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Cover Page Footnote

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DEVELOPMENT AND EXPANSION OF NEW YORK'S PERMANENT NEGLECT STATUTE

Joseph R. Carrieri*

I. Introduction

Since the early 1970s the well-being of foster children has been the subject of increased attention.¹ Legislation has advanced the protection of the foster child,² while the courts have begun to emphasize the child's best interests in determining whether parental rights to custody should be terminated and the child freed for adoption.³

Early decisions had stressed the rights of the natural parents, often to the exclusion of the child's welfare.⁴ Recent legislation and judicial decisions indicate that parental rights will be terminated where the best interests of the child so require. For example, family court review of the status of every child in foster care is now mandated at least once every twenty-four months.⁵ This procedure has successfully placed foster children in adoptive homes and returned others to their natural parents.⁶ Other recent decisions and statutes have clarified the rights of parties in abandonment,⁷ permanent

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1. Hall, *The Waning of Parental Rights*, CAMBRIDGE L. J. 248 (1972); see Gordon, *Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute*, 46 ST. JOHN'S L. REV. 215 (1971); 39 U. CIN. L. REV. 785 (1970).

2. See, e.g., 1976 N.Y. Laws chs. 666-68.

3. See, e.g., *In re Kenneth M.*, 383 N.Y.S.2d 1005 (Fam. Ct. 1976); *In re Adoption of N.*, 78 Misc. 2d 105, 355 N.Y.S.2d 956 (Sur. Ct. 1974).

4. See, e.g., *In re Susan W. v. Talbot G.*, 34 N.Y.2d 76, 312 N.E.2d 171, 356 N.Y.S.2d 34 (1974); *In re Bistany*, 239 N.Y. 19, 145 N.E. 70 (1924).

5. N.Y. Soc. SERV. LAW § 392(10) (McKinney Supp. 1976).

6. See, e.g., *In re Zwiebel*, 79 Misc. 2d 366, 358 N.Y.S.2d 795 (Fam. Ct. 1974); *In re Spencer*, 74 Misc. 2d 557, 346 N.Y.S.2d 645 (Fam. Ct. 1973); *In re Cynthia S.*, 74 Misc. 2d 935, 347 N.Y.S.2d 274 (Fam. Ct. 1973).

7. *In re Anonymous*, 40 N.Y.2d 96, 351 N.E.2d 707, 386 N.Y.S.2d 59 (1976); *In re Orlando F.*, 40 N.Y.2d 103, 351 N.E.2d 711, 386 N.Y.S.2d 64 (1976). Both of these decisions made it easier for agencies to free foster children for adoption and emphasized the best interest of the child. In *Anonymous*, the New York Court of Appeals held that where an agency can prove abandonment of a child for six months, it is not required to prove that it used diligent efforts to strengthen the parent-child relationship. 40 N.Y.2d at 98, 386 N.Y.S.2d at 63. In *Orlando F.*, the New York Court of Appeals held that a finding of permanent neglect will be supported

neglect,⁸ and adoption proceedings,⁹ and have expanded the rights of putative fathers.¹⁰

This Article will examine New York's permanent neglect statute as a means of terminating the custodial rights of natural parents to free children for adoption.

II. Permanent Neglect Proceedings

The custody of a destitute or dependent child may be committed to an authorized agency or foster parent in various ways. For example, a natural parent may voluntarily terminate his right to the guardianship and custody of a child under section 384 of the New York Social Services Law.¹¹ That section requires the parent to execute a written surrender of his rights whereupon the guardianship and custody of the child is committed to an authorized agency.¹²

A child may also be freed for adoption when the natural parent has actually abandoned the child.¹³ Section 384-b(4)(b) of the Social Services Law permits the guardianship and custody of a child to be committed to an authorized agency or foster parent if:¹⁴

[t]he parent or parents, whose consent to the adoption of the child would otherwise be required . . . , abandoned such child for the period of six

where a natural parent has failed either to maintain contact with or plan for the future of his child. 40 N.Y.2d at 98, 351 N.E.2d at 711, 386 N.Y.S.2d at 63. See text accompanying notes 68-80 *infra*.

8. 1976 N.Y. Laws ch. 666, §§ 14, 16.

9. *Id.* §§ 9-13.

10. *Id.* ch. 665, §§ 1-7. See also *Stanley v. Illinois*, 405 U.S. 645 (1972). In *Stanley*, the Supreme Court held that an unwed father's right to the custody of his child could not be terminated without compliance with the hearing requirements of the due process clause. The New York courts have not interpreted *Stanley* as requiring any drastic modification of the rights of putative fathers. See *In re Malpica-Orsini*, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975), *cert. denied*, 423 U.S. 1042 (1976); *In re Kenneth M.*, 87 Misc. 2d 295, 383 N.Y.S.2d 1005 (Fam. Ct. 1976). See 5 FORDHAM URBAN L.J. 175 (1976).

11. N.Y. Soc. SERV. LAW § 384 (McKinney Supp. 1976).

12. *Id.* The courts have held that upon the proper execution of a written surrender for purposes of adoption, a contractual relationship arises between the natural parent or parents and the accepting agency. Nevertheless, this contract is subject to judicial supervision and may be set aside prior to the time formal adoption occurs. *People ex rel. Anonymous v. Saratoga County Dep't of Public Welfare*, 30 App. Div. 2d 756, 291 N.Y.S.2d 526 (3d Dep't 1968); *Schenectady County Dep't of Social Services v. Patricia Ann S.*, 73 Misc. 2d 104, 341 N.Y.S.2d 169 (Fam. Ct. 1973).

13. N.Y. Soc. SERV. LAW § 384-b(4)(b) (McKinney Supp. 1976).

14. *Id.*

months immediately prior to the initiation of the proceedings under this section. . . .

Institution of a guardianship proceeding on the ground of permanent neglect is another method by which a child may be freed for adoption.¹⁵ Under section 384-b(7) of the Social Services Law, a "permanently neglected child" is defined as:¹⁶

a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.

If a court determines that a child has been permanently neglected by his parent, it may commit the guardianship and custody of the child to an authorized agency or foster parent.¹⁷

Prior to January 1, 1977, courts had to rely on section 611 of the New York Family Court Act¹⁸ for the statutory definition of a

15. *Id.* § 384-b(7). Under section 384-b of the Social Services Law, there are two other grounds upon which the guardianship and custody of a child can be committed to an authorized agency or foster parent: (1) if both of the child's parents are dead, and no guardian has been lawfully appointed; and (2) if the child's parent or parents "are presently and for the foreseeable future unable, by reasons of mental illness or mental retardation, to provide proper and adequate care [for him] . . ." *Id.* §§ 384-b(4)(a), 384-b(4)(c).

16. *Id.* § 384-b(7)(a).

17. *See id.* § 384-b(3).

18. N.Y. FAM. CT. ACT § 611 (McKinney 1976). The predecessor statute to section 611 was enacted in 1959. 1959 N.Y. Laws ch. 450. The Governor's Memorandum of Approval underscored the purpose that the statute was designed to achieve:

The purpose of these bills is to provide procedures with adequate safeguards to permit the adoption of a permanently neglected child, without the consent of his parents or parent.

Under existing law a great many children are doomed to grow up in institutions or foster homes at public expense and are prevented from forming normal, lasting family relationships, because minimal contacts between a parent and a child who remains in an institution or foster home act as a bar against a judicial finding that the child has been abandoned. Such a finding is necessary in order to permit the adoption of the child without parental consent and it cannot be made even where the contacts between parent and child are so infrequent and superficial as to be completely meaningless.

These bills act to remedy this situation and at the same time protect the rights of a parent who has a real interest in his or her child, but due to financial or other circumstances is unable to have the care and custody of the child. The bills have been

"permanently neglected child." Since the statutory language of section 384-b(7) of the Social Services Law is essentially the same as the former language of section 611 of the Family Court Act,¹⁹ the courts may continue to rely on judicial decisions which have interpreted section 611.²⁰

Prior to the enactment of section 611 of the Family Court Act, the natural parents' consent was required in order to free a child for adoption,²¹ unless the natural parent or parents had in fact completely abandoned the child. The Legislature enacted section 611 to provide a method for the termination of parental rights where a natural parent's contacts with his child had been so infrequent or meaningless as to amount to a de facto relinquishment of any parental responsibilities.²²

In a proceeding to terminate a natural parent's custody on the ground of permanent neglect, section 614 of the Family Court Act

reviewed and universally approved by public and private child welfare agencies, the courts dealing with adoptions, and interested persons generally.
1959 N.Y. Laws 1749.

19. Prior to January 1, 1977, section 611 of the Family Court Act contained the following language:

A "permanently neglected child" is a person under eighteen years of age who is in the care of an authorized agency, either in an institution or in a foster home, and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the moral and temporal welfare of the child. . . .

N.Y. FAM. CT. ACT § 611 (McKinney 1975), *as amended*, (McKinney Supp. 1976). See text accompanying note 16 *supra*.

20. See, e.g., *In re Denlow*, 87 Misc. 2d 410, 384 N.Y.S.2d 621 (Fam. Ct. 1976); *In re Orzo*, 84 Misc. 2d 482, 374 N.Y.S.2d 554 (Fam. Ct. 1975).

21. See *Susan W. v. Talbot G.*, 34 N.Y.2d 76, 312 N.E.2d 171, 356 N.Y.S.2d 34 (1974). The court stated that, "[e]ven where the flame of parental interest is reduced to a flicker the courts may not properly intervene to dissolve the parentage." *Id.* at 80, 312 N.E.2d at 174, 356 N.Y.S.2d at 38. In support of its holding the court cited *In re Bistany*, 239 N.Y. 19, 145 N.E. 70 (1924). In *Bistany*, Judge Cardozo said that in order for petitioning adoptive parents to prevail in a proceeding based on abandonment by the natural parents, the petitioners "must be able to show that even though the parents be given the benefit of every controverted fact, a finding of abandonment follows as an inference of law." *Id.* at 21, 145 N.E. at 70. The court also stated that "the order . . . [denying the petition for adoption] must stand unless we are prepared to hold that by acts so unequivocal as to bear one interpretation and one only the parents manifested an intention to abandon the child forever." *Id.* at 24, 145 N.E. at 71.

22. See note 18 *supra* and accompanying text.

requires the petitioner to show that:²³ (1) the child is in the care of an authorized agency;²⁴ (2) the child is under eighteen years of age; (3) the agency has made diligent efforts to encourage and strengthen the parental relationship; (4) notwithstanding the agency's efforts, the natural parent has failed substantially and continuously to maintain contact with or plan for the future of the child for a period of more than one year since the child's commitment to agency care; (5) the parents are physically and financially able to maintain such contacts and formulate plans for the child's future; and (6) the best interests of the child require that an authorized agency or foster family have custody of him. Thus, a determination of the degree to which both the agency and the natural parents have discharged their respective obligations is essential to the court's decision in a permanent neglect proceeding.

A. The Agency Obligation To Use Diligent Efforts

Section 384-b(7)(a) of the Social Services Law provides that before a child can be declared permanently neglected, the agency to whose care he is committed must use "diligent efforts to encourage and strengthen the parental relationship."²⁵ Through amendments which went into effect in January 1977, the Legislature for the first time has undertaken to define "diligent efforts":²⁶

"[D]iligent efforts" shall mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to: (1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family; (2) making suitable arrangements for the parents to visit the child; (3) provision of services and other assistance to the parents

23. N.Y. FAM. CT. ACT § 614(1) (McKinney Supp. 1976).

24. *Id.* § 614(1)(b). Section 371(10) of the Social Services Law defines the term "agency" as:

Any agency, association, corporation, institution, society or other organization which is incorporated or organized under the laws of this state with corporate power or empowered by law to care for, to place out or to board out children, which actually has its place of business or plant in this state and which is approved, visited, inspected and supervised by the board or which shall submit and consent to the approval, visitation, inspection and supervision of the board as to any and all acts in relation to the welfare of children performed or to be performed under this title.

N.Y. SOC. SERV. LAW § 371(10) (McKinney 1976).

25. N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney Supp. 1976).

26. *Id.* § 384-b(7)(f).

so that problems preventing the discharge of the child from care may be resolved or ameliorated; and (4) informing the parents at appropriate intervals of the child's progress, development and health.

Because the provision generally codified prior judicial determinations, an examination of these decisions will aid in the interpretation of this new provision.

Agency responsibilities include the duty to discharge its obligations efficiently and in good faith. *In re Joyce Ann R.*²⁷ was a fact-finding proceeding²⁸ in which the agency alleged that the natural mother was guilty of neglect and that her rights to custody of the child should be terminated permanently. The child had been in the custody of the same foster parents for six years.²⁹ During that time the agency and the natural mother had been unable to formulate any plan respecting the child's future.³⁰ The court denied the petition, holding that the agency had been too one-sided in its efforts to strengthen the parental relationship: "An ultimatum from the agency no matter how reasonable standing alone does not meet its statutory obligation of 'diligent efforts' to encourage and strengthen the parental relationship."³¹

The court further noted the inequality of position inherent in negotiations between the agency and the natural mother and discussed the responsibilities of both:³²

27. 82 Misc. 2d 730, 371 N.Y.S.2d 607 (Fam. Ct. 1975).

28. Upon the filing of a petition seeking termination of parental rights, the court issues a summons. On the return day of the summons, the court will schedule a "fact-finding" hearing. N.Y. FAM. CT. ACT § 616 (McKinney Supp. 1976). If the agency is able to prove its case by a preponderance of the evidence at the fact-finding, the court will order a dispositional hearing to determine whether the interests of the child require that the parent's custody be terminated. *Id.* § 625(a). The court must also determine what order of disposition is to be made. *Id.* § 631.

29. 82 Misc. 2d at 731, 371 N.Y.S.2d at 608.

30. *Id.*, 371 N.Y.S.2d at 609.

31. *Id.* at 732, 371 N.Y.S.2d at 609.

32. *Id.* at 732-33, 371 N.Y.S.2d at 610. The element of inequality of position between agency and natural parent was again discussed by the same court in *In re Sydney*, 84 Misc. 2d 932, 377 N.Y.S.2d 908 (Fam. Ct. 1975). In *Sydney* the family court found that the agency had not met its "special preliminary burden" of showing diligent efforts, and that the natural mother's actions in procuring more suitable housing and better paying employment amounted to "'planning' by conduct," *Id.* at 934, 377 N.Y.S.2d at 909, notwithstanding the agency's allegations of "failure to contact and failure to plan." *Id.* The court opined:

The parties are by no means dealing on an equal basis. The parent is by definition saddled with problems: economic, physical, sociological, psychiatric, or any combined

As to the [natural mother], the cases establish that "negative" argument tending merely to veto agency proposals does not constitute planning. Standards of substantiality, constructiveness, and attempted implementation must be met.

However, the agency and the natural parent cannot be viewed as equals in the planning process. First, almost by definition, the agency operates from a background of professional resources and accumulated experience; this parent from a background of mental stress, financial handicap, and insecurity. Second, the statute in *haec verba* states the duty of the agency to make "diligent efforts to encourage and strengthen the parental relationship."

The agency must therefore perform efficiently, diligently, and in good faith. The parent must demonstrate effort, good faith, and minimum adequacy as a planning parent.

Application of the diligent efforts requirement often demands flexibility.³³ A determination that an agency did not exercise diligent efforts should not affect the result where the child's well-being will be jeopardized by a continued relationship with an unqualified natural parent. In *In re Ray A. M.*,³⁴ the appellate division cautioned that time must not be wasted in measuring the exact degree of effort required on the part of the agency when the behavior of the natural parent is so bizarre that chances of resuming a normal relationship with her child are virtually nonexistent.³⁵

In re Ray A. M. was a permanent neglect proceeding instituted by the Spence-Chapin Adoption Service. After the child had first been in the custody of the New York City Department of Child Welfare for two and a half years, that agency placed her in a foster home where she resided for a period of three years prior to the commencement of the proceeding. The record before the court spanned a period of over two years. During that time there had been some nineteen hearings. The court described the natural mother as "aggressive, paranoid and immature."³⁶ Testimony adduced in the

thereof. The agency in contrast is vested with expertise, experience, capital, manpower and prestige. Agency efforts correlative to their superiority is obligatory.

Id.

33. See, e.g., *In re Ray A.M.*, 48 App. Div. 2d 161, 368 N.Y.S.2d 374 (2d Dep't), *aff'd*, 37 N.Y.2d 619, 339 N.E.2d 135, 376 N.Y.S.2d 431 (1975); *In re Denlow*, 87 Misc. 2d 410, 384 N.Y.S.2d 621 (Fam. Ct. 1976).

34. 37 N.Y.2d 619, 339 N.E.2d 135, 376 N.Y.S.2d 431, *aff'g* 48 App. Div. 2d 161, 368 N.Y.S.2d 374 (2d Dep't 1975).

35. 48 App. Div. 2d at 164, 368 N.Y.S.2d at 377.

36. *Id.* at 162, 368 N.Y.S.2d at 375.

family court had portrayed a bleak picture involving child battering, long periods of neglect, and failure to maintain contact with the agency.³⁷ The court held that the child was permanently neglected, and refused to consider an argument based on alleged agency failure to use diligent efforts to strengthen the parental relationship:³⁸

This is not simply a case where the neglect by the parent may have been matched by the neglect of the agency to attempt the strengthening of the parental relationship. . . . It may be that the adoption agency could have tried harder to encourage the natural mother-child relationship in order to satisfy the most searching mind that no more could reasonably be done. However, we must not get lost in an analysis of the niceties of the precise degree of required diligence of effort where the life-style and apparent socio-pathology of the mother (joined with her undoubted past neglect) indicate a bleak future indeed for the child. As stated in *Matter of Raymond "M."* . . . "The welfare of the child is not served if permanent termination is delayed in order to penalize the agency for its failure to make diligent efforts or in order to give the natural parent recompensate against the agency in the form of a second chance."

The court of appeals unanimously affirmed the appellate division³⁹ and vigorously endorsed the soundness of the holding below:⁴⁰

Only by sophistic analysis can it be argued that the child care agency failed in its duty to "encourage and strengthen the parental relationship" between this unfortunate child and the troubled and trouble-making mother. The mother exhibited not isolated instances of parental incapacity but a pattern of intransigence, instability, and abusive conduct toward the child which,

37. *Id.*, 368 N.Y.S.2d at 376.

38. *Id.* at 164, 368 N.Y.S.2d at 377, quoting *In re Raymond "M."*, 81 Misc. 2d 70, 79, 364 N.Y.S.2d 321, 329 (Fam. Ct. 1975)(citation omitted).

39. One justice in the appellate division dissented from the result reached by the majority in *In re Ray A.M.*, thus enabling the natural mother to appeal to the court of appeals as of right. 48 App. Div. 2d at 165, 368 N.Y.S. 2d at 378 (Martuscello, J., dissenting). See N.Y.C.P.L.R. § 5601(a) (McKinney 1963).

40. 37 N.Y.2d at 623-24, 339 N.E.2d at 138, 376 N.Y.S.2d at 435. The court of appeals noted the change in the law that had been brought about by amendment of section 614 of the Family Court Act. When the proceeding was commenced in the trial court, former section 614 required that permanent termination of parental rights be in the "moral and temporal" interests of the child. Section 614 was amended in 1975 with "best" interests of the child substituted for "moral and temporal" interests. The court of appeals elected to decide the case on the basis of the "best" interests standard, but concluded that "[t]he result in this case, on its facts, would be the same under either statutory standard." *Id.* at 622, 339 N.E.2d at 137, 376 N.Y.S.2d at 433. Article 6 of the Family Court Act governs the procedural aspects of permanent neglect proceedings commenced under section 384-b of the Social Services Law. N.Y. FAM. CT. ACT §§ 611-34 (McKinney 1975), as amended, (McKinney Supp. 1976).

performe, must have practically limited the agency in its efforts, if the best interests of the child were to govern the actions of the parties and the agencies involved

The attitude of the parent can thus be seen as a factor which in some cases can lessen the agency's burden of showing that it employed diligent efforts.

Also germane to the degree of diligent effort required of the agency is the natural parent's way of life. *In re Anthony L. "CC"*⁴¹ was a permanent neglect proceeding in which the natural mother was a reformed heroin addict. She had been almost constantly incarcerated since the birth of her child. The mother had failed to keep in regular contact with either the child or the agency and "never actually formulated or seriously contemplated any plans for the future of her infant,"⁴² despite the diligent efforts of the agency to persuade her to do so. The appellate division sustained the family court's finding that the agency had attempted to induce the mother to have some relationship with the child, as her circumstances and way of life would permit.⁴³ Despite such efforts, the parent did not respond. The family court's order finding permanent neglect was unanimously affirmed.⁴⁴

An agency is expected to use "diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child."⁴⁵ If an agency deter-

41. 48 App. Div. 2d 415, 370 N.Y.S.2d 219 (3d Dep't 1975).

42. *Id.* at 418, 370 N.Y.S.2d at 221.

43. *Id.*

44. *Id.* at 419, 370 N.Y.S.2d at 222.

45. N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney Supp. 1976). The shift in emphasis from parental rights to the child's best interests has been viewed as an enlightened development. *Bennett v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976), was a proceeding brought by a natural mother seeking custody of her child. The child had voluntarily been placed with a friend of the family. No statutory provision was directly applicable since the placement here was private and unsupervised. The court decided the case on the basis of common law principles, but commented on the progression in the law with respect to the custodial rights of natural parents:

The day is long past in this State, if it had ever been, when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle

mines that such diligent efforts will not be in the best interests of the child, there must be some evidence to support its decision. In *In re Denlow*⁴⁶ the agency sought to terminate parental rights based on allegations of both abandonment and permanent neglect. The child had been removed from the natural mother's residence pursuant to the emergency powers of the Department of Social Services. The child was sixteen months old when he was removed.⁴⁷ He had lived with the same foster parents for a period of ten years. The natural mother recognized that she was unable to care for the child, and therefore acquiesced in agency custody.⁴⁸ However, the natural mother always expressed an interest in her child and a desire to have

that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude. . . .

Recently enacted statute law, applicable to related areas of child custody such as adoption and permanent neglect proceedings, has explicitly required the courts to base custody decisions solely upon the best interest of the child. . . . Under these statutes, there is no presumption that the best interest of the child will be promoted by any particular custodial disposition. Only to this limited extent is there a departure from the pre-existing decisional rule, which never gave more than rebuttable presumptive status, however strongly, to the parent's "right."

Id. at 546-48, 356 N.E.2d at 281-82, 387 N.Y.S.2d at 824-26 (citations omitted).

46. 87 Misc. 2d 410, 384 N.Y.S.2d 621 (Fam. Ct. 1976).

47. *Id.* at 413, 384 N.Y.S. 2d at 626. The agency exercised the emergency powers conferred by section 1024 of the Family Court Act. N.Y. FAM. CT. ACT § 1024 (McKinney 1975). That section provides for removal of a child by an agency without parental consent or a prior court order where "the child is in such circumstance or condition that his continuing in [his] place of residence or in the care and custody of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health. . ." *Id.* § 1024(a)(i). The agency removing the child may do so without a court order where there is not time to apply for one, but if these emergency powers are exercised, the court must be informed of the removal. *Id.* § 1024(a)(iii). In *Denlow*, the agency did not take the steps required to confirm the propriety of the removal. The court noted that the child had been taken "under somewhat questionable circumstances" and that the "'separation' over [10] years [had] been without legal sanction and in plain violation of law." 87 Misc. 2d at 413, 384 N.Y.S.2d at 626. The court said that the agency's "circumvention of law [was] tolerable only because the child [had] always continued in foster care with the mother's consent." *Id.* at 413-14, 384 N.Y.S.2d at 626.

48. *Id.* at 414, 384 N.Y.S.2d at 626. The natural mother even acquiesced in the repeated denial of her requests to see the child and in the agency's ultimate termination of visitation when the agency advised her that this was in the child's best interests. *Id.* at 415, 384 N.Y.S.2d at 627. She had five other children and drew support only from public assistance. The court analogized the position of the natural mother to that of the "old woman who lived in a shoe." *Id.* at 420, 384 N.Y.S.2d at 630.

him back some day.⁴⁹

The family court in *Denlow* dismissed the agency's petition on the merits for its failure to establish a showing of abandonment or permanent neglect by the natural mother.⁵⁰ The agency had alleged that the mother was indifferent toward the child.⁵¹ It had stopped the child's visits to his natural mother's home when he complained to a caseworker.⁵² However, the agency also turned aside the natural mother's repeated requests to visit her child for a variety of reasons.⁵³ Based on this evidence, the court concluded:⁵⁴

[I]t cannot be said that [the agency] extended itself by diligent efforts to promote the parent-child relationship. This responsibility was given minimal recognition at best. The agency picked the foster parents here. The heavy investment of service to the foster family necessarily worked against any plan of reunion between mother and child. There is no proof—and, indeed, the record does not even suggest it—that such efforts would have been detrimental to the moral and temporal welfare of the child. The respondent was not an unfit mother due to alcohol addiction, drug usage, mental illness, behavioral deviation or other vice found to exist in any of the cases terminating parental rights. . . .

. . . The court can terminate parental rights only where the parent has failed to maintain contact or plan for the child *despite* the agency's diligent efforts . . . More is needed than has been shown in this case before the court will take this extreme and drastic step.

49. *Id.* at 415, 384 N.Y.S.2d at 627.

50. *Id.* at 422, 384 N.Y.S.2d at 631.

51. *Id.* at 421, 384 N.Y.S.2d at 631.

52. *Id.* at 415-16, 384 N.Y.S.2d at 627. The court paused to consider the significance of the child's expressed desire to be adopted by the foster parents:

This 12-year-old boy can hardly be expected to appreciate the full meaning and legal consequences of adoption. His immature wish and desire is largely emotional and the product of inevitable psychological conditioning. It is by no means determinative in a case like the present that entails far-reaching and life-long effects. . . . Should the day of repentance and change of mind ever dawn, then would come the real tragedy for Derek.

Id. at 416 n.8, 384 N.Y.S.2d at 627 n.8.

53. *Id.* at 414, 384 N.Y.S.2d at 626.

54. *Id.* at 419-21, 384 N.Y.S.2d at 630-31. But the court's constraint in making its decision is indicated by its assessment of the facts:

The realities of the situation are that Derek does not really know his mother, that she is unable to meet his special needs if we accept agency standards and opinion, and that the foster family of 10 years is meeting these needs and willing to adopt him. None of this is a substitute for law.

Id. at 421, 384 N.Y.S.2d at 631.

Thus, the New York courts have repeatedly recognized an agency's duty to use diligent efforts to strengthen a parent-child relationship.⁵⁵ Where it seems certain that an agency has not used diligent efforts to strengthen a parent-child relationship, the courts should demand evidence which establishes that the natural parent's "life-style and apparent sociopathology . . . indicate a bleak future . . . for the child."⁵⁶

B. Parental Failure Substantially and Continuously To Maintain Contact With or Plan For the Child's Future

The most serious failure on the part of a parent which could lead to termination of custodial rights is to have no contact with the child for a period of one year.⁵⁷ Where a parent has not visited, supported, or otherwise communicated with his child for this length of time, he will be deemed to have abandoned the child.⁵⁸ Such a course could lead to a complete severance of parental rights.

Prior to the 1975 amendment of section 611 of the Family Court Act,⁵⁹ a few insubstantial contacts by the parent were sufficient to prevent the termination of parental rights.⁶⁰ Evidence of such contacts is no longer sufficient to preclude a finding of abandonment or permanent neglect as a matter of law.⁶¹

In *In re Coddington*⁶² respondent natural mother voluntarily

55. See, e.g., *In re Orzo*, 84 Misc. 2d 482, 374 N.Y.S.2d 554 (Fam. Ct. 1975); *In re Coddington*, 84 Misc. 2d 253, 376 N.Y.S.2d 387 (Fam. Ct. 1975); *In re Joyce Ann R.*, 82 Misc. 2d 730, 371 N.Y.S.2d 607 (Fam. Ct. 1975).

56. *In re Ray A.M.*, 48 App. Div. 2d 161, 164, 368 N.Y.S.2d 374, 377 (2d Dep't), *aff'd*, 37 N.Y.2d 619, 339 N.E.2d 135, 376 N.Y.S.2d 431 (1975).

57. N.Y. Soc. SERV. LAW § 384-b(7)(a) (McKinney Supp. 1976). See *In re Coddington*, 84 Misc. 2d 253, 376 N.Y.S.2d 387 (Fam. Ct. 1975).

58. N.Y. Soc. SERV. LAW § 384-b(7)(a) (McKinney Supp. 1976).

59. 1975 N.Y. Laws ch. 704, § 2 (codified at N.Y. FAM. CT. ACT § 611 (McKinney 1975)), *as amended*, (McKinney Supp. 1976)).

60. See, e.g., *Susan W. v. Talbot G.*, 34 N.Y.2d 76, 312 N.E.2d 171, 356 N.Y.S.2d 34 (1974).

61. N.Y. Soc. SERV. LAW § 384-b(7)(b) (McKinney Supp. 1976), effective January 1, 1977, provides:

[E]vidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact.

Id.

62. 84 Misc. 2d 253, 376 N.Y.S.2d 387 (Fam. Ct. 1975).

placed her two children with the Department of Social Services. During the next three years, respondent visited her children thirteen times. Only one of these visits occurred in the year preceding the litigation. The Department had repeatedly warned the respondent of the consequences if she refused to make permanent plans for her children.⁶³ Despite these warnings, the mother failed to plan for her children or to take advantage of the Department's efforts to train her for employment.⁶⁴

In concluding that the respondent had permanently neglected her children,⁶⁵ the family court refused to follow the New York Court of Appeals decision in *Susan W. v. Talbot G.*⁶⁶ In *Susan W.* the court of appeals stated that "abandonment can be made out only from 'a settled purpose to be rid of all parental obligations and to forego all parental rights.'"⁶⁷ The *Coddington* court rejected this so called "settled purpose rule" in cases of permanent neglect because it placed greater emphasis upon the parent's intent rather than the effect of the parent's conduct upon the child.⁶⁸ Relying on the 1975 amendment to section 611 of the Family Court Act, the family court stated:⁶⁹

The result of applying the "settled purpose rule" would be, in most cases, as is illustrated here, to enshrine parental rights at the cost of leaving the child forever in limbo wholly at the mercy of parents' wavering and fluctuating intent. . . . [I]n cases brought by the Commissioner of Social Services for the permanent termination of parental rights . . . the parents' purpose or intent, while not wholly irrelevant, is certainly not controlling.

The determination of what constitutes lack of planning on the part of a parent is a somewhat more complicated problem. In some situations, a finding of lack of parental planning is not difficult.

63. *Id.* at 254-55, 376 N.Y.S.2d at 389.

64. *Id.* at 255, 376 N.Y.S.2d at 389-90.

65. *Id.* at 259, 376 N.Y.S.2d at 393.

66. 34 N.Y.2d 76, 312 N.E.2d 171, 356 N.Y.S.2d 34 (1974). In *Susan W.* the natural mother and her new husband petitioned for the adoption of the mother's three children. The natural father refused to consent to the adoption. Section 111 of New York's Domestic Relation Law requires that a natural parent give his consent to the adoption of his child unless he has abandoned the child. N.Y. DOM. REL. LAW § 111 (McKinney 1964), *as amended*, (McKinney Supp. 1976).

67. 34 N.Y.2d at 80, 312 N.E.2d at 173, 356 N.Y.S.2d at 37, *quoting In re Maxwell*, 4 N.Y.2d 429, 433, 151 N.E.2d 848, 850, 176 N.Y.S.2d 281, 283 (1958).

68. 84 Misc. 2d at 257-58, 376 N.Y.S.2d at 392.

69. *Id.* at 258, 376 N.Y.S.2d at 392.

These would include situations where a parent had refused employment, adequate housing, or professional help with a drug or drinking problem.⁷⁰ One court has defined the duty of a parent with respect to planning for the future of the child by saying that the "parent must demonstrate effort, good faith, and minimum adequacy as a planning parent."⁷¹ An examination of the cases which have considered the question of parental failure to plan suggests that the judiciary has not hesitated to terminate parental rights where the best interests of the child so require.⁷²

The New York Court of Appeals recently resolved a substantial problem relating to the requirement to plan in *In re Orlando F.*⁷³ Although the natural mother had maintained infrequent contact with the child, the family court determined that the mother had evinced a desire to obtain custody of the child⁷⁴ and concluded that the agency did not show a failure by the mother "to substantially or continuously maintain contact with or plan for the future of the child" for the requisite one year period. As a result, the family court dismissed the agency's petition to terminate the natural mother's custody of her child.⁷⁵

The appellate division affirmed.⁷⁶ The majority endorsed the family court's view that *either* contact or planning for the future of the child will defeat a petition seeking termination of parental rights on the grounds of permanent neglect.⁷⁷

Justice Theodore R. Kupferman dissented,⁷⁸ maintaining that section 611 of the Family Court Act required the parent both to maintain contact *and* plan for the child's future.⁷⁹

The court of appeals modified the appellate division's order and sustained the agency's petition.⁸⁰ The court stated that the words

70. See N.Y. Soc. SERV. LAW § 384-b(7)(c) (McKinney Supp. 1976).

71. *In re Joyce Ann R.*, 82 Misc. 2d 730, 733, 371 N.Y.S.2d 607, 610 (Fam. Ct. 1975). See text accompanying notes 27-32 *supra*.

72. See, e.g., *In re Ray A.M.*, 37 N.Y.2d 619, 339 N.E.2d 135, 376 N.Y.S.2d 431 (1975); *In re Joyce Ann R.*, 82 Misc. 2d 730, 371 N.Y.S.2d 607 (Fam. Ct. 1975).

73. 40 N.Y.2d 103, 351 N.E.2d 711, 386 N.Y.S.2d at 64 (1976).

74. 40 N.Y.2d at 108, 351 N.E.2d at 714, 386 N.Y.S.2d at 66.

75. See *id.* at 106, 351 N.E.2d at 712, 386 N.Y.S.2d at 65.

76. 50 App. Div. 2d 791, 377 N.Y.S.2d 502 (1st Dep't 1975).

77. *Id.*, 377 N.Y.S.2d at 503.

78. *Id.*, 377 N.Y.S.2d at 504 (Kupferman, J., dissenting).

79. *Id.*, 377 N.Y.S.2d at 503 (Kupferman, J., dissenting).

80. 40 N.Y.2d 103, 351 N.E.2d 711, 386 N.Y.S.2d 64 (1964).

“maintain contact with or plan for” must be construed as setting up separate requirements.⁸¹ It concluded that a finding of parental failure to plan⁸² is sufficient in itself to support a determination of permanent neglect.⁸³ Even where the parent has demonstrated an intention to have the child returned and has maintained contact with the child, the parent must take affirmative action to plan for the child’s future.⁸⁴ While the court decided that “substantially plan” means to design and act to execute a feasible and realistic plan, it refused to articulate a rigid definition:⁸⁵

81. *Id.* at 109-10, 351 N.E.2d at 714-15, 386 N.Y.S.2d at 66-67.

82. N.Y. FAM. CT. ACT § 611 (McKinney 1975). N.Y. SOC. SERV. LAW § 384-b(7)(c) (McKinney Supp. 1976), effective January 1, 1977, now defines the term “to plan for the future of the child”:

“[T]o plan for the future of the child” shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent.

83. 40 N.Y.2d at 110, 351 N.E.2d at 715, 386 N.Y.S.2d at 67.

84. *Id.* at 110-11, 351 N.E.2d at 715, 386 N.Y.S.2d at 67.

85. *Id.* at 111-12, 351 N.E.2d at 716, 386 N.Y.S.2d at 67.

In support of its conclusion that the requirements of contact and planning are to be read in the disjunctive, the court noted that in 1973, section 611 was amended by inserting the words “or plan” in place of the words “and plan.” 1973 N.Y. Laws ch. 870, § 2. The court also considered a statement made by State Senator Joseph R. Pisani made in support of this amendment:

The purpose of the permanent neglect proceedings is to provide a procedure for the permanent termination of parental rights by reason of permanent neglect of a child in the foster care of an authorized (public or private) agency and to authorize such agency to place the child for adoption.

The purpose of the proposed amendments is to redefine permanent neglect as being established where the parent or custodian has failed “substantially and continuously to maintain contact with the child” or where the parent or custodian has failed to “plan for the return of the custody of the child.” Under the present law both such failure to maintain contact and failure to plan for the return of custody of the child or to “plan for the future of the child” must be shown.

Where the parent or custodian fails in *either* respect, the child is left in limbo.

Thus, the relationship becomes meaningless where the parent or custodian visits so infrequently that the child has no sense of belonging.

Where there is only occasional visitation, there is certain to be a failure to plan for the return of the custody of the child. On the other hand, even where there is substantial and continuous visitation, the parent or custodian may fail to take steps to end the foster care status of the child and restore the child to a homelife with the parent

We need not formulate, under the instant facts, an exact standard which must be met in order to comply with the statutory mandate in light of respondent's utter failure to exert even a minimal attempt to develop a plan for her child's future. Indeed, each factual pattern will undoubtedly reveal peculiarities of its own but the particular facts and totality of circumstances must be scrutinized and weighed carefully in rendering decisions in such delicate human affairs

III. Conclusion

There are any number of social problems which are almost impossible to solve with unquestionable fairness to everyone, but which cry out for uniform and just solutions. While legislation is never a complete cure for such problems, it is the only significant vehicle that a society such as ours can employ to arrive at fair and consistent resolutions. Perhaps the most difficult area to regulate is the determination of the varying degrees of value to assign to the relationships of family members. In the case of laws respecting the rights of children and their natural parents, who for one reason or another must be separated, precise determinations are almost impossible.

The law has moved slowly, but with a steady hand, to tip the scales in favor of the interests of the children who become public charges. This is a move in the right direction. The sensitivity manifested by the legislative and judicial branches in solving problems involving foster children is assuredly grounds for optimism that government at all levels will give paramount consideration to those who stand to lose the most by a cold analysis of relative legal rights.

or custodian. A child is no less in limbo when kept in foster care year after year when the parent or custodian is physically and financially able to provide a home but fails to do so.

As appears from *Matter of Barbara P.*, the obligation of the parent or custodian to "plan for the future of the child" means to plan for the return of the custody of the child. The proposed amendment accordingly substitutes language which expressly so provides.

Memorandum of Senator Joseph R. Pisani, *reprinted in*, 1973 NEW YORK STATE LEGISLATIVE ANNUAL 35 (citations omitted).