

The Reality of Concurrent Planning: Juggling Multiple Family Plans Expediently Without Sufficient Resources

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Introduction

In the last few decades, the pendulum of dependency law policy has swung from focusing on family preservation to “permanency placement” for abused and neglected children.¹

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¹ America's child protection system evolved from the English Poor Laws which granted equity jurisdiction to courts to separate abused and neglected children from their parents and place children in poor houses or in involuntary apprenticeships. Sarah Abramowicz, *English Child Custody Law, 1660-1839: The Origins Of Judicial Intervention In Parental Custody*, 90 COLUM. L. REV. 1344 (1999); Mason Thomas, *Child Abuse And Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293 (1972). By 1824 child welfare was privatized and children were housed in large public houses of refuge, and in the 1850s a counter-movement sent impoverished city children to live with families in the country. Sarah M. Coupet, *What To Do With The*

In the Adoption Assistance and Child Welfare Act of 1980, the federal government made clear that permanency is the preeminent goal of child welfare law. That bill set discreet time limits for family reunification,² but critics identified significant flaws in that 1980 legislation. Thus, in 1997, Congress passed the Adoption and Safe Families Act, which further shortened the period for family reunification. This Act ushered in a requirement of concurrent planning under which the government must simultaneously provide parents assistance to reunify with their children and to prepare for permanent placement for dependent children should reunification fail.³

Sheep In Wolf's Clothing: The Role Of Rhetoric And Reality About Youth Offenders In The Constructive Dismantling Of The Juvenile Justice System, 148 U. PA. L. REV. 1303 (2000). However, by 1909 the trend had changed to preserving families and separating children from parents only when necessary. The 1909 White House Conference on the Care of Dependent Children declared: “[h]ome life is the highest and finest product of civilization. It is the great unfolding force of mind and of character.” David S. Tanenhouse, “*Growing Up Dependent: Family Preservation In Early Twentieth-Century Chicago*,” 19 L. & HIST. REV. 547 (2001). After a series of United States Supreme Court opinions in the 1970’s and 1980’s gave parents fundamental procedural due process in child protection proceedings, many bemoaned the “foster-care-drift” in which children languished without permanency while the government provided parents an opportunity to cure the defects that led to court intervention. Bridget A. Binn, *Focusing on Children: Providing Counsel to Children in Expedited Proceedings to Terminate Parental Rights*, 61 WASH. & LEE L. REV. 789, 812 (2004); Cathrine J. Ross, *The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental termination Proceedings*, 11 VA. J. SOC. POL’Y & L. 176, 194 (2004).

² Pub. L. No. 96-272. The 1980 Act “created a tension as agencies committed to reunification discouraged bonding between foster parents and foster children while at the same time, out of concern for child safety, discouraged contact with the child’s biological parents.” Megan M. O’Laughlin, *A Theory of Relativity: Kin Ship Foster Care May Be The Key To Stopping The Pendulum Of Termination v. Reunification*, 51 VAND. L. REV. 1427, 1434 (1998).

³ Pub. L. No. 105-89 (1997); 42 U.S.C. § 675 (1997); CAL. WELF. & INST. CODE § 16501.1(f)(9) (West 2004) is a representative state legislative enactment based on the Adoption and Safe Families Act: “When out-of-home services are used and the goal is reunification, the case plan shall describe the services to be provided to assist in reunification

This article will analyze the concurrent planning requirements of the Adoption and Safe Families Act in terms of its effectiveness at both reunification and permanency. Concurrent planning has not been the panacea that its creators imagined. Instead, it has had the effect of rushing parents through inadequate family reunification with little forethought for appropriate permanent plans for children. In its current state, it is a system that lacks adequate services, deemphasizes sibling connections, creates legal orphans without a sufficient supply of adoptive parents, and provides few, if any, front-end services to help families avoid court intervention.

I. Concurrent Planning Requirements

Concurrent planning involves a host of coordinated efforts in simultaneously providing family reunification and/or permanency for abused and/or neglected children, including: "(1) increased efforts to establish paternity at the earliest possible date; (2) a broadened definition of "relative"; (3) increased placement of siblings in the same home if that placement is in each child's best interest; (4) a reduction in the duration or an elimination of reunification services; (5) increased reliance on voluntary relinquishment by parents; and (6) kinship adoption agreements."⁴ In addition, concurrent

and the services to be provided concurrently to achieve legal permanency if efforts to reunify fail." See also, LAURA WILLIAMS, CALIFORNIA DEP'T OF SOC. SERVS. ADOPTIONS INITIATIVE BUREAU, CONCURRENT SERVICE PLANNING: RESOURCE GUIDE III-5 (1998).

⁴ William Wesley Patton, *Searching For The Proper Role Of Children's Counsel in California Dependency Cases; Or The Answer To The Riddle Of The Dependency Sphinx*, 1 J. CTR. FOR FAMILIES, CHILD. AND THE CTS. 21, 33 (1999). "We [the Federal Government] that State law and policy ensure that parents are given an opportunity to execute voluntary relinquishment of parental rights at all stages of the court process." U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILDREN & FAMILIES, ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE: GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN 2 (1999). U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILDREN & FAMILIES, ADOPTION 2002: THE

planning requires “full disclosure” to the parents about the parallel tracks of family reunification and permanency planning.⁵

The Adoption and Safe Families Act has elevated rapid permanency to a primary status. For instance, the federal government’s evaluation criteria for reviewing state child welfare laws places great emphasis on expedited permanency. Almost half of the federally mandated outcome measurements for concurrent planning involve timed permanency: (1) Additional abuse/neglect, (2) abuse in foster care, (3) re-entries into foster care, (4) stability of foster placements, (5) time to achieve family reunification, (6) time to achieve adoption, and (7) time spent in temporary foster care.⁶ Another major change ushered in by the 1997 Act is the latitude given to states to expand instances where reunification services need not be provided for serious abuse cases so that termination of parental rights can proceed immediately after disposition.⁷

Another key presumption is adoption is the preferred permanent goal should family reunification fail. In fact, the Adoption and Safe Families Act of 1997 set a goal of “doubling the number of foster children adopted by the year

PRESIDENT’S INITIATIVE ON ADOPTION AND FOSTER CARE: GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN 2 (1999) available at <http://www.acf.dhhs.gov/programs/cb/publications/adopt02/index> (last visited Aug. 26, 2003).

⁵ NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 12-13 (2000).

⁶ WILLIAM GRIMM & ISABELLE HURTUSBISE, NAT’L ASS’N OF COUNCIL FOR CHILDREN, CHILD AND FAMILY SERVICES REVIEWS: AN ONGOING SERIES PLACEMENT STABILITY AND SIBLING PLACEMENT AND VISITATION 285-86, *in* ACCESS TO JUSTICE FOR CHILDREN (National Association of Counsel for Children, Children’s Law Manual Series) (Denver, Colorado 2003).

⁷ CAL. WELF. & INST. CODE § 361.5(a)(2) provides a maximum of six months of reunification services if the child is under three and § 361.5 (b) provides “[r]eunification services need not be provided to a parent or guardian described...when the court finds, by clear and convincing evidence, any of the following” types of abuse [listing 12 specific factual scenarios].”

2002.”⁸ To provide further incentive to the states, the federal government has provided adoption subsidies of up to \$6,000 per adopted child to assist states in increasing the percentage of out-of-home children who achieve permanence through adoption.⁹ In addition to the adoption subsidies, in 2003 the United States Department of Health & Human Services awarded 25 states \$14.9 million in adoption “bonuses” because those states “completed more adoptions in 2002 than in each of the five previous years.”¹⁰ The adoption bonuses were not insubstantial: (1) Florida, \$3,520,000; (2) New Jersey, \$1,932,000; (3) Ohio, \$1,100,000; (4) Pennsylvania, \$1,172,000; (5) Tennessee, \$1,148,000; and (6) Wisconsin, \$1,158,000.¹¹

The child welfare system is becoming more federalized because of states’ need for a steady stream of federal financial resources and the concomitant federal expectation of compliance with federal mandates. However, federal resources focus primarily on the last phase of child welfare, permanency, rather than on ameliorating the conditions that lead to child abuse and neglect. Even though the Adoption and Safe Families Act of 1997 has provided the bulk of adoption assistance, the federal government, by contrast, only pays for approximately 15 percent of the state abuse prevention costs.¹² The federal, state, and local out-of-home care costs for the

⁸ RICHARD J. DELANEY, NAT’L ASS’N OF COUNSEL FOR CHILDREN, THE PERMUTATION OF PERMANENCY: MAKING SENSIBLE PLACEMENT DECISIONS 10 in National Association of Counsel for Children, Children’s Law Manual Series (Denver, Colorado 2003).

⁹ Robert M. Gordon, *Drifting Through Byzantium: The Promise And Failure of the Adoption And Safe Families Act of 1997*, 83 MINN. L. REV. 637, 651-52 (1999).

¹⁰ U.S. DEP’T OF HEALTH & HUM. SERVS., H.H.S. AWARDS \$14.9 MILLION IN BONUSES TO STATES FOR INCREASING THE NUMBER OF ADOPTIONS OF FOSTER CHILDREN (Sept. 12, 2003), available at <http://www.hhs.gov/lnews/press/2003/pres/20030912.html>.

¹¹ *Id.*

¹² JUVENILE JUSTICE STUDY COMMITTEE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, FUNDING FOR CALIFORNIA’S DEPENDENCY SYSTEM: CHAPTER IX, JUVENILE JUSTICE IN CALIFORNIA PART II: DEPENDENCY SYSTEM (July 1998), available at <http://ca.lwv.org/jjds/chap9.html>.

year 2000 were approximately \$9.1 billion¹³ and the role of federal spending on child welfare services in California has increased "from 20.7% in 1989 to 61.1% in 1994."¹⁴ In addition, the "Title IV-E Adoption Assistance Program pays 30% of the costs of adoption and 51.23% of adoption assistance in California."¹⁵ The federal adoption assistance program has had a dramatic effect shown by the increased number of adoptions: 31,000 in 1997 to 50,000 in 2000.¹⁶ Also the number of adopted children receiving adoption subsidies increased to 88 percent in 2000.¹⁷

II. The Reality of the Adoption and Safe Families Act of 1997

No one disputes that concurrent planning requires significantly greater resources than the previous system whose primary and initial focus was solely reunification. However, neither federal nor state funds are sufficient to provide reliable and thorough fact investigation, fact-finding, or family

¹³ U.S. DEP'T OF HEALTH & HUM. SERVS., NAT'L CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFORMATION, FOSTER CARE NATIONAL STATISTICS (2003).

¹⁴ JUVENILE JUSTICE STUDY COMMITTEE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *supra* note 12. "In 2000 the states spent \$20 billion to provide child protective, foster care, and adoption services...[and] [t]he federal share in 2000 was approximately 49% or \$9.9 billion." GRIMM & HURTUBISE, NAT'L ASS'N OF COUNSEL FOR CHILDREN, *supra* note 6.

¹⁵ *Id.* at 6. In addition the California 2003-2004 budget for child support services was \$106,200,000 with only \$31,910,000 paid from state sources and \$74,258,000 from federal funds. CALIFORNIA DEP'T OF CHILD SUPPORT SERVS. FIN. SERVS. BRANCH, CALIFORNIA DEPARTMENT OF CHILD SUPPORT SERVICES 2003-2004 GOVERNOR'S BUDGET HIGHLIGHTS 1 (2003).

¹⁶ Shay Bilchik, Remarks at CWLA Annual Conference Press Briefing (Mar. 4, 2003) *available at* <http://www.cwlaw.org.execdir/edremarks03034.htm> (last visited Aug. 2003).

¹⁷ U.S. DEP'T OF HEALTH & HUM. SERVS., ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS), THE AFCARS REPORT: CURRENT ESTIMATES AS OF OCTOBER 7, 2000, *available at* www.acf.hhs.gov/programs/cb/publications/afcars/report7.htm (Aug. 2002)

reunification services. There are also insufficient funds to assist families with front-end services that would avoid court intervention altogether. Concurrent planning was “developed with the expectation that social workers ... would have very low caseloads.”¹⁸ The reduction in casework loads is necessary, in part, because concurrent planning requires a more “careful, thorough and deliberate work in gathering information to make an accurate assessment and solid case plan” than the older pure reunification model.¹⁹ For instance, initial fact investigation under concurrent planning includes:

Early and comprehensive family assessment; case-specific planning for both reunification and alternative permanency options; early, intensive service provisions to parents; diligent searches for relatives; full disclosure to all parties; identification and support of family members and fost-adopt parents; inclusion of all parties in case planning; facilitation of intensive visitation schedules, and careful, team-oriented decisionmaking.²⁰

In addition to the increased fact-finding demands of a concurrent planning model, the expedited permanency time requirements of the Adoption and Safe Families Act of 1997 have exacerbated the difficulties of accurate and individual case management. One critic has described the current system as one of “skyrocketed” caseloads, backlogs in “assessing, ‘marketing,’ and preparing waiting children [for adoption] combined with finding, home studying, and readying willing adoptive parents. In the midst of this pell-mell, helter-skelter environment, unfortunate errors can occur.”²¹ For concurrent

¹⁸ JUVENILE JUSTICE STUDY COMMITTEE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *supra* note 12 at 6; PATRICIA SCHENE, INSTITUTE FOR CHILD AND FAMILY POLICY, IMPLEMENTING CONCURRENT PLANNING: A HANDBOOK FOR CHILD WELFARE ADMINISTRATORS 27 (May 2001).

¹⁹ *Concurrent Planning, Fairfax County, Virginia*, at 1, available at www.fcfcfa.net/concurrentplanning.html.

²⁰ SCHENE, INSTITUTE FOR CHILD AND FAMILY POLICY, *supra* note 18, at 27.

²¹ DELANEY, *supra* note 8, at 11.

planning to be effective and fair to all those involved, it “must begin when the court and child welfare agency first become involved with the family” and unlike the older pure rehabilitation model, notice should be given to all parties that reunification services are finite and a permanent plan for the child imminent.²²

Even though hundreds of millions of federal dollars have been allocated to meet the goals and timelines of the Adoption and Safe Families Act of 1997, the federal government has been dissatisfied with most states’ performances. For instance, not a single state that has been reviewed by the federal government has met all the permanency time goals of the Act.²³ An example of the federal government’s pressure on expedited permanency can be found in the federal government’s 2002 review of the California Child Welfare System. That report found California was not in compliance with permanency outcomes “based upon failure to meet the national standards for: ... (2) the percentage of children achieving reunification within 12 months of entry into foster care, [and] (3) the percentage of children discharged to finalized adoptions within 24 months of entry into foster care”²⁴ That report further found that in 24 percent of cases reviewed, the state agency had not set a permanent goal in a timely manner; in 19 percent of cases, it had not made “diligent efforts” for permanency; in only 53.2 percent of cases, did reunification occur within 12 months, compared with a national standard goal of 76.2 percent or greater; in 40 percent of cases, “diligent efforts” had not been made to finalize adoptions in a “timely manner”; and only 18 percent of cases concluded with finalized adoptions within 24

²² NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 5, at 10.

²³ Laura Meckler, *States are Failing Child Welfare Test*, ASSOCIATED PRESS, Aug. 19, 2003, at 1.

²⁴ U.S. DEP’T OF HEALTH & HUM. SERVS., ADMINISTRATION OF CHILDREN & FAMILIES, FINAL REPORT: CALIFORNIA CHILD AND FAMILY SERVICES REVIEW 6 (Jan. 2003).

months compared to the 32 percent national standard.²⁵ But equally as important as the federal data on California's permanency rates is a statement regarding the quality of the casework in concurrent planning. The report found that in "18 percent of applicable cases, the frequency and/or quality of caseworker visits with parents were not sufficient to promote the safety and well-being of the child or promote attainment of case goals," and in "47 percent of the cases, CDSS [California Department of Social Services] had not made diligent efforts to involve parents and/or children in the case planning process."²⁶ What that data fails to demonstrate is why the Act's goals have not been met. More investigation is necessary before we can determine whether the cause of the failure to achieve the goals is inadequate funding, inadequate state implementation, unrealistically high federal standards, a combination of these factors, or other factors altogether.

Predictably, more work per case is required under concurrent planning than under the older reunification model. If that work must be performed under expedited timelines, and if there is no equivalent increase in funding for additional social workers or appropriate reunification services, a substantial number of system errors will result and more families will be torn asunder by needless termination of parental rights proceedings. The same is true for the many children who might have achieved expedited permanency through adoption had workers been given fewer cases and more resources to identify, educate, and enroll prospective adoptive parents.²⁷

²⁵ *Id.* at 7-8. In contrast, "54.2% of New York children achieve[d] reunification within 12 months from removal as compared to the national standard of 76.2%, and only 2.95% of foster children exiting care to a finalized adoption within 24 months of the latest removal, as opposed to the national standard of 32%." Sara P. Schecter, *Owning ASFA*, 53 JUV. & FAM. CT. J. 1, 1-4 (2002).

²⁶ U.S. DEP'T OF HEALTH AND HUM. SERVS., *supra* note 25 at 10.

²⁷ It is not enough that generalized numeric goals are met, "[r]esponsive child welfare services directly address the needs and the interests of individual children and families." AMERICAN HUMANE ASSOCIATION, CHILDREN'S DIVISION; AMERICAN BAR ASSOCIATION, CENTER ON CHILDREN AND THE LAW & ANNIE E. CASEY FOUNDATION, ASSESSING

Despite increases in federal funding, “state funding for child welfare services has not kept up with caseload increases. This means some children and families do not receive services to remediate the negative effects of maltreatment.”²⁸ Thus, the concurrent planning picture in some states, such as California, is much worse because of the paucity of needed social workers and their excessive caseloads. For instance, even though approximately “67% of the families entering the child welfare system have substance abuse problems ... only 31% of the agencies responsible for providing them treatment, have the capacity to do so. The result – more children who remain in out of home care while their parents await treatment.”²⁹

At first blush, it might appear that the smaller the state, the lower the social worker caseload. However, the ratio of children per caseworker varies considerably by state. The children per caseworker in Alabama is 13.4 to 1, 15 to 1 in Arkansas, 17 to 1 in Colorado, 18 to 1 in Massachusetts, but between 35 and 50 to 1 in California.³⁰ California’s future looks dim with an insufficient number of social work students enrolled in college and a need for 25,280 new workers over the next five years.³¹ In 2000, the Los Angeles Grand Jury found California social workers were carrying three times the caseloads of social workers in New York City.³² Thus, even a

OUTCOMES IN CHILD WELFARE SERVICES: PRINCIPLES, CONCEPTS, AND A FRAMEWORK OF CORE OUTCOME INDICATORS 5 (1998).

²⁸ JUVENILE JUSTICE STUDY COMMITTEE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *supra* note 12 at 1.

²⁹ Shay Bilchik’s Remarks at CWLA Annual Conference Press Briefing, Child Welfare League of American, (March 4, 2003) at <http://www.cwlaw.org.execdir/edremarks030304.htm>. at 2.

³⁰ *Id.* at 3.

³¹ RECOMMENDATIONS FOR ADDRESSING CALIFORNIA’S SHORTAGE OF SOCIAL WORKERS FINDINGS FROM A SERIES OF HEARINGS CONVENED BY THE CALIFORNIA ASSEMBLY HUMAN SERVICES COMMITTEE 7-8 (Nov. 2002).

³² Lauren John, *Child Welfare: Attention Deficit: California’s Overloaded Child Welfare Workers Don’t Have Time To Do Their Jobs*, CHILDREN’S ADVOCATE, at 3 (Action Alliance for Children, March-April 2002). In addition, “[t]o meet optimal standards, caseloads would need to be reduced by more than 60%.” *Id.*, at 3. The American Federation of Nurses & Social Services Union has published a number of stories in their

large metropolis like New York City can successfully lower social worker caseloads and provide closer supervision to its children in care.

The reliability and quality of concurrent services and decision-making is not only threatened by underfunded and understaffed social services but also by the lack of resources for child dependency, attorneys and juvenile courts. For instance, dependency court calendars are so crowded that many juvenile courts only spend between three and 15 minutes hearing a dependency case.³³ Commentators have noted that the role of the juvenile dependency judge has expanded from fact-finder to also include community leader and judicial educator. One juvenile court workload survey found juvenile judges spend approximately 20 percent of their time reviewing case data even though the complexity of dependency cases has significantly increased over the last few years.³⁴ And parents' and children's counsel are equally overburdened and underpaid. Some dependency attorneys carry caseloads in excess of 450 cases and are compensated at a flat rate of \$380 per case.³⁵

newspaper, *The Dragon*, which have stated casework loads are "50% to 100%" above the 1982 workload figures, and social workers have only an average of five client hours per month for a job that takes seven and a half hours just to meet "minimal court requirements." Richard Bermack, *Caseload State of Emergency*, THE DRAGON, at 2-3 (AFNSS Union, Oct. 1997) available at www.rbb8.com/Dragon/cps-archive/state-of-emergency/caseload-crisis.htm (Oct. 1997);

SB 2030's Findings: High Caseloads are Preventing Social Workers From Helping Children and Families, THE DRAGON, Issue 6-3 available at www.rbb8.com/Dragon/issueb-3/sb2030/SB2030findings.htm (Jul. 2000).

³³ NATIONAL CENTER FOR STATE COURTS, EVALUATION DATA: OPEN HEARINGS AND COURT RECORDS IN JUVENILE PROTECTION MATTERS 8 (August 2001).

³⁴ SHIRLEY A. DOBBIN & SOPHIA I. GATOWSKI, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, PERMANENCY PLANNING FOR CHILDREN DEPARTMENT, TECHNICAL ASSISTANCE BULLETIN, NO. 1, JUDICIAL WORKLOAD ESTIMATES: REDEFINING THE CONCEPT OF 'JUDICIAL WORKLOAD' 1, 27-32, (Jan. 2001) available at www.ncjfcj.org.

³⁵ William Wesley Patton, *Searching For The Proper Role Of Children's Counsel in California Dependency Cases; Or The Answer To The Riddle*

It is difficult to have confidence in the reliability of fact-finding in the world of the expedited timetables under the Adoption and Safe Families Act of 1997. Judges have little time to consider the *sui generis* facts of each case; parents' and children's attorneys have little, if any, time to engage in fact investigation; and social workers can spend only a few minutes a month visiting parents and children.

III. An Analysis of the Quality of Permanent Placements Under the Adoption and Safe Families Act of 1997

It is impossible to declare the Adoption and Safe Families Act of 1997 a success merely because it has effectively increased the number of American children who have achieved permanency through adoption. Other outgrowths of the Act have included higher numbers of legal orphans and insufficient resources for family reunification and recruitment of prospective adoptive homes. As a result, it is important to consider whether the Act has set realistic standards for both permanency timetables and for the percentage of children who should be adopted as opposed to remaining in a non-adoptive but stable long-term placement where strong emotional bonds with caregivers and siblings provide significant support to the abused child's psychological health and welfare.

A. The Demographics of Out-Of-Home Children Placements

The Adoption and Safe Families Act of 1997 lists adoption as the presumptive permanent placement should family reunification fail. However, there are a range of other potential long-term placements including guardianships, long-term relative and non-relative foster care, and group homes that continue to be strongly utilized.³⁶ The following table

Of The Dependency Sphinx, 1 J. CTR. FOR FAMILIES, CHILD. AND THE CTS. 21, 31-32 (1999); Amy Bentley, *Ventura Defense Attorneys Fear Dependency Court System Unfair*, L.A. DAILY J., Jan. 7, 1999, at 3.

³⁶ "The first preferred option for permanency is reunification with the biological parents. The next preferred option is adoption by the relative or foster family with whom the child is living. The next preferred option is

demonstrates the changes in national out-of-home placements under the Adoption and Safe Families Act from September 30, 1998, to September 30, 2001:

	<u>1998</u>	<u>2001</u>
Foster/Non-Relative	43%	42%
Relative Foster Care	29%	24%
Group Homes	10%	12%
Pre-Adoptive	2%	4%
Other	6%	8% ³⁷

This data suggests the Act had the following effects: (1) a slight reduction in non-relative foster care, (2) a five percent reduction in relative foster care, (3) an increase of two percent in group homes, (4) an increase of two percent in pre-adoptive homes, and (5) an increase of two percent in non-articulated other placements.

These placement changes reflect a system in which little has changed. There is little disagreement that a child's interest is served by placement in a pre-adoptive home if reunification is unlikely, to enable the child to transition quickly and simply once termination of parental rights is finalized. However, without a large stable of pre-adoptive families who are willing to be placements from the beginning, concurrent planning will be less successful. The above statistics illustrate that within the first three years of the Act, there was only a two-percent increase in pre-adoptive placement. The incremental change in pre-adoptive placements should have been a strong indicator that concurrent planning was not being successfully implemented. Another disconcerting signal is the five-percent decrease in the number of relative placements since most state public

adoption by an appropriate family with whom the child has a positive exiting relationship ... Permanent guardianship or permanent custody is the final preferred option ..." ADOPTION AND PERMANENCY, *supra* note 8, at 14; Laura Williams, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES ADOPTIONS INITIATIVE BUREAU, CONCURRENT SERVICES PLANNING: RESOURCE GUIDE, at III-5 (1998).

³⁷ U.S. DEPT. OF HEALTH & HUM. SERVS., NAT'L CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFORMATION, FOSTER CARE NATIONAL STATISTICS 2 (June 2003).

welfare agencies generally agree relative foster care is the next best placement to children living with their natural parents. Even more troubling is the two-percent increase in the number of children housed in group homes, one of the least stable or desirable child placements.³⁸

A desired outcome of the Adoption and Safe Families Act of 1997 was the shortening of the time between termination of parental rights and the finalization of the adoption. This outcome could only be accomplished if the final placement of the child was envisioned at the onset of the case. The following table compares the months between termination of parental rights and finalization for the years 1998 and 2000:

	<u>1998</u>	<u>2000</u>
Alaska	12.21	16.92
Arizona	16.92	16.49
Arkansas	11.87	11.51
California	13.91	14.89
Delaware	9.98	10.28
Georgia	20.05	19.76
Kentucky	22.04	26.16 ³⁹

The data indicates the time between termination of parental rights and finalization has not uniformly shortened under the Act. Rather in some states – such as California, Delaware, and Kentucky – it has actually increased. This extension of time is perplexing since concurrent planning should have increased the likelihood that home studies and

³⁸ Under ASFA family reunification has dropped from 62 percent in 1998 to 57 percent in 2001, and adoption has increased from 14 percent in 1998 to 18 percent in 2001.

³⁹ U.S. DEPT. OF HEALTH & HUM. SERVS., ADMINISTRATION FOR CHILDREN & FAMILIES, TIME BETWEEN TPR AND FINALIZATION: OCTOBER 1, 1998 TO SEPTEMBER 30, 1999, at 1-2 (July 2001) *available at* <http://www.acf.hhs.gov/programs/cb/dis/tables/tpr99.htm>; U.S. DEPT. OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, TIME BETWEEN TPR AND FINALIZATION: OCTOBER 1, 1999 TO SEPTEMBER 30, 2000, at 1-2 *available at* <http://www.acf.hhs.gov/programs/cb/dis/tables/time.02.htm>.

other administrative tasks would be completed by the termination of parental rights hearings rather than afterwards. A currently non-quantifiable missing element in this analysis is whether the type of initial out-of-home placement affects the quality and success of the ultimate permanent placement. Common sense and accepted social work principles suggest that a more in-depth level of front-end assessment of the child's needs and the biological family's strengths and weaknesses would provide vital information for a stable placement in either the short or long term.

Perhaps the most telling statistic is the relationship between children adopted and the number of children who are free but waiting to be adopted. This statistic is important because it helps determine whether the Act's emphasis on adoption as the presumptive permanent placement is a reasonable goal in view of the limited number of available prospective adoptive families. For instance, in 1999, 46,000 children were adopted from public out-of-home care and 118,000 were free and awaiting adoption.⁴⁰ In contrast, in 2000, 51,000 children were adopted from public out-of-home care and 131,000 were waiting to be adopted.⁴¹ Therefore, the ratio between adoptees and those awaiting adoption in 1999 (2.57 freed children waiting per adopted child) remained the same in 2000 (2.57 freed waiting per adopted child).

⁴⁰ U.S. DEPT. OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS), THE AFCARS REPORT: CURRENT ESTIMATES AS OF OCTOBER 2000, 2-5 *available at* <http://www.acf.hhs.gov/programs/cb/publications/afcars/ar1000.htm>. In California during April/June 2001, 7,484 children were under study for adoption but not yet free; 7,456 were free for adoption, yet not placed; but only 3,231 approved foster homes were available.

⁴¹ U.S. DEPT. OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS), THE AFCARS REPORT: CURRENT ESTIMATES AS OF SEPTEMBER 30, 2000, 3-6 *available at* <http://www.acfrf.hhs.gov/programs/cb/publications/afcars/report7.htm> (Aug. 2002). There was an increase in the number of adoptions from 31,000 in 1997 to over 50,000 in 2000. Shay Bilchik, *Remarks at CWLA Annual Conference Press Briefing*, Child Welfare League of American, *supra* note 16.

Thus, the results of the Act are mixed. Although the number of public adoptions has increased, so too have the number of children permanently removed from their homes who are awaiting adoption. Some of these children are trapped in a temporary situation in which bureaucratic barriers prevent them from being quickly placed with identified and approved adoptive families. However, many other children have been freed without a determination of whether an available adoptive home exists. According to the previous table, the time lag between termination of parental rights and finality has not shortened in many states, resulting in more children becoming legal orphans for a substantial period, or worse, leaving foster care without an adoptive family. Without legal parents, these children have no rights to inheritance, social security, or confidence that their biological family will be given preference for future placement.

B. The Effects of Sibling Association Under The Adoption and Safe Families Act of 1997

The importance of the sibling bond on the short-term and long-term psychological health of children is now beyond dispute.⁴² An analysis of the out-of-home placement data from California demonstrates the effects of the Adoption and Safe Families Act of 1997 on the sibling bond.⁴³ The following chart compiles the percentage of California children from 1999 to 2002 in the various types of out-of-home placements:

⁴² See William Wesley Patton, *The Status Of Siblings' Rights: A View Into The New Millennium*, 51 DEPAUL L. REV. 1 (2001); Ellen Marrus, 'Where Have You Been, Fran?' *The Right Of Siblings To Seek Court Access To Override Parental Denial Of Visitation*, 66 TENN. L. REV. 977, 980-987 (1999); William Wesley Patton and Sara Latz, *Severing Hansel From Gretel: An Analysis of Siblings' Association Rights*, 48 U. MIAMI L. REV. 745 (1994).

⁴³ There are currently "no federal standards related to sibling placement and visitation"; however, the federal government supplies monetary subsidies to sibling groups that are defined as "hard to place." GRIMM & HURTUBISE, NAT'L ASS'N OF COUNCIL FOR CHILDREN *supra* note 6, at 306; U.S.C. § 673(c)(2)(A) (West 2004).

OUT OF HOME PLACEMENT⁴⁴

	1999	2000	2001	2002
Pre-Adopt:	1.3%	2.8%	3.7%	4.1%
Kinship Foster:	46.8%	44.6%	41.7%	38.9%
Non-Relative Foster:	18.9%	16.8%	15.9%	15.6%
Family Foster Agency:	16.3%	17.6%	18.3%	20.3%

While there is an increase in the percentage of children placed in pre-adoptive homes, a more disturbing trend is the almost eight-percent decrease in kinship foster care and the four-percent increase in foster family care. This data is significant because of the direct correlation between the type of out-of-home placement and the likelihood that siblings will maintain associational contact.

SIBLING PLACEMENTS⁴⁵

	All Siblings Placed Together	No Siblings Placed Together
Kinship:	56%	21%
Non-Relative Foster	33%	42%
Family Foster Agency ⁴⁶	32%	35%
Group Home	7%	84%

⁴⁴ CENTER FOR SOCIAL SERVICES RESEARCH, SCHOOL OF SOCIAL WELFARE, UNIVERSITY OF CALIFORNIA, BERKELEY, 1998-2002 JULY 1 CASELOAD CHILDREN IN CHILD WELFARE SUPERVISED FOSTER CARE BY PLACEMENT TYPE, *available at* <http://cssr.berkeley.edu/CWSCMSreports/pointintime/fostercare/children.edu> (last visited Aug. 2003).

⁴⁵ CAL. CHILDREN'S SERVS. ARCHIVE, UNIV. OF CAL. AT BERKELEY CTR. FOR SOC. SERVS. RESEARCH, CHILD WELFARE SIBLING PLACEMENT FROM CWS/CMS 1 (July 2003), *available at* http://cssr.berkeley.edu/CWSCMSreports/Highlights/data/sibs_q2_03_v1_text.pdf.

⁴⁶ “‘Foster Family agency’ means any organization engaged in the recruiting, certifying, and training of, and providing professional support to, foster parents, or in finding homes or other places for placement of children for temporary or permanent care who require that level of care as an alternative to a group home. Private foster family agencies shall be organized and operated on a nonprofit basis.” CAL. HEALTH & SAFETY CODE § 1502 (a)(4) (West 2003). Even though foster family agencies are non-profit, the monthly cost of caring for a child 0-4 years of age is \$1,589 compared with a cost of \$425 in county-run Foster Family

The two charts together illustrate that in California under the Adoption and Safe Families Act of 1997, siblings are less likely to be placed together. In the span of three years, the percentage of kinship care homes decreased by almost eight-percent. Since kinship homes have the highest percentage of sibling group placements (56 percent), more siblings are being separated than ever before. In fact, “foster children in kinship care were proportionally more likely to be placed with siblings and constitute some 50 percent of foster care sibling groups in California.”⁴⁷ Similarly, Foster Family Agencies placements increased by four percent, but a low percentage of placements in which all siblings remain together (32 percent) and in 35 percent of Foster Family placements, there were no siblings groups placed together. Foster Family Agency placements in which no siblings are placed together is 14 percent lower than the equivalent kinship placements. It appears the reduction of sibling-friendly placements is a direct result of the Act’s federal adoption presumption and the enticing federal adoption subsidies that run counter to the genesis of kinship care. On the other hand, concurrent planning is completely consistent with the nature of kinship

Homes. STATE OF CALIFORNIA, HEALTH AND HUMAN SERVS. AGENCY, DEP’T OF SOC. SERVS., ALL COUNTY LETTER No. 01-55 2-3 (2001). The private foster family agency has the authority to grant a “certificate of approval” to a certified foster family home if it meets the requirements as set by the Department of Social Services agency. CAL. HEALTH & SAFETY CODE § 1506 (b)(1) and (2) (West 2004). Because of the possibility of political corruption, the Legislature has forbidden gifts by private Foster Family Agencies to employees of the State Department of Social Services. CAL. HEALTH & SAFETY CODE § 1522.4 (c)(1) and (2) (West 2004) . However, since the current law is unclear regarding gifts between judges and Foster Family Agencies, the constitutional body responsible for the operation of California’s courts, the Judicial Council, has been requested by the Legislature to “study whether the California Code of Judicial Ethics should be amended to further limit or bar gifts from group home facilities and foster family agencies to judicial officers and employees of the court and to report its findings to the Legislature ...” CAL. HEALTH & SAFETY CODE §1522.4 (c)(4) (West 2004).

⁴⁷ GRIMM & HURTUSBISE, NAT’L ASS’N OF COUNCIL FOR CHILDREN, *supra* note 6, at 309.

care⁴⁸ because relatives are often available to care for a relative's children with little notice as early as at the first detention court hearing. However, "[p]lans for children in kinship care are less likely to include adoption and more likely to include placement with a relative as their goal"⁴⁹ In addition, because kinship care results in significantly longer temporary out-of-home care placements, they contradict the Act's mandate for expedited permanency.⁵⁰

The conflict between kinship care and the Act's presumption for adoption and expedited permanency raises the question of whether it is in the child's best interest to remain in long-term non-permanent kinship placements with bonded siblings or whether it is better to split bonded siblings into different adoptive and long-term foster placements. Prior to the Adoption and Safe Families Act of 1997, states had come to different conclusions regarding the importance of sibling bonds versus separating siblings into different confidential placements. For example, in 1985 the court in *L., et al. v. G.*⁵¹ found "siblings possess the natural, inherent and inalienable right to visit with each other," but other courts denied sibling association rights based upon a variety of reasons, such as no personal and/or subject matter jurisdiction and no standing.⁵²

Prior to the Adoption and Safe Families Act of 1997 most states had promulgated some form of sibling visitation statute.⁵³ However, because the Act presumes expedited

⁴⁸ Schene, *supra* note 18, at 20..

⁴⁹ U.S. DEP'T OF HEALTH & HUMAN SERVS. ADMIN. FOR CHILDREN & FAMILIES, REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE, PART II: SECRETARY'S REPORT TO CONGRESS 8 (June 2000), *available at* <http://aspe.hhs.gov/hsp/kinr2c00/full.pdf> (June 2000).

⁵⁰ CAL. DEP'T OF SOC. SERVS. DATA ANALYSIS & PUBL'NS, TERMINATION OF OUT-OF-HOME CARE PLACEMENTS FOR CHILD WELFARE SUPERVISED CHILDREN 1 (2002).

⁵¹ *L. et al. v. G.*, 497 A.2d 215, 220-22 (N.J. Super. Ct. Ch. Div. 1985).

⁵² *Scruggs v. Saterfiel*, 693 So. 2d 924 (Miss. 1997); *In the Interest of D.W.*, 542 N.W.2d 408 (Neb. 1996); Joel V. Williams, *Sibling Rights to Visitation: A Relationship Too Valuable To Be Denied*, 27 U. TOL. L. REV. 259, 287 (1995).

⁵³ See Patton & Latz, *Serving Hansel from Gretel*, *supra* note 42; Patton, *The Status of Sibling's Rights*, *supra* note 42.

permanency and adoption, states were cajoled by the fear of loss of revenue to modify their dependency statutes to reflect the goals of the Act. Therefore, state courts were left with seemingly inconsistent statutes. One set of statutes described the importance of sibling bonds and the other permanency and adoption. The question of how each state will resolve this dilemma still remains. The California Supreme Court recently determined in *In re Celine R.*⁵⁴ that permanency trumps siblings' association rights under the California statutory scheme. *Celine R.* involved three siblings, 10-year-old Crystal, five-year-old Celine, and four-year-old Angel. Crystal was placed with a maternal aunt, and Celine and Angel were placed with a paternal uncle. After reunification appeared to have failed, the court ordered Crystal into long-term foster care. The Department recommended termination of parental rights and the adoption of Celine and Angel by the paternal uncle and his girlfriend.⁵⁵ The attorney who represented all three siblings informed the court there was a potential conflict of interest because Crystal did not want to be separated from her siblings and because the children's attorney had evidence that court-ordered visitation among the siblings had been unreasonably denied. The dependency court terminated parental rights and referred Celine and Angel to the Department of Adoptions for adoptive placement.⁵⁶

On appeal, the children's attorney argued adoption was inappropriate under the recently promulgated sibling association statute, California Welfare & Institutions Code §366.26(c)(1)(E), which provides an exception to adoption as a permanent placement when:

There would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared

⁵⁴ *In re Celine R.*, 1 Cal. Rptr. 3d 432, 435 (Cal. 2003).

⁵⁵ *Id.* at 436-438.

⁵⁶ *Id.* at 437.

significant common experiences or has exiting close and strong bonds with a sibling, and whether ongoing contact is in the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption.⁵⁷

The California Supreme Court upheld the court of appeal opinion, which held § 366.26(c)(1)(E) did not prohibit the order of adoption because that section focuses on the emotional health only of the prospectively adopted children, excluding siblings who will not be adopted, like Crystal.⁵⁸ In addition, the California Supreme Court noted the state Legislature "has made adoption the preferred choice" of permanent planning, and that "[i]f it is likely the child will be adopted, the court must choose that option ... unless it 'finds a compelling reason for determining that termination would be detrimental to the child' under establish statutory exception."⁵⁹ *In re Celine R.* is the prototypical case that illustrates how the federal government's mandate that adoption is the presumptive permanent placement has been rubber-stamped by state legislatures and upheld by state supreme courts.⁶⁰ Cases like *In re Celine R.* are just a reminder that we have, based on Congress's ever-increasing funding, entered an era of centralized and federalized child welfare policy.

Conclusion

Conceptually, concurrent planning with an emphasis on expedited permanency either through reunification with the biological family or in an alternative placement, such as

⁵⁷ *Id.* at 439.

⁵⁸ *Id.* at 439-440.

⁵⁹ *Id.* at 435.

⁶⁰ The following are other important state court decisions on sibling association in relationship to permanency: *In re Paul C.*, 72 Cal. Rptr. 2d 369 (Cal. Ct. App. 1998); *Adoption of Hugo*, 700 N.E. 2d 516 (Mass. 1998); *Adoption of Vito*, 712 N.E.2d 1188 (Mass. App. Ct. 1999); *Scruggs v. Saterfiel*, 693 So. 2d 924 (Miss. 1997); *In re Christina L.*, 460 S.E.2d 692 (W. Va. 1995).

adoption or relative guardianship, appears to be a wise policy that promotes the physical and psychological health of abused and/or neglected children. However, that policy, as implemented by the states under the mandate of the Adoption and Safe Families Act of 1997, is severely flawed for a number of reasons. First, one may question whether termination of parental rights was required in a significant number of cases because: (1) the expedited decision to terminate parental rights is often made in six months, and sometimes without the necessity of providing family rehabilitation and reunification; (2) necessary social services are often not readily available so while the termination clock ticks away, little reunification is possible; (3) social workers are so overloaded with cases, making it physically impossible for them to provide the quality of family and child monitoring and assistance necessary for the initial decision to seek court jurisdiction, adjudication fact-finding, or disposition-ordered periodic review; (4) parents' and children's counsel also have unmanageable case loads; (5) the ultimate fact-finder, juvenile dependency judges, have only a few minutes per case to determine the fate of families; and (6) the dictates of the Adoption and Safe Families Act are antagonistic to siblings' rights to association, with policies of expedited permanency and adoptive preference that often unreasonably split strongly bonded siblings.

Even if additional funding is not provided by either the federal or state governments, there are several means of improving concurrent planning to provide more support for biological parents to rehabilitate and reunify with their children. First, permanency timelines can be reasonably expanded without leaving children in the limbo of indeterminate foster care. Second, since the average time between termination of parental rights and finality of adoption is between 9.98 months and 22.0 months, processes could expedite finality. Such processes include, a better coordination of early placement assessment, appropriate matching of pre-adoptive family and child, correct adoption subsidies based on the needs of the child, home-study fact investigation, and completion of adoption paperwork. These and other actions

would all help to shorten the time between termination and adoption.

Other proposed improvements to the Adoption and Safe Families Act of 1997 are to list strong sibling bonds as a ground for rebutting the presumption of adoption as the preferred placement, and approve other permanent placements such as relative guardianships (as long as additional resources are provided to support those kinship placements). California has already drafted a measure as grounds for denying the termination of parental rights, but that sibling exception does not always operate to determine the best post-termination permanent placement for all siblings.⁶¹ To determine the most appropriate post-reunification placement, the sibling bond should be relevant for all the children, not just the sibling being adopted.

Finally, in those jurisdictions that separate the functions of dependency reunification and post-termination adoptive services, activities need to be coordinated so biological parents are given a fair opportunity to reunify and so the prospective adoptive parents, from the time of their recruitment until the time of finality of adoption, are in contact with the biological parents. As long as it is in the best interest of the children, this type of continuous contact would help facilitate post-termination contact with biological parents and/or separated siblings. Whereas a decade ago many states' adoption schemes were confidential, today there is a trend toward permitting post-adoption visitation among biological parents and/or siblings and adopted children after termination of parental rights.⁶² Further research is needed to determine

⁶¹ See CAL. WELF. & INST. CODE § 366.26 (c)(1)(E) (West 2004) which provides that termination shall not be ordered if it would cause a "substantial interference with a child's sibling relationship."

⁶² See, Uniform Adoption Act § 4-113, 9 U.L.A. 1-94 (Supp. 1998); FLA. STAT. ANN. § 39.001(k) (West 2004); W. VA. CODE § 49-2-14(d) (2003); Anette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can It Survive The Uniform Adoption Act?*, 30 FAM. L.Q. 483, 509 (1996); Margaret M. Mahoney, *Open Adoption In Context: The Wisdom And Enforceability Of Visitation Orders For Former Parents Under Uniform Adoption Act* § 4-113, 51 FLA. L. REV. 89, 90-91 (1999).

whether a close connection between the biological family and the prospective adoptive family during the dependency proceedings will increase the likelihood that the adoptive parents will permit post-adoptive sibling visitation with the biological family or other adoptive families who have custody of the other siblings.

And finally, state dependency systems need to assure that the number of legal orphans whose parental rights have been terminated do not languish without a permanent replacement family. Currently the number of children legally freed for adoption substantially exceeds the number of available adoptive homes. Thus, the Adoption and Safe Families Act of 1997, in thousands of cases, has changed foster care drift in name only to "Post-Termination Foster Care Drift." One must question the assumption it is better to place children in a temporary foster placement without any biological parents than to maintain children in foster care without terminating their parental rights. Is it really in America's interest to legally sanction thousands of new orphans? And if the status of "orphan foster child" is to replace that of "foster child," what are the psychological implications for these children? It is clearly time to fine-tune the Act.