child advocates stems directly from "[t]he child welfare system's . . . traditional disdain for natural parents."¹⁹⁰ They disagree with permanency planning's theoretical position that "the law must make the child's needs paramount"¹⁹¹ or that "permanency in relationships" represents the foremost developmental need of a child.¹⁹² This approach, they argue, unduly restricts the rights of the natural parents; it relies on the false premise that a foster parent who has established a relationship with the child should be given preference over a natural parent even when the natural parent who lost custody was not at fault.¹⁹³

Such concerns about parental rights are misplaced. They overlook that the primary goal of permanency planning is to reunite foster children with their natural parents.¹⁹⁴ When it becomes clear, however, that the child cannot return to her natural home, permanency planning suggests that the child's right to be raised in a permanent and healthy home outweighs the natural parents' right to maintain legal ties with the child.¹⁹⁵ The decision to terminate parental rights is not based on the presumption that children are better off without their natural parents or that a foster parent who has bonded with the child should be preferred over a natural parent. Generally, termination occurs only when there is clear and convincing evidence¹⁹⁶ that

188 Shapiro, *supra* note 28, at 318 (quoting Professor Martin Guggenheim as saying that even in an unbiased legal system "the parents affected by expanding children's legal rights would overwhelmingly be indigent, because their lives are highly regulated by the government and their children are the ones whose 'rights' child-welfare professionals want to protect . . . [and these professionals] pursue the worst class-based policies and are very unfair to people of color").

189 *Id.* (quoting Professor Guggenheim).

190 Garrison, *supra* note 169, at 446.

191 GOLDSTEIN, *supra* note 73, at 7.

192 *Id.* at 99.

193 *Id.* at 99-100.

194 See ANTHONY N. MALUCCIO ET AL., PERMANENCY PLANNING FOR CHILDREN: CONCEPTS AND METHODS 3-5 (1986). Although the concept of permanency planning has evolved over the years, experts generally agree that the term permanency planning "refers to the idea of moving the child as soon as possible out of temporary substitute care and returning him or her to the family as the preferred alternative . . ." *Id.*

195 See NATIONAL COMM'N REPORT, *supra* note 16, at 10 ("The rights of neglectful or incapable parents should not have priority over the rights of children to a permanent, stable home.").

196 See *Santosky v. Kramer*, 455 U.S. 745 (1982).

the natural parents have either abandoned the child,¹⁹⁷ engaged in extreme and repetitious child abuse or neglect,¹⁹⁸ experienced radical deterioration of the parent-child relationship,¹⁹⁹ or failed to remedy the conditions that caused the separation.²⁰⁰ Once one of these is proven, and it is concluded that the child cannot safely return home, the court must also determine whether termination is in the child's best interests.²⁰¹ Permanency planning recognizes that "[b]ecause termination ends all parent-child contact, it is important to consider whether termination will lead to a more secure and appropriate home for the child."²⁰²

It is generally accepted that a parent has "special interests in his or her child,"²⁰³ and the Supreme Court has referred to parental rights as "fundamental."²⁰⁴ These interests and rights, however, are not absolute. Sometimes, the child's right to a permanent and healthy home clearly outweighs the right of the natural parent to maintain legal ties with the child.²⁰⁵ Allowing foster children to raise the issue of termination before the courts will not cause the deterioration of parental rights. It merely gives children the ability to assert their own rights. Regardless of who files the termination petition, the court still makes the ultimate decision by weighing the interests of the child.

E. The Case for Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings

The arguments against granting foster children the right to initiate termination proceedings are outweighed by the benefits that such a right would provide for foster children. Primarily, the right to petition for termination provides a self-help measure for foster children wronged by neglectful or abusive parents and disadvantaged by an overburdened social welfare system.²⁰⁶

¹⁹⁷ Mark A. Hardin & Ann Shalleck, *Children Living Apart from Their Parents*, in LEGAL RIGHTS OF CHILDREN § 9.17 (Robert M. Horowitz & Howard A. Davidson eds., 1984).

¹⁹⁸ *Id.* § 9.20.

¹⁹⁹ *Id.* § 9.21.

²⁰⁰ *Id.* § 9.18.

²⁰¹ *Id.* § 9.16.

²⁰² *Id.*

²⁰³ Julie S. Rappaport, Note, *The Legal System's Response to Child Abuse: A "Shield" for Children or a "Sword" Against the Constitutional Rights of Parents?*, 11 J. HUM. RTS. 257, 262 (1991).

²⁰⁴ *Id.* See also *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925) (discussing the rights of parents to decide to send their children to private and parochial schools as the "very essence of personal liberty and freedom").

²⁰⁵ See NATIONAL COMM'N REPORT, *supra* note 16, at 10.

²⁰⁶ Cobn, *supra* note 156, at 89.

1. *Giving Children a Voice in a System that Fails to Speak on Their Behalf*

Many of the problems created by unresponsive caseworkers and guardians ad litem may be avoided by giving children a formal, independent means of initiating termination proceedings.²⁰⁷ Providing children independent access to court may also alleviate problems that arise when states fail to comply with statutes requiring the appointment of guardians ad litem for children abused or neglected,²⁰⁸ or where guardian ad litem programs are woefully inadequate. For example, in 1991 Gregory Kingsley's home state of Florida attempted to eliminate its guardian ad litem program, despite the fact that over two thirds of the 11,300 wards of Florida remain in foster care longer than the eighteen months permitted by law.²⁰⁹ Allowing foster children to independently initiate termination proceedings would provide them with a means of self-help when the system entrusted with ensuring their welfare fails to do so.

2. *Gregory Kingsley: Demonstrating How Legal Self-Help Can Lead to Permanency*

Gregory's case illustrates how the right to initiate termination proceedings allows children to achieve permanency by helping them escape state foster care systems inundated by overworked welfare agents and ineffective or nonexistent guardians ad litem. Despite an eighteen month statutory limit on foster placements,²¹⁰ the Florida welfare system allowed Gregory Kingsley to remain in foster care for thirty months.²¹¹ Welfare officials did not return Gregory to the custody of his natural parents at the eighteen month judicial review hearing, and the Department of Health and Rehabilitative Services (HRS) failed to initiate a termination proceeding as they were required by statute to do,

²⁰⁷ *Id.*

²⁰⁸ Larry Rohter, *To Save or End a Troubled Parent's Rights*, N.Y. TIMES, Sept. 25, 1992, at C1 (referring to comments made by Florida Judge Hugh Glickstein, former head of the ABA's Family Law Section for Children).

²⁰⁹ When Florida sought to eliminate its guardian ad litem program, attorney Karen Gievers filed suit. Gievers previously had filed a class-action suit to force the state to improve the foster care system and compel modification of the state's "long-term foster care" policy. In January 1992, Gievers and the state "reached a cease-fire agreement, in which the governor promised to phase in improvements in the foster care system over the next three years." Wingert & Salholz, *supra* note 152, at 86.

²¹⁰ FLA. STAT. ch. 39.454(2) requires that if a child is not returned to the physical custody of his natural parents at the time of the eighteen month judicial review hearing, the HRS shall initiate proceedings to terminate parental rights *unless* extraordinary circumstances require that the child should continue to live in foster care.

²¹¹ See generally First Amended Complaint at 3-9, *In re Gregory Kingsley* (Fla. Cir. Ct. Oct. 13, 1992) (No. JU90-5245), *rev'd sub. nom. Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

unless, at the time of the judicial review, the court finds that the situation of the child is so extraordinary that the agreement should be extended. If the court decides to extend the agreement, the court shall enter detailed findings justifying the decision to extend, as well as the length of the extension.²¹²

HRS failed to present "extraordinary circumstances" for the extension, and the court failed to issue the requisite express findings justifying the decision to extend.²¹³ In the proceedings initiated to extend Gregory's foster care agreement for an additional six months, welfare agents also disregarded statutory dictates. By failing to provide Gregory with a competent attorney,²¹⁴ the state effectively denied him the opportunity to advocate his position. It was only when Gregory resorted to legal self-help that the state recognized his needs and desires. By exercising his right to initiate a termination proceeding, Gregory removed himself from the limbo experienced by many foster children and became a happy member of a loving family.²¹⁵

III

RECOGNIZING A FOSTER CHILD'S RIGHT TO INITIATE TERMINATION PROCEEDINGS: EXPLORING THE FEDERAL, STATE AND COMMON LAW POSSIBILITIES

This Note proposes that all foster children should be granted the right to petition the court and initiate parental rights termination proceedings. Granting foster children the right to initiate such proceedings will help ensure that a child's right to a permanent, stable home is given priority over the rights of neglectful or incapable parents. Recognizing such a right will not completely cure the ills of the foster care system, but it will help reduce the number of children condemned to travel through a series of foster homes for the greater part of their formative years, never knowing the love, confidence and security of permanent home life.

To be effective, a foster child's right to initiate termination proceedings must be grounded in either a constitutional guarantee, a statutory provision or a common law rule. The following sections explore constitutional, statutory and common-law bases for this right at both the federal and state level. This Note also discusses criticisms of

²¹² FLA. STAT. ch. 39.454(2) (1990).

²¹³ First Amended Complaint at 7, *In re Gregory Kingsley* (Fla. Cir. Ct. Oct. 13, 1992) (No. JU90-5245), *rev'd sub nom. Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

²¹⁴ *Id.* at 12.

²¹⁵ *Intriguing People*, *supra* note 26, at 65.

the *Kingsley* court's decision to deny children the right to independently initiate parental rights termination proceedings.

A. The Federal Constitution

1. *Limited Rights*

Federal law offers little assistance to powerless foster children seeking to escape the limbo of foster care. Litigants have had limited success attacking the constitutionality of foster care placement and removal procedures.²¹⁶ In many of the cases addressing foster care, courts have focused on the rights of foster families or parents.²¹⁷ Few have considered the status of foster children. Indeed, the courts have consistently rejected arguments for increased constitutional protection of children's rights.²¹⁸ These rejections have continued in spite of the Supreme Court's recognition that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."²¹⁹ District courts have declared that "children are 'persons' within the meaning of the Fourteenth Amendment"²²⁰ with "the same right as adults to freedom of, and privacy in, family life."²²¹ Despite these broad statements of constitutional principle, courts have been reluctant to grant foster children any meaningful rights under the Constitution.

Almost none of the constitutional arguments proffered by litigants have persuaded the federal courts to expand the scope of constitutional protection for foster children.²²² Courts have rejected

²¹⁶ Litigation concerning the constitutional status and rights of foster parents and foster children is a relatively recent phenomenon. No federal cases involving these issues were reported prior to the 1970s.

²¹⁷ See *Smith v. OFFER*, 431 U.S. 816 (1977). The *Smith* Court held that foster parents not only have standing to assert the claim that they have a constitutionally protected liberty interest in the integrity of their family unit, but that they also have standing to raise the rights of the foster children in their attack on the state procedures, even where court-appointed counsel represents the children. See *id.* at 841-42 & nn.44-45; see also *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 547 F.2d 835 (5th Cir. 1977), *rev'd*, 563 F.2d 1200 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978). *Drummond* held that a foster parent seeking to "exercise the right enjoyed by all other persons to adopt a child has the same liberty interest to protect as does a person who seeks the right to marry." *Id.* at 853.

²¹⁸ *Smith*, 431 U.S. at 851-52; *Child v. Beame*, 412 F. Supp. 593, 603 (S.D.N.Y. 1976).

²¹⁹ *In re Gault*, 387 U.S. 1, 13 (1967).

²²⁰ *Organization of Foster Families for Equality & Reform v. Dumpson*, 418 F. Supp. 277, 282 (S.D.N.Y. 1976), *rev'd sub nom. Smith v. OFFER*, 431 U.S. 816 (1977). The district court also held that "before a foster child can be peremptorily transferred from the foster home in which he has been living, . . . he is entitled to a hearing at which all concerned parties may present any relevant information to the administrative decisionmaker charged with determining the future placement of the child." *Id.* at 282. Although the court of appeals reversed, it failed to address the assertion that foster children were "persons" under the Fourteenth Amendment.

²²¹ *Beame*, 412 F. Supp. at 602.

²²² See *Smith*, 431 U.S. at 842-47; *Beame*, 412 F. Supp. at 602-09.

arguments that foster children have a substantive due process right to an adoptive home.²²³ Additionally, a federal court dismissed an Eighth Amendment claim that the continued custody of foster children in foster homes may constitute cruel and unusual punishment.²²⁴ Courts have also rejected the argument that decent, safe and sanitary housing is an essential component of a full and adequate family life and, thus, should be a constitutionally protected fundamental right.²²⁵ Given the reluctance of the federal courts to recognize the rights of foster children, it is difficult to formulate a successful federal constitutional claim establishing a foster child's right to initiate termination proceedings. The next subsection discusses one way to establish such a right under the United States Constitution.

2. *A Foster Child's Constitutional Rights Under Smith v. OFFER*

The argument that a foster child's right to initiate termination proceedings is a right guaranteed under the Constitution can be based on *Smith v. Organization of Foster Families for Equality & Reform (OFFER)*,²²⁶ a case the Supreme Court decided in 1977. In *Smith*, a group of individual foster parents and an organization of foster families initiated a class action suit against the state of New York and New York City welfare officials alleging that the statutory and regulatory procedures for removing foster children from foster homes violated both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.²²⁷ The plaintiffs contended that placement of a

²²³ *Beame*, 412 F. Supp. at 607-08. The court noted that one could not equate the child plaintiff's status while in the foster care of the state with those civilly committed to the state's custody because of mental illness, physical retardation or other similar ailments. *Id.* at 608. Accordingly, if foster care is merely state provision of a substitute home for children whose parents have failed to adequately care for them, then keeping children under such "substitute guardianship" cannot be considered a denial of treatment. *Id.*

²²⁴ *Id.* The court noted that to constitute cruel and unusual punishment under the Eighth Amendment, "confinement or restrictions . . . must be 'characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people,' or must exceed the 'limits of civilized standards.'" *Id.* (citing *Thartarella v. Kelley*, 349 F. Supp. 575, 597 (S.D.N.Y. 1972) and *Trop v. Dulles*, 356 U.S. 86, 100 (1958)) (citations omitted). Plaintiffs did not challenge the living conditions of the foster homes, but argued instead that "continued confinement," even in comfortable foster homes, is, ipso facto, cruel and unusual punishment as long as permanent adoption is a viable alternative." *Id.* The court found that this argument failed to state an Eighth Amendment claim. *Id.*

²²⁵ *Id.* at 603 (quoting *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) for the proposition that "the Constitution does not provide judicial remedies for every social and economic ill Absent [a] constitutional mandate, the assurance of adequate housing . . . [is a] legislative, not judicial, function[]").

²²⁶ 431 U.S. 816 (1977).

²²⁷ The New York statutes give placement agencies discretion to remove a child from a foster home with ten days advance notice of removal. N.Y. SOC. SERV. LAW §§ 383(2), 400 (McKinney 1992). Objecting foster parents may request a conference with the Department of Social Services (DSS). At the conference, foster parents may appear with counsel to learn the reasons for the removal and may submit reasons opposing the action. The

child with a foster family for over a year creates an emotional tie between the foster child and her foster family. As a result of this emotional bond, the foster family becomes the "true 'psychological family' of the child."²²⁸ Plaintiffs argued that "psychological" families have a liberty interest in their own survival, which is protected by the Due Process Clause of the Fourteenth Amendment.²²⁹ Accordingly, the members of the class action asserted that a "foster child cannot be removed without a prior hearing satisfying due process."²³⁰

The district court, although disclaiming any need to "reach out to decide such novel questions"²³¹ as those presented by the foster parents, found a constitutionally protected liberty interest in the "right to be heard before being 'condemned to suffer grievous loss.'"²³² The court found that "children are 'persons' within the meaning of the Fourteenth Amendment whose rights are entitled to protection."²³³ Therefore, the court noted the "harmful consequences of a precipitous and perhaps improvident decision to remove a child from his foster family"²³⁴ and concluded that the "pre-removal procedures . . . [were] constitutionally defective."²³⁵ Thus, the court held that a foster child is "entitled to a hearing"²³⁶ before being "peremptorily transferred from the foster home in which he has been living."²³⁷

The Supreme Court reversed the district court.²³⁸ Finding that existing New York procedures adequately protected any liberty inter-

agency officials conducting the conference must render a written decision within five days of the conference and send notice of the decision to both the foster parent and the appropriate agency. If the official decides to remove the child, the foster parents may appeal to DSS, which then conducts a full adversarial administrative hearing. The results of the administrative hearing are subject to judicial review, but removal of the child is not stayed pending either the hearing or the judicial review. N.Y. COMP. CODES R. & REGS. tit. 18, § 443.5 (1988).

²²⁸ *Smith v. OFFER*, 431 U.S. 816, 839 (1977).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Organization of Foster Families for Equality & Reform v. Dumpson*, 418 F. Supp. 277, 282 (S.D.N.Y. 1976), *rev'd sub nom. Smith v. OFFER*, 431 U.S. 816 (1977).

²³² *Id.* 431 U.S. 816 (1977) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). On review the Supreme Court noted that, if the liberty interest the district court sought to protect grew out of the affective ties between child and foster parents, then "we do not see how [this reasoning] differs from a holding that the foster family relationship is entitled to privacy protection analogous to the natural family—the issue the District Court purported not to reach." *Smith*, 431 U.S. at 840 n.43.

²³³ *Dumpson*, 418 F. Supp. at 282.

²³⁴ *Id.* at 283.

²³⁵ *Id.* at 282.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Smith*, 431 U.S. at 839. *Smith* leaves open the question of what procedural rights are to be afforded to foster parents and children, but apparently the Court believed that an automatic hearing would provide little benefit for most children. This conclusion was partially based on the premise that as foster parents have the right to request such a hearing,

ests that the plaintiffs might have, the Court declined to establish a foster child's right to an automatic due process hearing prior to removal from an authorized foster home.²³⁹ Avoiding the liberty interest question, the Court rested its conclusion on narrower grounds.²⁴⁰

The *Smith* Court failed to resolve the question of whether foster children have a per se constitutionally protected liberty interest²⁴¹ or property interest²⁴² in the foster relationship. The Court did hold, however, that foster *parents* had standing to bring a claim asserting the violation of their constitutionally protected liberty interest in the integrity of their family.²⁴³ By equating the foster child's liberty interest with that of the foster parents, the Court effectively evaded all of the arguments regarding the liberty or property interests of individual foster children.²⁴⁴ In his concurrence, Justice Stewart stated that the "Court surmises that foster families who share these [emotional] attachments might enjoy the same constitutional [liberty] interest in 'family privacy' as natural families."²⁴⁵

Justice Brennan's majority opinion in *Smith* does not completely preclude an argument that foster children should have the right to initiate termination proceedings; a matter which directly concerns their family relationships. The *Smith* majority strongly emphasized that "the usual understanding of 'family' implies biological relationships,"²⁴⁶ but conceded that a foster family could "hold the same place

no interest of the child can be served by requiring a hearing to assess the emotional impact of removal from foster parents who did not care enough for the child to request one. *Id.* at 847-50. The Court also noted that during a period of approximately two years, less than one percent of foster parents faced with a transfer requested a hearing. *Id.* at 851.

John J. Musewicz notes, however, that in rejecting the right to automatic hearings, the Court failed to consider "(1) whether foster parents knew and understood the right to such a hearing, (2) whether foster parents were functionally able to initiate a hearing, and (3) whether a specific alternative foster home should be chosen for the child based on unsupervised discretion of agency personnel." Musewicz, *supra* note 72, at 663-64 n.107.
²³⁹ *Smith*, 431 U.S. at 850-51.

²⁴⁰ The Supreme Court noted that "even on the assumption that appellees have a protected 'liberty interest,' the District Court erred in holding that the preremoval procedures presently employed by the State [were] constitutionally defective." *Smith*, 431 U.S. at 847. The Court went on to hold that "the procedures provided by New York State . . . and New York City . . . are adequate to protect whatever liberty interests appellees may have." *Id.* at 856.

²⁴¹ Two circuit courts have addressed the liberty issue and denied its existence. See *Kyees v. County Dep't of Pub. Welfare*, 600 F.2d 693, 697-99 (7th Cir. 1979); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1206-09 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978). The Fifth Circuit has recognized a Fourteenth Amendment liberty interest for foster parents seeking to adopt a child. See *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 547 F.2d 835, 853-55 (5th Cir. 1977).

²⁴² The *Smith* court never considered the property interest claim rejected by the District Court because plaintiffs failed to renew this argument. 431 U.S. at 839.

²⁴³ *Id.* at 841-42 & nn.44-45.

²⁴⁴ *Id.* at 838-40, 850.

²⁴⁵ *Id.* at 861 (Stewart, J., concurring).

²⁴⁶ *Id.* at 843.

in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family."²⁴⁷ Under the Court's analysis, the primary distinction between foster families and natural families is the contractual nature of foster relationships. The Court noted that, in removing children from a foster home, the state interferes with a relationship originating in state law.²⁴⁸ In contrast, "the liberty interest in family privacy has its source . . . in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.' "²⁴⁹

Yet, the interest of a foster child in establishing an enduring family relationship stems from an "intrinsic human right."²⁵⁰ Accordingly, the Court should not have characterized the foster child's right to initiate a proceeding to terminate the rights of their natural parents as one involving a contractual, non-biological relationship. Rather, the Court should have recognized that foster children have a fundamental, intrinsic human right to make decisions regarding their familial relationships, including the decision to initiate termination proceedings against their natural parents. Furthermore, even if termination proceedings must be characterized as involving relationships with non-biological parents, such as foster parents or future adoptive parents, the Court's distinction between relationships based on human rights and contractual rights should not apply. Foster children do not "knowingly assume[] [a] contractual relation with the State"²⁵¹ when they are placed in foster care.

Instead of recognizing the foster child's fundamental interest, the *Smith* Court equated the child's liberty interests with those of a foster parent.²⁵² In so doing, the Court ignored the child's need for an enduring family relationship, which is essential to her emotional and physical well-being. For a foster child, the interest in a healthy family environment is a need so fundamental that it cannot be equated with the contractual, limited liberty interests²⁵³ of the foster parents. Therefore, the Court should have recognized that foster children have a separate, fundamental right to permanence—the right to a stable and enduring family relationship, even if that family is not biologically based.²⁵⁴

²⁴⁷ *Id.* at 844.

²⁴⁸ *Id.* at 845.

²⁴⁹ *Id.* at 845 (citing *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

²⁵⁰ *Id.* (quoting *Moore*, 431 U.S. at 503).

²⁵¹ *Id.*

²⁵² *Id.* at 838-39.

²⁵³ *Id.* at 846.

²⁵⁴ See *Musewicz*, *supra* note 72, at 661-78 (advocating judicial recognition of a fundamental right to permanence).

3. *A Foster Child's Right to Be Free From Undue Procedural Burdens*

If a child has a right to an enduring family relationship, then a state should not be permitted to impose procedural barriers that unduly impede a child's attempts to achieve such permanence. Although states generally "may require a minor to wait until the age of majority before being permitted to exercise legal rights independently,"²⁵⁵ they may not unreasonably burden a minor's pursuit of a fundamental right.²⁵⁶ Given the failure of welfare officials and guardians ad litem to initiate termination proceedings on behalf of long-term foster children, the denial of a foster child's right to initiate termination proceedings constitutes an undue limitation on that child's fundamental constitutional rights.²⁵⁷

a. *Bellotti v. Baird: Arguments for a Foster Child's Right to Initiate a Termination Proceeding*

Minors have successfully made similar arguments in cases involving statutes requiring parental consent for abortion.²⁵⁸ In these cases, the Supreme Court recognized that states have some latitude to limit the procedural rights of minors, but held that they cannot place an unreasonable burden on minors' exercise of certain fundamental rights. In *Bellotti v. Baird*,²⁵⁹ the Court found that a Massachusetts statute requiring parental consent before an abortion could be performed on an unmarried woman under the age of eighteen was unconstitutional in two ways. First, the statute allowed judicial authorization for an abortion to be withheld from a minor who was mature and competent to make the decision independently.²⁶⁰ Second, the statute required parental consultation or notification in every case, denying pregnant minors the opportunity to receive an independent judicial determination that they are mature enough to consent to the abortion or that the abortion would be in their best interest.²⁶¹

²⁵⁵ *Bellotti v. Baird*, 443 U.S. 622, 650 (1979).

²⁵⁶ *Kingsley v. Kingsley*, 623 So. 2d 780, 785 (Fla. Dist. Ct. App. 1993) (citing *Bellotti*, 443 U.S. at 640, 643 n.23).

²⁵⁷ In some cases, foster children's right to permanence can only be enforced through termination proceedings. Overburdened or unresponsive foster care officials often fail to initiate such proceedings; consequently, children must resort to self-help to effectuate their right to permanence. State rules incapacitating minors, however, prevent children from doing so. See *supra* notes parts I.C.1. & II.E.1.

²⁵⁸ *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

²⁵⁹ 443 U.S. 622 (1979).

²⁶⁰ *Id.* at 649-51.

²⁶¹ The Court emphasized that "the constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions upon initial access to court." *Id.* at 648. The Court also determined that "every pregnant minor is entitled in the first instance to go directly to the court for a judicial determination without prior parental notice, consultation, or consent." *Id.* at 649.

In reaching its decision, the Court set forth three justifications for the conclusion that a child's constitutional rights cannot always be equated with the rights of an adult: (1) "the peculiar vulnerability of children;"²⁶² (2) the "inability [of children] to make critical decisions in an informed, mature manner;"²⁶³ and (3) "the importance of the parental role in child rearing."²⁶⁴ In addition to recognizing these three justifications for limiting the rights of children, the Court noted that the Massachusetts statute promoted a constitutionally permissible state interest by encouraging unmarried, pregnant minors to seek help and advice from their parents when making the decision whether or not to have a child.²⁶⁵

Despite these findings, the Court found the "unique nature and consequences of the abortion decision" determinative.²⁶⁶ The right to seek an abortion, the Court noted, "differs in important ways from other decisions that may be made during minority."²⁶⁷ The decision to have an abortion "is one that simply cannot be postponed"²⁶⁸ because failure to make a timely abortion decision will often result in grave and indelible consequences.²⁶⁹ Thus, due to the uniqueness of the abortion decision,²⁷⁰ the Court concluded that the Massachusetts statute inappropriately gave "a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy."²⁷¹

A better approach, the Court suggested, would be to provide pregnant minors with the opportunity to demonstrate in a formal proceeding either (1) "that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests."²⁷² Thus, the Court created an exception to the general rule prohibiting children from independently initiating a legal proceeding because of the uniqueness of the abortion decision.²⁷³

Arguments analogous to those made by the plaintiffs in *Bellotti* can be made on behalf of foster children seeking to establish the right

²⁶² *Id.* at 643.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 640-41, 648.

²⁶⁶ *Id.* at 643.

²⁶⁷ *Id.* at 642.

²⁶⁸ *Id.* at 643.

²⁶⁹ *Id.* at 642.

²⁷⁰ *Id.* at 643.

²⁷¹ *Id.* (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)).

²⁷² *Id.* at 643-44 (citations omitted).

²⁷³ *Id.* at 643.

to independently initiate termination proceedings. The unique nature and consequences of a foster child's decision to pursue termination also justifies an exception to procedural limitations traditionally imposed upon minors.²⁷⁴ If foster children are denied access to the court because of procedural restrictions that require them to rely on inadequate and incompetent state officials to secure their constitutional rights,²⁷⁵ then such procedural requirements constitute undue restrictions on the exercise of those children's constitutional rights. Denying a foster child direct access to the judiciary, where a determination can be made that parental rights termination is in his best interests, erects a procedural limitation that is the equivalent of an "absolute, and possibly arbitrary, veto"²⁷⁶ of that child's fundamental right to an enduring family relationship.

b. *The Rights of Natural Parents and Foster Children Are Not Mutually Exclusive*

To attain the right to initiate parental rights termination proceedings, foster children will have to assert that granting them this right will not unduly impinge on the constitutional rights of their nat-

²⁷⁴ The *Bellotti* Court noted that "the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'" 443 U.S. at 635 (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971)). These needs, however, are not addressed by denying direct court access to foster children who wish to initiate termination proceedings and secure their fundamental rights. Indeed, the opposite is true: by allowing children to freely be heard by the judiciary, these foster children may actually be able to have their needs for concern, sympathy and paternal attention met by a new, adoptive family.

The Court also noted that "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors." *Id.* at 637. This justification is clearly not applicable, in that initiating termination proceedings aims only to put before a disinterested judge the question of whether the child's biological parents in reality play this "guiding role" to any extent.

The decision to terminate a parent's right is made by a court, not the child petitioner. Although some argue that the decision to initiate a termination proceeding may be psychologically damaging, *see supra* part II.B., the truly "important, affirmative choice with potentially serious consequences" at issue is the decision to terminate.

Similarly, in *Bellotti* the important decision was not whether to seek parental consent or judicial authorization for the abortion, but rather, whether to have the abortion. In *Bellotti*, the Court held that judicial authorization of a minor's desire to have an abortion was permissible in cases where the child was mature and her decision was well informed, or, in cases where the minor was not capable of making an independent decision but the her desire for an abortion was consistent with her best interests. *Id.* at 643-44. The same reasoning could be applied in situations where a child comes before a court and indicates that she wishes to terminate the rights of her natural parents. The court will only be inclined to grant the child's wish if doing so is in her best interests. Because the court is responsible for the ultimate decision to terminate, there is no danger that the child's lack of experience, perspective or judgment will result in an inappropriate or detrimental termination.

²⁷⁵ *See supra* part I.B.3.

²⁷⁶ *Belotti*, 443 U.S. at 644.

ural parents or other parties. Protecting the rights of natural parents seemed to concern the *Smith* majority, which emphasized that granting the procedural protections requested by the plaintiff foster parents would involve "derogating from the substantive liberty" of the natural parents.²⁷⁷ The Court found it difficult to reconcile the absolute rights of natural parents with the liberty interest asserted by the foster parents. Accordingly, the Court noted the difficulty of acquiring a liberty interest "in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right."²⁷⁸

Granting foster children the right to initiate termination proceedings arguably would not infringe upon the rights of natural parents because the same mechanisms that currently protect the liberty interests of parents involved in state-initiated termination proceedings would also be in place in cases involving child petitioners.²⁷⁹ Furthermore, a child petitioner could distinguish *Smith*, which pitted the rights of biological parents against the rights of foster parents, by arguing that in a child-initiated termination proceeding the rights of the child and natural parent must be balanced. *Both* parties have an equal liberty interest deriving from both the blood relationship and basic human rights. At some point the right of a foster child to a permanent and happy home must outweigh the right of the natural parent to maintain legal ties with the child.²⁸⁰

Recognition of a foster child's right to assert liberty and property interests may overcome state procedural obstacles that effectively deny the child the power to influence decisions about family matters. *Smith* does not resolve whether a foster child has a fundamental right to permanence or whether foster parents have valid Fourteenth Amendment interests in the child's placement.²⁸¹ Lower federal courts have consistently rejected arguments that foster families have such interests.²⁸² Judges may commiserate with the problems faced by those in-

²⁷⁷ *Smith v. OFFER*, 431 U.S. 816, 846 (1977).

²⁷⁸ *Id.*

²⁷⁹ See LEGAL ISSUES IN FOSTER CARE, *supra* note 66, at 31-34 (discussing higher procedural standards in termination proceedings which are due to "the gravity of . . . [the] deprivation and the stigma of being found unfit.").

²⁸⁰ See *supra* part II.D.

²⁸¹ See *Musewicz*, *supra* note 72, at 665-66.

²⁸² In *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978), the Fifth Circuit Court of Appeals rejected the foster parents' arguments for protected liberty and property interests in adopting their foster child. *Id.* at 1206-08. In *Child v. Beame*, 412 F. Supp. 593, 604-05 (S.D.N.Y. 1976), the district court held that neither Title IV of the Social Security Act nor the New York Social Services Law creates an enforceable property interest in a permanent, stable home for foster children. *Id.* at 603. The same court rejected the Fourteenth Amendment property claims of foster parent plaintiffs in *Organization of Foster Families for Equality and Reform v. Dumpson*, 418 F. Supp. 277 (S.D.N.Y. 1976), *rev'd sub nom.*

volved in the foster care system,²⁸³ but they generally adhere to the judicial philosophy that it is not the courts' role to solve those problems.²⁸⁴

Despite these difficulties, foster children may secure the right to initiate termination proceedings by first asserting a constitutionally protected interest in permanence and then assailing procedural inadequacies that impinge upon that interest.

4. *The Federal Constitution: A Weak Foundation for a Foster Child's Right to Initiate Termination Proceedings*

Although advocates can advance some creative arguments using *Smith* and the Due Process Clause of the Fourteenth Amendment, the federal Constitution does not offer a dependable foundation for the right to initiate termination proceedings. The current Supreme Court is unlikely to discover such a right within the four corners of the Constitution.²⁸⁵ Reform will most likely come, if at all, from the legislatures.²⁸⁶

B. Federal Statutes: The Adoption Assistance and Child Welfare Act of 1980

The state and local governments of the United States historically provided services for children.²⁸⁷ In 1909, however, the federal government held the first White House Conference on Children and established the Children's Bureau, thus making the welfare of children a legitimate national concern.²⁸⁸ The federal government's role in

Smith v. OFFER, 431 U.S. 816 (1977). The court found no merit in the argument that the realities of the New York foster care system justified the foster parents' expectation that their role would not be abruptly and summarily terminated. *Id.* at 880-81. Although the Supreme Court reversed *Dumpson* in *Smith*, it did not consider the property interest argument because plaintiffs failed to renew this argument after it was rejected by the district court. *Smith*, 431 U.S. at 839.

²⁸³ The *Smith* Court noted that "there are elements of truth" in the foster parents' portrayal of "a foster-care system in which children neglected by their parents and condemned to a permanent limbo of foster care are arbitrarily shunted about by social workers whenever they become attached to a foster home." 431 U.S. at 838 n.41.

²⁸⁴ For example, the *Smith* majority considered only the procedural issues present in the case and stated that "[a]rguments asserting the need for reform of New York's statutory scheme are properly addressed to the New York Legislature." *Id.* at 838.

²⁸⁵ The election of President Clinton has raised hopes that future changes in the composition of the Supreme Court will lead to increased recognition of children's constitutional rights to standing. Perhaps the influence of Hillary Rodham Clinton, who is strongly committed to children's rights, will have an impact. See generally, Rodham, *supra* note 37, at 487-88 (arguing for the extension of more adult rights to children and increased recognition of children's unique needs and interests in the form of enforceable rights).

²⁸⁶ See *infra* parts II.D.-E. (discussing state constitutions and statutes).

²⁸⁷ KNITZER & ALLEN, *supra* note 13, at 105.

²⁸⁸ *Id.*

providing adequate children's services has gradually expanded since the 1930s.²⁸⁹

Interest in national family policy has increased over the past decades, and today federal government action and inaction greatly influences the quality of family life.²⁹⁰ Despite concern for the American family, however, federal statutes have not provided fertile ground for the expansion of children's rights. The shortcomings of the main federal law governing child welfare practices, the Adoption Assistance and Child Welfare Act of 1980 (AACWA),²⁹¹ illustrate the failure of federal statutory law to provide for such expansion. As currently interpreted and applied, the AACWA, like other federal statutes, fails to provide a basis for giving foster children the right to sue for termination of natural parental rights.

1. *Provisions Under the AACWA*

Congress enacted the AACWA to reduce unnecessary and unplanned foster care by encouraging permanency planning for abused and neglected children.²⁹² The Act offers fiscal incentives for states to adopt its substantive reforms.²⁹³ Among these substantive reforms are the AACWA requirements that a child may be placed in foster care only after a judicial determination that the state welfare agency has made reasonable efforts to prevent removal of the child, and that

²⁸⁹ *Id.* at 105. Knitzer and Allen provide an overview and evaluation of major federal programs enacted which seek to promote child welfare, strengthen the juvenile justice system, provide social services to children, and address the special needs of children and children with disabilities. *Id.* at 107-150.

²⁹⁰ *See id.*

²⁹¹ Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C. (1988 & Supp. 1994)); *see also* Mary Lee Allen et al., *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in *FOSTER CHILDREN IN THE COURTS* 575-79 (Mark Hardin ed., 1983).

²⁹² *See* PELTON, *supra* note 51, at 54, 79.

²⁹³ The Act ties receipt of particular funds to a state's adherence to particular substantive provisions. Only state plans approved by the Secretary of Health and Human Services qualify for payment. *See* 42 U.S.C. §§ 622(a), 671(a) (1988 & Supp. 1992). This provision has been described as follows:

Title IV-E of the AACWA [42 U.S.C.A. §§ 670-676 (West 1991 & Supp. 1994)] governs the receipt of federal matching funds for maintenance of children in foster care and certain administrative costs. Most of the substantive requirements of the Act must be met to qualify for Title IV-E payments.

Funding for services to children and their families comes under a different part of the AACWA, Title IV-B of the Social Security Act. To qualify for certain funds under Title IV-B, states must satisfy substantive requirements of the act which overlap only in part with Title IV-E requirements. In addition, certain requirements of the act are tied to the receipt of foster care payments for voluntary foster care and the transfer of certain unused foster care maintenance matching funds to child welfare services.

Hardin & Shalleck, *supra* note 63, at 379 (footnotes omitted).

where removal is necessary, the child must be returned to and reunited with her family as soon as possible.²⁹⁴

Once a child is in foster care, the Act mandates procedures to facilitate permanency for the child. For example, the state must develop a case plan that details problems, goals, necessary tasks and timetables for the child's return to her home or permanent placement.²⁹⁵ At least every six months, a court or administrative body must conduct a case review, evaluating the effectiveness of the case plan and the necessity for and appropriateness of the child's continued placement in foster care.²⁹⁶ Finally, the AACWA requires a dispositional hearing before a court-approved body within eighteen months of placement to determine the future status of the child.²⁹⁷

2. *Shortcomings of the AACWA as a Basis for a Child's Right to Initiate Termination Proceedings*

Despite the broad provisions and initial promise of the Act,²⁹⁸ it has provided only limited benefits. Two serious shortcomings prevent the AACWA from effectively reforming the foster care system: first, it fails to provide its beneficiaries with rudimentary procedural protections; second, as currently interpreted, the Act confers neither enforceable civil rights nor a private cause of action upon foster children. These shortcomings limit the ability of the AACWA to effectuate the intended reform of Congress. Consequently, the Act is an inadequate foundation upon which to base a foster child's right to initiate termination proceedings. These two shortcomings will be discussed in greater detail in the following subsections.

a. *The AACWA's Lack of Procedural Protection for Foster Children*

While the AACWA provides for judicial oversight of a foster child's placement,²⁹⁹ it does not grant children procedural protections in these proceedings.³⁰⁰ For example, the Act does not specify

²⁹⁴ 42 U.S.C. §§ 671(a)(15), 672(a)(1) (1988).

²⁹⁵ 42 U.S.C. §§ 671(a)(16), 675(1) (1988).

²⁹⁶ 42 U.S.C. §§ 627(a)(2)(B), 675(5)(A), (B) (1988).

²⁹⁷ 42 U.S.C. §§ 627(a)(2)(B), 675(5)(C) (1988). The court or administrative body may decide that the child should be returned home, placed for adoption, or kept in the foster care system, either permanently or on a short term basis. Should the child remain in foster care, these decisionmaking hearings must continue periodically. 42 U.S.C. § 675(5)(C) (1988).

²⁹⁸ At its inception, commentators predicted that the AACWA would "have a dramatic effect on the operation of child welfare systems through the country." Allen et al., *supra* note 291, at 576.

²⁹⁹ See *supra* note 296 and accompanying text.

³⁰⁰ Note, however, that the Act provides natural parents with procedural protections. For example, it dictates that "safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting the privileges of parents." 42

who may participate in the eighteen month hearing and six month review, nor does it establish the procedures for these required reviews. The Act only guarantees the right of natural parents to participate in the proceedings, and for six month reviews, participation is guaranteed only when such reviews are held before an administrative panel.³⁰¹ The Act does not guarantee participation on the part of the child, the child's guardian ad litem, the foster parents or other caretakers.³⁰²

The Act does not support a child's right to participate in, let alone initiate, termination proceedings. Nevertheless, the AACWA should, at a minimum, guarantee the participation of all persons involved in the child's placement. It is illogical to enact legislation to promote the welfare of children and to then leave them unrepresented in the review process. Indeed, one critic noted that "[u]nless all affected parties have access to the process and are guaranteed that it is a fair and meaningful one, there is little reason to believe the review will produce anything but counterproductive animosity."³⁰³

b. *The AAWCA's Unavailability as a Source of Substantive Rights*

Initially, commentators assumed that the AACWA would "provide fertile ground for . . . affirmative litigation to effectuate system-wide change."³⁰⁴ A recent Supreme Court decision, *Suter v. Artist M.*,³⁰⁵ however, has proven these commentators wrong. In *Suter*, child beneficiaries of the Act filed a class action suit alleging that the Illinois child welfare agency had failed to make "reasonable efforts" to preserve and reunite families, in contravention of section 671(a)(15) of the AACWA. The district court and court of appeals³⁰⁶ held that the Act contained an implied cause of action under Title 42 of the United

U.S.C. § 675(5)(C) (1988). The AACWA does not specify, however, the procedures through which officials are to notify parents and give them the opportunity to challenge agency decisions. The AACWA does provide persons denied benefits under the Act with a fair hearing. 42 U.S.C. § 671(a)(12) (1988). The Act does not clarify what procedures would apply to such hearings. See Hardin & Shalleck, *supra* note 63, at 379 (discussing the elements of a fair hearing under the AACWA); see also Abigail English, *Litigation Under the Adoption Assistance and Child Welfare Act of 1980*, in *FOSTER CHILDREN IN THE COURTS* 612, 627-28 (Mark Hardin ed., 1983) (discussing due process elements of fair hearings under general social welfare provisions).

³⁰¹ See 42 U.S.C. § 675(5)(B) & (6) (1988).

³⁰² See Musewicz, *supra* note 72, at 735 n.420.

³⁰³ *Id.* at 735.

³⁰⁴ English, *supra* note 300, at 613. See also Barbara L. Atwell, "A Lost Generation": *The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980*, 60 U. CIN. L. REV. 593, 637 (arguing that private enforcement of the AACWA's requirements through actions brought under 42 U.S.C. § 1983 (1988) is necessary to make the Act an effective tool for achieving foster care reform).

³⁰⁵ *Suter v. Artist M.*, 112 S. Ct. 1360 (1992).

³⁰⁶ *Artist M. v. Johnson*, 917 F.2d 980 (7th Cir. 1990), *aff'g* 726 F. Supp. 690 (N.D.Ill. 1989).

States Code, section 1983.³⁰⁷ The Supreme Court concluded, however, that section 671(a)(15) neither confers rights enforceable under section 1983 nor implies a private cause of action. Section 1983, the Court stated, “is not available to enforce a violation of a federal statute ‘where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983.’”³⁰⁸ The Court held that Congress did not “unambiguously confer upon the child beneficiaries of the Act the right to enforce the . . . ‘reasonable efforts’” requirement.³⁰⁹ Legislative history, the Court indicated, left a great deal of discretion to the states to meet the “reasonable efforts” requirement.³¹⁰ Additionally, the Court noted that because other sections of the Act provide mechanisms for the Secretary of Health and Human Services to enforce the “reasonable efforts” clause, the absence of a section 1983 remedy does not render the clause meaningless.³¹¹ According to the Court, the regulations under the Act were not specific and did not indicate that the state’s failure to do anything other than submit an acceptance plan would deny it federal funds.³¹²

The Court’s ruling in *Suter* indicates that the AACWA will not support private actions challenging state-imposed impediments to foster care reform, even if those impediments violate the Act’s purpose of securing permanence for foster children. Foster children thus cannot use the Act as a sword to challenge restrictions on their right to initiate termination proceedings.

3. *Federal Statutes Need to Be Improved & Amended*

The Court’s restrictive reading of the AACWA means that, in its current form, the Act provides no basis for a foster child to sue for termination. Recently, Congress formally reported on the AACWA’s

³⁰⁷ 42 U.S.C. 1983 (1988).

³⁰⁸ *Suter*, 112 S. Ct. at 1366 (quoting *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423 (1987)). The weakness of the Court’s decision can be seen in the circularity of its reasoning: Section 1983 does not vindicate rights not recognized by section 1983.

³⁰⁹ *Id.* at 1367-68.

³¹⁰ *Id.* at 1369.

³¹¹ *Id.* The Court acknowledges that these enforcement provisions “may not provide a comprehensive mechanism so as to manifest Congress’ intent to foreclose remedies under § 1983.” *Id.* at 1368. It notes, however, that it need not consider the foreclosure issue due to its conclusion that the AACWA does not create the enforceable rights asserted by the foster children. *Id.* at n.11. See *Atwell*, *supra* note 304, at 647 (“It is disturbing . . . that the Court seems satisfied that section 1983 is not necessary as long as its absence does not render the statute a dead letter. While the lack of a section 1983 claim may not make the reasonable efforts provision a dead letter, it may terminally weaken it.”).

³¹² *Suter*, 112 S. Ct. at 1369.

many shortcomings.³¹³ Congress heard testimony from child welfare experts that the Act "could be strengthened to include greater procedural protections to children in the foster care/child welfare system"³¹⁴ and that it specifically should provide the child with a private cause of action.³¹⁵ Child advocates must lobby for new federal legislation that explicitly grants foster children further procedural rights, such as the right to initiate termination proceedings.

C. The *Kingsley* Decision: Criticisms and Distinctions

The denial of Gregory Kingsley's right to initiate termination proceedings by the Florida appeals court establishes an undesirable precedent in Florida, and non-binding persuasive authority in other states. Several aspects of the appellate court's decision in *Kingsley v. Kingsley* make it ripe for reversal by the Florida Supreme Court or should at least deflate its persuasive value in other jurisdictions. These arguments are set forth in the following subsections.

1. Florida Rule of Civil Procedure 1.210(b)

First, the appellate court's holding misconstrues Florida Rule of Civil Procedure 1.210(b). Analyzing this rule, the court concluded that a guardian ad litem or next friend *must* represent a child in a legal proceeding in order to ensure "the orderly administration of justice and the procedural protection of a minor's welfare and interest by the court."³¹⁶ Rule 1.210(b), however, states that:

When an infant or incompetent person has a representative, such as a guardian or other like fiduciary, the representative *may* sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative *may* sue by next friend or by guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person *not otherwise represented* in an action or shall make such other order as it deems proper for the *protection of the infant or incompetent person*.³¹⁷

The statute does not *require* representation by a guardian ad litem or next friend. Instead, such representation is optional, and the appointment of a guardian ad litem or next friend is discretionary.³¹⁸ When a

³¹³ DISCARDED CHILDREN, *supra* note 3, at 55-58.

³¹⁴ *Id.* at 57 (summarizing testimony of Mark Hardin, Esq. and Anita Weinberg, Esq.).

³¹⁵ *Id.* at 58.

³¹⁶ *Kingsley v. Kingsley*, 623 So. 2d 780, 784 (Fla. Dist. Ct. App. 1993).

³¹⁷ FLA. R. CIV. P. 1.210(b) (emphasis added).

³¹⁸ Rule 1.210(b) is interpreted by the Florida courts in the same manner as its identical federal counterpart. See FED. R. CIV. P. 17(c); see also *Smith v. Langford*, 255 So. 2d 294, 297 (Fla. Dist. Ct. App. 1971). The "[a]ppointment of a guardian ad litem is considered to be discretionary under the Federal Rules, provided the . . . [c]ourt enters a finding that the

minor comes before the court with a competent attorney to represent her, it would be superfluous to require that child to be represented by a guardian ad litem.³¹⁹

2. *Florida Case Law: Smith v. Langford*

Second, the appellate court failed to address fully the holding set forth in an earlier case, *Smith v. Langford*.³²⁰ *Langford* involved a minor plaintiff seeking a "judicial determination that [the] defendant [was] the father of her unborn child."³²¹ After the circuit court dismissed the complaint without prejudice, plaintiff appealed the decision.³²² On appeal, the court noted that "a suit may be brought by or against an infant in his individual capacity,"³²³ and that "it is not necessary in all cases that a guardian ad litem or next friend be appointed to represent him in the action."³²⁴ According to *Langford*, when it becomes apparent to a court that one of the parties to an action is a minor, it is

essential that the court . . . consider whether an appointment of a legal representative for the infant should be made. If, however, the court is of the opinion that the interest of the minor will be fully protected throughout the action and in its final disposition without the necessity of appointing a legal representative to act for the minor, then the appointment of such a representative may be dispensed with.³²⁵

In so holding, the court leaves open the possibility of a juvenile party appearing without the assistance of a guardian ad litem or next friend.

In reaching its final decision, the *Langford* court found that the trial court had erred in refusing to proceed further merely because

interests of the minor are adequately protected in the event it does not make such appointment." *M.S. v. Wermers*, 557 F.2d 170, 174 (8th Cir. 1977) (citing *Noe v. True*, 507 F.2d 9, 11-12 (6th Cir. 1974); *Jacobs v. Board of Sch. Comm'rs*, 490 F.2d 601, 603-04 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975); *Roberts v. Ohio Casualty Ins. Co.*, 256 F.2d 35, 39 (5th Cir. 1958)).

³¹⁹ For example, in *Westcott v. United States Fidelity & Guar. Co.*, the court of appeals held that the failure of the trial court to grant a motion for a guardian ad litem for a minor defendant was not reversible error in part because an able attorney had already been employed to represent the minor, and in part because the motion was to obtain a jury trial. 158 F.2d 20, 20 (4th Cir. 1946).

³²⁰ *Langford*, 255 So. 2d 294 (Fla. Dist. Ct. App. 1971).

³²¹ *Id.* at 295.

³²² *Id.*

³²³ *Id.* at 297 (interpreting Rule 1.210(b) in the same manner as its identical federal counterpart, Federal Rule of Civil Procedure 17(c), and adopting the views espoused by Kooman in FEDERAL CIVIL PRACTICE 385, Vol. 2 (1970 ed.)).

³²⁴ *Id.*

³²⁵ *Id.* at 297-98.

the plaintiff was a minor.³²⁶ Upon learning of plaintiff's juvenile status,

the trial court should have considered whether, in view of the nature of this action and the circumstances of the case, it was necessary for the suit to be brought and maintained by a guardian ad litem or next friend for the use and benefit of the minor plaintiff; if so, it should then have proceeded to appoint a guardian ad litem for plaintiff or permitted plaintiff to amend her complaint by bringing the action in her name by her mother as next friend.³²⁷

Thus, in Gregory's case, the court should have considered whether Gregory's youth, in light of the circumstances, made it necessary for a guardian ad litem or next friend to bring the suit on his behalf. Instead, the court announced a blanket rule that *all* minors who wish to initiate a parental rights termination proceeding *must* do so through a guardian ad litem or next friend. If the court had looked to the circumstances surrounding Gregory's case, the judges easily could have found that his representation by Jerri Blair provided him with adequate protection during the termination proceeding. Indeed, the appellate court conceded that Gregory's attorney could have filed a termination petition on Gregory's behalf—but only if she acted as his "next friend" rather than as his attorney.³²⁸ Even though Gregory would have been the real party in interest under the "attorney as next friend" approach, the court indicated that this "long-recognized and well-tested procedure"³²⁹ fulfilled the requirement that "an adult person of reasonable judgment and integrity conduct the litigation for the minor."³³⁰

The Florida appellate court asserted that the next friend requirement is "necessary for the orderly conduct of judicial proceedings,"³³¹ but did not clarify how this requirement is more effective in furthering judicial order than rules that govern the actions of attorneys not wearing the "next friend" label. The law already prohibits an attorney from filing frivolous claims, and attorneys, even those not acting as next friends, are required to be "person[s] of reasonable judgment and integrity"³³² who will promote the "orderly conduct of judicial proceedings."³³³

326 *Id.* at 298.

327 *Id.*

328 *Kingsley v. Kingsley*, 623 So. 2d 780, 784 (Fla. Dist. Ct. App. 1993).

329 *Id.*

330 *Id.*

331 *Id.*

332 *Id.*

333 *Id.*

3. *The Guardian Ad Litem and the Next Friend: Uncertain Roles*

A third area of criticism is the appellate court's failure to delineate the roles that next friends and guardians ad litem should play in termination proceedings. The appellate court did not address the "question of whether the next friend has any function in the proceedings after the petition has been filed and an appropriate guardian ad litem has been appointed by the court."³³⁴ Although the court claimed that this question was not raised in Gregory's case, its failure to address this issue makes it unclear what responsibilities an attorney may or must undertake when acting as a foster child's next friend in a termination proceeding. The court also suggested that even in situations where an attorney is acting as the child's next friend, a guardian ad litem must be appointed to represent the child in the actual proceeding. Thus, the court implied that Gregory's attorney, acting as his next friend, should have filed a termination petition on his behalf and then stepped aside, allowing a court-appointed guardian ad litem to represent him in the actual termination proceeding. If this is the case, it is not clear how the next friend requirement serves to further the judicial process any more than if a child were to initiate a proceeding on her own or with the help of her attorney. Indeed, it is hard to discern how a next friend promotes the "orderly conduct of judicial proceedings"³³⁵ if her role in the actual proceeding is, in all likelihood, non-existent.³³⁶

4. *Procedural Impediments That Unduly Burden a Foster Child's Substantive Rights*

The Florida appellate court's reasoning is flawed in its assertion that "Gregory's lack of capacity due to nonage is a procedural, not substantive impediment which minimally restricts his right to participate as a party in proceedings brought to terminate the parental rights of his natural parents."³³⁷ By concluding that "this procedural requirement does not unduly burden a child's fundamental liberty interest to be 'free of physical and emotional violence at the hands of

³³⁴ *Id.* at 784 n.8.

³³⁵ *Id.* at 784.

³³⁶ Indeed, it is unclear why the participation of attorneys acting as next friends should be limited to the filing of petitions. It is difficult to conceive of a rationale for prohibiting attorneys—even those bearing the next friend moniker—from representing and protecting the child's interests in the actual termination proceeding. Standing alone, a procedure that requires a next friend attorney to defer to a court-appointed guardian after the petition has been filed seems illogical. Given the sad state of the Florida welfare system and its overburdened guardian ad litem program, what can justify requiring that guardians represent foster children in termination proceedings if next friend attorneys, who are already familiar with the needs and wishes of the children, are available to do the job?

³³⁷ *Kingsley*, 623 So. 2d at 785.

his . . . most trusted caretaker,'³³⁸ the opinion disregards the basic facts of the case at hand. This conclusion also ignores the enormous limitations placed on children who wish to escape the limbo of foster care.

Like foster children across the nation, Gregory's rights were severely impaired by the underfunded and overburdened child welfare system responsible for his well-being. The law guardian who was responsible for protecting his interests was unresponsive and the procedures governing his journey through the foster care system were routinely ignored by welfare workers and judges. The court that tried Gregory's case presumed that the procedures erected to protect the rights of foster children were working smoothly. This presumption was unwarranted. By closing its eyes to the inadequacies of Florida's child welfare system, the appellate court failed to recognize that denying foster children the right to initiate termination proceedings and requiring them to rely upon ineffective guardians ad litem³³⁹ to protect their interests places an undue burden on their pursuit of fundamental rights.³⁴⁰

5. *The Presumption of Incompetence: An Exception to the Rule*

The fifth and most fundamental criticism of the *Kingsley* decision responds to the appellate court's reliance on the "historic concept"³⁴¹ that all children are presumptively incompetent and lack the capacity coherently to petition a court for the protection of their basic rights. The appellate court upheld the ban on direct court access for children by falling back on an admittedly "arbitrary"³⁴² rule to protect against the judicial disorder that courts anticipate would ensue if children were permitted to initiate termination proceedings.

In reaching its conclusion, the appellate court relied heavily on *Bellotti v. Baird*.³⁴³ Quoting from *Bellotti*, the opinion asserted that the Constitution allows states to "require a minor to wait until the age of majority before being permitted to exercise legal rights independently."³⁴⁴ This assertion was qualified in *Bellotti* by the Court's deter-

³³⁸ *Id.* The court notes that the procedural burden that it is placing on foster children is "only marginally greater than the burden on an adult . . ." *Id.* at 784.

³³⁹ The United States Advisory Board on Child Abuse and Neglect reports that "[t]raditionally, attorneys involved in child protective judicial proceedings have been inadequately trained and compensated . . . [and that] [d]espite the increasing legal complexity of these cases, too often the affected children are not receiving independent legal counsel."). CRITICAL FIRST STEPS, *supra* note 5, at 88.

³⁴⁰ See *Kingsley*, 623 So. 2d at 785 (citing the objective criteria set forth in *Bellotti v. Baird*, 443 U.S. 622 (1979)).

³⁴¹ *Id.* at 783.

³⁴² *Id.*

³⁴³ 443 U.S. 622 (1979). See also *supra* notes 258-76 and accompanying text.

³⁴⁴ *Kingsley*, 623 So. 2d at 784.

mination that, because of “the peculiar nature of the abortion decision,”³⁴⁵ the general rule prohibiting minors from directly accessing the judicial system did not apply. Indeed, *Bellotti* held that a pregnant minor must be afforded “an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests.”³⁴⁶

The *Kingsley* court could have held that foster children seeking to initiate termination proceedings are similarly exempt from the general rule. As in the case of an abortion decision, a foster child’s decision to pursue termination is unique in nature and consequence.³⁴⁷ Given the fact that pursuing termination is often a child’s only means of securing an enduring family relationship, the *Kingsley* court should have concluded that without the opportunity to directly access the court, a foster child’s constitutional rights are unduly burdened.³⁴⁸

D. State Constitutions

Like the Florida appellate court, courts of other states may be reluctant to abandon the notion that children are incapable of initiating any type of legal action. The rights guaranteed to foster children under federal law are quite limited. There is, however, a third source of rights for foster children. In states where the climate is favorable for recognizing new children’s rights, state constitutions may provide a basis for establishing a foster child’s right to initiate a termination proceeding.

1. *Privacy Rights Guaranteed by State Constitutions*

A particular state’s constitution may be interpreted to supplement the minimal rights afforded under federal law. For example, at the trial level, Gregory Kingsley successfully argued that the general right to make private choices about living arrangements required recognition of his right to initiate a termination proceeding.³⁴⁹ The privacy right, the Florida circuit court held, flowed from Article I of the Florida Constitution.³⁵⁰ Article I guaranteed Gregory the right to pursue happiness,³⁵¹ the right to due process of law,³⁵² the right of access

³⁴⁵ *Bellotti*, 443 U.S. at 643-44 n.23.

³⁴⁶ *Id.* at 651.

³⁴⁷ See *infra* notes 354-402 and accompanying text.

³⁴⁸ *Id.*

³⁴⁹ *Gregory K. v. Ralph K.*, No. CI92-5127, 1992 WL 551488 (Fla. Cir. Ct. July 20, 1992) (order on standing), *rev’d sub nom. Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

³⁵⁰ *Id.*

³⁵¹ FLA. CONST. art. I, § 2.

³⁵² *Id.* art. I, § 9.

to the courts of the state,³⁵³ and the right to make private choices.³⁵⁴ Judge Kirk affirmed that the right to privacy set forth in the Florida Constitution³⁵⁵ extends to all natural persons, including minors.³⁵⁶ Quoting the Florida Supreme Court decision *In re T.W.*³⁵⁷ and a United States Supreme Court case, *Planned Parenthood v. Danforth*,³⁵⁸ Judge Kirk explained that “[c]onstitutional rights do not mature and come into being magically only when one attains the state defined age of majority.”³⁵⁹

Many state constitutional provisions grant broader rights than those provided by the federal equivalent. In some states, for instance, the right to privacy is clearly expressed in the constitution.³⁶⁰ Other states, whose constitutions do not specifically enumerate a right to privacy, have implied such a right.³⁶¹ In those jurisdictions that recognize a state constitutional right to privacy, children should have the right to initiate and participate directly in proceedings that involve private choices about their familial affiliation. As in *Gregory K.*, however, states must recognize that minors are “persons” in order for foster children to persuade a court that the “freedom of personal choice in matters of . . . family life”³⁶² is a protected liberty interest under the right to privacy embodied in their state constitutions.³⁶³

³⁵³ *Id.* art. I, § 21.

³⁵⁴ *Id.* art. I, § 23.

³⁵⁵ *Id.* This provision guarantees that “[e]very natural person has the right to be let alone and free from governmental intrusion into his private life.” *Id.*

³⁵⁶ *Gregory K.*, No. CI92-5127, 1992 WL 551488.

³⁵⁷ 551 So. 2d 1186, 1191-92 (Fla. 1989).

³⁵⁸ 428 U.S. 52, 74 (1976).

³⁵⁹ *Gregory K.*, No. CI92-5127, 1992 WL 551488. In *In re T.W.*, 551 So. 2d at 1191, Florida’s highest court observed that the “Supreme Court has recognized a privacy right that shields an individual’s autonomy in deciding matters concerning marriage, procreation, contraception, family relationships, and child rearing and education.” Noting that the United States Supreme Court “has made it clear that the states, not the federal government, are the final guarantors of personal privacy,” the court held that the Florida Constitution “embraces more privacy interests, and extends more protection to the individual . . . than does the federal Constitution.” *Id.* at 1191-92.

³⁶⁰ The California Constitution, for example, states that “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” CAL. CONST. art. I, § 1. Similarly, the Arizona Constitution provides that “[n]o person shall be disturbed in his private affairs . . . without authority of law.” ARIZ. CONST. art. II, § 8. See, e.g., ALASKA CONST. art. I, § 22; FLA. CONST. art. I, § 23; HAW. CONST. art. 1, § 6; ILL. CONST. art. I, § 12; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; WASH. CONST. art. I, § 7.

³⁶¹ Despite the lack of an explicit right to privacy in the Massachusetts Constitution, the Supreme Judicial Court of Massachusetts has held that unity and privacy of family are entitled to constitutional protection. See *Adoption of a Minor*, 438 N.E.2d 38, 45 (Mass. 1982).

³⁶² *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974).

³⁶³ *Gregory K.*, No. CI92-5127, 1992 WL 551488.

Arguments addressing children's status as "persons" should be tailored to fit the constitutional language of the state in which the claim is being brought. A state constitution's express recognition of privacy rights makes it easier to maintain that the right to petition for parental rights termination is constitutionally protected. When the right to privacy is not specifically set forth in a state constitution, foster children should attempt to have such a right recognized by the judiciary.

2. *Undue Burdens on a Foster Child's State Constitutional Rights*

Additionally, as the *Kingsley* decision indicates, foster children must demonstrate more than just a constitutional right to make decisions regarding their familial relationships. Foster children must also establish that the procedural limitations on their rights are unduly burdensome and constitutionally impermissible.³⁶⁴ The Supreme Court decision of *Bellotti v. Baird*³⁶⁵ held that states could not impose undue burdens on a minor's exercise of her fundamental rights.³⁶⁶ Forcing foster children to rely on inadequate child welfare systems to initiate termination proceedings on their behalf severely burdens the constitutional rights of those foster children.

In states that guard privacy rights more zealously than the Supreme Court's interpretation of constitutional mandates, an advocate could contend that state statutes limiting a foster child's ability to make choices regarding her familial relationships should be subject to heightened scrutiny. In Florida, for example, a statute that impinges on a minor's constitutional rights must survive a "stringent test."³⁶⁷ Under such a test, when a statute implicates the right to privacy, "the state must prove that the statute furthers a compelling state interest through the least intrusive means."³⁶⁸

It is unclear what would constitute a compelling—rather than merely "significant"³⁶⁹—state interest in limiting a minor's ability to initiate a termination proceeding. A state might assert that such a limitation furthers the state's interest in protecting immature minors. A state might also assert, as did the appellate court in *Kingsley*, that

³⁶⁴ See *supra* parts III.A. & III.C. (discussing the argument, suggested by *Bellotti v. Baird*, that denying foster children direct access to the judicial system constitutes an undue burden upon their constitutional rights).

³⁶⁵ 443 U.S. 622 (1979).

³⁶⁶ *Id.* at 640, 643 n.23.

³⁶⁷ *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989).

³⁶⁸ *Id.* (citing the test enumerated in *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985)).

³⁶⁹ At the federal level, intrusive statutes need only further a "significant," not a compelling, state interest. *Id.* at 1194-95 n.8.

denying foster children direct court access is necessary for the orderly administration of justice.

These might be worthy objectives, but they are not compelling state interests. Indeed, procedural limitations on foster children's access to the courts do nothing to further such objectives. Even if such interests could be characterized as "compelling," denying foster children direct court access is not the "least intrusive means" of protecting these interests. States that want to protect minors can do so by ensuring that they are provided with effective counsel during the course of the termination proceeding. Similarly, states concerned about large numbers of frivolous termination suits being brought directly by minors can apply pre-existing procedural mechanisms that effectively prevent or diminish these potential problems.³⁷⁰ These are just two mechanisms that promote state interests without unduly intruding upon a foster child's right to impact decisions regarding his familial relationships.

E. State Statutes

A foster child's right to initiate termination proceedings can also be rooted in state statutes. In *Gregory K.*, the Florida circuit court recognized Gregory's right to sue for parental rights termination under Florida statutory law.³⁷¹ Because Gregory was a person with knowledge of facts that could form the basis of a claim, the court concluded that he had the right to file a petition under the Florida statutes.³⁷² Similar arguments can be made in those states with comparably broad statutory language.³⁷³

³⁷⁰ See, e.g., FED. R. CIV. P. 11 ("By presenting to the court . . . a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . [that] it is not presented for any improper purpose, such as to harass or cause unnecessary delay . . . [and] that the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

³⁷¹ *Gregory K.*, No. C192-5127, 1992 WL 551488.

³⁷² Chapter 39.001(a) of the Florida Statutes provides for judicial and nonjudicial proceedings whereby children and other interested parties can receive fair hearings and recognition, protection, and enforcement of their constitutional rights. Chapter 39.461 of the Florida Statutes states that "any . . . person who has knowledge of the facts alleged" may file a petition for termination of parental rights.

³⁷³ In Tennessee, for example, a state law provides that a petition for termination "may be made by any person . . . who has knowledge of the facts alleged or is informed and believes that they are true." TENN. CODE ANN. § 37-1-119 (1993). Likewise South Carolina provides that "[a] petition seeking termination of parental rights may be filed by the child protective services agency or any interested party." S.C. CODE ANN. § 20-7-1564 (Law Co-op. 1984). Indeed, the child whose ties are being severed is probably the party most inter-

Children asserting the right to initiate termination proceedings on the basis of state statutory provisions must tailor their arguments to conform with their state's specific statutory language. Where statutes fail to include specific language or standards specifying who may initiate termination proceedings,³⁷⁴ the success of a standing argument may be less predictable. The Texas Code, for example, fails to provide who may file a termination petition.³⁷⁵ One Texas court denied standing to foster parents who filed a termination petition in order to facilitate the adoption of their foster child.³⁷⁶ Therefore, it appears that a statutory argument for the right of foster children to initiate termination proceedings in Texas will succeed only if either the statute is amended or litigants persuade the courts that foster children warrant an exception to the general rule prohibiting minors from directly accessing the judicial system.³⁷⁷ In states like Texas, where the statutory standards are vague, child advocates should lobby state legislators and persuade them to replace vague language with explicit guarantees of foster children's rights.

The statutes of some states clearly preclude interpretations favoring foster children's rights.³⁷⁸ For example, an Illinois statute allows parental termination petitions to be filed only by *adult* persons, agencies, associations, or guardians ad litem.³⁷⁹ This statute leaves little room for an interpretation that a child may independently file a petition, except through an undue procedural burden argument as per *Bellotti v. Baird*. Additionally, Virginia's courts will not accept a termination petition unless the child welfare agency with custody of the child presents the court with a foster care plan recommending termi-

ested in such a proceeding. See also ALASKA STAT. § 25.23.180 (1993) (petition for termination proceeding may be made); IOWA CODE § 232.111.2 (1992) (department of human services, juvenile court officer, county attorney or judge can authorize any competent person having knowledge of the circumstances to file a petition); MISS. CODE ANN. § 93-15-105(1) (1993) (any person, agency or institution may file a petition); S.C. CODE ANN. § 20-7-1564 (Law. Co-op. 1991); WASH. REV. CODE § 13.34.180 (1991) (any party to a dependency hearing may file a petition).

³⁷⁴ See GA. CODE ANN. § 15-11-82 (1990); KAN. STAT. ANN. § 38-1582 (1986); ME. REV. STAT. ANN. tit. 19, § 533-A (West Supp. 1993); MINN. STAT. ANN. § 260.221 (West 1992 & Supp. 1994); NEB. REV. STAT. § 43-291 (1992); N.Y. DOM. REL. LAW § 112 (McKinney 1993); R.I. GEN. LAWS § 15-7-7 (1992).

³⁷⁵ TEX. REV. CIV. STAT. § 15.02 (1986).

³⁷⁶ *Mendez v. Brewer*, 626 S.W.2d 498, 500 (Tex. 1982) (affirming decision that denied foster parents the right to intervene in a termination suit by the Department of Social Services or to bring an independent termination suit).

³⁷⁷ See *supra* part III.C. (suggesting possible arguments justifying a foster child's right to initiate termination proceedings).

³⁷⁸ See CONN. GEN. STAT. ANN. § 45a-715(a) (1993 & Supp. 1994); DEL. CODE ANN. tit. 13, § 1104 (1992); ILL. ANN. STAT. ch. 37, para 803-15 (1989); LA. REV. STAT. ANN.-CH. C. art. 1004 (West 1994); UTAH CODE ANN. § 78-3f-104 (Supp. 1993); WIS. STAT. § 48.42 (West 1987).

³⁷⁹ ILL. ANN. STAT. ch. 37, para 803-15 (1989).

nation as in the best interests of the child.³⁸⁰ Thus, under Virginia law, Gregory would have been denied standing because the state welfare agency did not recommend termination until after Gregory initiated the proceeding. Child advocates in these states must actively lobby for statutory standards that permit foster children to petition for termination.

IV

A FOSTER CHILD'S RIGHT TO COUNSEL: EXAMINING THE FEDERAL, STATE AND COMMON LAW ALTERNATIVES

Foster children can take advantage of the right to initiate termination proceedings only if they are represented by effective counsel. Legal representation assists foster children in filing termination petitions and is crucial to a successful argument for the enforcement of their rights.

A. The Guardian Ad Litem: Ineffective Counsel for Foster Children Seeking to Initiate Termination Proceedings

In almost every state, abused or neglected children have the right to a court-appointed attorney, often called a "guardian ad litem."³⁸¹ This attorney acts independently to protect the child's interests in the formal adjudication and dispositional stages of the litigation.³⁸² Yet, in post-dispositional case review hearings, such as separate proceedings seeking termination of parental rights, "state statutes and appellate courts rarely require—and thus children are much less likely to have—court-appointed representation."³⁸³ Thus, it is difficult to argue that children initiating termination proceedings should be guaranteed representation by effective counsel.

If a child *is* represented in a termination proceeding, it is usually by a guardian ad litem.³⁸⁴ Most states mandate that an attorney, acting as a guardian ad litem, represent a foster child upon the state's

³⁸⁰ *Stanley v. Fairfax County Dep't of Social Servs.*, 395 S.E.2d 199, 202 (Va. Ct. App. 1990), *aff'd*, 405 S.E.2d 621 (Va. 1991).

³⁸¹ Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 268 (1991). Davidson notes that

[a] primary impetus for such laws was not a Supreme Court decision, but rather the 1974 federal Child Abuse Prevention and Treatment Act . . . [which] requires that states receiving certain federal assistance for child protective services assure that every child involved in a civil child protective proceeding has a court-appointed guardian ad litem.

Id.

³⁸² *Id.* at 269.

³⁸³ *Id.* Davidson observes that "it seems odd and unfortunate that all states do not clearly mandate appointment of counsel for the child in termination of parental rights hearings, since the long-term consequences are greatest in these cases." *Id.*

³⁸⁴ *Id.* at 268-69.

initiation of that child's removal from the home of her biological parents.³⁸⁵ While the duties of a guardian ad litem include representing foster children in state-initiated adjudicatory hearings initiated by the state, expanding the role of the guardian to include the representation of children in termination proceedings does not satisfy the requirement of effective counsel. A guardian ad litem is prohibited from adopting an adversarial position at adjudicatory hearings.³⁸⁶ Thus, the guardian may consider neither the child's parents nor the state as an opponent.³⁸⁷ The guardian's role is to advocate what she believes is in the "best interests" of the child,³⁸⁸ even if her conception of the child's best interests does not coincide with the child's reasoned desires.³⁸⁹ Accordingly, "acting in the best interests of the child and acting as the child's legal representative are quite different matters."³⁹⁰

In a termination proceeding initiated by the state against a foster child's natural parents, both the state and the natural parents attempt to convince the judge that their position is in the "best interests of the child."³⁹¹ To balance the positions taken by these adversaries, the guardian ad litem investigates the child's wishes, considers the possible options for the child, and then makes an independent recommendation to the court as to whether termination should occur.³⁹²

Although the guardian ad litem may provide adequate representation for children in non-adversarial proceedings, the guardian is less able to assist a child who adopts an adversarial posture toward his natural parents, and often toward the state as well, by initiating a termination proceeding.³⁹³ When the interests of the child are directly in conflict with those of another party in the proceeding, "[t]he court

³⁸⁵ *Id.* at 269. A few states employ lay citizens as guardians, but guardians rarely represent children in abuse-related child custody disputes. *Id.* at 261-62.

³⁸⁶ GOTTESMAN, *supra* note 73, at 50.

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ The definition of the guardian's role presumes: (a) the correctness of the paternalistic notion that the judicial process should give more weight to adult guardian's determination of the child's best interest than to the child's own wishes, and (b) that the scope of the guardian's representation should be limited to proceedings involving the state and the natural parents, but not the child, as adversaries.

³⁹⁰ NATIONAL COUNCIL OF JUV. & FAM. CT. JUDGES ET. AL., MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER 31 (1987) [hereinafter MAKING REASONABLE EFFORTS].

³⁹¹ GOTTESMAN, *supra* note 73, at 50.

³⁹² *Id.* at 50-52.

³⁹³ See Davidson, *supra* note 381, at 256.

should . . . appoint a separate attorney for the child,"³⁹⁴ rather than a guardian ad litem.³⁹⁵

Assume, for example, that a guardian ad litem is assigned to represent a child who has been in foster care for six years and wishes to file a termination petition with the court. Even if the child's petition is not frivolous, the guardian cannot recommend termination to the court if, in his opinion, termination is either too drastic a step or, for some reason, not in the best interests of the child.³⁹⁶ Hindered from recommending what her "client" seeks, the guardian ad litem cannot provide the child with effective representation to establish a prima facie case for termination.³⁹⁷ Thus, a child represented only by a guardian ad litem does not enjoy fully the right to have his views "freely heard and fairly considered"³⁹⁸ by the judicial system. The child petitioner in such a scenario is denied vigorous representation of her objectives and her right to initiate termination proceedings may thus be thwarted.

A more productive way to give effect to a child's right to initiate termination proceedings would be to recognize the child's right to a court-appointed, and independent, counsel. Children involved in adversarial juvenile proceedings already enjoy such a right.³⁹⁹ An attorney appointed to represent the child, but not acting as a guardian ad litem, is less likely to inject her personal values into the proceeding. After determining that her client's cause of action is not frivolous, the attorney would present the case for termination in the best light possible. Representation by independent, court-appointed attorneys observing American Bar Association (ABA) standards of professional responsibility⁴⁰⁰ would ensure effective advocacy of the child's views

³⁹⁴ MAKING REASONABLE EFFORTS, *supra* note 390, at 31. See also STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1980) (observing that "[i]ndependent counsel should also be provided for the juvenile who is the subject of proceedings affecting his or her status or custody"); Davidson, *supra* note 381, at 277 (noting that children need "independent advocacy in all types of proceedings where their interests may be affected").

³⁹⁵ See Davidson, *supra* note 381, at 277.

³⁹⁶ GOTTESMAN, *supra* note 73, at 51-52.

³⁹⁷ Even if the guardian notifies the court of the child's wishes, subsequent recommendations that are contrary to the child's wishes are likely to impede the court's action for termination.

³⁹⁸ Davidson, *supra* note 381, at 255-56 (quoting language from Article 12 of the United Nations Convention on the Rights of the Child).

³⁹⁹ See *infra* part IV.B.; see also GOTTESMAN, *supra* note 73, at 22. Attorneys are provided to juveniles in a variety of ways. In some states, the public defender's offices assign attorneys on a case-by-case basis, while in other states, the courts maintain rosters of qualified attorneys and make assignments on a rotating basis. *Id.*

⁴⁰⁰ Davidson, *supra* note 381, at 262. The ABA Juvenile Justice Standards address areas of concern specific to child clients. *Id.* These standards, however, should not be interpreted as restrictions on an attorney's representation of a child client. Davidson adds that "[t]hese [s]tandards reject the use of attorneys as merely guardians ad litem entrusted with protecting the child's 'best interests' . . . [and] are, therefore oriented toward assuring that

before the judge. In reaching a determination regarding termination, the judge would therefore be able to consider the arguments for and against termination offered by *all* affected parties: the state officials, the natural parents *and* the child whose welfare is at stake. Although this arrangement may complicate the decision-making process for the judge, the interest of simplicity does not justify silencing a child's voice in protecting her own fundamental rights.⁴⁰¹

Representation by an independent, court-appointed attorney is the best means of ensuring that foster children will be able to effectively exercise their right to initiate termination proceedings.⁴⁰² The remainder of this section examines possible grounds in federal and state law for establishing the right to independent, court-appointed counsel in such proceedings.

B. Children's Right to Counsel: Limited Alternatives Under Federal Law

1. Smith, Gault *and* Lassiter

The Supreme Court has not yet decided on whether children have the right to counsel in termination proceedings. Moreover, the Court's 1977 decision in *Smith v. OFFER*⁴⁰³ held that the *failure* to provide counsel for a child facing removal from a long-term foster home did not by itself constitute a denial of due process. However, the Supreme Court recognized the right to counsel for juvenile crime suspects in the 1967 case *In re Gault*.⁴⁰⁴ Noting the "awesome prospect of incarceration," the Court held that the Due Process Clause of the Fourteenth Amendment guarantees a child the right to be repre-

the child's own views concerning the case will be effectively heard in court through a lawyer-advocate." *Id.*

⁴⁰¹ In 1989 the ABA "adopted a policy stating that, in child abuse and neglect-related judicial proceedings, all children should be represented by both a lay guardian ad litem . . . and an attorney acting as the child's legal counsel." *Id.* (emphasis omitted). Perhaps such an arrangement would ensure zealous advocacy for the child, as well as a disinterested opinion as to what decision would best serve the interests of the child. This arrangement still presents the danger that a court will disregard the child's desires if they conflict with the lay guardian's recommendation.

⁴⁰² Foster children require more than mere representation by an independent attorney. An attempt must also be made to ensure that such representation will be skillful and diligent. Commenting on the proceedings for which legal representation is already required for children, a Congressional committee reported that "children . . . often do not get the kind of representation they need . . . [because the lawyers representing them] are poorly paid, poorly trained, and are often involved because they need the income to make ends meet or to gain courtroom experience." DISCARDED CHILDREN, *supra* note 3, at 55. Improving the quality of the lawyers appointed to represent children in all legal proceedings, not just child-initiated termination hearings, should be a primary goal for child advocates. See generally Davidson, *supra* note 381, at 262 (mentioning existing guidelines for attorneys).

⁴⁰³ 431 U.S. 816 (1977).

⁴⁰⁴ 387 U.S. 1 (1967).

sented by counsel in juvenile delinquency proceedings.⁴⁰⁵ The Court restricted application of its holding to adjudicatory proceedings in which "the consequence [for the juvenile is] that he may be committed to a state institution."⁴⁰⁶ By contrast, the *Smith* Court found that the provision of advocates for foster children in adjudicatory hearings would impose "a major administrative burden on the state [that] would be balanced by little gain in accuracy of decisionmaking."⁴⁰⁷

Additionally, in *Lassiter v. Department of Social Services*,⁴⁰⁸ the Supreme Court held that the Due Process Clause requires courts to appoint counsel for indigent parents faced with a termination hearing only in exceptional circumstances.⁴⁰⁹ The Court indicated that as a general rule "there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty."⁴¹⁰ The Court stated, however, that this presumption may be overcome if the parents demonstrate that their interest, when combined with the risk of error, is sufficient to outweigh the state's interest in " 'informality, flexibility, and economy.' "⁴¹¹ Thus, the Court refused to grant an absolute right to counsel for indigent parents faced with termination proceedings,

⁴⁰⁵ The Court required that the "child and his parents . . . [receive notification] of the child's right" to retain private counsel or, if they were unable to afford counsel, to obtain a court appointed attorney. *Id.* at 41.

⁴⁰⁶ *Id.* at 13. The Court stated:

We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile delinquents. For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. We consider only the problems presented to us by this case.

Id.

⁴⁰⁷ 431 U.S. at 852 n.59.

⁴⁰⁸ 452 U.S. 18 (1981). In this case, the lower court deemed petitioner's infant son a neglected child and placed him in custody of a state agency in 1975. *Id.* at 20. A year later the petitioner was convicted of second-degree murder and she began serving a 25-40 year prison term. *Id.* In 1978 a termination proceeding was instituted and petitioner was brought from prison to attend. *Id.* Finding that she had been given ample time to obtain counsel and that because her failure to do so was without just cause, the court did not postpone the proceeding. *Id.* at 22. Additionally, because petitioner did not claim indigency, the court did not appoint counsel for her. *Id.* During the hearing, petitioner and her mother responded to questions by the court, and petitioner cross-examined a social worker. *Id.* at 23. The court terminated petitioner's parental rights, finding that she had "wilfully failed to maintain concern or responsibility for the welfare of the minor." *Id.* at 24. On appeal, petitioner claimed she had been denied due process because the court failed to appoint counsel for her. *Id.*

⁴⁰⁹ *Id.* at 32.

⁴¹⁰ *Id.* at 31.

⁴¹¹ *Id.* at 31-32 (quoting *Gagnon v. Scarpelli*, 411 U.S. 788 (1973)). *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) establishes that three factors must be considered in determining the "specific dictates of due process" in any given situation. *Id.* These factors are: "the private interest that will be affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedures used"; and "the Government's inter-

although it left open the possibility that court-appointed counsel might be necessary in a particular case.

In light of *Lassiter*, foster children seeking to establish the right to counsel in termination proceedings should employ arguments that focus on the following factors: (1) children have a strong interest in their representation in matters which often contemplate extremely serious consequences; (2) there is a high risk of error that without independent representation, the children's interests will not be effectively demonstrated in an adversarial process that may involve conflicting parental interests; and (3) the state interests are relatively weak. Although these arguments have not yet been tested in federal court, they may prove successful.

2. *The Federal Rules of Civil Procedure*

Additionally, foster children initiating claims in federal court⁴¹² may be affected by Federal Rule of Civil Procedure 17(c), which provides that:

whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.⁴¹³

Under Rule 17(c), federal law controls the appointment of a representative for a minor or incompetent person,⁴¹⁴ even though Rule 17(b) provides that state law determines the capacity of a representative to sue or be sued.⁴¹⁵ In *Blackwell v. Vance Trucking*,⁴¹⁶ the district court observed that the language of Rule 17(c), which provides that an infant may sue through a next friend or guardian ad litem, "seems to abolish the traditional distinction"⁴¹⁷ between the treatment of plaintiffs and defendants. A federal district court may thus appoint a guardian ad litem not only for an incompetent defendant, but also for an incompetent plaintiff.⁴¹⁸

est, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

⁴¹² Such as an AACWA claim. *See supra* part III.B.

⁴¹³ FED. R. CIV. P. 17(c).

⁴¹⁴ *Travelers Indem. Co. v. Bengtson*, 231 F.2d 263 (5th Cir. 1953).

⁴¹⁵ FED. R. CIV. P. 17(b).

⁴¹⁶ 139 F. Supp. 103 (D. S.C. 1956).

⁴¹⁷ *Id.* at 106.

⁴¹⁸ *See, e.g.*, FED. R. CIV. P. 17(b); *see also Blackwell*, 139 F. Supp. at 103 (noting that Rule 17(c) abolishes that rule and allows a guardian to be appointed for an infant plaintiff,

Rule 17(c) makes the appointment of a guardian ad litem mandatory⁴¹⁹ only when the infant's interests are not already adequately represented and protected.⁴²⁰ Thus, in *Westcott v. United States*⁴²¹ the court of appeals refused to reverse a case based on the failure of the trial court to grant a motion for a guardian ad litem for a minor defendant. The *Westcott* court concluded that an able attorney had been employed to represent the minor and noted that no suggestion was made that a guardian ad litem be appointed until the day of the trial.⁴²² When courts do find that a child's interests are in need of representation and protection, however, the failure to appoint a guardian may constitute reversible error.⁴²³

Thus, foster children suing in federal court can assert a right to counsel by arguing under Rule 17(c) that their interests require the protection and representation of counsel. Such arguments have not yet been tested in federal court.

B. The Right to Counsel Under State Law

As the Supreme Court recognized in *Lassiter*, even when the Due Process Clause does not require the appointment of independent counsel for minors, "wise public policy . . . may . . . [still] require that higher standards be adopted than those minimally tolerable under the Constitution."⁴²⁴ Toward this end, all states have enacted statutes that require courts to appoint a legal representative or guardian ad litem in termination proceedings, or at the very least, to allow the judge to appoint a guardian ad litem at her discretion.⁴²⁵

State statutes providing children and their parents with the right to representation vary greatly in their specificity and language.⁴²⁶ In

although traditionally a court should appoint a guardian ad litem only to an infant who was a party defendant).

⁴¹⁹ *Westcott v. United States Fidelity & Guar. Co.*, 158 F.2d 20 (4th Cir. 1946).

⁴²⁰ *Roberts v. Ohio Casualty Ins. Co.*, 256 F.2d 35 (5th Cir. 1958).

⁴²¹ 158 F.2d 20 (4th Cir. 1946).

⁴²² *Id.* at 21-22.

⁴²³ See, e.g., *Gardner v. Parsons*, 874 F.2d 131 (3d Cir. 1989) (guardian ad litem should have been appointed for mentally retarded minor in federal civil rights action challenging the quality of state-provided care); *Shearer v. Coats*, 434 N.W.2d 596 (S.D. 1989) (holding that defendant minor in state court action may not have default judgment entered against him unless court appointed guardian represents him and appears in the case).

⁴²⁴ *Lassiter*, 452 U.S. at 33.

⁴²⁵ See Davidson, *supra* note 381, at 268.

⁴²⁶ Many state codes, such as Pennsylvania's, provide for representation at all proceeding stages for a child and her parents, custodian or guardian. When no limitation appears, as in the Pennsylvania statute, the right to counsel seemingly extends beyond "delinquency" matters, to cases of abuse and neglect or noncriminal misbehavior. 42 PA. CONS. STAT. ANN. § 6337 (1982). In the Wyoming case of *In re Child X*, for example, the termination of parental rights was overturned when counsel was not appointed for a child, as was statutorily mandated. 617 P.2d 1078 (Wyo. 1980). The Illinois enactment typifies a second group of statutes which simply entitle all juveniles to the right to counsel without specifying

Oklahoma, for example, appointing children their own counsel in termination proceedings is required upon a finding that it is necessary to protect the interests of the child. In the Oklahoma Supreme Court case of *In re T.M.H.*, the court interpreted this statute to require separate counsel for *all* children involved in *all* future termination cases.⁴²⁷ The court reasoned that in termination proceedings the child is "caught in the middle" and as a result, "the rights and . . . interests of children are frequently jeopardized . . . because the best interests of a child are determined without resort to an independent advocate for the child."⁴²⁸ Furthermore, the court noted that social service agencies do not always adequately protect the child's interests, especially when the social service agency is the party being challenged.⁴²⁹ The *TMH* court's interpretation of the statute seems to incorporate the three-prong balancing test discussed by the Supreme Court in *Lassiter*. The *TMH* court concluded that the balance will forever remain in favor of the child's right to counsel. This approach presents another option for state courts seeking to establish such a right.

When statutes fail to state that the right to counsel in termination proceedings exists, the courts are generally unwilling to recognize the right independently. For example, in 1976 the Oregon Court of Appeals held that children are not entitled to counsel in every juvenile court proceeding to terminate parental rights.⁴³⁰ Two years earlier, the court had recognized the importance of representation in such hearings, which, the court noted, often involve "potential for conflict between the interests of the children . . . and, of *both* the state and the parents."⁴³¹ Thus, the court retreated from its recognition of the significance of termination proceedings, holding that right-to-counsel issues should be decided on a case-by-case basis.⁴³²

whether this right extends to all stages of the proceeding or to non-delinquency cases. ILL. ANN. STAT. ch. 705, para. 405/1-5 (Smith-Hurd 1992). In contrast, a third cluster of states have enacted statutes which suggest a more limited right to counsel. For example, in Nevada, the statute appears broad in application, but is actually quite narrow in that it leaves the question of appointment of counsel in individual cases to the discretion of the court. See, e.g., NEV. REV. STAT., FIRST JUDICIAL DISTRICT CT. RULES, RULE 23 (1994). A fourth group of state statutes, exemplified by the Virginia code, explicitly state that the right to counsel applies in noncriminal misbehavior, neglect and dependency cases, as well as "delinquency" matters. See, e.g., VA. CODE § 16.1-266 (1988).

⁴²⁷ *In re T.M.H.*, 613 P.2d 468 (Okla. 1980).

⁴²⁸ *Id.* at 470.

⁴²⁹ *Id.*

⁴³⁰ *In re D.*, 547 P.2d 175, 181 (Or. Ct. App. 1976), cert. denied, 429 U.S. 907 (1976). Similarly, in 1976 the Pennsylvania Supreme Court held that although children have a statutory right to counsel in juvenile dependency proceeding, they do not have a statutory or constitutional right to counsel in adoption proceeding. *In re Kapcsos*, 360 A.2d 174, 178 (Pa. 1976).

⁴³¹ *In re Wade*, 527 P.2d 753, 756 (Or. Ct. App. 1974).

⁴³² *In re D.*, 547 P.2d at 181.

Thus, although many states have provided for a right to counsel for children involved in state-initiated termination proceedings, courts and legislatures should be urged to require court-appointed representation for foster children who choose to initiate termination of parental rights proceedings. In conjunction with their efforts to establish the right to standing, child advocates must lobby state legislatures to enact statutes specifically guaranteeing the right to counsel in such proceedings.

CONCLUSION

To rectify the growing limbo problem plaguing foster children like Gregory Kingsley, all foster children should be given the opportunity to initiate parental rights termination. Granting foster children the right to initiate parental rights termination proceedings and providing them with court-appointed attorneys to aid in their efforts would pave the way for the legal system to address their problems. If given a voice that is guaranteed to be heard by those responsible for making the decisions that so dramatically affect their lives, foster children will finally have the opportunity to obtain permanent and healthy homes. Child advocates should actively seek to establish these rights under federal and state constitutions and statutes. Only once such rights are recognized and appropriate guidance is given to those who participate in termination proceedings, will foster children have an effective tool to help extract themselves from the quagmire of foster care.

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