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THE CHALLENGE OF SUBSTANCE ABUSE FOR FAMILY PRESERVATION POLICY

DOROTHY ROBERTS, J.D.*

INTRODUCTION

One of the strongest criticisms of the foster care system is that children spend too much time in it. In recent decades, federal child welfare policy has swung between emphasizing child protection and emphasizing family preservation. But one goal has remained constant—the goal of permanency. It is generally held that children should be moved quickly from foster care into permanent homes, either by returning them to their biological families or finding them adoptive families. The state's interest in keeping families together is sometimes sacrificed to permanency planning if reunification efforts drag on too long.

The tension between permanency and family preservation has intensified in the last few years as a result of two developments. First, more and more cases of abuse and neglect are associated with parental substance abuse.¹ Many experts link the extraordinary growth of the foster care population in the last two decades to parental drug abuse, which places children at higher risk of maltreatment and removal from the home.² Substance abuse presents a special challenge

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1. Estimates of the portion of confirmed cases of child abuse associated with substance abuse are 40% and higher. See Lesa Bethea, *Primary Prevention of Child Abuse*, 59 AM. FAM. PHYSICIAN 1577, 1579 (1999); NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY (CASA), NO SAFE HAVEN: CHILDREN OF SUBSTANCE ABUSING PARENTS 13 (1999) [hereinafter CASA, NO SAFE HAVEN]. CASA's national survey of child welfare professionals found that most reported that substance abuse causes or contributes to at least half of all cases of child maltreatment; nearly 40% of respondents cited it as a factor in over 75% of cases. See *id.* Moreover, "[c]hildren whose parents abuse drugs and alcohol are almost three times (2.7) likelier to be abused and more than four times (4.2) likelier to be neglected than children of parents who are not substance abusers." *Id.* at 3. Alcohol is involved in most of these cases. See *id.* at 13.

2. See CASA, NO SAFE HAVEN, *supra* note 1, at 12 (reporting that 71.6% of survey respondents ranked substance abuse and addiction as the top cause of the rise in child mal-

to family reunification efforts because effective drug treatment programs typically last for long periods of time and because drug addicts often relapse and require ongoing services.³ Second, the Adoption and Safe Families Act (ASFA), enacted in 1997,⁴ and new state statutes impose swifter timetables for terminating parental rights to "free" children for adoption.⁵ These legal developments stem from the concern that children were spending too long in foster care waiting for their parents to meet the requirements of child protection agencies.⁶

This Article uses the issues raised by substance abusing parents with children in foster care to critique the current trend toward speeding up termination of parental rights for the sake of permanency and to explore alternative approaches to child protection. Substance abuse forces courts to choose between preserving families and expediting the permanent placement of children. This Article takes the position that new laws place too much pressure on caseworkers and judges to choose permanency over maintaining the parent-child relationship. Part I describes the context of the challenge that substance abuse poses for family preservation efforts and the tension between the goal of giving children permanent homes and the goal of keeping families together.⁷ This tension has increased with the passage of ASFA, which accelerates the deadline for filing a petition to

treatment); Mark F. Testa, *Conditions of Risk of Substitute Care*, 14 CHILDREN & YOUTH SERVICES REV. 27 (1992); Isabel Wolock & Stephen Magura, *Parental Substance Abuse as a Predictor of Child Maltreatment Re-Reports*, 20 CHILD ABUSE & NEGLECT 1183, 1191 (1996).

3. See Dennis C. Daley & Miriam S. Raskin, *Relapse Prevention and Treatment Effectiveness Studies*, in TREATING THE CHEMICALLY DEPENDENT AND THEIR FAMILIES 128, 128-171 (Dennis C. Daley & Miriam S. Raskin eds., 1991); Richard P. Barth et al., *Toward More Effective and Efficient Programs for Drug- and AIDS-Affected Families*, in FAMILIES LIVING WITH DRUGS AND HIV: INTERVENTION AND TREATMENT STRATEGIES 337, 342-347 (Richard P. Barth et al. eds., 1993).

4. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.). ASFA requires states to file a petition to terminate the rights of parents whose child has been in foster care for 15 of the previous 22 months, unless a relative is caring for the child, a compelling reason exists why termination would not be in the best interests of the child, or the state did not provide reasonable efforts for reunification. 42 U.S.C. § 675(5)(E).

5. See 705 ILL. COMP. STAT. 405/1-2 (West 1999) (providing for expedited termination of parental rights); S.C. CODE ANN. § 20-7-768 (Law. Co-op. 1998) (requiring child welfare department to file petition to terminate parental rights if a child has been in foster care for 15 of the most recent 22 months). By 1996, 26 states had reduced the deadline for a dispositional hearing to less than 18 months. See Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 676 (1999).

6. See *Substance Abuse in Welfare Families: Hearing on the Impacts of Substance Abuse on Families Receiving Welfare Before the Subcomm. on Human Resources*, 105th Cong. 4 (1997) (opening statement of E. Clay Shaw, Jr., Chairman, Subcommittee on Human Resources).

7. See *infra* text accompanying notes 13-28.

terminate parental rights.⁸ Part II explains the special difficulties that substance-abusing parents have in fitting this expedited time frame.⁹ Part III explores the implications of this conflict for the emphasis on permanency as the preeminent aim of child welfare practice.¹⁰ Part IV defends giving greater weight to preserving the relationship between substance-abusing parents and their children.¹¹ Finally, an alternative approach, rooted in concern for social justice, to deciding the conflict between family preservation and permanency is also presented in Part V.¹²

I. THE TENSION BETWEEN PERMANENCY AND FAMILY PRESERVATION

The goal of permanency is well-established in current child welfare philosophy. Two books were particularly influential in convincing policy makers that permanent homes are essential to healthy child development. Mass and Engler's *Children in Need of Parents*, published in 1959, documented foster care drift and the psychological difficulties that stem from multiple placements.¹³ The 1973 classic, *Beyond the Best Interests of the Child*, asserted the theory that continuity in children's relationships with a caregiver is essential to normal psychological development.¹⁴ As a result, the 1980 Child Welfare Act¹⁵ reflects the prevailing wisdom that children in foster care should be placed in permanent homes as quickly as possible.¹⁶ Although the law encouraged reuniting children with their biological parents, it provided for termination of parental rights as an avenue for permanency.¹⁷

Concern for permanency places a limit on the federal mandate that state child protective services make reasonable efforts to reunify children in foster care with their parents.¹⁸ Returning a child quickly

8. See *supra* text accompanying note 4.

9. See *infra* text accompanying notes 29-56.

10. See *infra* text accompanying notes 57-78.

11. See *infra* text accompanying notes 79-96.

12. See *infra* text accompanying notes 79-96.

13. See generally HENRY S. MAAS & RICHARD E. ENGLER, *CHILDREN IN NEED OF PARENTS* (1959).

14. See generally JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

15. Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.).

16. See Kathleen A. Bailie, *The Other Neglected Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers who Represent Them*, 66 *FORDHAM L. REV.* 2285, 2289 (1998).

17. See 42 U.S.C.A. § 671(a)(15)(A)-(C) (West 1999). See also Cheryl A. DeMichele, *The Illinois Adoption Act: Should a Child's Length of Time in Foster Care Measure Parental Unfitness?* 30 *LOY. U. CHI. L.J.* 727, 741 (1998).

18. See S. REP. NO. 96-336, pt. 1 (1979).

to her parents satisfies the interest in permanency, but what should happen if the parents are not ready to take back the child? How long can reunification efforts take before the damage of unstable custody arrangements occurs? At what point should agencies give up on parents for the sake of placing children in a permanent home? Most states are not willing to wait forever for parents to become fit enough to regain custody of their children. Most have enacted statutes that make the length of time a child remains out of the legal custody of the parent a ground for terminating the parent's rights.¹⁹ Indeed, "the most commonly used ground for termination is a finding that a child has been out of the custody of the parent, usually in foster care, for a statutory period of time. . .".²⁰

The tension between permanency planning and family reunification is intensified by the amendment to federal child welfare law, ASFA. This amendment represents a dramatic shift in philosophy from an emphasis on the reunification of children in foster care with their biological families to an emphasis on making these children available for adoption into new families. When he signed the legislation, President Clinton vowed to double the number of children adopted annually by 2002.²¹ The passage of ASFA was largely inspired by concern about the federal mandate that states use "reasonable efforts" to return children in foster care to their homes.²² Pointing to tragic cases of child deaths, critics claimed that the "reasonable efforts" language encouraged caseworkers to relinquish children into the hands of violent parents.²³ Congress therefore modified the 1980 act to direct authorities to make the health and safety of children in foster care their top priority.

But ASFA was fueled by more than concerns about dangerous homes. Congress also encouraged adoption as a means of reducing the exploding foster care population and ensuring permanency for

19. See Jennifer Ayres Hand, Note, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1261 (1996). Length of time out of custody is a ground for termination in 34 states: Ariz., Ark., Cal., Del., Ga., Ill., Ind., Iowa, Kan., La., Me., Md., Mass., Minn., Miss., Mo., Mont., Neb., Nev., N.M., N.Y., N.C., Ohio, Okla., Or., Pa., R.I., S.C., Tenn., Tex., Utah, Va., Wash., Wis. See *id.* at 1261 n.66.

20. *Id.* at 1251.

21. See *Cheers for New Law on Adoptions*, N.Y. TIMES, Nov. 2, 1997, at A24. See also Gordon, *supra* note 5, at 649.

22. See generally Gordon, *supra* note 5, at 649-51 (discussing the "reasonable efforts" requirement).

23. See *id.* at 646-47. See, e.g., RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES* (1996); Michael Quinn, "Family Preservation" *It Can Kill*, NEWSDAY (New York), Jan. 11, 1996, at A33.

children languishing in foster care.²⁴ In addition to providing financial incentives for states to move more children into adoption homes,²⁵ ASFA shortened the deadline for states to hold a permanency hearing and to file a petition to terminate parental rights.²⁶ These deadlines have little to do with child abuse; they concern the length of time a child has spent in foster care.²⁷ More families will probably be affected by expedited termination rules than by the rules safeguarding against severe child abuse.²⁸

II. THE SPECIAL CHALLENGE OF SUBSTANCE ABUSE

Some experts in the field have criticized the imposition of accelerated time clocks on parents who are trying to get their children back. In testimony regarding the Adoption Promotion Act of 1997,²⁹ the Child Welfare League of America³⁰ expressed concern that the bill's deadline for termination proceedings might "disrupt good and timely progress toward reunification."³¹ The efforts of substance-abusing parents to seek treatment, in particular, are on a collision course with new termination deadlines. Family preservation programs have concentrated on short-term, intensive services directed at avoiding removal or returning children quickly to their homes.³² This approach

24. See Gordon, *supra* note 5, at 649-50.

25. See *id.* at 651.

26. See *id.*

27. See Hand, *supra* note 19, at 1252. "This ground addresses the problem of the parent whose rights cannot be terminated under other grounds but whose child would otherwise be relegated to the uncertain life of long-term foster care." ANN M. HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 13.17 at 33 (2d ed. 1993).

28. See DUNCAN LINDSEY, THE WELFARE OF CHILDREN 28 (1994). Most children in foster care were removed from their homes because of neglect, not abuse. See *id.* at 28-9. "[I]nadequacy of income more than any other factor, constitutes the reason that children are removed." *Id.* at 155. See also Alex Morales, *Seeking a Cure for Child Abuse*, USA TODAY (MAGAZINE), Sept. 1, 1998, at 34 (finding that "approximately 55% of the kids who are seriously mistreated suffer from severe neglect."). See generally LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES (1989) (criticizing the removal of poor children from their homes for parental neglect).

29. See *The Adoption Promotion Act of 1997: Hearing on H.R. 867 Before the Subcomm. on Human Resources of the House Ways and Means Comm.*, 105th Cong. 73 (1997) (statement of the Child Welfare League of America). The Adoption Promotion Act of 1997 was instituted in an effort to ensure the safety of children, place children in permanent homes and improve the timeliness of decision making with regard to the placement of children. See *id.*

30. The Child Welfare League of America has approximately 900 members consisting of public and private agencies. See *id.* They work to improve conditions for families and children at risk, providing services such as family preservation, child protective services, and family foster care. See *id.*

31. *Id.*

32. See Gordon, *supra* note 5, at 645.

simply does not fit drug addiction, which is often a chronic, relapsing problem.³³

It will often be difficult for a substance-abusing parent to successfully complete a treatment program and conform to other child protective services requirements in time. As Jess McDonald, Director of the Illinois Department of Children and Family Services, stated at a recent government hearing, "the 12-month permanency clock for children ignores the clock of treatment for addiction, which at best is 24 months."³⁴ To begin with, there are not enough treatment facilities to serve the numbers of parents seeking help;³⁵ parents must surmount imposing barriers to enter those that exist.³⁶ A 1997 survey of state child welfare agencies found that they could provide appropriate substance abuse services to only thirty-one percent of all parents and twenty percent of pregnant women who need them.³⁷ Nearly all of the CASA survey respondents reported that parents who need residen-

33. See *supra* note 3 and accompanying text. But see HERBERT FINGARETTE, *HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE* 39-41 (1999) (citing experiments that show that alcoholics have considerable control over their drinking); Sally L. Satel, *The Fallacies of No-Fault Addiction*, 134 *PUB. INT.* 52, 56-57 (1999) (criticizing policies that de-stigmatize addicts by recasting them as chronic illness sufferers and advocating criminal sanctions to prevent relapse). Even the National Institute of Mental Health study Satel cites, however, found the mean duration of illness was 6.1 years. See *id.* Professor Satel may be correct in assessing that drug addicts "are not perpetually helpless victims of chronic disease" and "can be the agents of their own recovery." *Id.* at 67. Indeed, mothers whose children have been taken away from them have great incentive to complete treatment. It is in recognition of their agency and motivation to recover that state efforts should be directed at reuniting them with their children. But even the most motivated addict may not be able to recover completely in one year.

34. Cornelia Grumman, *Parents Give Advice on Reforming DCFS; Agency Criticized at Panel Hearings*, CHI. TRIB., Apr. 13, 1999, at Metro Chicago 3. Ironically, the clashing clocks analogy is also deployed by advocates of expedited termination of parental rights. For example, Joseph Califano argues that "[t]here is an irreconcilable clash between the rapidly ticking clock of physical, intellectual, emotional and spiritual development for the abused and neglected child and the slow-motion clock of recovery for the parent addicted to alcohol or drugs." Joseph A. Califano, *The Least Among Us: Children of Substance-Abusing Parents*, 180 *AM.*, 10, 12 (1999). See also CASA, *NO SAFE HAVEN*, *supra* note 1, at 30 (referring to "The Clock of Child Development: Children cannot wait" and "The Clock of Recovery: Alcohol and drug abusers need time to conquer their addiction"). According to this view, children in foster care experiencing a rapid rate of development are quickly injured while waiting for their substance-abusing parents to recover. Thus, Califano proposes that "[c]aseworkers and judges should move rapidly to place children for adoption when parents refuse treatment or fail to respond to it." Califano, *supra* note 34, at 12.

35. See Howard A. Davidson, *Protecting America's Children: A Challenge*, TRIAL, Jan. 1, 1999, at 26. See also CASA, *NO SAFE HAVEN*, *supra* note 1, at 30.

36. See Christine E. Grella, *Women in Residential Drug Treatment: Differences by Program Type and Pregnancy*, 10 *J. HEALTH CARE FOR POOR & UNDESERVED*, May 1, 1999, at 216-17.

37. See CASA, *NO SAFE HAVEN*, *supra* note 1, at 5.

tial substance abuse treatment must wait; only 5.8 percent said treatment was immediately available.³⁸

Even those services that are available are rarely appropriate for mothers because most treatment programs are based on a male-oriented model.³⁹ Most outpatient clinics do not provide childcare;⁴⁰ nor do most residential treatment programs admit children.⁴¹ Moreover, treatment programs fail to provide the comprehensive services that women need, such as prenatal and gynecological care, contraceptive counseling, appropriate job training, and counseling for sexual and physical abuse.⁴² Predominantly male staff and clients are often hostile to female clients and employ a confrontational style of therapy that makes many women uncomfortable.⁴³ Finally, the typical focus on individual pathology tends to exclude social forces that are critical to understanding women's substance abuse.⁴⁴ When all of these obstacles converge to sabotage participation in the program, mothers are blamed for failing to complete treatment and threatened with termination of their parental rights.

Government officials have largely ignored the burgeoning need for comprehensive, long-term treatment for women. While shortening the time frame for parents to recover in 1997, Congress considered and rejected proposals to expand both reunification and drug treatment services for families involved with child protection agencies.⁴⁵ Child welfare agencies are devoting more resources to investigation and removal of children of substance-abusing parents, and less to providing treatment and other services to these families.⁴⁶

Welfare reform adds another set of timetables that increase the pressure on many substance-abusing parents. Under welfare reform, poor mothers must meet new training and work requirements to retain their benefits that may conflict with treatment needs and child

38. *See id.* at 34.

39. *See* DOROTHY ROBERTS, WOMEN, PREGNANCY & SUBSTANCE ABUSE, CENTER FOR WOMEN POLICY STUDIES 3 (1991); Antonnette V. Graham et al., *Miracle Village: A Recovery Community for Addicted Women and Their Children in Public Housing*, 14 J. SUBSTANCE ABUSE TREATMENT 275, 276 (1997).

40. *See* Graham, *supra* note 39, at 276.

41. *See* Wendy Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 AM J. PUB. HEALTH 483, 485 (1990).

42. *See id.*

43. *See id.*

44. *See id.* at 485-86.

45. *See* Gordon, *supra* note 5, at 665.

46. *See* CASA, NO SAFE HAVEN, *supra* note 1, at 4-5.

protective service demands.⁴⁷ The two-year cut-off for receiving Temporary Assistance to Needy Families⁴⁸ benefits may clash with both the time needed for treatment and the deadline for termination of parental rights.⁴⁹ Most states either limit or deny altogether welfare benefits to people who have been convicted of some drug-related crimes.⁵⁰ Few welfare workers, moreover, are trained to perform the screening needed to refer their clients to drug treatment services.⁵¹

Studies show that longer periods in treatment may increase chances for recovery.⁵² A 1998 study by the Mathematic Policy Research Group found that five states' treatment programs for pregnant women that adopted existing 28-day programs did not result in

47. See *SA Providers Face Numerous Barriers in Helping Welfare Clients*, 11 ALCOHOLISM & DRUG ABUSE WEEKLY, June 21, 1999, at 1 [hereinafter *SA Providers Face Numerous Barriers in Helping Welfare Clients*] (discussing LEGAL ACTION CENTER, STEPS TO SUCCESS: HELPING WOMEN WITH ALCOHOL AND DRUG PROBLEMS MOVE FROM WELFARE TO WORK 15-16 (1999)); Matt Grayson, *Kicking Habits: Preparing Welfare Recipients for the Work Force*, 72 SPECTRUM 5, 5 (1998) (noting that "[w]elfare recipients, now limited as to the time that they can receive benefits, face increased pressure to succeed in the working world."). See also NANCY YOUNG & SIDNEY GARDNER, CHILDREN AND FAMILY FUTURES AND DRUG STRATEGIES, IMPLEMENTING WELFARE REFORM: SOLUTIONS TO THE SUBSTANCE ABUSE PROBLEM 1 (1997) (reporting that between 5 and 39% of welfare recipients "use alcohol and other drugs in ways that impair their ability to secure and keep jobs, as well as their ability to be effective parents.").

48. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 repealed the Aid to Families with Dependent Children (AFDC) program and replaced it with a new block grant program, entitled Temporary Assistance to Needy Families (TANF). See Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 553 (1999).

49. See Grayson, *supra* note 47, at 7.

50. See *Analysis: States Largely Ignoring Addiction Issues in Welfare Planning*, 9 ALCOHOLISM & DRUG ABUSE WEEKLY, Nov. 3, 1997, at 6 (discussing a Legal Action Center report which notes that 20 states will deny welfare benefits, while 21 states will limit welfare benefits to those convicted of drug-related crimes).

51. See *SA Providers Face Numerous Barriers in Helping Welfare Clients*, *supra* note 47, at 6. See generally YOUNG, *supra* note 47, app. at 52-53. See also Mark J. Werner et al., *Screening, Early Identification, and Office-Based Intervention with Children and Youth Living in Substance-abusing Families*, 103 PEDIATRICS 1099, 1102 (1999) (discussing the special training required for health care providers to identify and manage children exposed to parental addiction). New Hampshire received a waiver from the Department of Health and Human Services under ASFA to establish a demonstration project that assesses the effect of parental substance abuse treatment on child safety and family stability. See *Two New Child Welfare Waivers Include Parental Addiction Treatment*, 10 ALCOHOLISM & DRUG ABUSE WEEKLY, Oct. 5, 1998, at 1, 6. The project includes the hiring of a substance abuse specialist to train child welfare staff to identify substance abuse problems and work with families to receive services. See *id.* at 1.

52. See Stephen Magura & Alexandre B. Laudet, *Parental Substance Abuse and Child Maltreatment: Review and Implications for Intervention*, 19 CHILD & YOUTH SERVS. REV. 193, 210 (1996); *Substance Abuse in Welfare Families: Hearing Before the Subcomm. on Human Resources*, 105th Cong. 19 (statement of Jane L. Ross, Director of the Income Security Issues Health, Education, and Human Services Division, GAO); Douglas J. Besharov, *Looking Beyond 30, 60, and 90 Days*, 16 CHILD REV. & YOUTH SERVS. REV. 445, 445 (1994).

higher-birthweight infants.⁵³ Outcomes were better, however, for babies born to mothers who received more intensive and longer-term treatment.⁵⁴ Similarly, a study of comprehensive programs for mothers who abused crack and alcohol found that 77.8 percent remained sober and drug-free after nine months of completing treatment.⁵⁵ Successful treatment programs include myriad services that address the complexity of problems that substance-abusing persons typically experience – “mental and physical health services for women, child care assistance (some allow women to bring children with them to treatment), pediatric services for children, individual and single-sex group therapy, marital or family counseling, parenting education, literacy programs and job training.”⁵⁶

Numerous obstacles to receiving appropriate treatment make it difficult for many substance-abusing parents to recover within the time frame imposed by new permanency policies. There is evidence, however, that given adequate time and services many of these parents could be reunited with their children. Does the emphasis on permanency unwisely short-circuit substance-abusing parents' efforts to keep their families together?

III. THE PROBLEMS WITH PERMANENCY

The challenge that substance abuse poses for family preservation efforts raises broader questions about the preeminence of permanency as a goal of child welfare practice. Enforcing permanence with mechanical timetables can escalate the disruption and instability in a child's life. Terminating parental rights severs a child's legal tie to the parents. When this breakup occurs because of a statutory deadline it may interfere with an on-going and valuable relationship between parent and child. Unlike abandonment or severe child abuse, time spent in foster care does not determine the nature of the children's bond with their parents.⁵⁷ It is odd that such a harsh rupture as termination of parental rights is so often uncritically viewed as a means to family stability. Judges are far more protective of the ties between children

53. See *Review Recommends Intensive Services to Improve Outcomes for Pregnant Addicts*, 10 ALCOHOLISM & DRUG ABUSE WEEKLY, June 29, 1998, at 1, 5.

54. See *id.* at 5.

55. See CASA, NO SAFE HAVEN, *supra* note 1, at 80.

56. *Id.* See, e.g., Alma J. Carten, *Mothers in Recovery: Rebuilding Families in the Aftermath of Addiction*, 41 SOCIAL WORK 214, 216-17 (1996) (discussing study of 20 women who successfully completed New York City's Family Rehabilitation Program); Graham, *supra* note 39, at 275-76.

57. See Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 381 (1996).

and parents who have lost custody as a result of divorce.⁵⁸ They typically issue visitation orders designed to ensure a continuing relationship between children and the non-custodial parent—even parents who are not fit to raise them.⁵⁹

The conflict between recovery from substance abuse and statutory deadlines is frequently the reason for termination of parental rights.⁶⁰ In this contest, judges typically give top priority to children's interest in permanency. Children's need for permanency, they reason, supersedes their need to maintain ties to parents with addiction problems. The priority given to permanency is often misplaced. First, courts sometimes misjudge the relative importance to children of speedy resolution of placement versus preserving the relationship with their parents. Even where experts find a continuing parent-child emotional bond and promise of successful drug treatment, some judges are unwilling to wait for parents to recover. *In the Interest of N.F. and C.H.*,⁶¹ the mother, Janet, argued that the closeness of her relationship with her two children should preclude termination.⁶² The court explained that a strong bond between parent and child is a mitigating but not overriding factor in considering whether to terminate the parent's rights.⁶³ It concluded, "we do not believe we should exercise more patience with Janet because of the nature of her problem. The rights and needs of a child for permanency are not dependent upon the type of disability which saddles the parent."⁶⁴

Second, courts sometimes base the decision to terminate parents' rights on an erroneous understanding of addiction and the recovery process. They view a substance-abusing parent's relapse as evidence of immutable parental unfitness and the futility of state reunification efforts. In *Andrea L. v. Superior Court*,⁶⁵ for example, the judge refused to extend family reunification services beyond the statutory limit because the mother relapsed.⁶⁶ The mother had been in complete compliance with the child protection agency's plan except for one

58. *See id.* at 373.

59. *See id.* at 373-74.

60. *See, e.g.*, Hand, *supra* note 19, at 1292.

61. 579 N.W.2d 338 (Iowa Ct. App. 1998).

62. *See id.* at 340.

63. *See id.* at 341.

64. *Id.* *See also In the Matter of Torrin G.*, 240 A.D.2d 820, 821, 658 N.Y.S.2d 712, 714 (N.Y. App. Div. 1997) (holding that, despite good relationship mother established with infant son, her failure to complete substance abuse treatment programs justified termination of parental rights).

65. 75 Cal. Rptr. 2d 851 (Cal. Ct. App. 1998).

66. *See id.* at 857.

instance of a positive drug test.⁶⁷ She tested negative for drugs on four subsequent occasions.⁶⁸ The drug treatment center's progress report stated that she had made "great changes in her decision making skills, communication skills and [had] a much more positive outlook. . ."⁶⁹ and recommended that the reunification process continue.⁷⁰

The exchange among the county counsel, mother's attorney, and the juvenile court judge about the significance of the mother's sole relapse vividly illustrates the impact that uninformed perceptions of addiction can have on parental rights. The county counsel took the position that the mother's relapse completely negated the great progress she had made in the drug treatment program:

"[I]t doesn't matter how many programs mother completed before she relapsed. The relapse takes her back to square one. All the intervention has not been successful, so I don't see that there is a sufficient offer of proof that the children can be safely returned to her care given a dirty test for cocaine. . ."⁷¹

Although a representative of the drug treatment program was prepared to testify that she was confident in the mother's chances for success, the juvenile court expressed little patience for the mother:

". . . [A]t this point I am very frustrated. I mean, this mother had been stepping forward. She had been doing what she was supposed to do. She had been testing clean. Somebody explain to me the lure of cocaine such that a mother will jeopardize being able to have her children back with her. . . It's beyond me to understand. . ."⁷²

The appellate court upheld the juvenile court judge's exercise of discretion, holding that the judge could reasonably conclude that the mother's relapse did not constitute extraordinary circumstances needed to extend reunification services.⁷³

Third, the presumption that termination of parental rights will lead to a permanent placement is false. Many children who have been permanently separated from their parents will stay in the foster care

67. *See id.* at 854.

68. *See id.*

69. *Id.* (quoting a Toberman Settlement House progress report dated March 3, 1998).

70. *See id.* at 855.

71. *Id.* at 854-55.

72. *Id.* at 855.

73. *See id.* at 857.

system without finding an adoptive home.⁷⁴ Data on the foster care system over the last twenty years show that the number of terminations of parental rights far outpaces the number of adoptions.⁷⁵ Martin Guggenheim's study of statistics gathered from Michigan and New York over the period from 1987 to 1993 showed a dramatic increase in the number of children who become "state wards"—children whose parents' rights have been terminated and are waiting in foster care to be adopted.⁷⁶ Although the number of state wards adopted also increased, it lagged behind the number of children newly becoming state wards as a result of termination of their parents' rights.⁷⁷ Both states, in short, experienced "a dramatic increase in the number of children who are freed for adoption but not adopted."⁷⁸ State wards who maintained a close relationship with their substance-abusing parents would probably have been better off waiting longer for their parents to recover.

Finally, the focus on finding permanent placements for children already in foster care tends to overlook the fundamental problem with the foster care system—too many children are removed from their homes in the first place. This is a problem that cannot be attributed to growing rates of parental substance abuse alone. The foster care population began exploding before substance abuse was recognized as a significant child welfare problem.⁷⁹ Rather, the reason for the large numbers of children in foster care is the rescue philosophy of child welfare practice.⁸⁰ The main service the U.S. child welfare system offers struggling families is foster care.⁸¹ This rescue mentality leads caseworkers to separate children from parents who use drugs or abuse alcohol even when children could safely remain at home.⁸² In

74. See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 134 (1995).

75. See generally *id.* at 132-33 (discussing findings of studies conducted in the late 1970s and early 1980s).

76. See *id.* at 126-27.

77. See *id.* at 133.

78. *Id.* at 127.

79. See PELTON, *supra* note 28, at 5-8. Congress first addressed the problems of rising foster care caseloads and "foster care drift" two decades ago when it passed the Child Welfare Act of 1980. See Gordon, *supra* note 5, at 643.

80. See LINDSEY, *supra* note 28, at 16-19 (describing the "residual" approach to child protection); PELTON, *supra* note 28, at 10-21.

81. See PELTON, *supra* note 28, at 19 (stating that "[t]he main service of child welfare agencies traditionally has been foster care placement."). See also *id.* at 74 (noting federal spending on foster care).

82. Former caseworker Marc Parent tells a moving story about his reluctant decision to "rescue" an 11-year-old boy from his alcoholic mother even though the boy probably would

many cases, keeping children with their parents while offering intensive family preservation services and drug treatment is safer, more stable, and less traumatic for children than placing them in the care of strangers in the foster care system.⁸³

Imagine finding as much value in maintaining a continuing relationship between children in foster care and their substance-abusing mothers as we do in maintaining the relationship between divorced fathers and their children. Giving the same importance to their family bond would challenge the wisdom of expedited deadlines, or even any deadlines at all. We would implement instead standards that take into account the nature of substance abuse and the parent-child relationship in removal and termination decisions. We would expand experimental but inadequate treatment programs geared toward mothers that support family relationships, such as residential facilities that allow children to remain with their mothers. We would be committed to providing long-term services to recovering parents and their children. On the other hand, parents so deep into drugs or alcohol that they have totally abandoned their very young children for more than a year should not be permitted to stall state efforts to place the children with adoptive families. Such parents, however, appear to represent a minority of parents who have lost custody of their children because of substance abuse. Child welfare policy should be directed toward keeping these hopeless cases to a minimum.

IV. A SOCIAL JUSTICE APPROACH

Why go to such lengths to preserve the relationship between children and their neglectful, addicted parents? It is easy to see how these children might be immediately better off in healthier, safer, and more comfortable environments.⁸⁴ Arguments about parents' right to autonomy wither in the face of drug-scarred lives and the countervailing rights of children to be protected from abuse and the instability of foster care placements. As one caseworker observed,

have been better off remaining at home. See MARC PARENT, *TURNING STONES: MY DAYS AND NIGHTS WITH CHILDREN AT RISK* 120-170 (1996).

83. James Willwerth, *Should We Take Away Their Kids? Often the Best Way to Save the Child is to Save the Mother as Well*, *TIME*, May 13, 1991, at 62. See also CASA, *NO SAFE HAVEN*, *supra* note 1, at 24 (noting several reasons why "[i]t is essential that we provide treatment for substance abusing parents").

84. See CASA, *NO SAFE HAVEN*, *supra* note 1, at 40 (discussing surveys of child welfare professionals indicating children should be removed from homes where abuse is taking place).

After six months, parents' rights should be terminated. I have some cases where the children have been in foster care for 2 to 3 years because parents continued to relapse. I feel if parents can't get their priorities straight in six months then they probably never will, and why make the children suffer. Haven't they suffered enough?⁸⁵

The urgency of terminating parental rights seems to be heightened, moreover, by the developmental needs of young children.⁸⁶ Some child welfare advocates argue that the conflicting clocks of child development and parental recovery from substance abuse mean that agencies should abandon unsuccessful efforts to reunite addicted parents with their children fairly quickly.⁸⁷ CASA warns that "[t]he child welfare system, which must attend to the urgent developmental needs of children, cannot have the patience with the recovery process that should be accorded to addicts in public health arenas."⁸⁸ Despite these concerns about permanency, there are important reasons to provide prolonged state services to families affected by substance abuse.

A. *Race and Class Disparities in Removals*

The child welfare system's response to parental substance abuse since the 1980s affects group status as well as individual families. In January 1999, Black children made up forty-five percent of the foster care population although they were only fifteen percent of the general population under age eighteen.⁸⁹ The disparity is even more alarming in the nation's big cities.⁹⁰ Removal of children because of maternal substance abuse has contributed significantly to the increase in numbers of poor Black children pouring into foster care.⁹¹ There is evidence that the system of detecting and reporting drug use during pregnancy, which leads to removal of newborns from custody of the

85. *Id.* at 39 (quoting a caseworker in Wichita, Kansas).

86. *See id.* at 18.

87. *See id.* at 30.

88. *Id.* at 8. Although CASA recognizes that "[e]very child has a right to have his or her substance-abusing parents get a fair shot at recovery with timely and comprehensive treatment," it advocates the superseding principle that "[e]very child has a right to have precious and urgent developmental needs take precedence over the timing of parental recovery." *Id.* at 8-9.

89. *See* U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *Current Estimates as of January 1999(1)* (visited Sept. 23, 1999) <<http://www.acf.dhhs.gov/programs/cb/stats/ar0199a.htm>>.

90. *See* Carten, *supra* note 56, at 215-16.

91. *See id.* at 216.

mother, is rife with race and class bias.⁹² Most reports to child protection services based on positive newborn drug tests come from inner-city hospitals that serve poor minority communities.⁹³ A study of reporting of prenatal drug use in Pinellas County Florida found that, despite similar rates of drug use, Black patients were ten times more likely to be reported than white patients.⁹⁴ The public's willingness to remove so many babies from their mothers is based largely on racialized myths about crack babies and pregnant crack addicts.⁹⁵ Substance abuse, moreover, looks more dangerous when combined with the hazardous conditions of poverty and inadequate housing.⁹⁶ Children are removed from their homes not solely because their parents use drugs and alcohol, but because their substance-abusing parents are poor.⁹⁷

The assumption that any amount of crack use makes a mother dangerous to her children led to automatic removal of newborns in many states.⁹⁸ Once children are removed, the odds are stacked against the mother. Peggy Davis and Gautam Barua have argued that, contrary to the common assumption of judicial lenience toward neglectful parents, risk averse judges are likely to err on the side of retaining state custody of children.⁹⁹ Judges are more afraid of making the wrong decision to return a child to an abusive home, which will garner negative public attention, than a wrong decision to keep a child in substitute care, which will go unnoticed.¹⁰⁰ The race and class bias in decisions to remove children from substance-abusing parents is a strong reason to try to keep these families together.

92. See *id.* at 215; DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 175 (1997).

93. See Carten, *supra* note 56, at 215.

94. See ROBERTS, *supra* note 92, at 175.

95. See *id.*

96. See Carten, *supra* note 56, at 216.

97. See LINDSEY, *supra* note 28, at 155 (“[I]nadequacy of income, more than any other factor, constitutes the reason that children are removed.”).

98. See Califano, *supra* note 34, at 11. “The proportion of children whom caseworkers place in foster care at birth jumped 44 percent from the 1983-86 period to the 1990-94 period.” *Id.* at 12.

99. See Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 149-50 (1995).

100. See *id.* at 157-58.

B. What about Children's Rights?

Parents' right to regain custody of their children is often pitted against children's right to a safe and permanent home.¹⁰¹ Advocates of expedited termination procedures argue that parents must lose their claim to their children when the children's welfare is threatened by lengthy and uncertain stays in substitute care. Does my approach that advocates greater patience with substance-abusing parents pay too little heed to their children's rights? A social justice approach furthers children's interests as well as those of parents. First, this approach values children's own interest in maintaining a relationship with their parents, even parents who abuse drugs. It is not fair to children if their bonds with their parents are unnecessarily broken, especially if this occurs in part because of their race and socio-economic status.¹⁰² Second, this approach recognizes that poor minority children are hurt by a system that disrespects their family bonds and, more broadly, devalues the group to which they belong. The status and welfare of children depends on their place in society, not just on the conduct of individual parents. Finally, this approach is part of a struggle to create a more egalitarian child welfare system that values all families equally and provides basic social supports to all families. Children are benefited most not by a policy that encourages quick disruption of their relationship with their families, but by a policy that ensures more parents are able to take care of their children.

101. See Dorothy Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PENN. J. CONST. L. (forthcoming 1999).

102. Thus, the CASA report stresses as the first guiding principle of policy addressing parental substance abuse: "Every child has a right to have his or her substance-abusing parents get a fair shot at recovery with timely and comprehensive treatment." CASA, *NO SAFE HAVEN*, *supra* note 1, at 8.