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**THE TIES THAT BIND:
ATTACHMENT THEORY AND CHILD
WELFARE—CONSIDERING THE BENEFITS OF
MAINTAINING BIOLOGICAL CONNECTIONS
FOR CHILDREN IN FOSTER CARE**

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Supervised by Professor Susan V. Mangold

Steven and his three younger siblings were removed from the home they shared with their mother and father when Steven was 5 years old. His parents were charged with child neglect and all of the children were sent to foster care. Steven's parents were accused of leaving their children unattended at various times and not providing them with adequate food and shelter. There were also reports of domestic violence and drug use in the home. For whatever reason the children were not placed together in the same foster home. They were no longer living as a family and Steven often expressed how he desperately missed his parents and his siblings. He frequently said he loved his parents and he wanted to return home despite the conditions he had been living in.

While living in foster care Steven had some behavioral issues, as to be expected, given all that he had been through. But for the most part his behaviors were manageable. He coped as best he could with the separation from his family and looked forward to his visits. He never lost hope that he would someday have his family together again.

Steven's parents struggled with substance abuse and poverty and they were unable to fulfill the obligations mandated by the department of social services necessary to regain custody of their children. The county filed to terminate their parental rights and

Steven never returned home. Instead, just a day before his 8th birthday he said his final goodbye to his parents. He came to school that morning dressed in a shirt and tie and informed the school staff that today would be the last day he would ever see his parents again. And just like that Steven was left without a family.

The aftermath of this severance was evident almost immediately. Steven would have frequent violent and emotional outbursts and he was easily provoked to anger. He often attempted to run away from his school and his foster home. Always, during his emotional outbursts he would cry and say that he wanted his mom and dad. Steven ended up in a children's psychiatric hospital because his emotional outbursts and violence were uncontrollable. Would Steven have been better off had he been able to keep some contact with his biological parents? Once the separation from his parents was final he fell apart. Steven has spent much of his childhood between foster homes, psychiatric hospitals and institutions. Steven is now approaching his teens and the status of his permanency is uncertain due to his instability. He may likely remain a legal orphan and age out of the foster care system.¹

Sadly, Steven's story is one of many. In 2014, approximately 415,000 children in the United States were placed in foster care.² Like Steven, nearly 110,000 (26%) children are in care and waiting to be adopted.³ A majority of these children are placed in foster care due to neglect and abuse.⁴ They are removed from everything they have ever known. This type of removal, compounded by their family history, has the potential to traumatize them at a stage of life

¹ For 7 years, I worked with numerous children like Steven as a special education teacher in a residential treatment facility. Steven is an actual child that was in my care, but his name was changed to maintain confidentiality.

² U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES., ADMIN ON CHILD, YOUTH & FAMILIES., CHILD. BUREAU, TRENDS IN FOSTER CARE AND ADOPTION: FY 2005-FY 2014, http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption2014.pdf (last visited Oct. 2015).

³ *Id.*

⁴ Christine Diedrick Mochel, *Redefining "Child" and Redefining Lives: The Possible Beneficial Impact the Fostering Connections to Success Act and Court Involvement Could Have on Older Foster Care Youth*, 40 CAP. U.L. REV. 517, 517 (2012).

when they are most vulnerable.⁵ The traumatic state makes it difficult for them to ever establish permanence. Their problems are often exacerbated by prolonged placement and a transient and unstable lifestyle, moving from foster home to foster home.⁶ When a foster family has a difficult time managing a child with major behavioral problems, the placement is often disrupted. Because of the shift from home to home, these children often lack any consistent emotional connection to at least one caring adult. The lack of attachment perpetuates the behaviors, and the behaviors lead to impermanence. This is a circular problem that is difficult to remedy.

Allowing a child to keep a connection with his biological parents may mitigate this problem. The traumatic effects of being displaced could be lessened if a child is still able to have contact with a parent they have formed a bond with, regardless of whether the parent can meet all of the child's needs. Though this relationship is far from ideal, it may be the best option given the circumstances. To determine if it is in the child's best interest to maintain a relationship with her biological parents, certain factors should be considered. The age of the child, the strength of the parent-child bond, the child's wishes, and the parent's ability to continue the relationship should be taken into account to best meet the individual child's needs. The child's desire to continue a relationship with her parents and the parent's ability to fulfill this desire should be given the greatest weight when making this decision.

When parent's rights are terminated, the parent-child relationship no longer exists in the eyes of the law. But, in reality children frequently have feelings of attachment toward their biological parents.⁷ Many children, even in cases of abuse or

⁵ *Id.*

⁶ Randi J. O'Donnell, *A Second Chance for Children and Families: A Model Statute to Reinstate Parental Rights After Termination*, 48 FAM. CT. REV. 362, 363 (2010).

⁷ Randi Mandelbaum, *Re-Examining and Re-Defining Permanency from a Youth's Perspective*, 43 CAP. U.L. REV. 259, 297 (2015).

neglect, have a deep-seeded need to maintain relationships with their biological families.⁸

Legal termination of parental rights does not mean that the parent-child relationship, however inadequate by societal standards, simply ceases to exist. The legal termination of familial bonds does not erase the child's memory or knowledge that her parent is somewhere out there in the world. In essence, a termination can be a significant loss to both the child and the parent, analogous to the death of a loved one. The difference being that it is not the absence of life that prevents the child from ever seeing her parent; it is the law that severs the contact. Unlike death, this loss could be prevented or reversed.

There are legal alternatives that would allow for a child to maintain a relationship with his biological family in some form, if that is in the best interest of the child. This relationship can take various forms and can be malleable to the needs of the child. For Steven, maintaining a relationship with his biological parents may have changed the course of his life. Steven had an obvious bond with his parents. His parents were highly consistent in their visitation with Steven and his siblings. Though they were unable to meet his day-to-day needs, his parents maintained a high level of interest in Steven's wellbeing and showed him love and affection during their visits. Steven expressed his desire to see his parents and looked forward to his visits with them. Taking all of this into consideration, it would seem to be in Steven's best interest to continue contact with his parents. Keeping a relationship with his parents may have kept him stable and his placement might not have been disrupted. Clearly, severing Steven's ties to his parents seemed to cause him greater instability. Adopting a more individualized approach to permanency and avoiding a "one size fits all" policy may have benefited Steven and many other legal orphans.

In Part I of this Article, I will discuss the policies governing the child welfare system and the implications they have on children and families. I will describe the child welfare process and what leads to the termination of parental rights.

⁸ *Id.*

Part II will describe the traumatic effects of separation and severance from the biological family on the child. I will discuss attachment theory and its application in the child welfare process. I will outline the problems with current child welfare permanency policies.

In Part III, I will consider alternative procedures and policies for permanency that allows a child to maintain a connection to his/her biological family. These alternative methods may help to mitigate the emotional trauma experienced by the child and promote greater stability.

I. The Child Welfare System

A. Federal Child Welfare Legislation

States are responsible for creating laws to protect children from abuse or neglect, but these laws are heavily influenced by federal mandates tied to funding.⁹ The Child Abuse Prevention and Treatment Act (CAPTA) of 1974 was the first federal mandate concerning suspected child abuse or neglect that required states to follow certain guidelines in order to obtain funding.¹⁰ Under CAPTA, states were required to more clearly define abuse and neglect statutes, and to set up a system for reporting and intervening in cases of child abuse and neglect.¹¹ Unfortunately, these broad requirements had unintended consequences. Many children were removed from their home unnecessarily and ended up drifting through the foster care system.¹²

The federal government responded to the challenges from CAPTA by enacting the Adoption Assistance and Child Welfare Act (AACWA) of 1980.¹³ This legislation mandated procedures that

⁹ Douglas E. Abrams, Sarah H. Ramsey & Susan V. Mangold, *CHILD & THE LAW, DOCTRINE, POLICY AND PRACTICE* 284 (5th ed. 2014)

¹⁰ *Id.* at 281.

¹¹ *Id.*

¹² *Id.* at 444.

¹³ *Id.* at 445.

were designed to reduce unnecessary placement and foster care drift.¹⁴ Under AACWA, the states were required to use “reasonable efforts” to preserve family integrity.¹⁵ This meant that the states needed to make efforts to keep children with their parents and return them quickly if they were removed. The AACWA sought to remedy the overuse of child removal that caused so many children to be stranded in the foster care system.¹⁶ By 1997, Congress became concerned that under AACWA children may have been left in unsafe homes far too long because of the broad application of the “reasonable efforts” requirement. They were also concerned that states were affording too much time for parents to rehabilitate when they were removed.¹⁷ Children were held in foster care indefinitely while parents showed little success or promise of rehabilitating and reuniting with their children.¹⁸

The Adoption and Safe Families Act of 1997 (ASFA) was an amendment to AACWA intended to create better outcomes for children. ASFA added exceptions to reasonable efforts and mandated that the health and safety of the child had to be paramount.¹⁹ ASFA also required states to meet deadlines for establishing permanency of a child in foster care.²⁰ Timelines were established to either reunify a child with his family or free him for adoption. If a child has been in foster care for 15 out of 22 months, a petition for the termination of parental rights must be filed.²¹ Unfortunately, ASFA was not the cure for foster care limbo.

In 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act (hereinafter “Fostering Connections”). Fostering Connections recognized the difficulty faced by children who never return home to their parents and never become

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 375-76.

¹⁸ *Id.* at 376.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

adopted.²² Congress increased support for these legal orphans.²³ Congress also recognized the significance of relative caregivers and removed past barriers or provided new avenues for the encouragement of kinship caregiving.²⁴

More than forty years has passed since the federal government sought to establish interventions to protect children from abuse or neglect. One legislative measure after another was created to remedy the defects of its predecessor. Yet, children still linger in foster care, and families are still torn apart. The problems that lead to the removal of a child might not be readily remedied, yet a child should not remain in limbo while the parent struggles to make things better. It is a complicated problem that clearly cannot be fixed by a generalized policy. A more individualized approach should be adopted with strong consideration for the children's attachment to their biological parents.

B. The Road to Termination of Parental Rights

Parents have a right to raise their child as they see fit, but that right is not limitless.²⁵ The state is permitted to intervene in the parent-child relationship when it is necessary to protect the child's health or safety.²⁶ In cases of child abuse or neglect, the state has the authority to step in to protect the child. It has the power to remove children from the custody of their parents either temporarily or permanently.²⁷

In cases of egregious abuse, the state's intervention is rarely questioned. But, in cases of neglect, the lines between legitimate intervention and interference with parental rights is blurred.²⁸

²² *Id.* at 446.

²³ *Id.*

²⁴ Fostering Connections to Success and Increasing Adoptions Act of 2008, PUB. L. NO. 110-351, 122 STAT. 3949-56.

²⁵ ABRAMS et al., note 9, at 279.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Neglect may be a product of poverty, mental illness and circumstances beyond what the parent is fully able to control. The broad definition of neglect may implicate parents for a lifestyle considered to be immoral or inadequate by societal standards.²⁹ Often there is a struggle between the obligation of the state to protect children from substantiated abuse, and the implication that the state's intervention is often nothing more than a judgment about the right way to live.³⁰

Although each state is charged with creating child protective statutes, most state procedures for investigating and responding to abuse or neglect are similar. When a report is made to child protective services, the agency will investigate to determine whether abuse or neglect has in fact occurred.³¹ If the agency finds that the alleged abuse or neglect is credible, they will determine what type of intervention is necessary. If the child is at imminent risk of harm, the agency has the ability to remove the child immediately from her home. If there is no risk of imminent harm, but some defects in parenting were uncovered, the agency will generally leave the child in the parent's care and provide the family with rehabilitative services meant to remedy whatever defects were found. The agency must go before the court to petition for the recommended intervention, and the court ultimately determines the disposition of the child and family.

Many elements of the child protective system exacerbate the problems of the families involved in the process.³² Families find themselves tangled in a web of public agencies that are often poorly coordinated.³³ If the parents fail to comply with all of the mandates required, the agency may take action against the parents. This generally means that if the children were allowed to remain in the home, and the parent is deemed noncompliant with services, the agency

²⁹ *Id.*

³⁰ Theresa D. Legare, *Preventing Judicially Mandated Orphans*, 38 FAMILY & CONCILIATION COURTS REV. 260, 260 (2000).

³¹ Abrams et al., *supra* note 9, at 286.

³² DEP'T OF HEALTH & HUMAN SERVS., U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY 26 (1990).

³³ *Id.*

may seek to remove the children. If the children were already removed from the care and custody of the parents, the agency may petition for the termination of the parent's rights. Noncompliance with services is often at the center of a termination of parental rights.³⁴

When it has been determined that the child will not be returned to her parents, there are three basic options available.³⁵ The first is voluntary relinquishment of parental rights, which may allow a parent to maintain some form of contact with the child.³⁶ The second option would be to maintain ties with the natural parent while placing the child in the guardianship of another or in an adoptive home.³⁷ This option may or may not allow the parents to retain some rights to the child. The third option is involuntary termination of parental rights with no contact between the child and the biological parent.³⁸ The action taken is dependent upon the agency, the court, and the parties involved.

Child welfare policies provide a framework for the decisions made to determine what happens to the child and the family once the state intervenes.³⁹ These decisions may contradict what is best for the child.⁴⁰ Poor outcomes for children may be the result of poor decision-making within the system.⁴¹ Although multiple factors must be considered, attachment theory can help child service agencies better understand the importance of the relationship between the child and their caregiver.⁴² A greater reliance on attachment theory

³⁴ Eve M. Brank et al., *Parental Compliance: Its Role in Termination of Parental Rights Cases*, 80 NEB. L. REV. 335, 344 (2001).

³⁵ Tracey B. Harding, *Involuntary Termination of Parental Rights: Reform Is Needed*, 39 BRANDEIS L.J. 895, 895 (2001).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Corey Shdaimah, "The Law Cannot Terminate Bloodlines": *Families and Child Welfare Decisions*, 32 CHILD. & YOUTH SERVS. REV. 704, 704 (2010).

⁴⁰ *Id.*

⁴¹ Ferol E. Mennen & Maura O'Keefe, *Informed Decisions in Child Welfare: The Use of Attachment Theory*, 27 CHILD. & YOUTH SERVS. REV. 577, 578 (2005).

⁴² *Id.* at 587.

can help avoid harm to children by using the child's attachment as a guide to the decision-making.⁴³

II. Trauma, Attachment Theory and Child Welfare Policy and Practice

A. Trauma

Psychological trauma is the personal experience of events that are shocking, terrifying, or overwhelming that result in intense feelings of fear, horror or helplessness.⁴⁴ Child abuse and neglect are generally categorized as complex trauma.⁴⁵ Complex trauma is multiple, prolonged, chronic traumatic events that are interpersonal and developmentally adverse.⁴⁶ Exposure to complex trauma can cause problems with emotional regulation, behavior control, interpersonal relationships, and biological processes.⁴⁷

When a child is removed from her home, she faces additional stressors that can perpetuate the trauma and intensify her emotional instability. A child in foster care will potentially deal with the separation from family members, friends and her community, while she faces an uncertain future.⁴⁸ Lifelong psychological and physiological injuries are associated with childhood trauma.⁴⁹ The trauma may be exacerbated by the separation from her primary caregiver.⁵⁰ Contact with her primary caregiver may alleviate some

⁴³ *Id.*

⁴⁴ Joan B. Gillece, *Understanding the Effects of Trauma on Lives of Offenders*, CORRECTIONS TODAY, Feb. 2009, at 48.

⁴⁵ Rachel A. Fusco & Helen Cahalane, *Young Children in the Child Welfare System: What Factors Contribute to Trauma Symptomology?*, 92 CHILD WELFARE, 37, 38 (2013).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Lisa Conradi et al., *Promising Practices and Strategies for Using Trauma-Informed Child Welfare Practices to Improve Foster Care Placement Stability: A Breakthrough Series Collaborative*, 90 CHILD WELFARE 207, 208 (2011).

⁴⁹ 2 Dan J. Tennenhouse, LONG TERM INJURIES FROM CHILD ABUSE AND FROM LEGAL INTERFERENCE WITH PARENTAL ATTACHMENT, § 30:8.10 (Att'ys Med. Deskbook 2014) Westlaw (database updated Oct. 2016).

⁵⁰ *Id.*

of this stress and allow the child to form vital relationships while dealing with the transition into foster care.⁵¹

B. Attachment Theory and Ties to Biology

Most children form an attachment with their primary caregivers even in the presence of abuse or neglect.⁵² Even when the quality of care is poor a child will most likely form a bond with his parents.⁵³ Disruptions in a child's relationship with his primary caregiver can lead to developmental problems, and psychological and physiological distress.⁵⁴ When a child is remanded to foster care, sustained contact with his biological parents may be essential for continued physical and emotional growth of the child.⁵⁵ Continued contact with his primary caregiver is claimed to provide better overall adjustment of the child and allows him to form new connections with others more readily.⁵⁶ The ability to adjust and form new connections is vital for a child living in the foster care system. The need for contact with the primary caregiver is corroborated by attachment theory.

Attachment theory is defined as the propensity of human beings to form strong bonds to another differentiated and preferred individual.⁵⁷ The object of attachment is usually someone who is perceived as stronger or wiser, as in the parent-child relationship.⁵⁸ There is a strong relationship between a child's attachment experience with her parents and her ability to form affectionate bonds later

⁵¹ *Id.*

⁵² Lenore McWey, *I Promise to Act Better if You Let Me See My Family: Attachment Theory and Foster Care Visitation*, 5 FAM. SOC. WORK 91, 92 (2000).

⁵³ Lois A. Weithorn, *Developmental Neuroscience, Children's Relationships with Primary Caregivers, and Child Protection Policy Reform*, 63 HASTINGS L.J. 1487, 1538 (2012).

⁵⁴ *Id.* at 1531.

⁵⁵ Lenore McWey, *I Promise to Act Better if You Let Me See My Family: Attachment Theory and Foster Care Visitation*, 5 J. FAM. SOC. WORK 91, 92 (2000).

⁵⁶ *Id.*

⁵⁷ *Id.* at 93.

⁵⁸ *Id.*

in life.⁵⁹ When a child is separated from the object of her attachment (usually the biological parent) the child will exhibit signs of distress.⁶⁰ A child in foster care may have difficulty forming relationships with others when the attachment relationship is denied.⁶¹

In addition to attachment, biology is often a strong source of identity for a child.⁶² Denying the need to identify with her biology can harm to the child.⁶³ Research shows that by allowing a child to have continual contact with her biological parents, she will feel a greater sense of security, self-confidence and maintain a better relationship with her foster parents.⁶⁴ While arguably not all child-parent contact is beneficial for the child, an awareness of the benefits of the continued relationship, when appropriate, is vital.

Children and families in the child welfare system have very different needs that require individualized permanency options. By applying attachment theory among other considerations, a framework can be used to determine whether or not continuity of the parent-child relationship is beneficial. Factors to consider when choosing whether or not to continue the parent-child relationship as part of the permanency plan: (1) the age of the child; (2) the nature and strength of the relationship between the birth parent and the child; (3) any unique cultural, ethnic, religious or racial experiences or knowledge offered by the birth parent; (4) the child's expressed desire to maintain a relationship with their biological parent; (5) the ability and willingness of the parent to continue the relationship with the child; (6) the foster or adoptive parents willingness to support the parent-child relationship. A greater weight on the child's desire to maintain the relationship and the parent's ability to reciprocate should be considered. Those factors are indicia of a viable bond that may be necessary for a child's emotional wellbeing.

⁵⁹ *Id.* at 94.

⁶⁰ *Id.* at 92.

⁶¹ *Id.*

⁶² Candace M. Zierdt, *Make New Parents but Keep the Old*, 69 N.D. L. REV. 497, 506 (1993).

⁶³ *Id.* at 508.

⁶⁴ *Id.* at 509-10.

Considering a child's wishes is not a completely foreign concept in child welfare. Most states require the court to consider a child's preference for adoption when the child has reached a certain age.⁶⁵ The child may have the ability to veto an adoption or express her preference for a particular adoptive family. The child's has a right to be heard in most jurisdictions and ideally her voice is taken into account when the court decides adoptive outcomes. The same degree of consideration should be used when deciding whether or not to maintain contact with biological parents.

Unfortunately current child welfare policies often fail to sufficiently appreciate the importance of the child's birth family.⁶⁶ Failure to acknowledge this need can lead to disruption in temporary placement and failed adoptions.⁶⁷

C. Child Welfare Policy and Practice

The primary goal of child welfare is to ensure children's safety and protect them from further harm.⁶⁸ Using attachment theory when making decisions regarding children allows child welfare decision makers to weigh the implications of harm from separation with parents against the benefits of the separation.⁶⁹ While attachment theory is not the only factor that needs to be utilized when making decisions regarding children in the system, a greater reliance on attachment theory could prevent child welfare intervention from creating further harm.⁷⁰ Unfortunately, demands of the system can interfere with the ideal of using attachment theory.⁷¹ Decisions made by the child welfare system are not always made in the best interest of the child due to increased caseloads, poorly

⁶⁵ Sarah J. Baldwin, *Choosing a Home: When Should Children Make Autonomous Choices About Their Home Life?*, 46 SUFFOLK U. L. REV. 503, 512 (2013).

⁶⁶ *Id.* at 508.

⁶⁷ *Id.*

⁶⁸ Mennen & O'Keefe, *supra* note 41, at 577.

⁶⁹ Weithorn, *supra* note 51, at 1532-33.

⁷⁰ Mennen & O'Keefe, *supra* note 41, at 578.

⁷¹ *Id.*

trained workers, media attention, personal bias and political pressures.⁷²

Although child welfare workers overwhelmingly recognize the significance of biological ties they admit they often lack the resources necessary to support biological families.⁷³ Social and economic problems that impact families are outside the scope of what child welfare policy can address.⁷⁴ The deep-rooted problems of poverty, homelessness and substance abuse are unlikely to be alleviated in the fifteen month period granted to the parents under the permanency guidelines of ASFA.⁷⁵ Unfortunately, family dissolution is seen as the only viable option to protect the child.⁷⁶

Permanency is the primary goal when the child welfare system intervenes in the parent-child relationship.⁷⁷ A permanent placement for a child in temporary foster care is always the plan. Although there may be other options, permanency plans generally consist of two options: return to the biological parents or adoption. A third option to permanency is guardianship, which allows the biological parent to maintain a role in the child's life. However, before guardianship is offered, it must first be determined that return home and adoption are not appropriate permanency options for the child.

The permanency plan chosen is dependent upon whether or not the biological parents are willing or able to rehabilitate so that the child can be returned to them. If the parents fail to timely correct whatever deficiency was present that caused the child to be removed, their rights will be terminated. The children are then released for adoption and will generally have no contact with their parents once their rights are legally terminated. This permanent separation can create psychological harm for the child.⁷⁸ Considera-

⁷² *Id.*

⁷³ Shdaimah, *supra* note 39, at 704.

⁷⁴ *Id.* at 705.

⁷⁵ Legere, *supra* note 30, at 274.

⁷⁶ Shdaimah, *supra* note 39, at 705.

⁷⁷ Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1, 2-5 (2015).

⁷⁸ Alexis T. Williams, *Rethinking Social Severance: Post-Termination Contact Between Birth Parents and Children*, 41 CONN. L. REV. 609, 617 (2008).

tion of alternative permanency options that allow for contact with biological parents may soften the transition and lessen the trauma.⁷⁹

Child welfare policy carries a distinct pro-adoption rhetoric.⁸⁰ Adoption has become synonymous with permanence.⁸¹ Federal policy initiatives to move children out of the foster care system and into permanent homes makes adoption the optimal permanency option.⁸² Federal financial incentives for adoption of children in the foster care system provide even greater support for the adoption agenda.⁸³ Though adoption by caring adults is undoubtedly better than being left to linger in foster care, more appropriately tailored options may be overlooked.⁸⁴

A more expansive definition of permanency with a child-centered perspective allows child welfare workers to determine which legally permanent option is best for a particular child.⁸⁵ An understanding of what permanency means is the driving force behind policy decisions. Permanency defined as legally enforceable duties assumed by a caregiver, focuses on the responsibility of the caregiver regardless of a psychological bond.⁸⁶ But, permanency defined as an enduring relationship formed through a sense of belonging takes on a relational dimension.⁸⁷ Permanency defined in psychological as opposed to legal terms, focuses on the child's attachment to caregivers and requires a more individualized approach to permanency. Consideration for a child's real world relationship with both her biological parents and the potential caregivers should always be considered.⁸⁸

⁷⁹ *Id.*

⁸⁰ Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence,"* 34 CAP. U. L. REV. 405, 405 (2005).

⁸¹ *Id.*

⁸² *Id.* at 408.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare,* 66 ALA. L. REV. 715, 718 (2015).

⁸⁶ Coupet, *supra* note 78, at 439.

⁸⁷ *Id.*

⁸⁸ Gupta-Kagan, *supra* note 83, at 718.

When a parent's rights are terminated far too many children are left without any positive, ongoing relationship with an adult that cares for them.⁸⁹ A more realistic approach to permanency would allow a child to retain her social relationship with her biological parents whether or not legal permanence has been achieved. These flexible permanency options involve increased reliance on kinship caregivers, guardianship options, non-exclusive adoptions and post-termination social relationships.

III. Permanency Options

Having a blanket solution for permanency completely discounts the individual needs of these very vulnerable children and families. A child who has already experienced trauma may be re-traumatized when forced to sever ties with her biological parents. Limiting permanency options has clearly been ineffective. The child welfare system in its current state is broken. The system is designed around an unrealistic expectation that a child will forget her birth family completely and experience a "rebirth" in the foster or adoptive home.⁹⁰ Severance with the biological family may not always be in the child's best interest. Considering attachment when making permanency decisions will allow for better outcomes.

Child welfare practices should recognize that a biological parent may not be able to care for her child in a traditional parental role, but may still be able to play a positive role in the child's life.⁹¹ What form that role takes is dependent upon the relationship of the child with the parent and the parent's ability to fulfill that role. Relying on a continuum of permanency options, which may permit a child to maintain either legal or social relationships with biological parents, allows for permanency to be an individualized solution for families in need.

⁸⁹ Williams, *supra* note 76, at 609.

⁹⁰ *Id.* at 613.

⁹¹ *Id.* at 618.

A. Greater Reliance on Kinship Care

Kinship care is a form of foster care but the child is placed with relatives. Although kinship care is not necessarily a permanent option this “impermanent” option may serve the same goal.⁹² Because permanency itself can be viewed as a product of the relational dynamics of caregiving, the emotional and familial bonds that already exist between a kinship caregiver provide a dynamic that permanency is intended to create.⁹³ Psychological permanence already exists.

A kinship placement could be a legally permanent placement if the caregiver adopts the child. Though the kinship caregiver may be willing and able to provide permanent and loving homes to relative minors, they may be resistant to adoption for many valid reasons.⁹⁴ The kinship caregiver is already related to the child in meaningful ways and may fear the radical reconfiguration of familial relationships created by adoption.⁹⁵ The high priority current child welfare policies place on adoption can create a burden for the kinship caregiver.⁹⁶ Oftentimes because permanency options are fixed and adoption is seen as the only way to achieve permanence, the kinship caregiver is forced into an unnatural and radical reconfiguration of their family ties.⁹⁷

Allowing this impermanent option to be a viable substitution for formal adoption may be in the best interest of the child and family. Having a policy that favors adoption reflects a systematic failure to consider the meaningful value of kinship resources for poor and minority families.⁹⁸

⁹² Coupet, *supra* note 78, at 405.

⁹³ *Id.* at 437.

⁹⁴ *Id.* at 411.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 450.

⁹⁸ *Id.* at 452.

B. Guardianship

Guardianship is an alternative to adoption that confers legal authority to a parent substitute without requiring the severance of the biological parent-child bond.⁹⁹ Though both kinship caregivers and non-kinship caregivers may be willing to choose guardianship, federal funding is only eligible for kinship guardianship.¹⁰⁰ Under federal regulations, states must rule out adoption first before guardianship subsidies are made available.¹⁰¹ This subordinates guardianship to adoption and reinforces the belief that true permanency is only achieved through adoption.¹⁰²

Guardianship allows the child to retain a relationship with her biological parents. The relationship varies depending upon the needs of the family and the child. Biological parents may retain the legal status of a parent and be allowed visitation or other contact rights.¹⁰³ Guardianship allows for the preservation of valuable parent-child relationships, while it respects the foster parents' identities regarding the child.¹⁰⁴ It also allows the family to avoid termination litigation.¹⁰⁵

Giving guardianship the full funding and consideration that adoption has would increase the probability of its use and allow families to select this option if it best meets their needs.

C. Alternatives to Traditional Adoption

Traditional adoption generally terminates the relationship between the child and her biological parent. A non-exclusive adoption allows for adoption of a child by her foster parents without

⁹⁹ Tiffany Buban, *Protecting Children: Using Guardianships as an Alternatives to Foster Care and Adoptions*, 19 J. AM. ACAD. MATRIMONIAL LAW. 389, 389 (2005).

¹⁰⁰ Gupta-Kagan, *supra* note 75, at 7.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 11.

¹⁰⁴ *Id.* at 22.

¹⁰⁵ *Id.*

severing the child's legal relationship with the biological parents.¹⁰⁶ This option allows the child to maintain a relationship similar to guardianship but it gives the foster parents the legal title of "parent."¹⁰⁷ The parent-substitute will be the primary custodian and should have a bulk of the decision-making rights.¹⁰⁸ Her biological parents are entitled to frequent visitation, but should not interfere with day-to-day parenting choices.¹⁰⁹ Legally recognizing more than two parents respects the child's relationship with the functional parent and the biological parent.¹¹⁰

A Native American approach to permanency allows adoption without terminating parental rights through non-exclusive adoption known as Tribal Customary Adoptions (TCA).¹¹¹ Native American tribal customary law recognizes the negative impact that termination of parental rights has on children and families while acknowledging the need for legal parent substitutes.¹¹² The tribe logically views the natural parent-child relationship as something that the court cannot permanently and legally sever.¹¹³ TCA allows the tribe to find safe, permanent homes for children while allowing them to maintain important family ties.¹¹⁴

California added TCA as a permanency option for Native American children in 2010.¹¹⁵ TCA allows a culturally appropriate permanency option for Native American children who are dependents of California courts, while still providing these children with

¹⁰⁶ Gupta-Kagan, *supra* note 83, at 716.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 719.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 718-19.

¹¹¹ Paula Polasky, *Customary Adoptions for Non-Indian Children: Borrowing from Tribal Traditions to Encourage Permanency for Legal Orphans Through Bypassing Termination of Parental Rights*, 30 LAW & INEQ. 401, 403 (2012).

¹¹² *Id.*

¹¹³ *Id.* at 410-11.

¹¹⁴ *Id.* at 411.

¹¹⁵ Judicial Council of California, *Judicial Branch Report to the Legislature: Tribal Customary Adoptions 1, 2* (2013), http://www.nrc4tribes.org/files/lr-Tribal-Customary-Adoption-Report_123112.pdf.

all of the benefits associated with other state adoption procedures.¹¹⁶ California found that TCA took less time to complete than conventional adoptions.¹¹⁷ Birth parents and children were reported to be happy about having this option as it allowed for the parent's ongoing participation in the child's life.¹¹⁸ Parents were less likely to contest TCA than traditional adoptions with termination of parental rights.¹¹⁹ Although at the time that the California report on the inclusion of TCA was released TCA had only been used for two years, children and families thus far had benefitted.¹²⁰ Extending this permanency option to all children would seem equally beneficial.

D. Reinstating Parental Rights

There are circumstances where it may be in the best interest of the child to vacate the final order terminating parental rights and reinstate the rights of the parent to the child.¹²¹ This option recognizes the need for a solution to the problems created when the parent-child relationship is legally terminated and the child has not yet been adopted.¹²² For whatever reason, at the time of the termination, contact with the parent was not seen as beneficial. Either a change in the parent's status or recognition of the value of contact with the parent has occurred. The parent may have made considerable rehabilitation efforts post-termination making contact with the child beneficial. It may also be that the strength of parent-child bond was not considered when creating a permanency plan and is now being recognized.¹²³ Whatever the reason, the availability to reinstate

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 10-11.

¹¹⁸ *Id.* at 13-14.

¹¹⁹ *Id.* at 14.

¹²⁰ *Id.* at 15.

¹²¹ Randi J. O'Donnell, *A Second Chance for Children and Families: A Model Statute to Reinstate Parental Rights after Termination*, 48 FAM. CT. REV. 362, 362 (2010).

¹²² Lashanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA J. SOC. POL'Y & L 318, 321 (2010).

¹²³ *Id.* at 320 n.2.

some or all of the parent's rights may be a benefit to select children and families.

IV. Conclusion

It is unrealistic to expect children to simply erase the memory of their biological parents and just start over. This is especially true when the child has formed an attachment with her parent. Even in the absence of attachment, the child may feel a strong connection to her biological ties. Children who have entered the child welfare system have often experienced trauma. Ignoring a child's need for contact with her biological parents can further the harm.

Legal recognition of the realities of children and families makes it necessary for multiple permanency options. Permanency options should reflect the needs of the children served. The child's age, her attachment to the parents, and her desires, should be considered when determining whether or not to sever ties to biological families. A generalized policy for permanency that favors complete severance of biological ties and exclusive adoption may not be in the best interest of all children. Child welfare policies and practices must recognize the diverse needs of children and families and consider the repercussions of limited permanency options.

