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IS TWENTY-TWO MONTHS BEYOND 
THE BEST INTEREST OF THE CHILD? 
ASFA'S GUIDELINES FOR THE TERMINATION 
OF PARENTAL RIGHTS

Katherine A. Hort*

INTRODUCTION

Chris Congdon was two years old when he and his three-year-old brother were placed in foster care. The boys' mother, Christine DiPerna, was mildly retarded and suffered from depression. Their father was a diabetic-asthmatic with a weak heart. He was also a schizophrenic who had been arrested so often the town police knew him by name.

Chris already had been back and forth between parental custody and foster homes when, at age five, he went to live with Sue Luebert and her husband Christopher Hill. Upon his arrival, the couple promised Chris he would never have to go to another foster home. He could stay with them until he returned to his natural parents. Within days he was calling them mom and dad.

Chris's foster family encouraged the involvement of his natural parents. Once, Luebert and Chris arrived at the Child Welfare Office to visit with Chris's mother only to find they missed her due to a scheduling mistake. Luebert later located DiPerna in a

* J.D. candidate, Fordham University School of Law, 2002; B.A., English, University of Pennsylvania, 1997. I would like to thank Professor Abner Greene for helping me turn a general interest in children and the law into this Note. Special thanks to the editors and staff of the Fordham Urban Law Journal for their insight and edits, and of course, to Anne and Robert Hort for everything.

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
nearby coffee shop.\textsuperscript{10} For Chris's sixth birthday, Luebbert and Hill drove him nearly 200 miles to celebrate at his brother's foster home.\textsuperscript{11} In addition, they often picked up Chris's parents so they could attend Chris's open houses at school.\textsuperscript{12}

Three years later, Chris and his brother were still in foster care despite DiPerna and Congdon's efforts to rehabilitate and regain custody of their children.\textsuperscript{13} Around this time, Chris told his Sunday school class the Bible story he best remembered was the story of King Solomon.\textsuperscript{14} Finally, in February of 1996, Chris's caseworker told him the judge was going to cut all legal ties between him and his parents.\textsuperscript{15}

On August 13, 1997, five years after Chris came to live with Luebbert and Hill, DiPerna and Congdon's parental rights were terminated.\textsuperscript{16} Luebbert and DiPerna, both of whom Chris called mom, cried. Luebbert said, "There are no winners in this, this is only about people getting on with their lives."\textsuperscript{17} Situations like this highlight the dilemmas the foster care system must address when balancing deference to the biological family with a child's need for a permanent home.

On November 19, 1997, the Adoption and Safe Families Act ("ASFA" or "the Act") was signed into federal law.\textsuperscript{18} ASFA promised to overhaul the failing foster care system\textsuperscript{19} by shortening the time children spent in foster care. Many children languished in foster care because long term goals were not established, maintained, or carried out.\textsuperscript{20} This is referred to as "foster care drift."\textsuperscript{21}

\begin{itemize}
  \item \textsuperscript{10} Stack, \textit{supra} note 1.
  \item \textsuperscript{11} Stack, \textit{supra} note 9.
  \item \textsuperscript{12} \textit{Id}.
  \item \textsuperscript{13} Stack, \textit{supra} note 8.
  \item \textsuperscript{14} \textit{Id}. In the famous biblical story of King Solomon, two women claimed to be the mother of the same child. King Solomon ordered the child be cut in two so that each mother could keep half. He knew the child's real mother would give up her claim so the child would not be harmed. 1 \textit{Kings} 3:16-27.
  \item \textsuperscript{17} \textit{Id}.
  \item \textsuperscript{18} Celeste Pagano, \textit{Adoption and Foster Care}, 36 \textit{HARV. J. ON LEGIS.} 242, 242 (1999).
  \item \textsuperscript{19} \textit{Id}.
  \item \textsuperscript{20} Del A. v. Roemer, 777 F. Supp. 1297, 1313 (E.D. La. 1991) (defining drift as "refer[ring] to children still in the foster care system after many years because permanent goals were not established, maintained and carried out.")
\end{itemize}
ASFA contains a provision mandating that the state file for the termination of parental rights after a child has spent fifteen of the past twenty-two months in foster care (the "15/22 provision"). There are three exceptions to this provision: (1) if the child is living with a relative ("kinship placement"); (2) if the state agency has documented a compelling reason why filing is not in the best interest of the child; and (3) if the state has failed to provide the family with the services necessary to safely reunite the child with her parents. The standard governing the decision to reunify parent and child is one of "reasonable efforts" and the Act requires a state's compliance to be eligible for federal child welfare money. Thus, states have had to pass legislation complementary to ASFA. The legislative responses of states have differed greatly.

21. Id.
23. Id.
24. Id. For a discussion of the term, see text accompanying notes 99-108 and 123-128.

considers Illinois’s and New York’s enactments because they are the states with the starkest decline in the number of children entering foster care.\textsuperscript{28}

Illinois has gone beyond ASFA’s requirements by incorporating the fifteen out of twenty-two month exception into a new basis for parental unfitness.\textsuperscript{29} An Illinois court may find a parent unfit based solely on the child’s placement in foster care for fifteen out of the past twenty-two months.\textsuperscript{30} Although the statute includes the same three exceptions as the federal act, the new unfitness standard lightens the state’s burden in proving a parent is unfit.\textsuperscript{31}

By contrast, New York has more or less adopted ASFA in full.\textsuperscript{32} This allows it to rely more heavily on the various exceptions to the “15/22” requirement.\textsuperscript{33} Because the exceptions are broad, they can be applied to many foster care cases. Through reliance on the exceptions and judicial discretion, New York can easily delay parental termination beyond the twenty-two month period if deemed appropriate. Although both states’ statutes have the 15/22 rule and the exceptions, Illinois’s inclusion of the new unfitness standard goes far beyond what the federal ASFA mandates, and this Note argues, makes it too easy to terminates parental rights. Although ASFA is designed to limit foster care drift, Illinois’s unfitness standard goes too far.

Part I of this Note discusses the legal precedents, child development theories, and policies regarding “reasonable efforts” and parental termination that led to the enactment of ASFA. Part II examines Illinois’s and New York’s different responses to ASFA. This Part also introduces the debate over “congregate care” as an alternative for those children who may never be returned to a parent’s care, but whom are unlikely to be adopted. Part III argues


\textsuperscript{29} 750 ILL. COMP. STAT. 50/1 (D)(m-1)(2000).


\textsuperscript{31} Id.


\textsuperscript{33} Glenda Morris Rothberg, \textit{Foster Care & Adoption Reform Legislation: Implementing the Adoption and Safe Families Act of 1997}, 14 \textit{St. John’s J. Legal Comment.} 427, 430 (2000) (“The good news is that there is judicial discretion.”).
the New York system is more workable than the Illinois system given the complexities of the foster care system.

This Note concludes by arguing the federal government's rigid time frame for parental termination is overly simplistic because it makes it difficult for decision makers to account for various individual circumstances. A state foster care system is far too complicated to function effectively without the use of the exceptions like those embraced by New York. Illinois's statute makes it too easy to terminate parental rights. However, this Note suggests that despite policies dictating faster termination, there always will be children who are wards of the state. Foster care may not be the solution for all of them, and this Note suggests a reconsideration of group homes as an alternative.

I. HISTORY OF CHILD WELFARE LEADING UP TO ASFA

The proper role of the government in regulating child welfare is affected by prevailing notions of federalism and family autonomy. This Part examines historical conceptions of the government's role in the intimate family sphere. Foster care systems were traditionally administered by the states but changing demands on the foster care system led to federal involvement starting in the 1970s. Federal oversight expanded significantly in 1980 with the passage of the Adoption Assistance and Child Welfare Act ("AACWA") and continued with ASFA. It was with these measures that the "best interest of the child" standard came to govern parental termination decisions. This part also introduces the highly influential book, Beyond the Best Interest of the Child, that, by emphasizing the need for stability in the rearing of young children, led to an emphasis on permanent placements for children.

A. Family Law as a State Issue

Although not necessarily revolutionary on its face, a federal act addressing child welfare signaled a significant shift in traditional child welfare policy because family law had historically been treated as a state issue. The framers of the Constitution designed a government of dual sovereignty in which states would have significant control over the "lives, liberties and properties of the peo-

34. This is the acronym for the Adoption Assistance and Child Welfare Act of 1980 discussed infra in the text accompanying footnotes 87-108.
ple," whereas the federal government would have power only over national issues. Those powers were to be limited and enumerated by the Constitution. However, through the Commerce Clause, the Constitution does grant Congress some power over local affairs. Although the potential elasticity of the Commerce Clause was evident at the founding, the reach of the clause became apparent during the New Deal.

Congress' power under the Commerce Clause had been interpreted by the United States Supreme Court as virtually limitless until the recent case of United States v. Lopez, in which the Court invalidated the Gun-Free School Zones Act. This federal act

36. The Federalist No. 45 (James Madison) (Clinton Rossiter ed., 1961)
37. Id.
38. U.S. Const. art. 1, § 8 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .").
39. The New Deal is the general term used for President Franklin Delano Roosevelt's reforms. In order for much New Deal legislation to be passed, the scope of congressional power needed to be broadened. See John W. Blum et al., The National Experience: A History of the United States 706-07 (1993). This was largely done through a broad reading of the Commerce Clause. Beginning in 1937 with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that a labor stoppage in Pennsylvania would have a substantial effect on interstate commerce and thus could be regulated by Congress), the Supreme Court showed a willingness to uphold commerce-based laws. See generally Wickard v. Fillburn, 317 U.S. 111 (1942) (using the cumulative effect theory to set quotas on all wheat, including that which would be consumed on the farm where it was grown); U.S. v Darby, 312 U.S. 100 (1941) (holding that the Tenth Amendment will no longer act as an independent limitation on congressional authority over interstate commerce).

Another significant development in the Supreme Court at this time was the Court's refusal to continue invoking vague notions of liberty via substantive due process to strike down progressive state and federal legislation. For a more complete discussion of this development, see, e.g., Kevin McNamee, Comment, Do as I Say and Not as I Do: Dickerson, Constitutional Common Law and the Imperial Supreme Court, 28 Fordham Urb. L.J. 101, 1299 n.382 (2001).
40. See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964) (holding that "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce"); Katzenbach v. McClung, 379 U.S. 294 (1964) (holding that local activities in the aggregate can affect interstate commerce).
criminalized handgun possession in proximity to a school. The *Lopez* Court held that the statute exceeded Congress' authority under the Commerce Clause. Specifically, Chief Justice Rehnquist wrote, "[U]nder the Government's . . . reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power." Thus, Congress' legislation of family affairs would seem to "signal the falling of the final outpost of federalism." *Lopez* would seem to assert that legislation pertaining to child welfare belongs under state regulation.

Although family law traditionally has been the domain of the states, a desperate need for change prompted the federal government's interference. Furthermore, the financial incentives offered through ASFA raise issues of conditional spending power. In *South Dakota v. Dole,* the Supreme Court held Congress is entitled to influence state policy through the conditional grant of federal funds. In his opinion, Chief Justice Rehnquist emphasized the scope of the spending power is limited:

The spending power is of course not unlimited, but is instead subject to several general restrictions. . . . [First] the exercise of the spending power must be in pursuit of the general welfare. In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second . . . [if] Congress desires to condition the States' receipt of federal funds, it must do so

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43. Id.
44. Adler, *supra* note 35, at 198. In summary, the majority in *Lopez* made this statement:

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states" and that to hold otherwise "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local. *Lopez,* 514 U.S. at 567-68.

45. Although the legal theories behind the federal/state bifurcation is outside the purview of this Note, Adler's essay, *supra* note 35, discusses various analyses including feminist and liberal perspectives.

46. These changes are discussed *infra* at text accompanying notes 87-108.
47. 483 U.S. 203 (1987) (upholding a federal statute directing the Secretary of Transportation to withhold a portion of federal highway funds from states that do not prohibit the purchase of alcohol by those under the age of twenty-one).
48. *Id.* at 208.
unambiguously . . . . Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs. Finally . . . other constitutional provisions may provide an independent bar to the conditional grant of federal funds. 49

Child welfare clearly is intended to "serve general public purposes," and thus the conditional spending offered by ASFA certainly would be upheld under this test. Further, all fifty states have enacted legislation in response to ASFA. 50 This certainly suggests that Congress' unambiguously conditions the state's response. The third prong to the test is the hardest to quantify. There needs to be a minimal nexus between the purpose for which the spending is granted and the benefits it will provide. 51 Whether federal funding incentives will, in fact, lead to a rehabilitation of the foster care system remains to be seen.

Both Lopez and Dole examine the tension between the autonomy of the states and the federal government's right to influence state policy. Although these cases indirectly inform analysis of congressional action in child welfare policy, the Supreme Court has also directly addressed the termination of parental rights in three different cases. 52 All three cases reiterate the fundamental importance of the family 53 and the privacy protections the family relationship warrants. 54 Of course, by putting a premium on privacy,

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49. Id. at 207-08 (citations omitted).
50. See collected statutes supra note 27.
51. A court would likely find the minimal nexus necessary between wanting states to facilitate the adoption of more children, and providing financial incentives if they do.
52. M.L.B. v. S.L.J., 519 U.S. 102 (1996) (holding that Mississippi may not condition appeals from parental rights termination cases on the affected parent's ability to pay record preparation fees); Santosky v. Kramer, 455 U.S. 745 (1981) (holding that "clear and convincing" evidence is constitutionally required in parental termination proceedings); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (holding that appointment of counsel for indigent defendants in parental status termination proceedings is not routinely required by the Constitution and should be determined on a case-by-case basis).
53. M.L.B., 519 U.S. at 128 ("To destroy permanently all legal recognition of all parental relationship[s] . . . [is] among the most severe forms of state action.") (citation omitted); Santosky, 455 U.S. at 753 ("[T]his Court[] [has] historically recognized] that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."); Lassiter, 452 U.S. at 27 (holding that "[a] parent's interest . . . is a commanding one.")
there is an underlying assumption "that, left to their own devices, family members generally can be trusted to act in one another's best interests." This is often not the case in parental termination proceedings and, in these circumstances, the court is required to pass judgment on the independent interest of the children. In order to justify this intrusion, the Supreme Court, in *Lassiter v. Department of Social Services of Durham City*, agreed that the nature of due process in parental rights termination proceedings turns on a balance of three factors: the private interests affected by the proceeding; the risk of error created by the state's chosen procedure; and the countervailing governmental interest. This test remains relevant under ASFA and will be discussed in part III when the approaches of New York and Illinois are analyzed for their strengths and weaknesses.

**B. Psychological Parent Theory**

Permanency planning in foster care was largely a response to the psychological parent theory developed by Joseph Goldstein, Anna Freud, and Albert J. Solnit. In their book, *Beyond the Best Interests of the Child*, the authors focused on the selection and manipulation of a child's external environment as a means of "improving and nourishing his internal environment." The authors set forth the premise that the "law must make the child's needs paramount." Their view challenged the transient nature of the child placement system as it existed at the time they were writing.

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55. *Id.* at 583.
57. These factors are taken from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).
59. This term is used to describe the emphasis on the importance of a child having a permanent home. Under permanency planning, a child should either be adopted or returned to her parents. They should not remain in the purgatory of foster care any longer than necessary.
60. DeMichele, *supra* note 30, at 745.
62. *Id.* at 7.
63. *Id.*
64. *Id.* at 43.

The procedures of child placement are not designed to assure a prompt final decision. The process is characterized by extended periods of uncertainty caused by overcautious and overworked administrative agencies; by courts with overcrowded dockets, extended and oft postponed hearings; and by
Beyond the Best Interests of the Child emphasizes the import of having a permanent family to a child's emotional, intellectual, and moral development.\textsuperscript{65} Children's needs change constantly as they develop.\textsuperscript{66} This necessitates stability with regard to their care.\textsuperscript{67} Children's sense of time is far more egocentric than adults; they do not easily tolerate "postponement of gratification;" they are sensitive to being separated from those they care about.\textsuperscript{68} This becomes even more marked in foster care situations when a child's loyalties and affections are often torn.\textsuperscript{69} These conflicts are exacerbated since children do not develop a sense of the importance of blood-tie relationships until they are older. When children are young, they form their primary attachments based on day-to-day interactions.\textsuperscript{70} By having continuous contact with one adult who meets their needs for "physical care, nourishment, comfort, affection, and stimulation," children learn that they are valued and wanted.\textsuperscript{71}

The authors use the term "psychological parent" to describe the stable relationship between child and caretaker.\textsuperscript{72} It is very hard to build such a bond in foster care because foster care is designed to be temporary. Foster parents are wary about becoming too attached to their foster child.\textsuperscript{73} Thus the foster care system can never offer a child the necessary psychological parent relationship since judges who are inclined to procrastinate before rendering their decisions at trial or on appeal.

\textit{Id.}  
\textsuperscript{65} \textit{Id.} at 10.  
\textsuperscript{66} \textit{Id.} at 11.  
\textsuperscript{67} See \textit{id.}.  
\textsuperscript{68} \textit{id.}.  
\textsuperscript{69} See \textit{id.} at 12.  

Unlike adults, who are generally capable of maintaining positive emotional ties with a number of different individuals, unrelated or even hostile to each other, children lack the capacity to do so. They will freely love more than one adult only if the individuals in question feel positively to one another. Failing this, children become prey to severe and crippling loyalty conflicts.

\textit{Id.}  
\textsuperscript{70} \textit{Id.} at 12-13.  
\textsuperscript{71} \textit{Id.} at 17.  
\textsuperscript{72} \textit{Id.} at 19.  

Whether any adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

\textit{Id.}  
\textsuperscript{73} \textit{Id.} at 24. ("So far as the adults are concerned, it implies a warning against any deep emotional involvement with the child since under the given insecure circumstances this would be judged as excessive.").
children are moved from home to home without enough time to bond to one caregiver.

*Beyond the Best Interests of the Child* proposes that placements should provide the least detrimental foster care alternative available to safeguard children's growth and development. The authors offer two guidelines: (a) placement should safeguard the child's need for continuity of relationships, and (b) child care placement "decisions must take into account the law's incapacity to supervise interpersonal relationships and . . . [difficulty in making] long-range predictions.”

The psychological parent theory, widely accepted by policymakers, is not without critics. The soundness of Goldstein, Freud, and Solnit's research techniques have been called into question for reflecting cultural biases, being inapplicable to older children, and being based on the authors' own agenda. The theory also has been criticized because emphasizing a single psychological parent

74. *Id.* at 32-35.

[C]hild placement [should] be final and unconditional and . . . pending final placement a child must not be shifted to accord with each tentative decision. This means that all child placements, except where specifically designed for brief temporary care, shall be as permanent as the placement of a new born with its biological parents.

*Id.* at 35.

75. *Id.* at 49.


78. Davis, *supra* note 77, at 359 ("Studies across five cultures have shown that 'after the universal emergence of distress at separation from mother, at about [one] year of age, . . . there is considerable diversity among cultures in its decline in the second and third years of life.'").

79. *Id.* at 353.

80. Johnson, *supra* note 77, at 406 ("[T]he male-dominated mental health professions inherently favored Bowlby's [early theorist whose work influence the psychological parent concept] theory because it reinforced the notion that it was best for the mother to stay home and raise her children.").
does not recognize the importance of the family unit (i.e., siblings, fathers) as a whole.\textsuperscript{81}

Specifically, applying the psychological parent theory to foster children reveals the theory's possible weaknesses. In an influential article, Marsha Garrison weighs the dangers of possible conflict between foster parents and natural parents against the potential disadvantages of losing a parent altogether.\textsuperscript{82} She considers various studies\textsuperscript{83} and concludes that visitation with natural parents, even if only sporadic, is beneficial.\textsuperscript{84} Of course, for such visits to work best, both the natural and foster parents should cooperate. However, even though antagonism between the natural and foster parents can be troubling to a young child, ceasing contact is not necessarily better.\textsuperscript{85} Garrison concludes by suggesting a court should only consider termination if it has “first deprived the natural parent of legal custody and appointed a permanent guardian in his stead. Even then, the court may not terminate other parental rights unless it finds that the child would suffer specific, significant harm which cannot be averted by any less drastic alternative.”\textsuperscript{86}

\begin{itemize}
  \item \textsuperscript{81} Id. at 407 (“Although Goldstein, Freud, and Solnit acknowledge that each parent—father and mother—may be a ‘psychological parent,’ the theory does not appreciate the myriad of caretaking relationships a child may enjoy.”).
  \item \textsuperscript{82} See Garrison, supra note 76, at 460-69.
  \item \textsuperscript{83} Garrison cites to such studies as Cowen & Stout, A Comparative Study of the Adjustment Made by Foster Children After Complete and Partial Breaks in Continuity of Home Environment, 9 Am. J. Orthopsychiatry 330 (1939) in Garrison, supra note 76, at 461 n.170; Van der Waals, Former Foster Children Reflect on Their Childhood, 7 Children 29 (1960) in Garrison, supra note 76, at 461 n.169; E. Weinstein, The Self Image of the Foster Child (1960) in Garrison, supra note 76, at 462 n.177; David Fanshel & Eugene Shinn, Children in Foster Care 483 (1978) in Garrison, supra note 76, at 423 n.4.
  \item \textsuperscript{84} Garrison, supra note 76, at 466-67 (“Thus, visitation by natural parents can aid the child in elevating his self-esteem, understanding and coping with his parents’ problems, and effectively mourning the loss of his natural parents. Both psychoanalytic theory and empirical data suggest that a visiting parent is better than no parent at all.”).
  \item \textsuperscript{85} Id. at 467-68.
  \item Gone need not mean forgotten. The child may still cling to an alliance with the absent parent that prevents him from becoming deeply involved in the foster home; he may feel abandoned and rejected. Rather than resolving the child’s problems, cessation of contact with the natural parent is likely only to bury them . . . [I]t is better for the child to have to cope with real parents who are obviously flawed in their parental behavior, who bring a mixture of love and rejection, than to reckon with fantasy parents who play an undermining role on the deeper level of the child’s subconscious.
  \item \textsuperscript{86} Id. at 474.
  \item Id. (citations omitted).
\end{itemize}

Although the government has recognized its inherent *parens patriae* role as "the ultimate protector of children," this role historically has fallen within the purview of state law rather than federal law. Throughout the twentieth century, directing the child welfare system was the responsibility of states, localities, and private religious and philanthropic organizations. It was not until the mid 1970s that an increased awareness of the deficiencies of the foster care system led to congressional action. The result was the Adoption Assistance and Child Welfare Act of 1980 ("AACWA").

AACWA attempted to address the "burgeoning problem of 'foster care drift.'" More than 500,000 children were in foster care and many of them were unlikely to find a permanent home; they were "drifting" between multiple foster care homes for extended periods of time. AACWA sought to lower the number of children in foster care and shorten their stay within the system by (1) keeping families together whenever possible by providing them with the support they needed, and (2) finding permanent adoptive homes for children who could not be reunited with their parents. Further, AACWA mandated that: "reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B)

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87. Translated from Latin, meaning: "parent of his or her country." Black's Law Dictionary 1137 (7th ed. 1999). Traditionally, this refers to the role of the state as sovereign and guardian of persons under legal disability, such as juveniles. Id.

88. Gray, supra note 25, at 477.

89. While the Fourteenth Amendment favors the family in issues relating to domestic matters, this presumption is balanced against the state's compelling interest in the well-being of its citizens. Mary O'Flynn, The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse, 16 J. Contemp. Health L. & Pol'y 243, 248 (1999). States have historically provided services for abused and neglected children and have been able to legislate child welfare. Id. It was not until the Social Security Act was passed in 1935 that the foundation was set for federal funding for social services. Furthermore, it was not until 1974, after the Child Abuse Prevention and Treatment Act was passed, that the federal government intervened in child welfare policy. Id.


91. Gray, supra note 25, at 477.

92. Id. at 477-78.

93. Gordon, supra note 90, at 643.

94. Id.

to make it possible for the child to return to his home.\textsuperscript{996} Less than a decade after AACWA was passed, the number of children in foster care exploded.\textsuperscript{97} Although there were certainly outside factors such as crack cocaine use, AIDS, homelessness, and teenage pregnancies\textsuperscript{98} that contributed to this increase, it was apparent AACWA was not working.

One of the problems in implementing AACWA was the interpretation of the term "reasonable efforts." Because the term was not defined in the federal regulation,\textsuperscript{99} AACWA left to the discretion of state court judges the determination of the reasonableness of state action.\textsuperscript{100} Judges were supposed to receive formal guidance from the Department of Health and Human Services (HHS),\textsuperscript{101} but HHS never created set guidelines so judges were often left to their own discretion.\textsuperscript{102} Thus, at best, what constituted reasonable efforts varied according to individual circumstances\textsuperscript{103} and the amount of available funding for both parental social ser-

\begin{footnotesize}
\begin{itemize}
  \item 96. Id.
  \item 97. David J. Herring, Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children, 26 Loy. U. Chi. L.J. 183, 190 n.50 (1995). "The number of children in foster care had increased from 280,000 at the end of fiscal year 1986 to 407,000 children at the end of fiscal year 1990." Id. Furthermore, "by the end of fiscal year 1989, 39.5% of the children living in substitute care had been in care for more than two years, 15.5% had been in care between two and three years, 13.4% had been in care between three and five years, and 10.6% had been in care for five years or more." Id.; e.g., Staff of House Comm. On Ways and Means, 103d Cong., Overview of Entitlement Programs: 1994 Green Book, H.R. Doc. No. 103-27, at 639 tbl.14-14 (showing an increase from approximately 34,450 foster children in 1970 to more than 100,000 in 1980). One shocking statistic showed that the number of children in the foster care system was greater than the entire population of the state of Wyoming. R. Bruce Dold, Giving Kids a Little More "Wiggle Room," Chi. Trib., Dec. 12, 1997, at 27.
  \item 99. Pagano, supra note 18, at 243.
  \item 101. Continuing Crisis in Foster Care: Hearing Before the Select Comm. On Children, Youth, and Families of the House Comm. On Ways and Means, 100th Cong. 3 (1987) (statement of Rep. George Miller) (recognizing that the act’s success hinged on “vigorous enforcement of the legal safeguards and oversight of the program by the Department of Human and Health Services”).
  \item 102. See generally Raymond, supra note 100, at 1240 (discussing “how HHS’s unwillingness to aggressively enforce the judicial determination requirement has allowed states to circumvent congressional intent under AACWA”).
  \item 103. Id. at 1245.
\end{itemize}
\end{footnotesize}
vices (in the case of reunification) and appropriate foster care placement (in the case of adoption). At worst, a finding of reasonable efforts was a mere formality. One study showed that child welfare agents devoted as little as thirty seconds to deciding whether reasonable efforts were shown.104 Many states went so far as to preprint court orders that included check boxes so judges would not forget to include the words "reasonable efforts" in their orders.105

Thus, as the reasonable efforts requirement grew increasingly ineffective, the National Commission on Children concluded in 1991 that: "[i]f the nation had deliberately designed a system that would . . . abandon the children who depend on it, it could not have done a better job than the present child welfare system."106 It was the failure of AACWA that led to such high expectations for the Adoption and Safe Families Act, which was lauded as a "revolution"107 that would be "to the abused and neglected children in our nation's foster-care system what the Voting Rights Act was to black Americans in 1965."108

D. The Adoption and Safe Families Act

The Adoption and Safe Families Act ("ASFA" or "the Act") was, at least partially, an outgrowth of the Clinton Administration's focus on issues affecting families and children.109 The Act originally was introduced in the House Ways and Means Committee by Rep-
resentatives Dave Camp (R-Mich.), Barbara B. Kennelly (D-Conn.), and E. Clay Shaw (R-Fla.), and was called the Adoption Promotion Act of 1997. Lead sponsors in the Senate included conservative Republican Mike DeWine, moderate Republican John Chafee, and liberal Democrat Jay Rockefeller. It had tremendous bipartisan support—organizations as diverse as the Heritage Foundation and the Children’s Defense Fund endorsed it; the House approved the bill 416 to five, and the Senate did not even call the roll.

Limiting the time period between when a child enters the state foster care system and the initiation of termination proceedings involves a delicate balance between promoting family preservation and reunification and ensuring the safety and health of children. As originally introduced, ASFA required states to begin termination proceedings for any child under ten who had been in foster care for eighteen of the past twenty-four months. After some debate, the time frame was shortened to twelve of the past eighteen months. Congress eventually split the difference by deciding that fifteen months was an appropriate time period.

The purpose of ASFA is “[t]o promote the adoption of children in foster care.” Thus, ASFA pushes states to implement legisla-

112. For information on The Heritage Foundation, see http://www.heritage.org/mission.html (“The Heritage Foundation is a research and educational institute—a think tank—whose mission is to formulate and promote conservative public policies.”).
113. For information on the Children’s Defense Fund, see http://www.childrensdefense.org/aboutus.htm (“CDF provides a strong, effective voice for all the children of America who cannot vote, lobby, or speak for themselves. We pay particular attention to the needs of poor and minority children and those with disabilities.”).
116. Id. at S12,198 (daily ed. Nov. 8, 1997).
117. 143 Cong. Rec. H2014 (daily ed. Apr. 30, 1997) (Representative Kennelly referred to this balance as “a central dilemma in the field of child protection.”).
118. Id. at 2016 (statement of Rep. Shaw).
119. Id. at 2027 (statement of Rep. Tiahrt).
120. Of course, as with many compromises, “[s]omething was lost in the effort to please all parties.” Shalini Ahuja et al., My Law’s “Flawed,” Says Richard Gelles, Child Welfare Watch, Winter 2000, No. 6, at 5. Richard Gelles, the “father” of ASFA, is concerned that the timelines are not customized for children depending on their ages. Id. Gelles feels that: “[T]he termination timetable should be much shorter for infants and toddlers—six months, in most cases. But he also says there shouldn’t be any timetable at all for children in their teens.” Id.
Termination favoring expedited parental rights and adoption proceedings. Although ASFA continues the federal family preservation and support systems initially enacted with AACWA,\textsuperscript{122} there is a definite shift in focus from AACWA’s emphasis on the preservation and reunification of families. One of the most pronounced changes to AACWA is ASFA’s effort to define the reasonable efforts requirement.\textsuperscript{123} Although not offering an explicit definition, ASFA does provide that “in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child’s health and safety shall be the paramount concern.”\textsuperscript{124} Thus, the Act does not articulate a definition, but does seek to clarify the requirement.

Further, states are not required to make reasonable efforts if a court has determined that a parent of a child in foster care has committed specific violent crimes against any of their children.\textsuperscript{125} Reasonable efforts are also not necessary if the parent has subjected a child to “aggravating circumstances” such as “abandonment, torture, chronic abuse, and sexual abuse” as defined by state law.\textsuperscript{126} In order to speed up the judicial process, once a court determines that reasonable efforts to preserve and reunify families are not required, the state must hold a permanency hearing within thirty days and make a “reasonable effort” to find the child a permanent placement.\textsuperscript{127} Additionally, “reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child.”\textsuperscript{128} ASFA also emphasizes concurrent planning, meaning the state must be making

\begin{itemize}
  \item \textsuperscript{122} 42 U.S.C. § 671 (2000).
  \item \textsuperscript{123} 42 U.S.C. § 671(a)(15) (2000).
  \item Such crimes include:
    \begin{itemize}
      \item (I) Committed murder . . . of another child of the parent
      \item (II) Committed voluntary manslaughter . . . of another child of the parent
      \item (III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter
      \item (IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent.
    \end{itemize}
  \item \textsuperscript{126} 42 U.S.C. § 671(a)(15)(D)(i) (2000) (“[T]he parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse.”).
\end{itemize}
alternative arrangements for a child while still trying to rehabilitate the natural parents.\(^\text{129}\)  

ASFA seeks "to strike a balance between family reunification and preservation with the health and safety of children."\(^\text{130}\) ASFA addresses three major concerns:\(^\text{131}\) (1) the impracticality of family reunification;\(^\text{132}\) (2) "foster care drift";\(^\text{133}\) and (3) the need to increase adoptions of foster children unable to return to their parents.\(^\text{134}\)  

The Act also seeks to promote adoption.\(^\text{135}\) States can no longer allow inter-jurisdictional barriers to delay adoptions\(^\text{136}\) and must

\(^{129}\) 42 U.S.C. § 671(a)(15)(F) ("[R]easonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts of the type [made to preserve and reunify families."]"). Douglas H. Reiniger defines concurrent planning as: "From initial placement, social workers must simultaneously work both toward discharge to parent and adoptive planning. Efforts to recruit pre-adoptive homes and place foster children in pre-adoptive homes must be commenced as soon as a child is placed in foster care." Douglas H. Reineger, The Adoption and Safe Families Act/ New York Practical Implications for Foster Care Agencies and Caseworkers, 182 PLI/CRIM 647, 650 (1999). This is distinguished from the earlier practice of contingency planning: "a linear approach to planning that emphasized the primacy of parental rights." \(\text{Id.}\) at 649.  

\(^{130}\) Gray, \textit{supra} note 25, at 478.  

\(^{131}\) Gordon, \textit{supra} note 90, at 650-51. Gordon presents these three major concerns and the series of measures enacted to address them. \(\text{Id.}\)  

\(^{132}\) \(\text{Id.}\) at 646-47.  

Experts, activists, and journalists told horror stories of state agencies that had sent children home to parents who had savagely beaten, prostituted, or tried to kill them or their siblings . . . . Some commentators treated these cases as indicia of the larger failure of family preservation programs to achieve measurable results. The more common view was that family preservation could still be useful in some circumstances, but not when parents had crossed a line that made them dangerous to their children. \(\text{Id.}\)  

\(^{133}\) See Del A. v. Roemer, 777 F. Supp. 1297, 1313 (E.D. La. 1991) (defining and discussing "foster care drift").  

\(^{134}\) See Gordon, \textit{supra} note 90, at 649. Gordon writes,  

[S]o adoption now enjoyed fervent bipartisan support. With the President’s help, Republicans had already pushed through Congress an adoption tax credit and a tightening of the Multi-Ethnic Placement Act, banning delays in the adoption process that result from race-based matching of parents and children. President Clinton had also announced a national goal of doubling the number of children adopted from foster care to 54,000 by the year 2002. Yet both sides agreed they could do more. Although new data showed an increase in the number of public sector adoptions, such adoptions had not kept pace with the dramatic growth in the foster care population over the last decade. Congress hoped to reduce foster care drift largely by increasing adoptions.  


document their efforts to search for adoptive parents through adoption exchanges. ASFA also creates financial incentives to increase adoption of foster children.

II. NEW YORK AND ILLINOIS: DIFFERENT APPROACHES TO ASFA’S TERMINATION OF PARENTAL RIGHTS PROVISION

In keeping with the federal statute, both New York and Illinois have adopted the "15/22" termination provision as well as the three exceptions. However, these states seem to have divergent goals. Whereas New York puts a premium on the reunification of the natural family, Illinois emphasizes the importance of adoption. This Part presents a chronological view of both New York and Illinois’s foster care policies. It then considers their different approaches to responding to ASFA. This Part also introduces congregate care as a possible solution for children who are not adoptable, but are not able to be returned to their parents’ care.

A. New York’s Approach to ASFA

1. History of New York Statute

New York began requiring permanency planning as part of their child welfare policies as early as the 1970s. The present statute, which implements ASFA’s “15/22” termination requirement, was enacted on February 11, 1999. The statute was applied retroactively to all children currently in foster care.

“Pending agency adoptions and private-placement, pre-adoption certification proceedings are also covered.”

The new provisions do not abolish old family court practices, but rather add “a layer of responsibility” to them. Family court workers hope that many current laws and practices can be used to

138. 42 U.S.C. § 673b(d)(1) (2000) (providing for incentive payments payable to the state of $4,000 per child for the increase in the number of foster children adopted per year over the average number prior to the passage of the Act, and an additional $6,000 per “special needs” adoption). See also 42 U.S.C § 671(a)(21) (2000) (defining “special needs” as requiring “medical, mental health, or rehabilitative care”).
139. DeMichele, supra note 30, at 738 n.99.
140. N.Y. Soc. SERV. LAw § 358-a (McKinney 1999).
143. Id.
144. Rothberg, supra note 33, at 428.
satisfy the federal requirements, thus avoiding confusing changes for courts and participating agencies. There is tremendous pressure on New York (and on all the states) because federal funding is conditioned on enactment of provisions set out by the federal statute.

2. Provisions of New York’s Statute

New York’s ASFA legislation shifts New York’s focus away from “the paramount rights of the biological parent” and toward “the well-being and best interests of the child.” The legislative intent behind the adoption of stringent time constraints was to pressure parents to rehabilitate faster so that their children could be returned to their custody. The impetus is made stronger by the fact that a parent’s effort also affects the custody of her other children. As discussed earlier, under ASFA, child welfare agencies are mandated to engage in concurrent planning. However, the New York statute does not provide any guidelines or standards for concurrent planning. The law, as written, still dictates that the state’s first obligation is to help the family reunite through appropriate services. The Family Court Advisory Committee has proposed legislation that would obligate “local departments of social

145. Id.
146. Id. (“Right now the courts and people who work in the courts are trying to figure out what the statute says, how they can implement the statute.”).
147. 42 U.S.C. § 679b(4) (2000) (providing for necessary regulations so that state performance may be measured as a condition to receiving federal funds).
149. Rothberg, supra note 33, at 428.
It [the statute] pressures parents whose children enter the social services system to work diligently to get their children back, because they are at a greater risk now that their children will be placed in another setting, which will become a permanent setting for the child through a variety of mechanisms that are enumerated in the statute.

Id.
150. Family Court Advisory and Rules Comm., N.Y. State Unified Court Sys., Report of the Family Court Advisory and Rules Committee to the Chief Administrative Judge of the Courts of the State of NY 14 (1999) [hereinafter JUDICIAL MEMORANDUM] (“Moreover, termination of the parental rights of one child may constitute grounds for an authorized agency to seek judicial authorization to cease reunification efforts with respect to siblings.” This means that if a parent loses rights to one of their children, all efforts to reunite them with others will cease.).
152. N.Y. Soc. Serv. Law § 384-b(1)(iii) (McKinney 2001). This law is very different in scope from the federal ASFA which is meant to “promote the adoption of children.” Pub. L. No. 105-89, 111 Stat. 2115 (1997).
services, and, as applicable, authorized child care agencies, to gather information necessary for the formulation and effectuation of permanent plans promptly when a child enters care, and on an ongoing basis thereafter.\textsuperscript{153}

The new statute mandates "permanency hearings" reflecting the substantial judicial involvement necessary to monitor the movement of children out of foster care.\textsuperscript{154} During these annual hearings, the court is able to review the permanency plan for a foster child and decide if the plan is being implemented properly.\textsuperscript{155} The decisions that must be made include whether the child will be returned to the parent; recommended for parental termination; placed for adoption; or referred for legal guardianship or some other planned permanent living arrangement.\textsuperscript{156} If there is a finding that reasonable efforts were made to reunite the family, the hearings will finalize the permanent placement arrangement.\textsuperscript{157} Permanency hearings must occur within the first twelve months after the child entered care,\textsuperscript{158} regardless of whether the placement was voluntary or involuntary.\textsuperscript{159} The court has the option to suspend the requirement if reasonable efforts were made to reunite the family.\textsuperscript{160} If the court decides reasonable efforts are not required, then the hearing must be held within thirty days.\textsuperscript{161} Although these changes are meant to increase judicial involvement and responsibility, they have been interpreted by some as limiting the services and assistance that parents receive.\textsuperscript{162}

Reasonable efforts is only one of ASFA's three exceptions. Additionally, if there is a "compelling reason" for determining that termination would not be in the best interest of the child, the state

\textsuperscript{153} Judicial Memorandum, supra note 150, at 6.
\textsuperscript{154} N.Y. Soc. Serv. Law §§ 358-a(3)(b), 392(5-a) (McKinney 2001).
\textsuperscript{155} Rothberg, supra note 33, at 429.
\textsuperscript{156} N.Y. Soc. Serv. Law § 358-a (McKinney 2001).
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id. Within the context of concurrent planning, there are benefits to providing parents with an opportunity to voluntarily consider options for their children. See Madelyn Freundlich, Expediting Termination of Parental Rights: Solving a Problem or Sowing the Seeds of a New Predicament?, 28 Cap. U. L. Rev. 97, 107 (1999) (addressing policy reasons for allowing voluntary placement).
\textsuperscript{160} N.Y. Soc. Serv. Law § 358-a (McKinney 2001).
\textsuperscript{161} Id.
\textsuperscript{162} See Bernardine Dohrn, Foster Care & Adoption Reform Legislation: Implementing the Adoption and Safe Families Act of 1997, 14 St. John's J. Legal Comment. 419, 425 (2000) (referring to the no reasonable efforts exception as "creating confusion" and "offer[ing] the state an ever-expanding list of cases where no reasonable efforts are required.").
is not required to terminate within twenty-two months. Compelling reasons include: (a) the child has a permanency goal other than adoption; (b) there are insufficient grounds for filing a termination petition; and (c) the child is more than fourteen years old and will not consent to adoption.  

Because the courts are becoming more actively involved in the foster care system, the role of legal representation for children is becoming increasingly important. In a recent article, Marvin Ventrell considers the various models of legal representation for children, and finds that two traditional models exist. The first is the "pure attorney" model, in which the attorney represents the child as they would any other client. The second is, the "attorney guardian ad litem" model, in which the attorney represents what they consider to be the child's best interest. New York, according to Ventrell, has created a new model, which he refers to as the "child's attorney" model. This model recognizes:

[T]hat children are not simply little adults, and that we cannot simply act as attorneys in the traditional sense with no exceptions . . . . The model recognizes that you can give a child too much autonomy in the legal process and that children do not always know what is best for them.

This issue of legal representation of children becomes relevant under ASFA because if there is a finding that reasonable efforts are not necessary, lawyers will need to advocate much more aggressively because they will have less time to prepare and more to overcome. Thus, "the right to competent counsel is 'indispensable' for both parents and children both to protect the fundamental family interests at stake and to assist the court in making well-informed, reasoned decisions."  

Recently, Child Welfare Watch proposed a solution which includes the following provisions: (a) helping parents regain custody

165. Id. at 436.
166. Id.
167. Id. at 437.
168. Id. at 437-38.
169. Id.
170. JUDICIAL MEMORANDUM, supra, note 150, at 14.
of their children should be the main priority of the system;\textsuperscript{171} (b) the city's Administration for Children's Services must force agencies to provide more quality services to parents before termination proceedings begin;\textsuperscript{172} (c) agencies that have placed a high percentage of their children on the adoption track should be scrutinized closely;\textsuperscript{173} and (d) the exceptions to ASFA must be utilized "as vigorously as possible."\textsuperscript{174} These solutions were proposed after extensive interviews with people who work in New York City's child welfare system, and are indicative of how ASFA is being interpreted.\textsuperscript{175}

New York's emphasis in implementing ASFA remains on judicial discretion\textsuperscript{176} and the three exceptions.\textsuperscript{177} For example, at least one court has spoken out against ASFA's "one size fits all approach"\textsuperscript{178} because the court was concerned that the termination criteria would replace individualized determinations on a case. The New York system emphasizes individual consideration of each case, rather than speeding up hearings for the sake of efficiency.

**B. Illinois's Approach to ASFA**

1. *History of Illinois Statute*

 Unlike New York's policies, which had elements of permanency planning as early as the 1970s,\textsuperscript{179} Illinois child welfare policies had none until ASFA. The first Illinois law relating to the adoption of children was passed in 1867.\textsuperscript{180} It remained "relatively unaltered" until 1874, when revisions addressing the legal effect on the child's

\textsuperscript{171}. Shaluni Ahuja et al., *Recommendations & Solutions, Child Welfare Watch*, Winter 2000, No. 6, at 3. ("The city and its agencies need to recognize they are failing to do this fundamental job—and that many families will be wrongly split apart as a result of that failure.").

\textsuperscript{172}. Id. ("ASFA's great flaw is that it speeds up the clock on terminations without creating an equal mandate to pressure agencies to make energetic efforts on behalf of reuniting families.").

\textsuperscript{173}. Id. ("One of the most crucial indicators of an agency's commitment to reuniting parents with their kids is the percentage of children it places on the adoption track.").

\textsuperscript{174}. Id. (citing the most important exception as being reunification).

\textsuperscript{175}. Id.

\textsuperscript{176}. Rothberg, *supra* note 33, at 430 ("The good news is that there is judicial discretion.").


\textsuperscript{178}. *In re Adoption of Jonee*, 695 N.Y.S.2d 920, 925 (N.Y. Fam. Ct. 1999).

\textsuperscript{179}. DeMichele, *supra* note 30, 738 n.99.

\textsuperscript{180}. Id. at 730.
natural parents of the adoption were added. In 1907, the Adoption Act was amended so that parental unfitness was a requisite finding for entering an adoption decree. There were no “significant changes” to the Adoption Act until 1945 when revisions regarding prospective adoptive parents were added. The Act was altered again in 1959 to add an additional parental unfitness ground rendering a parent unfit if she had “neglected or mistreated her child.” In 1967, the Illinois General Assembly revised the Adoption Act of 1959 so that it no longer required a court to adhere to previous findings, decrees, orders, and judgments from other proceedings affecting or determining parental rights. This provision worked to slow down termination proceedings because the court could, effectively, start from scratch with each new hearing.

2. Provisions of Illinois Statute

In response to ASFA, the Illinois General Assembly enacted Senate Bill 1339 in June of 1998. The bill was drafted primarily by the Illinois Department of Children and Family Services (“DCFS”). DCFS incorporated parts of the bill into Section 2/13 of the Juvenile Court Act, which creates strict time limits to initiate parental rights termination proceedings. ASFA provisions are generally reflected in section 2/13, however, unlike AFSA, which initiates termination proceedings based on the time the child is in foster care, section 2/13 defines parental unfitness based on the child’s length of stay in foster care. These changes were enacted both “in compliance with and in response to” ASFA. Section

181. Id. at 730-31.
182. Id. at 731-32. The grounds included: “(1) depravity; (2) open and notorious adultery or fornication; (3) habitual drunkenness for the space of one year prior to the filing of the petition; (4) extreme and repeated cruelty to the child; (5) abandonment of the child; or (6) desertion of the child for more than six (6) months preceding the filing of the adoption petition.” Id.
183. Id. at 732.
184. Id. at 734.
185. Id.
186. Id. at 734-35.
187. Id. at 747-48.
188. For more information about DCFS, see http://state.il.us/dcfs/ab_about.shtml.
189. 705 ILL. COMP. STAT. 405/2-13 (4.5)(a) (2000).
190. Id.
192. DeMichele, supra note 30, at 749.
193. Id. at 750.
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2/13 includes ASFA’s fifteen of twenty-two months time limit. After filing a termination petition, the State Attorney must prove the parent is unfit under one of the state’s parental unfitness grounds.

Section 2/13 includes the same three exceptions as both the New York provision and the federal act. It also mandates concurrent planning “so that permanency may occur at the earliest opportunity. It states that consideration should be given so that if reunification fails or is delayed, the placement made is the best available placement to provide permanency for the child.” Like ASFA, Illinois defines reasonable efforts as making “the child’s health and safety . . . the paramount concern.” In addition, however, it uses the time line as a new ground for proving parental unfitness. The court can find parents unfit if their child has been in foster care for fifteen out of the past twenty-two months. Although this eases the state’s burden of proving a parent is unfit, parents can rebut this presumption of unfitness by showing that it is in the child’s best interest to be returned to the parent within six months from the date of the proceeding. Similarly, the time frame may be tolled if the court finds that no reasonable efforts were made by the state to reunite children with their birth parents.

Even with these exceptions, this new provision does not require the state to consider whether the parent is capable of, or interested in, parenting. Thus, because Illinois’s ASFA provisions go beyond what is required by ASFA, it is likely that Illinois will find more parents unfit than will other states.

Since the passage of ASFA, Illinois has led the states in the number of placements of children in permanent homes and has sig-

194. 705 ILL. COMP. STAT. § 405/2-13(4.5)(a) (2000).
196. 750 ILL. COMP. STAT. § 50/1(D) (2000).
197. See supra text accompanying notes 22-23.
201. DeMichele, supra note 30, at 755.
202. 750 ILL. COMP. STAT. § 50/1(D)(m-1) (2000). The statute requires a parent to make this showing by a preponderance of the evidence. Id.
203. Id.
204. Id.
205. DeMichele, supra note 30, at 755.
206. In 2000, Illinois was awarded $5.3 million dollars from the United States Department of Health and Human Services. This was a million dollars more than California (which ranked second) received. Press Release, Illinois Department of Child &
nificantly reduced the number of children in foster care.\textsuperscript{207} However, much of this is a result of adoption. Although the Illinois Department of Children and Family Services emphasizes that foster care is only a temporary solution and that the “ultimate goal”\textsuperscript{208} is to reunite the child with his birth parents, much more emphasis is placed on adoption.\textsuperscript{209} Many states’ programs emphasize family preservation programs; an Illinois study found such programs ineffective.\textsuperscript{210} Critics of the study argued that the failure of family preservation programs in Illinois was caused by a poorly run programs, not a fundamental flaw in the system. It appears that Illinois puts a lower priority on reunification than New York.

C. History of Congregate Care

New York and Illinois have legislated very different policies in reaction to ASFA’s timeline for termination of parental rights. This Part discusses the history of group homes in America. Congregate care facilities, historically called orphanages, were traditionally the most common care option for children not living with their parents.

In colonial America, most children who were wards of the state were either indentured or apprenticed.\textsuperscript{211} Some orphans worked in exchange for acquiring skills, food, and clothing until they reached the age of majority.\textsuperscript{212} Others lived in almshouses where they usually were mixed “with the ill, the insane, the elderly, and the crim-
While some of these children were orphans, many of them had parents who were too poor to care for them. By the 1830s, orphan asylums were widely thought of as the best option for substitute family care. Factors that influenced the growth of “orphan asylums” were largely the same as those contributing to urban growth. Industrialization and the accompanying labor wages left many families “unable to deal with any calamity they might face.” Canals and railroads, which made travel easier, facilitated both the spread of diseases (leading to an increase in mortality) and an increase in mobility (leading to an increase in desertions). Since people were less likely to live near relatives, family support was unavailable if an emergency were to arise; when parents needed help, instead of relying on family members, they began to leave their children at orphanages.

Before 1860, most orphanages were administered by Christian organizations. However, in the period after the Civil War, the states began to create large, publicly funded “Soldiers' Orphans' Homes.” By the Progressive Era, complaints mounted that asylums were too large and too institutional to be effective for fostering child development.

In 1909, President Theodore Roosevelt called the White House Conference On Dependent Children. The Conference was called “at the urging of several prominent reformers, none of whom was an advocate of orphan asylums.” The most influential conclusion of the Conference was that:

[C]hildren should not be removed from their parents simply because a family was poor. When it was necessary to remove children, they should be placed in carefully selected foster homes, which were deemed superior to institutions. Orphan asylums were a distant third choice; institutions, when used, should be for temporary care of children only, and if possible in small cot-

213. Id.
214. Id. at 4.
215. Id. at 20-21.
216. Id. at 21.
217. Id. at 21-22.
218. Id.
219. Id. at 25.
220. Id. at 27.
221. The years between 1900 and 1920 are called the Progressive Era because it was a time of widespread societal reform. E.g., BLUM, supra note 39, at 553-609.
222. HACST, supra note 211, at 37.
223. Id. at 37-38.
224. Id. at 38.
tages rather than crowded congregate asylums. Annual state inspections should be made of every kind of agency that cared for dependent children. In effect, orphan asylum managers were told that they were the last resort.225

Despite criticism, orphanages continued to be founded.226 These group homes were defended on the grounds that although good private homes might be optimal they were difficult to find.227 "Orphan asylums were needed to temporarily care for children while their families weathered harsh economic times, or while the asylum or another agency was trying to place them in homes."228 Foster care was becoming more common, but it did not replace institutional care in the 1910s and 1920s.229 The passage of Aid to Dependent Children as part of the Social Security Act of 1935230 contributed to the demise of the orphanage, for it enabled poor children to remain in their mother’s care.231 Before the passage of "Mother’s Pensions," children were removed from parents who could not support them. These pensions enabled single mothers to not work outside the home and instead stay home and care for their children.

Today, most group homes care for children with special needs.232 Group homes for other children largely fell out of favor because no matter how they were run they remained institutional.233 By necessity, group homes were highly structured and organized, leaving little room for orphans to develop individuality or to receive special attention.234 The policy of group homes once again gained the attention of policy makers when in 1994 Newt Gingrich, Speaker of the House of Representatives, suggested that the money saved by cutting welfare benefits to unwed teen mothers could be used by

225. Id.
226. Id. at 40.
227. Id.
228. Id.
229. Id. at 50.
232. With the development of welfare programs, many children were maintained in their parent’s homes with public subsidies. Many orphan asylums responded by shifting away from caring for ordinary children and instead focusing on children with special needs. See HACSI, supra note 211, at 46.
233. See id. at 148.
234. Id. at 148-49.
the states to fund orphanages. Although the idea was dismissed by some as being "Dickensian" and "unbelievable and absurd," it has been supported by others because orphanages offer greater continuity and stability than foster care since there is less moving around.

III. The Best Interests of the Child Cannot Always Be Determined in Twenty-Two Months

The "15/22" provision was enacted to help eliminate foster care drift, but a strict time frame raises concerns. First, it is possible that, given more time, a greater number of parents could rehabilitate themselves. Second, termination is largely irrelevant if the child is not ultimately adopted. New York and Illinois have divergent preferences regarding the best solution to these difficult issues. The New York statute may err on the side of keeping a child in foster care too long before termination of parental rights, whereas the Illinois statute leaves open the possibility that parental rights will be terminated too quickly. However, termination cannot automatically solve an abused or neglected child's problems. It is only one piece of the solution. The more difficult issue is what should happen to children who are "liberated" from their parents, but are still not adopted.

This Part first discusses why New York's ASFA legislation provides a better solution to the foster care problem than does Illinois's. It then argues that termination is often just the beginning of the problem, and that states that equate termination with success are oversimplifying the issue. Although termination is helpful to children who will be adopted, there is also a need for alternative, permanent arrangements for the many foster care children for whom adoption is not a likely outcome. One such possibility is congregate care, or what was historically known as the orphanage system.

236. Mitchell B. Pearlstein, Orphanage Idea Gets Better Reception, Star Trib. (Minneapolis), May 24, 2000, at 21A.
237. See id.
A. New York Provides a Better Solution Than Illinois

The New York statute gives the courts more discretion to consider the individual circumstances of each family. If courts have the discretion, resources, and time to consider not only the traditional factors such as violence or abuse, as well as the likelihood of a child being adopted and the present involvement of the natural parent, terminations may occur less often or over a longer period of time. However, it is not the number of terminations by which a state’s “success” should be judged. These are decisions that should be carefully researched and considered. The best interest of the child must remain the primary concern. Although the phrase “best interest of the child” has become linked to the permanency movement, there are situations in which the “best interest of the child” is not benefited by termination.

The effect of the Illinois statute’s “15/22” provision is that more parental rights terminations will occur. Yet, this does not necessarily mean that all children affected will be adopted. It is possible that more terminations will result in more “legal orphans.”240 On any given day in the United States, one-fifth of the children in foster care are legally available for adoption.241 Research shows that children in foster care often maintain deep attachments to their biological families, and thus termination should be recommended only if the child is likely to be adopted.242 Just because a child does not live with their parents does not mean the child has forgotten them. If a child has little chance of a permanent placement with a new family, their parents rights to see them or talk to them should not be limited. Children with special needs, because they are less likely to be adopted, and older children, who are more likely to remember their biological families, will not necessarily benefit from parental termination. Whereas younger children, who do not remember their natural parents and will likely be adopted, should remain in foster care for as short a period as possible. The physical condition and age of a child should be considered before a termination takes place.

240. Legal orphans are defined as “children legally severed from their natural parents without an awaiting adoptive home.” DeMichele, supra note 30, at 755 (citing Talk of the Nation: Adoptions for Abused and Neglected Children in Foster Care (National Public Radio broadcast, Nov. 18, 1997).
241. Id. at 755-56 (stating that “on any given day in the United States, at least 107,000 of the 507,000 children currently in foster care are legally free and awaiting adoption”).
242. Garrison, supra note 76, at 462.
New York's law puts a great deal of weight on the subjective opinions of the judges, social workers, and agency staff who oversee the state foster care system. This individualized consideration is time-consuming and costly. By contrast, Illinois's statute set in place procedures that are more efficient and put less pressure on the already overwhelmed foster care system. ASFA was intended to hasten a child's passage through foster care, and it is possible that by relying on discretionary exceptions, New York's already overburdened courts will be unlikely to meet the requirements of ASFA. Some might conclude that individualized consideration is flawed, allowing the exceptions to swallow the provision, and thus enabling foster care drift. This conclusion, although seemingly logical, is not satisfactory since the decision to terminate a parent's right to her child must not be taken lightly. New York's law recognizes that individual circumstances, such as the likelihood of adoption and the individual child's needs and wishes, should be taken into consideration.

Termination only lowers the number of children in foster care if those children free to be adopted are indeed adopted. Many children in foster care are not appropriate candidates for adoption because of age, sibling groups, or emotional and physical difficulties. The Illinois provision makes it easier to terminate parental rights, but does not offer any new solutions for permanent placements. Stories like Chris Congdon's illustrate that if termination eventually does occur, it is no less painful for having been slow. Children's rights must be the primary concern, coming before the efforts of parents to both rehabilitate themselves and exert their parental rights. Children should have the opportunity to build family ties with an appropriate adoptive family, and for this to occur, the rights of the child's natural parents may have to be terminated. Nevertheless, it is troubling that under Illinois law, a parent may lose the right to raise her own children because they have lived in foster care for fifteen of the previous twenty-two months.

The Supreme Court's test for when parental rights should be terminated highlights the possible shortcomings of Illinois's parental termination provision. The court balances three factors so as to address the competing issues of parental rights and the well-being of the child. Justice Blackmun characterized the difficulty of determining whether a parental termination is appropriate in his dissenting opinion in Lassiter:

243. Supra text accompanying notes 1-17.
244. Supra text accompanying notes 52-58.
At stake here is the “interest of a parent in the companionship, care, custody, and management of his or her children.” This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. . . . “[F]ar more precious . . . than property rights,” parental rights have been deemed to be among those “essential to the orderly pursuit of happiness by free men.”

Because a termination proceeding is “both total and irrevocable,” courts must consider the risk of an erroneous termination. The Supreme Court addresses this balance in Santosky: “For the child, the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo. For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family.” In Santosky, the court struck down a New York statute that set the standard for parental termination at only a “fair preponderance of the evidence” because “[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.”

Parental termination creates two dangers: the risk that a parent’s rights might be terminated when they should not be, and the chance that a parent’s rights should have been terminated, but were not. The first is great because parental termination is permanent. “Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child’s religious, educational, emotional, or physical development.” Truly, this is a “unique kind of deprivation.” The Court has recognized the gravity of such a decision in all three of the relevant cases. To give any possible benefit of the doubt to the parent, the Court allocates the risk appropriately through the standard of

246. Id. at 39.
248. Id. at 768 (quoting Addington v. Texas, 441 U.S. 418, 427 (1979)).
249. Lassiter, 452 U.S. at 39.
250. Id. at 40.
proof, allowing for appeals in forma pauperis and appointing counsel in certain situations.

In contrast, the danger of not terminating parental rights fast enough is less serious. There is usually no risk of additional danger to children because they must be removed from their parent's custody before a termination proceeding. In fact, one of the main arguments against extended foster stays is the expense. As Chris Congdon's foster care experience illustrates, extended foster stays involve caseworkers, child welfare office visits, and court appointments, all of which cost federal, state or local government, as well as the families involved, money. Nonetheless, the significant economic costs must be considered along with the emotional costs to the families. It is also unrealistic to think that there will be no costs once children are returned to their parents or adopted. Many adopted children are still subsidized by the state. Even children who are returned to their parents will likely continue to receive state subsidies because most families in the foster system live below the poverty line.

The cost of proper placement is clearly money well spent. Children's best interests are still paramount, and it remains in their best interests to have permanent homes. Often, the actual court termination proceedings do not drastically change children's day-to-day arrangements. In Chris's case, the adoption was largely symbolic; he already had lived with Hill and Luebbert for five years. His situation also was distinct because his own parents had remained in close contact with him. This is often not the case. In one study, fifty-seven percent of the children still in foster care at the end of a five-year study were no longer receiving visits from their natural


254. While the cost of state subsidies for children in foster care is quite substantial, these are not relevant since many children will continue to be subsidized even if adopted. *Child Welfare Watch, Too Fast for Families, Washington's Get-Tough Adoption Law Hits Home* 5 (2000) (finding that in New York City, 99.6% of adoptive parents received the adoption subsidy in 1998); see also 42 U.S.C. § 670 (2000) (providing adoption assistance for children with special needs).


parents. In a situation in which the child was not in close contact with his natural parents, the tension between loyalties would likely be lessened.

Thus, although New York's statute may err on the side of not terminating rights quickly enough, this is not as problematic as Illinois's statute which likely errs on the side of terminating parental rights too quickly.

B. The Focus on Time Limits is Overly Simplistic

ASFA’s time limit creates various problems. For example, ASFA’s exception regarding parents who have been denied the services required by the reasonable efforts clause creates a loophole. Most families do not get perfect services because family courts are both under-funded and under-staffed. The volume of new cases brought under ASFA exacerbates the problem. Furthermore, the legal representation of children within an adversarial system is difficult since the parent, the child, and the state may all have divergent views. Thus, the largely situational concept of reasonable efforts is difficult to qualify. Another problem with the time limit is that ASFA only mandates the initiation of termination proceedings. Once started, they may take months to complete. Factors such as the time taken by the individual

257. Garrison, supra note 76, at 423 n.4 (citing David Fanshel’s and Eugene Shinn’s study).

258. Bill Grimm, Adoption and Safe Families Act Brings Big Changes in Child Welfare, YOUTH LAW News, Nov./Dec. 1997, at 7 (“[The reasonable efforts] exception is, in the real world, likely to limit severely the impact of the requirement that the child welfare agency seek parental rights termination. Unavailability of services and failure to provide timely and appropriate services to parents are common to child welfare systems nationwide.”); See also Melissa D. Protzek, A Voice For The Children, PENN. LAWYER, January/February 2000, at 26 (“Juvenile court judges in urban areas have about 15 minutes per case to decide the fate of abused and neglected children.”).

259. Grimm, supra note 258 at 8. While some funds have been authorized to assist the courts, these funds are not yet appropriated. Id.

260. See Ventrell, supra note 164, at 434-35.


262. Congressional Budget Office, H.R. Rep. No. 77, at 23 (1997) (noting that the termination of parental rights process “takes anywhere from 90 days to several years, with the median length of time being about a year”).
caseworkers to gather and organize the information necessary to pursue the case will affect how long the termination proceedings take.263

By equating termination with success, ASFA seems to assume that any child who is free to be adopted will be adopted. It also assumes that if a child is returned to his natural parent’s care, the child will be appropriately cared for. Neither of these assumptions is necessarily true. By recognizing that Chris Congdon’s situation was unusual, one sees the shortcomings of a rigid termination schedule.

Chris was fortunate to have a loving, responsible set of caregivers who were waiting to adopt him. This is often not the case.264 For the many children who are unlikely to be adopted (adolescents and teenagers, sibling groups, emotionally or physically disabled children) enforced time limits are ineffectual. Their parents’ “termination” will not effectively change their situation. They will remain in state care because they are less likely to be adopted than young, healthy children. It is an interesting side note that Chris Congdon’s twelve year old brother (who is mentally retarded, suffers from depression, and has attempted to kill himself four times)265 lived in a group home.266 Even though he is unlikely ever to be adopted, his parents’ rights to him were terminated along with their rights to Chris. They can no longer visit him, or call him for his birthday, or send Christmas presents. This is unjust. For a child who will otherwise have no parents, an imperfect pair often may be preferable. This is especially true when the children are older and already have significant ties to their birth parents.

Termination deadlines presume that a child is better off without their natural parents. This is likely true when there is a history of abuse or with a situation like Chris’s in which he had formed strong emotional ties to another family. However, for the many children in care whose primary attachment is to their birth parent(s) a termination is not beneficial.

Another problem with considering reunification as the end of the solution is that just because a child is reunited with his birth parent does not mean the state’s role is over. “Between thirteen

263. Freundlich, supra note 159, at 102.
264. Ellen H. Silberman & Maggie Mulvihill, House Bill Would Speed Up Adoption Process, BOSTON HER., Dec. 1, 1998, (stating that 4,000 children are placed in foster care, but only 1,000 are adopted each year).
265. Stack, supra note 1.
266. Stack, supra note 9.
and forty-five percent of children who are reunited with their biological parents after being in foster care become victims of abuse again.” Because termination is permanent, it is possible that when faced with the serious decision to either terminate or return a child to his parents, a judge might lean towards returning the child. This could result in a child being returned to parents who were not yet in a position to care for him.

Time limits raise significant issues for parents who must be separated from their children for reasons unrelated to their parenting capabilities. Drug addicted parents and incarcerated parents are both affected by ASFA’s strict guidelines. A drug addicted parent may be unable to comply with the requirements imposed by ASFA. A parent may be unable to recover from an addiction in twenty-two months. Drug dependency often involves relapses, and the waitlist for treatment centers may exceed twenty-two months. Some children will become available for adoption even though their own parents, with treatment, would have been able to regain custody of their children.

A similar situation arises with parents who are incarcerated. In the past thirty years, the “War on Drugs” has greatly increased the number of women who are incarcerated. In 1998 there were more than 80,000 female prisoners, and of those, the vast majority

268. U.S. GEN. ACCOUNTING OFFICE, PARENTAL SUBSTANCE ABUSE, GAO/HEHS 98-40, 4 (1997). This United States Department of Health and Human Services report found that, depending on the area of the country examined, substance abuse was involved in up to 90% of all child abuse or neglect cases. Id.
269. O’Flynn, supra note 89, at 257 (stating that “permanency decisions may be required before a parent is even admitted to a treatment program, and long before it can be determined whether a parent is likely to succeed in substance abuse treatment”).
270. See U.S. GEN. ACCOUNTING OFFICE, supra note 268 (noting that “drug treatment may last up to one or two years”).
272. O’Flynn, supra note 89, at 260 (contending that “services currently available are inadequate”).
273. See generally O’Flynn, supra note 89 (suggesting coordination between substance abuse treatments and child welfare agencies as a possible solution).
274. In a message to Congress in 1971, President Richard Nixon “portrayed drug abuse as ‘a national emergency,’ labeling it ‘public enemy number one’ and calling for ‘a total offensive.’” STEVEN WISOTSKY, BREAKING THE IMPASSE ON THE WAR ON DRUGS 3 (1986). Since then, the term has largely become associated with a drug policy that emphasizes criminalization as opposed to treatment.
had minor children. Some of these children are in kinship care, but those who are placed in non-kinship foster homes are affected by ASFA’s termination provisions. A mother, incarcerated for a crime that had nothing to do with her children, can lose them if her sentence is more than twenty-two months.

Foster care is often the only option for parents who must be separated from their children. However, little scholarship exists on what motivates adults to take in foster children. Although there certainly are people who want to be good foster parents for the sake of being foster parents, many are hoping to become adoptive parents. This can create a conflict if the child is either unwilling to be adopted or unavailable because his own parents’ rights have not been terminated. Thus, there is a need for options that do not lead to a child’s conflict of loyalty to two sets of parents.

Foster parents share their homes and their time with needy children. They may receive subsidies to pay for the child’s expenses, however, they no longer expect tangible compensation. “The most natural compensation is for the placed child to form an attachment to the foster carers; the foster carers may view this as incompatible with the child having strong family attachments.” If a child has ties to his natural parents while in foster care, “a triangulated conflict among parents, children, and foster parents” may exist. Although initially Luebbert and Hill struggled to create “the perfect alliance between birth family and foster family” for the benefit of Chris, eventually they realized that the problem was too complex, and that they had to instead worry about what was best for the child. The conflict involved is inevitable when a child’s loyalty is pulled in different directions.

Although proponents of foster care have said that “[i]deally there should be a moratorium on expectations for children to attach themselves to foster carers,” this is unrealistic. It is also unfair to expect a child not to bond with their foster parents, espe-

276. SALLY E. PALMER, MAINTAINING FAMILY TIES: INCLUSIVE PRACTICE IN FOSTER CARE 82 (1995). Palmer refers to such fostering as “exclusive.” This sort of fostering tends to engender “tension and competitiveness” between natural parents and foster parents. Id. at 83 (citations omitted).
277. Id. at 87 (citation omitted).
279. PALMER, supra note 276, at 91.
cially when they see them more regularly than their own parents. This is a problem to which congregate care might be a solution.

C. Congregate Care May be a Possible Solution

One such option is a return to what were known historically as orphanages. This term, which brings to mind Oliver Twist\(^{280}\) and Little Orphan Annie,\(^{281}\) are now more euphemistically termed "group homes" or "residential academies."\(^{282}\) However you refer to them, they are public organizations that specifically care for children who either did not have parents or had parents who were unable to take care of them. This Note argues, however, that group homes may help care for children who cannot return to their parents within twenty-two months, but might be able to at some point in the future.

Admittedly, congregate care is an unrealistic option for many children. One of the main arguments against it is cost. In order to be well run, these homes require significant funding. Costs per child vary broadly from $20,000\(^{283}\) to $36,000\(^{284}\) to $70,000.\(^{285}\) When the homes are more homelike, and less institutional, these costs increase even more. One of the reasons that orphanages fell out of favor was that they were "institutional." The larger the asylum, the more likely it was that children's days would be highly routine.\(^{286}\) This regimentation was "far from the 'homelike' ideal,"\(^{287}\) and the asylums were thus criticized for raising "institutional" children who "lacked individuality."\(^{288}\)

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\(^{280}\) Charles Dickens's novel tells the story of an English orphan who begins life in a poorhouse.

\(^{281}\) Harold Gray's 1930s cartoon strip was later adapted into a popular musical about a plucky red haired orphan adopted by millionaire Daddy Warbucks.

\(^{282}\) Cohen, supra note 235.

\(^{283}\) Carolyn Barta, Bringing Orphanages up to Date, PITTSBURGH POST-GAZETTE, June 21, 1998, at A13.


\(^{285}\) Wornie Reed, Will Orphanages Work For Neglected Children?: Focus Resources on Parents, Neighborhoods, Schools, THE PLAIN DEALER (Cleveland), Feb. 25, 1999, at 9B.

\(^{286}\) Hacsi, supra note 211, at 148.

\[^{287}\] [The children] usually ate a meager diet, and in larger asylums wore uniforms that decreased their sense of individuality and marked them as 'asylum children' to outsiders. Discipline remained an important part of most asylum managers’ thinking well into the twentieth century and was at times harsh and brutal.

\[^{288}\] Id. at 159; see also id. at 37.
With a smaller ratio of children to caretakers this problem would be diminished. This problem also can be addressed by shifting from dormitory-styled bedrooms and cafeterias to smaller units where smaller groups of children are matched with house parents who live round-the-clock with the same group of children. Likewise, the orphanages of the past usually ran their own schools. This further isolated the children living within them, leading to stigmatization. However, this was a product of the time in which they existed. There is no reason why many children could not attend ordinary public schools that would increase their interaction with other children and the general community.

One of the benefits of group homes is that they offer stability. As discussed earlier, many children in foster care drift from placement to placement. This occurs for many reasons, but one of them is to decrease the chance of substantial attachments developing between the foster child and his foster parents. However, this leads to the very "drift" that ASFA seeks to prevent. Properly run group homes would help prevent this problem. Children would have a stable caring environment while not being torn between two sets of parents. After all, we think of a good foster situation as one that most closely resembles a biological family. Yet this sort of situation makes it difficult for a child who will not be adopted by that family, eventually to be moved. By using properly equipped and well-staffed group homes, a child's emotional needs could be met without attachments being made to a second family with whom the child will not stay. Group homes also should be easier to supervise than foster homes, thus helping to curtail abuse and neglect of children. Further, the constant presence of other children in a group

[1] Individuality is destroyed in an institution of that kind with a thousand children, and how? The child is reared by the bell. The bell rings in the morning to rise, the bell rings to dress, the bell rings for prayers . . . The consequence is that the child is reared to do only something in the world that it has its attention called to.

Id. at 37 (citing a speaker at the National Conference of Jewish Charities in 1904). Charles Loring Brace, the founder of the Children's Aid Society went so far as to declare orphan asylums un-American because they raised "a species of character which is monastic—indolent, unused to struggle; subordinate indeed, but with little independence and manly vigor." MATTHEW A. CRENSON, BUILDING THE INVISIBLE ORPHANAGE 94 (1998) (citation omitted).

289. See Shrogen & Mehren, supra note 284.
290. HACSI, supra note 211, at 57.
291. By the twentieth century, more orphanages were like this. See discussion accompanying note 307.
292. See supra text accompanying note 21.
home decreases isolation and lessens the potential for abuse to go unnoticed.

Today, as was the case historically, most of the children in foster care are not orphans. The historic term “orphan asylum” was largely a misnomer since most of the children living in these state run homes were not “orphans.” At most, many were “half-orphans,” children who had one living parent. Furthermore, as general mortality rates fell, so did the number of “full orphans.” By the end of the nineteenth century, “reunification was usually a real possibility” for many children living in orphanages and by the start of the twentieth century, the vast majority of children who left orphanages returned to their families. Orphanages, like the foster care system of today, often were used as a temporary solution to aid parents through difficult circumstances.

Traditionally, three different kinds of orphanages existed; each type expressed different views with respect to the role of parents and reunification. “Isolating orphanages” limited children’s contact with the outside world and their parents, with the intention of separating children from their families and their religious and ethnic heritages. These asylums often were the legal guardians of their wards and “explicitly sought to break the bonds between parent and child.” “Protective orphanages” tried to protect the children by controlling both their secular and their religious education. However, this training usually would mirror the child’s own background. In these cases, managers were generally “willing, and sometimes happy” to return children to the care of their parents. The third kind of orphanage, “integrative asylums,” did

293. HACSI, supra note 211, at 1.
294. The main reasons that children enter foster care are abuse, neglect and poverty. Death of a parent is not a main cause. See Gendell, supra note 256, at 26.
295. THE AMERICAN HERITAGE DICTIONARY 877 (1991). “Orphan” is defined as “a child whose parents are dead.” Id.
296. HACSI, supra note 211, at 1. Today these children are often referred to as “social orphans.” Shrogen & Mehren, supra note 289.
297. Id.
298. Id. at 2.
299. Id. at 106.
300. Id. at 56.
301. Id.
302. Id.
303. Id.
304. Id.
305. Id.
306. Id.
not exist until the final decades of the nineteenth century. 307 In these asylums, children attended local schools and had regular contact with their families. 308 Asylum managers struggled with whether to seek legal guardianship over the children. 309 Managers who hoped to reunify families often feared taking away a parent's legal rights would "damage the emotional bonds between parent and child, thereby reducing the likelihood that children and parents would reunite." 310 However, by obtaining guardianship, managers could maintain the right not to surrender a child to parents whom they deemed unfit. Likewise, visitation rights also varied with the orphanage and the asylum manager. If a parent had legally abandoned her parental rights, she usually would have no visiting rights at all. 311 Most asylums, however, allow visits twice per week. 312 By the twentieth century, more asylums had extended visitation periods, 313 and the managers encouraged children and parents to spend as much time together as possible. 314 These more liberalized visiting hours were an effort to encourage the "reestablishment of the parental home." 315

The integrative asylum is a possibility for children who will not be adopted but for whom termination may be unnecessary. Though certainly not perfect, these group homes could minimize the conflict children feel when torn between their natural parents whom they remember, and the foster parents with whom they live. Furthermore, group homes would be able to foster a sense of belonging. A foster child is likely to live in a house, where, even if he is cared for, he feels different because he is the only foster child he knows. In a group setting where a child would be surrounded by similarly situated children, this is less likely to happen. Also, with foster care, there is a possibility that the placement will not succeed or that the family will not be able to keep the child. For example, Chris had been in several placements before he was placed with

307. Id. at 57. The author points out that the institutions that integrative asylums relied on such as public school systems, sports leagues, and the Girl and Boy Scouts, did not really exist yet. Id.
308. Id.
309. See id. at 126.
310. Id. at 127.
311. Id. at 128.
312. Id.
313. Id. at 129. These varied from the allowing of "an 'elaborate system of visiting' . . . when the children returned to their parents for brief stays to having visiting hours almost every day of the week." Id.
314. Id.
315. Id.
Hill and Luebbert. Different placements may mean a child lacks the stable environment he needs, and he may internalize a feeling of not being wanted. Group homes would protect against this because a child would have a place where he could stay permanently. One of the concerns with orphanages is that a child should not live in one permanently because “it could close off the possibility of a child’s ever living with a family.” Even. Perhaps this is true, but group homes do not have to be a permanent solution. Orphanages could function as a sort of halfway house for children in the midst of parental terminations, or for those in the process of returning home.

ASFA’s federal provision assumes that parents’ rights will be involuntarily terminated. Although the federal mandates do not specifically address voluntary relinquishment, they do not preclude such considerations. In fact, concurrent planning offers the benefit of providing parents with an opportunity to consider options for their children. Research suggests that involuntary termination may be detrimental to children, and one study found that “[t]he adversary nature of the [involuntary] proceedings and their length left the child[ren] in a limbo of anxiety and heightened loyalty conflicts in relation to the parents, grief about losing them, and hostility toward the agency seeking the termination.” The emphasis on termination also may foreclose opportunities for parents to consider arrangements such as open adoptions that would allow some sort of ongoing relationship with their children.

Furthermore, a parent is likely to feel threatened when faced with the possibility that her child will be removed permanently from her care. A mother may feel that her role was usurped if another family is raising her children. This problem can be exacerbated if the foster family is better off economically and, therefore,

317. Freundlich, supra note 159, at 105-06.
318. See Freundlich, supra note 159, at 107. But see Katherine C. Pearson, Cooperate or We’ll Take Your Child: The Parent’s Fictional Voluntary Separation Decision and a Proposal for Change, 65 TENN. L. REV. 835, 836 (1998). The author submits that “voluntary” terminations are often coercive and misleading so as to pressure parents to make immediate decisions. Id.
319. Id.
321. Id.
better able to provide for the child. By utilizing the resources a group home can provide, a natural parent who wants to stay involved can do so in a less threatening way.

CONCLUSION

The government (both state and federal) cannot wait indefinitely for parents to be able and ready to care for their children. This is why ASFA’s parental rights termination provision requires that parents rehabilitate themselves quickly or have their parental rights terminated. Despite this goal, parental termination is only beneficial for children who later will be adopted. The emphasis on a strict time line is not the answer to America’s foster care problem.

By placing a premium on the end results of adoption or termination, the states are ignoring the most difficult part of the problem. New York stresses the preeminence of reunification, while Illinois stresses adoption. These distinct approaches have led both to enact responsive legislation and follow ASFA differently. Because New York puts a premium on reunification, it relies more heavily on the three statutory exceptions. Because Illinois emphasizes adoption, it makes termination easier by adding the new unfitness standard. Successful adoptions are happy endings. So are family reunifications. A stay in foster care is rarely as positive. The reason that ASFA was enacted in the first place was to speed up this flawed and difficult process. This Note suggests group homes as one permanent care solution for children who can neither return home nor be adopted.