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AGENCY KNOWS BEST? RESTRICTING JUDGES' ABILITY TO PLACE CHILDREN IN ALTERNATIVE PLANNED PERMANENT LIVING ARRANGEMENTS

INTRODUCTION

Since the enactment of the Adoption and Safe Families Act¹ (ASFA) of 1997, permanency for children in foster care has been a major goal of each state's child welfare system.² The focus on permanency was meant to combat "foster care drift," the phenomenon of children languishing in multiple foster care placements without a permanent goal or any plan for their futures.³ ASFA sets forth several permanency goals: reunification with parent(s), termination of parental rights and placement for adoption, legal guardianship, placement with a relative, or "another planned permanent living arrangement."⁴ These placement options are listed in descending order of preference; reunification with the parents, when possible, is the preferred option, and "another planned permanent living arrangement" is the least favored option.

Ohio calls these disfavored alternative placements "planned permanent living arrangements" (PPLAs)⁵—rather a misnomer, as all permanency options for children are (or should be) living arrangements that are planned and permanent. PPLAs can take many forms—long-term family foster care, placement in a group foster

¹ Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in various sections of 42 U.S.C.).

² See U.S. DEP'T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, PROGRAM INSTRUCTION ACYF-CB-PI-98-02 (1998), available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/pi9802.htm (stating that the purposes of ASFA are to ensure children's "safety, permanency, and well-being").

³ See, e.g., Richard P. Barth, Fred Wulczyn & Tom Crea, *From Anticipation to Evidence: Research on the Adoption and Safe Families Act*, 12 VA. J. SOC. POL'Y & L. 371, 373 (2005).

⁴ 42 U.S.C. § 675(5)(C) (2000).

⁵ OHIO REV. CODE ANN. § 2151.011(B)(37) (West Supp. 2007).

home,⁶ or placement in an institution such as a hospital or mental health facility. Under the Ohio Revised Code, a PPLA is an order of a juvenile court pursuant to which both of the following apply:

- (a) The court gives legal custody of a child to a public children services agency or a private child placing agency without the termination of parental rights. (b) The order permits the agency to make an appropriate placement of the child and to enter into a written agreement with a foster care provider or with another person or agency with whom the child is placed.⁷

All PPLA placements are made “with the intention that the child will remain in that home or institution until he is no longer in the county child services system. A PPLA does not sever the parental bonds as permanent custody does, but it also does not provide the child with a legally permanent placement” as, for instance, adoption would.⁸

Children are placed in PPLAs only when the other, more preferred, permanency goals are inappropriate. Because PPLA placements are disfavored, each state’s laws typically require various findings before a judge can make a PPLA placement. Ohio Revised Code § 2151.353, relating to dispositional options in child protection proceedings, provides, in relevant part:

- (A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition: . . .

- (5) Place the child in a planned permanent living arrangement with a public children services agency or private child placing agency, if a public children services agency or private child placing agency requests the court to place the child in a planned permanent living arrangement and if the court finds, by clear and convincing evidence, that a planned permanent living arrangement is in the best interest of the child and that one of the following exists:

⁶ Family foster care refers to placements in which a foster family cares for a child in a private home. Group foster homes, on the other hand, are just that—group homes for foster children, without a family-like setting.

⁷ § 2151.011(B)(37).

⁸ *In re D.B.*, No. 81421, 2003 WL 21511310, at *1 (Ohio Ct. App. July 3, 2003).

(a) The child, because of physical, mental, or psychological problems or needs, is unable to function in a family-like setting and must remain in residential or institutional care.

(b) The parents of the child have significant physical, mental, or psychological problems and are unable to care for the child because of those problems, adoption is not in the best interest of the child . . . and the child retains a significant and positive relationship with a parent or relative.

(c) The child is sixteen years of age or older, has been counseled on the permanent placement options available to the child, is unwilling to accept or unable to adapt to a permanent placement, and is in an agency program preparing the child for independent living.

For most children, long-term state custody is a poor option with poor outcomes. Adoption can provide a brighter future for many foster children, but it is not a one-size-fits-all solution. For a few children, a PPLA is the only appropriate permanency option.

A recent Ohio Supreme Court decision, *In re A.B.*,⁹ categorically prohibits judges from placing children in PPLAs unless the state child welfare agency has first requested such a placement. As a matter of statutory interpretation, the decision is questionable. As a matter of policy, it is potentially disastrous.

This Note is the story of four siblings whose individual best interests the Ohio Supreme Court failed to consider in face of a general public policy favoring termination of parental rights and adoption. Part I of this Note tells these children's story. Part II examines the myriad ways in which the Ohio Supreme Court decision failed these children and other children in similar circumstances. Part III examines the PPLA statutes in Ohio and other states, and Part IV suggests judicial and legislative changes that would permit individualized consideration of a child's best interests.

I. A STORY OF FOUR SIBLINGS

In May 2003, the Summit County Children Services Board placed four siblings in foster care after allegations that their parents were not

⁹ 852 N.E.2d 1187 (Ohio 2006).

providing for their basic needs and were abusing drugs. Eventually, the mother voluntarily surrendered her parental rights. The father enrolled in two drug treatment programs, but relapsed after each program. At the time of the termination trial, he was enrolled in a nine-month inpatient drug treatment program.¹⁰

In June 2004, the trial court appointed an attorney to represent the children's wishes after being notified that the children's desire to return to their father conflicted with the guardian *ad litem*'s (GAL's) determination of their best interests. In October 2004, the agency filed a motion for permanent custody of the children. The children's attorney moved instead for a PPLA—a long-term foster care placement with the children's current foster mother.¹¹

At the termination of parental rights trial in March 2005, it was undisputed that the four children (who ranged in age from 6 to 12 years old at the time) were closely bonded and it was in their best interests to remain together as a sibling group. The agency caseworker testified that it would be detrimental to the children to separate them. The caseworker further testified that no adoptive family had been identified for the children, that the agency could not guarantee the children would remain together if they were placed for adoption, and that she had never encountered a family who adopted a sibling group of four. The children's current foster mother—by whom the GAL was “amazed”—was willing to continue caring for the children indefinitely. The foster mother did not want to adopt, however, because she was in her late 50s and did not want to “burden” her own adult children with raising the B. siblings if something should happen to her. The GAL testified that it was in the children's best interests to continue placement with the current foster mother.¹² After a full hearing on the agency's motion, the trial court found that terminating the father's rights was not in the children's best interests, and instead granted the motion for a PPLA placement with the children's current foster mother.¹³

The Ohio Supreme Court ruled, five to two, that the plain language of section 2151.353(A)(5) was “unambiguous” and prohibited a juvenile court judge from placing a child in a PPLA unless the agency had first requested a PPLA placement.¹⁴ In so doing, the Court ignored the dissent's forceful argument that the

¹⁰ *In re A.B.*, No. 22659, 2005 WL 2291869, at *1 (Ohio Ct. App. Sept. 21, 2005), cert. granted, 840 N.E.2d 201 (Ohio 2005), rev'd, 852 N.E.2d 1187 (Ohio 2006).

¹¹ *Id.*

¹² *Id.* at *3–4.

¹³ *Id.* at *1.

¹⁴ *In re A.B.*, 852 N.E.2d at 1193.

statute cited applied only to *initial* dispositions immediately following a finding that the child is abused, neglected, or dependent, and that the PPLA ordered for the B. siblings was a *final* disposition.¹⁵ The majority opinion reasoned that section 2151.353 places restrictions on PPLAs because “[a] planned permanent living arrangement places a child in limbo, which can delay placement in a permanent home.”¹⁶ Presumably, the court meant that PPLA placements would delay children’s placements into *legally* permanent (i.e., adoptive) homes; any home can be permanent in duration.

II. THE RAMIFICATIONS OF *A.B.*

Although the precise number of Ohio foster children in circumstances similar to the B. siblings is unclear, the Ohio Supreme Court decision in *A.B.* affects far more than the four siblings whose fates were at issue. Nationwide, there were approximately 513,000 children in foster care in fiscal year 2005.¹⁷ Seven percent of those children—37,628—had a case plan goal of long-term foster care.¹⁸ Another six percent—31,938—had a goal of emancipation,¹⁹ meaning that their goal was to remain in foster care until reaching majority. A further eight percent—42,403—had no case plan goal yet,²⁰ and it is possible that some of this group could eventually have goals of long-term foster care or emancipation. Assuming that the percentage of children with these goals who reside in Ohio is equal to Ohio’s proportion of the U.S. population (3.8 percent²¹), an estimated 2,643 Ohio foster children have case plan goals of long-term foster care or emancipation.²² The B. siblings are not alone.

The Ohio Supreme Court’s decision in *A.B.* has potentially devastating ramifications not only for the B. siblings and foster children in similar circumstances, but for all Ohio foster children. The

¹⁵ For more on the dissenting opinion and a discussion of the statutory interpretation arguments for and against the Ohio Supreme Court’s decision, see *infra* Part III.A.

¹⁶ *In re A.B.*, 852 N.E.2d at 1193.

¹⁷ U.S. DEP’T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, THE AFCARS REP.—PRELIMINARY FY 2005 ESTIMATES AS OF SEPTEMBER 2006, available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.htm (last visited July 18, 2007).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Ohio Department of Development, *Ohio’s Population*, www.odod.state.oh.us/research/files/p0006.pdf (last visited March 15, 2007).

²² Of course, this estimate is just that—an estimate, and it may not be accurate. However, unless the Ohio Department of Job and Family Services publicizes the statistics for each case plan goal, this seems to be the only way to get a sense of the number of children that the Ohio Supreme Court’s decision might affect.

decision contradicts the legislative purposes behind the federal Adoption and Safe Families Act of 1997, equates permanency with termination of parental rights, blindly asserts that adoption is always achievable and always in a child's best interests despite the very real problem of "legal orphans," and assumes that the agency should be the primary—or even sole—arbiter of a child's best interests.

A. The Adoption and Safe Families Act of 1997

The Adoption and Safe Families Act of 1997 (ASFA)²³ has been described as "the most significant change in federal child welfare and child protection policy in nearly 20 years."²⁴ Upon signing the legislation, President Clinton said that it "fundamentally alter[ed] our Nation's approach to foster care and adoption."²⁵ The overarching purposes of ASFA, according to the federal Administration for Children and Families, are "safety, permanency, and well-being" for children.²⁶

ASFA's changes to child welfare law include: "clarify[ing] the 'reasonable efforts' requirement, expedit[ing] the process of placing children with permanent families when they cannot return home, emphasize[ing] child safety and promot[ing] adoption when appropriate for the child."²⁷ Among ASFA's requirements are a series of timeframes that must be met in order for states to continue receiving federal funds. Permanency hearings—hearings at which a child's permanent plan is decided—must be held within 12 months of a child's entry into foster care.²⁸ The state is required to file for termination of parental rights when a child has been in foster care for fifteen of the past twenty-two months, when a child is an abandoned infant (as state law determines), or when the parent has killed another child or perpetrated "serious bodily injury" on the child or another

²³ Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in various sections of 42 U.S.C.).

²⁴ Richard J. Gelles, *The Adoption and Safe Families Act of 1997 Rightly Places Child Safety First*, BROWN U. CHILD & ADOLESCENT BEHAVIOR LETTER, April 1998, 1, at 1.

²⁵ Remarks on Signing the Adoption and Safe Families Act of 1997, 33 WEEKLY COMP. PRES. DOC. 1863, 1864 (Nov. 19, 1997) [hereinafter *Remarks*].

²⁶ U.S. DEP'T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, PROGRAM INSTRUCTION ACYF-CB-PI-98-02 (1998), available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/pi9802.htm; see also *Remarks*, *supra* note 25, at 1864 ("[ASFA] will improve the well-being of hundreds of thousands of our most vulnerable children. The new legislation makes it clear that children's health and safety are the paramount concerns of our public child welfare system. It makes it clear that good foster care provides important safe havens for our children, but it is by definition a temporary, not a permanent, setting.").

²⁷ Steve Christian, *1998 State Legislative Responses to the Adoption and Safe Families Act of 1997*, State Legislative Report (March 1999), available at <http://www.ncsl.org/programs/cyf/asfaslr.htm> (last visited Dec. 19, 2006).

²⁸ 42 U.S.C. § 675(5)(C) (2000).

child.²⁹ The fifteen-of-twenty-two-months timeframe, as researcher Fred Wulczyn notes, “has no developmental referent—it applies whether the child is fifteen days or fifteen years old at the time of entrance into foster care.”³⁰ Four states, including Ohio, have shortened the timeframe to require filings for termination of parental rights when the child has spent twelve of the past twenty-two months in foster care.³¹ Other states, most notably Minnesota and Colorado, have shortened the timeframe for permanency hearings when the child is below a certain age.³²

Under ASFA, the state is not required to file for termination of parental rights within this timeframe if a relative is caring for the child, if the agency has documented “a compelling reason” why filing is not in the child’s best interests, or if the state has not provided services necessary to reunify the child with his or her family.³³ One compelling reason not to file for termination of parental rights, according to federal regulations, is that adoption is not an appropriate goal for the child.³⁴ No states statutorily defined these “compelling reasons,” but two states—Iowa and West Virginia—did provide examples.³⁵ Iowa includes as a compelling reason a “reasonable likelihood that completion of services will make it possible for the child to safely remain home or return home within six months.”³⁶ West Virginia includes as compelling reasons “the child’s age and preference regarding termination of parental rights and that the child is in placement as a juvenile delinquent.”³⁷ California, Iowa, and Rhode Island enacted a handful of other exceptions to the fifteen-of-twenty-two requirement that also could be considered “compelling reasons,” although the statutes do not call the exceptions by that language.³⁸

²⁹ 42 U.S.C. § 675(5)(E).

³⁰ FRED WULCZYN ET AL., *BEYOND COMMON SENSE: CHILD WELFARE, CHILD WELL-BEING, AND THE EVIDENCE FOR POLICY REFORM* 9 (2005).

³¹ OHIO REV. CODE ANN. § 2151.413 (West 2006). The other states that have adopted the twelve-of-twenty-two requirement are Florida, Michigan, and Rhode Island. Christian, *supra* note 27.

³² COLO. REV. STAT. § 19-1-102(1.6) (2006) (“[T]he general assembly finds and declares that it is appropriate to provide for an expedited placement procedure to ensure that children under the age of six years who have been removed from their homes are placed in permanent homes as expeditiously as possible.”); COLO. REV. STAT. § 19-3-702 (requiring permanency hearing within three months of the dispositional hearing for children under 6 years old); MINN. STAT. § 260C.301(5)(i) (2006) (six months for children under 8 years old).

³³ 42 U.S.C. § 675(5)(E).

³⁴ 45 C.F.R. § 1356.21(i)(2)(ii)(A) (2006).

³⁵ Christian, *supra* note 27.

³⁶ *Id.* (citing IOWA CODE § 232.111).

³⁷ *Id.* (citing W.VA. CODE § 49-6-5b).

³⁸ *See id.*

Even though ASFA places the burden on the agency to document an exception to the fifteen-of-twenty-two requirement, it is possible that the “compelling reason” not to file for termination of parental rights could arise due to judicial action—for example, if there were a permanency hearing at which the judge denied the agency’s motion to change the child’s case plan permanency goal to termination of parental rights. The judge’s denial of the motion to change the permanency goal then would be a compelling reason for the agency not to proceed with filing a subsequent motion to terminate parental rights. Additionally, one could argue that the agency has documented compelling reasons if the agency’s own evidence at the permanency hearing proved to the judge that there was a good reason not to proceed towards termination.

Of course, this presumes that there is formal review of a child’s case plan goal before the agency files a petition to terminate parental rights, and that is not necessarily the case in Ohio. For instance, Cuyahoga County—Ohio’s most populous—tends to skip a separate permanency hearing and address the issue of permanency at the annual review hearing; the court has very little input in the permanency plan.³⁹ This appears to meet ASFA’s timelines, but perhaps not its spirit; ASFA seems to envision a separate permanency hearing at which *the court*, not the agency, would decide which permanency goal was appropriate for the child, and when to implement the goal.⁴⁰ If Ohio judges typically do not have any review of agency decisions regarding the permanency plan until the termination of parental rights trial, judicial action is probably unlikely to create a “compelling reason” for the agency not to file a petition to terminate parental rights.

Although ASFA requires the agency to file for termination of parental rights once a child spends fifteen of twenty-two months in foster care, ASFA does *not*—and cannot—mandate that the court grant a motion for termination of parental rights. If parents’ rights were automatically terminated after children spent fifteen-of-twenty-

³⁹ Interview with Lynne L. Stewart, Staff Attorney, Cuyahoga County Juvenile Court, in Cleveland, Ohio (Jan. 3, 2007).

⁴⁰ See 42 U.S.C. § 675(5)(C) (“[States must] assure each child in foster care . . . a permanency hearing to be held . . . no later than 12 months after the date the child is considered to have entered foster care . . . , which hearing shall determine the permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent, placed for adoption and the State will file a petition for termination of parental rights, or referred for legal guardianship, or (in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian) placed in another planned permanent living arrangement”) (emphasis added).

two months in care, without judicial discretion to deny a termination petition, this would be an incredible due process concern; family bonds are a fundamental right.⁴¹

This required judicial discretion presents a problem directly relevant to the issue of PPLA placements. Suppose the agency files a petition to terminate parental rights, and the statutory grounds for termination are met (whether the grounds are the length of time a child has been in care or another enumerated reason), but it is not in the child's best interests to terminate parental rights. Perhaps the child would benefit from continuing a relationship with his or her parent(s), perhaps the child has a significant relationship with another biological relative, or perhaps some other reason makes termination inappropriate. Due process requires the judge to have discretion to deny the agency's motion to terminate parental rights, as noted above. But what happens when the judge finds that terminating the parents' rights is not in the child's best interests and denies the agency's motion for termination? If a judge does not have discretion to place the child in an alternative permanent placement instead of terminating parental rights (because the agency did not request placement in a PPLA), the child will remain in foster care, but without a permanent plan. This contravenes the very purpose of ASFA, to provide permanency and prevent foster care drift. Yet the Ohio Supreme Court decision appears to sanction precisely this result.

Under the Ohio Supreme Court's interpretation of the statutes, a judge appears to have discretion to deny the agency's motion for termination of parental rights and order any other permanency option *except* a PPLA placement. For instance, in *A.B.*, the judge apparently could have ordered a guardianship with the children's current foster mother without running afoul of the Ohio Revised Code. However, by transitioning from being a foster parent to being a guardian, the foster mother would lose the financial subsidies that assist her in caring for the four children; depending on a foster parent's financial situation, this loss of support could be enough to decide against guardianship.⁴²

⁴¹ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

⁴² Ohio has no subsidized guardianship program, although some other states do. Center for Law and Social Policy and Children's Defense Fund, *Child Welfare in Ohio* (2006), http://www.clasp.org/publications/child_welfare_in_ohio06.pdf. In many of the states that have established subsidized guardianships, subsidies are available only to relative caregivers; in others, the children must be above a certain age to qualify. Children's Defense Fund, *States' Subsidized Guardianship Laws at a Glance* (October 2004), http://www.childrendefense.org/site/DocServer/guardianship_laws.pdf?docID=544.

Guardianship probably was not a feasible option for the foster mother in *A.B.*, or one of the parties would have suggested it. Yet the judge could have ordered this non-ideal placement *sua sponte*, but could not order what appeared to be the most appropriate placement.

B. Rates of Adoption

Despite ASFA's encouragement of termination of parental rights and adoption, older children remain statistically far less likely to leave the foster care system through adoption than younger children; adoption may not be a realistic possibility for some of these children. The rate of adoption is highest for children who are placed into foster care as infants; infants are nearly as likely to be adopted as they are to be reunited with their biological families.⁴³ The rate of adoption decreases markedly for children placed into care as one-year-olds, and steadily declines based on age.⁴⁴

Children who are six to ten years old at the time of their first placement into foster care are the age group most likely to remain in care after six years have passed.⁴⁵ At eight years old, although more than sixty percent of children who enter foster care at that age are reunited with their parent(s), they are slightly more likely to leave through "other" exits than be adopted.⁴⁶ "Other" exits include running away, emancipation, and transfers to other systems (most notably the juvenile justice system).⁴⁷ The rate of "other" exits increases markedly after eight years old and far outstrips adoptions for older children.⁴⁸ For children who enter foster care at fifteen years old, "other" exits from foster care comprise one-third of all exits.⁴⁹ Researcher Fred Wulczyn observes: "Although children above age 10 at the *time of entry* are about as likely to go home as other, younger children are, the likelihood of adoption is below 10 percent and quickly approaches zero. Among children who entered foster care at age 14 or above, an exit by way of completed adoption was rare."⁵⁰

Indeed, federal statistics show that of all adoptions finalized nationwide in fiscal year 2004, the vast majority were children under ten years old at the time of finalization.⁵¹ The percentages range from

⁴³ WULCZYN ET AL., *supra* note 30, at 111 (chart).

⁴⁴ *Id.*

⁴⁵ *Id.* at 173.

⁴⁶ *Id.* at 111 (chart).

⁴⁷ *Id.* at 111.

⁴⁸ *Id.* at 111 (chart).

⁴⁹ WULCZYN ET AL., *supra* note 30, at 117 n.7.

⁵⁰ *Id.* at 176 (emphasis in original).

⁵¹ U.S. DEP'T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, CHILD'S FINALIZATION AGE (GROUPED), OCT. 1, 2003 TO SEPT. 30, 2004 (2006),

sixty-three percent in the District of Columbia to eight-nine percent in the state of Washington.⁵² Given the time that usually elapses before an adoption is finalized, these adopted children entered foster care at even younger ages.

The mean wait between termination of parental rights and adoption finalization, according to the same federal statistics, was more than a year, everywhere except the District of Columbia, Indiana, Iowa, Missouri, Puerto Rico, Rhode Island, Utah, Wisconsin, and Wyoming.⁵³ These jurisdictions also had extremely low median waits—as low as 2.02 months in Rhode Island.⁵⁴ Maine had the longest mean wait between termination and adoption finalization, at 22.84 months; the median wait there was 17.48 months.⁵⁵ In Ohio, the mean wait was 19.90 months and the median wait was 13.27 months;⁵⁶ the disparity in the two numbers indicates that a significant number of the more than 2200 Ohio adoptees⁵⁷ waited far longer than the mean between termination and adoption. Of course, these figures do not consider the amount of time that elapses between placement into “the system” and termination of parental rights, which also may be lengthy.

C. “Legal Orphans”

These statistics indicate that adoption may not be a realistic, achievable permanency plan for many older children. The vast majority of adoptions occur before a child’s eleventh birthday, and these adopted children entered the system far earlier, and younger. Thus, if the rights of older children’s parents are terminated without an adoptive resource in place, the termination is far less likely to lead to a completed adoption than for younger children. This could leave older children as “legal orphans”—children who have no legal ties to anyone but the state.⁵⁸ The number of legal orphans appears to have

http://www.acf.hhs.gov/programs/cb/stats_research/afcars/statistics/age06.htm.

⁵² *Id.*

⁵³ U.S. DEP’T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, TIME BETWEEN TPR AND FINALIZATION, OCT. 1, 2002 TO SEPT. 30, 2003 (2006), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/statistics/time06.htm. The means are: D.C. (7.97 months), Indiana (11.48 months), Iowa (11.66 months), Missouri (9.46 months), Puerto Rico (9.30 months), Rhode Island (6.83 months), Utah (8.22 months), Wisconsin (7.50 months), and Wyoming (8.01 months).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* The wait figures in the federal statistics do not include 177 Ohio adoptees for whom data were unavailable.

⁵⁸ “When TPRs [terminations of parental rights] are followed by adoption into a lifetime

risen significantly since 1997; within three years after ASFA's passage, research suggested that the number of terminations of parental rights was increasing significantly.⁵⁹ Subsequent studies found that forty-two percent of children in North Carolina, and forty-seven percent of children in Colorado whose parents' rights had been terminated remained in foster care at the conclusion of the study.⁶⁰ In Ohio, a total of 6,664 children whose parents' rights had been terminated were in the permanent custody of public children services agencies at the end of fiscal year 2005.⁶¹

ASFA's accelerated timelines for termination of parental rights were motivated, in part, by a reasoning "that children are much more likely to be adopted if they are free of legal attachments to their caregivers and can be identified by adoptive families as available for adoption,"⁶² but a recent survey of the research found "negligible evidentiary support" for this proposition with regard to older children.⁶³ The experience of at least one large county, in fact, suggests that it is possible to increase the number of adoptions without creating legal orphans—by aggressively seeking adoptive parents before the biological parents' rights are terminated—thus reducing the amount of time children spend in legal limbo. Allegheny County, Pennsylvania (in which Pittsburgh is located), has 0.4 percent of the nation's population but completes twice that percentage—0.8 percent—of the nation's foster care adoptions.⁶⁴ The county managed

family, it contributes to the goal of having children move into legally permanent homes. But if it fails, it may result in children who have no legal relationship to any parents or guardians." Barth et al., *supra* note 3, at 395.

⁵⁹ See Stephanie J. Gendell, *In Search of Permanency: A Reflection on the First Three Years of the Adoption and Safe Families Act Implementation*, 39 FAM. & CONCILIATION CTS. REV. 25, 32–33 (2001). (discussing national trends since ASFA's passage).

⁶⁰ Barth et al., *supra* note 3, at 390 (citing DEBORAH GIBBS ET AL., RTI INTERNATIONAL, TERMINATION OF PARENTAL RIGHTS FOR OLDER FOSTER CHILDREN: EXPLORING PRACTICE AND POLICY ISSUES ES–2, 3–14, 4–19 (2004)).

⁶¹ THE OHIO DEP'T OF JOB & FAMILY SERV., 2005 ANN. REP. at 18, http://jfs.ohio.gov/ocomm_root/2005AnnualReport.pdf (last visited March 15, 2007).

⁶² Barth et al., *supra* note 3, at 389. Indeed, certain federal policies encourage states to pursue termination of parental rights, even for older children, long before potential adoptive families have been identified, in the belief that early terminations will facilitate eventual adoptions. See ADMIN. OF CHILDREN & FAMILIES, CHILD WELFARE OUTCOMES: 2001 ANN. REP. TO CONGRESS, EXECUTIVE SUMMARY, available at <http://www.acf.hhs.gov/programs/cb/pubs/cwo01/chapters/executive.htm> (last visited Jan. 1, 2007) ("The analyses of CFSR Final Report information identified the following potential barriers to attaining permanency for older children: . . . A perception of agency and court personnel that older children are 'unadoptable' and that filing for termination of parental rights will only result in the creation of 'legal orphans.'").

⁶³ Barth et al., *supra* note 3, at 397.

⁶⁴ Barbara White Stack, *County a Model on Foster Adoption: Agency Meets U.S. Goals Without Raising Number of Legal Orphans*, PITTSBURGH POST-GAZETTE, Dec. 26, 2004, at

both to increase reunification services and aggressively pursue adoption when reunification was infeasible, reducing the average time children spend in foster care to just twenty-two months, nearly a year less than the nationwide average.⁶⁵ Allegheny County refused to create a large class of legal orphans in its quest to increase adoptions; at the end of 2004, the county had precisely seven legal orphans.⁶⁶ Its experience indicates that achieving permanency for foster children is possible without turning the children into long-term legal orphans.

Less than two months before its decision in *A.B.*, the Supreme Court of Ohio decided *In re McBride*,⁶⁷ a case involving a legal orphan. In that case, a mother whose rights had been terminated filed a non-relative petition for custody of her biological daughter; the girl had been in foster care since 1996 but had never been adopted.⁶⁸ The court unanimously held that the biological mother had no standing to petition for custody of the daughter to whom her rights were terminated.⁶⁹ Strangely, the court mentioned very little about the child involved, except a brief mention in one of the final sentences of the opinion: "We recognize that Selina's current situation is not ideal . . ."⁷⁰

In both *McBride* and *A.B.*, the court had the opportunity to address the problem of Ohio's 6,664 legal orphans,⁷¹ but it did not even discuss the issue. The trial court in *A.B.* appeared to choose a PPLA placement, in part, because it wanted to avoid making the children legal orphans. The Ohio Supreme Court's decision in *A.B.* indicates that this is not an acceptable motivation for a judicial decision, yet this motivation appears to directly relate to a child's best interests. Indeed, for many children, it may be detrimental to sever biological family ties without any realistic possibility of adoption.

D. Biological Family Ties and "Aging Out"

Ties to a biological family can become especially important as a child ages. Children who "age out" of foster care without a permanent family are far more at risk for "a range of deleterious outcomes as a

A18.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 850 N.E.2d 43 (Ohio 2006).

⁶⁸ *Id.* at 44.

⁶⁹ *Id.* at 47.

⁷⁰ *Id.*

⁷¹ THE OHIO DEP'T OF JOB & FAMILY SERV., 2005 ANNUAL REPORT: ACCOMPLISHMENTS 18 (2005) (recounting the department's accomplishments from July 1, 2004 to June 30, 2005).

young adult such as early pregnancy or parenthood, criminal involvement, homelessness, lack of employment or dropping out of high school.”⁷² One study found that twenty-seven percent of young men and ten percent of young women reported that they had been in jail at least once in the first twelve to eighteen months after leaving the Wisconsin child welfare system.⁷³ Thirteen percent of the young women reported being sexually assaulted or raped during that time.⁷⁴ Nearly half (forty-four percent) reported that obtaining medical care was a problem most or all of the time since leaving the child welfare system, and thirty-two percent said the same of “having enough money.”⁷⁵ Only sixty-one percent of the youths were employed when interviewed twelve to eighteen months after their discharge from foster care, and only nine percent had entered college.⁷⁶ Twelve percent of the Wisconsin former foster youth reported being homeless at least once, and twenty-two percent had lived in at least four places in the twelve to eighteen months following their discharge.⁷⁷ According to a recent Michigan study, forty-seven percent of former

⁷² LAUREN L. FREY ET AL., CASEY FAMILY SERVICES, A CALL TO ACTION: AN INTEGRATED APPROACH TO YOUTH PERMANENCY AND PREPARATION FOR ADULTHOOD 1 (Apr. 2005). See also LUCY A. BILAVER & MARK E. COURTNEY, NAT’L CAMPAIGN TO PREVENT TEEN PREGNANCY, CHAPIN HALL CENTER FOR CHILDREN, SCIENCE SAYS: FOSTER CARE YOUTH I (Aug. 2006) (finding that “at age 19, foster youth who leave the system are at higher risk for teen pregnancy and birth than both their peers who remain in the system and youth who have never been in foster care.”); ROBERT M. GOERGE ET AL., CHAPIN HALL CENTER FOR CHILDREN, EMPLOYMENT OUTCOMES FOR YOUTH AGING OUT OF FOSTER CARE (MAR. 2002) (finding that former foster care youth are underemployed, earn less than their peers, and make slower progress in the job market); MARTHA SHIRK & GARY STANGLER, ON THEIR OWN: WHAT HAPPENS TO KIDS WHEN THEY AGE OUT OF THE FOSTER CARE SYSTEM (2004) (tracing the fates of several former foster children); Mary Elizabeth Collins, *Transition to Adulthood for Vulnerable Youths: A Review of Research and Implications for Policy*, 75 SOC. SERVICE REV. 271 (2001) (reviewing the generally poor outcomes for former foster children and emphasizing “the importance of continued family and community support to foster individual development, even after young people leave home”); Alfreda P. Iglehart & Rosina M. Becerra, *Hispanic and African American Youth: Life After Foster Care Emancipation*, 11 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK 79 (2002) (describing the struggles of twenty-eight Hispanic and African-American youth after their emancipation from foster care); Matthew Mason et al., *A Comparison of Foster Care Outcomes Across Four Child Welfare Agencies*, 7 J. FAM. SOC. WORK 55 (2003) (presenting interviews with 222 foster care alumni from four different foster care agencies); Ruth Massinga & Peter J. Pecora, *Providing Better Opportunities for Older Children in the Child Welfare System*, 14 FUTURE CHILDREN 15 (2004) (analyzing poor outcomes for older foster children and suggesting changes in independent living programs).

⁷³ Mark E. Courtney, Irving Piliavin, Andrew Grogan-Kaylor & Ande Nesmith, *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, 80 CHILD WELFARE 685, 709 (2001) (tracking 141 young adults who left the Wisconsin foster care system during 1995–1996).

⁷⁴ *Id.* at 712.

⁷⁵ *Id.* at 705, tbl. 6.

⁷⁶ *Id.* at 706, 711.

⁷⁷ *Id.* at 710.

foster youth in that state will be homeless at least once in the first three years after they age out of the child welfare system.⁷⁸

Given the amount of support—both emotional and financial—that many families continue to provide well after a child reaches the age of eighteen, the poor results for children who age out is perhaps not surprising. For example, many families assist with the costs of post-secondary education and provide housing until the young adult can afford to live independently; many college graduates return to their parents' home to save money.⁷⁹ Wealthy families provide an average of \$33,000 in cash—a figure which does not include education or room and board—to their adult children between the ages of eighteen and thirty-four, according to one researcher.⁸⁰ Lower-income families, of course, cannot provide as much financial support, but they still provide some support (an average of \$9,000, according to the same research).⁸¹ According to a National Association of Realtors survey, twenty-four percent of first-time homebuyers, regardless of their age, receive help with their down payments from a relative or friend.⁸²

Children who age out of foster care without either an adoptive family or ties to their biological family have none of this support. If a child is unlikely to be adopted, it might be preferable not to seek termination at the fifteen-of-twenty-two mark, trying to retain at least some potential resource for the child to fall back on after his or her eighteenth birthday. Indeed, many former foster youths report relying on their biological families after discharge from foster care.⁸³

Certainly, there are cases in which termination is the only appropriate option, even if it would leave the child as a legal orphan indefinitely or perhaps permanently. However, in many other cases, it is possible that severing biological family relationships will hurt an older child by making him or her a legal orphan and removing the possibility of family support after the age of eighteen. Having ties to a biological family—even a dysfunctional one—could be preferable to being completely on one's own.⁸⁴ Termination of parental rights is

⁷⁸ Desiree Cooper, *Home for Girls Doesn't Want Help to End at 18*, DETROIT FREE PRESS, July 6, 2006, at A1.

⁷⁹ See, e.g., Chris Seper, *Many Parents Helping Long After College*, CLEVELAND PLAIN DEALER, Sept. 25, 2006, at A1.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Ann Perry, *Using the Family Silver*, L.A. TIMES, Jan. 1, 2006, at K1. See also Christine Haughney, *Buying With Help From Mom and Dad*, N.Y. TIMES, March 18, 2007, § 11, at 1 (more first-time real estate buyers are receiving help from their parents, and some parents are purchasing real estate for their children).

⁸³ COURTNEY ET AL., *supra* note 73, at 698.

⁸⁴ Additionally, some older children manage to reunite with their biological families by running away, even if they no longer have any legal ties to their biological relatives. Barth et al.,

not a one-size-fits-all option, especially for older children. Courts should carefully weigh both the potential benefits (the possibility of adoption and a permanent home) with the potential costs (the possibility of becoming a legal orphan). Each child's situation is different and requires individualized consideration.

E. Roles of the Players in "the System"

Another concerning consequence of the Ohio Supreme Court's decision in *A.B.* is that it effectively emasculates the roles of the judge and the GAL in child protection hearings in Ohio. GALs, in particular, play a critical role in the child protection system. A 1974 federal statute, the Child Abuse Prevention and Treatment Act (CAPTA),⁸⁵ requires states to provide GALs to advocate for the best interests of each child involved in child protection proceedings. Shortly thereafter, as states were beginning to implement CAPTA, a Seattle judge began recruiting volunteers to represent children's best interests in court; the idea of using non-attorneys to represent children spread and eventually became a nationwide Court-Appointed Special Advocate (CASA) program.⁸⁶ Today, some jurisdictions rely on CASA volunteers, others on volunteer attorneys, others on paid GALs, and still others on a combination of some or all of these to represent children's best interests. Ohio counties employ a variety of procedures for the appointment of GALs.⁸⁷ Thirty-five of Ohio's eighty-eight counties have CASA programs,⁸⁸ while others require that GALs be attorneys.⁸⁹

Whether the GAL is an attorney or a lay volunteer, a GAL in Ohio is charged with "perform[ing] whatever functions are necessary to protect the best interest of the child"⁹⁰ An Ohio attorney appointed as a GAL typically is appointed in a dual role—as counsel for the child and as the GAL.⁹¹ If there is any conflict between the attorney's role as counsel (advocating the child's wishes) and as GAL

supra note 3, at 394.

⁸⁵ Pub. L. No. 93-247, 88 Stat. 4 (1974).

⁸⁶ National CASA Association, *History of the CASA Movement*, http://www.nationalcasa.org/about_us/history.html (last visited March 21, 2007).

⁸⁷ Karen Elliot, *The Guardian Ad Litem in Ohio's Domestic Relations Courts: The Square Peg Fits*, 27 OHIO N.U. L. REV. 267, 270 (2001).

⁸⁸ Ohio CASA Association, *Court Appointed Special Advocate—History*, <http://www.ohiocasa.org/LM/History.htm> (last visited July 18, 2007).

⁸⁹ See, e.g., CUYAHOGA COUNTY CT. C. P. JUV. DIV. R. 17(B).

⁹⁰ OHIO REV. CODE ANN. § 2151.281(I) (West 2006). For criticism of Ohio's general lack of guidelines on the role of GALs, see Charles T. Cromley, Jr., Comment, "[A]s Guardian Ad Litem I'm in a Rather Difficult Position," 24 OHIO N.U. L. REV. 567 (1998).

⁹¹ OHIO REV. CODE ANN. § 2151.281(H); OHIO JUV. R. 4(C)(1).

(advocating the child's best interests), the attorney must notify the court; the court then will relieve the attorney from the GAL role and appoint another GAL.⁹² If the GAL is a volunteer, and there is a conflict between the child's wishes and the GAL's determination of the child's best interests, the court is to appoint an attorney as counsel for the child.⁹³ Although they do not define the precise scope of a GAL's role, the Ohio statutes thus seem to value the GAL as an independent, un-conflicted advocate of the child's best interests and provide procedures to avoid any conflict.

If the county child welfare agency always acted in a child's best interests, GALs presumably would not be necessary. The GAL serves as a form of check on the county agency, independently advocating the child's best interests to the court. Indeed, the agency's institutional interests in a given case may be opposed to the child's best interests. As the amicus curiae brief in *A.B.* noted, state agencies receive payments from the federal government for each adoption, but must bear the costs of a PPLA.⁹⁴ There was no suggestion in *A.B.* that potential financial incentives tainted the agency's handling of this particular case, but the very existence of the financial incentives means that the agency's interests are not always identical to the child's.

In almost all other areas of the law, judges have tremendous discretion, but statutes and principles of due process naturally restrict this discretion somewhat in the area of child welfare. For instance, statutory prerequisites must be satisfied and certain procedures must be followed before judges can terminate parents' rights. This makes sense, based on the tremendous importance of the interests at stake.⁹⁵ However, it makes little sense to restrict *judges'* discretion to determine a child's best interests, while simultaneously granting the *agency* nearly unfettered discretion in the same determination.

Some argue that the "best interests of the child" is a fuzzy standard subject to cultural, racial, and economic biases,⁹⁶ but it is difficult to imagine a child welfare system that did not attempt to determine the child's best interests. Further, surely it is better to have two persons responsible for determining the child's best interests, rather than one alone. If the agency alone is allowed to determine the child's best

⁹² OHIO REV. CODE ANN. § 2151.281(H); OHIO JUV. R. 4(C)(2).

⁹³ OHIO REV. CODE ANN. § 2151.281(H).

⁹⁴ Brief of Amicus Curiae Justice for Children Project in Support of Appellee Charles Brown and Appellees A.B., J.B., T.B., and C.B., No. 2005-1966, 2006 WL 926939, at *8 (Mar. 13, 2006), *In re A.B.*, 852 N.E.2d 1187 (Ohio 2006).

⁹⁵ See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

⁹⁶ See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

interests without any judicial review, it seems that the risk of biased determinations would be far greater.

The Ohio Supreme Court's decision in *A.B.* emasculates the roles of the GAL and judge in child protection hearings in Ohio. The decision assumes that the agency is the sole (or best) arbiter of the child's best interests by giving broad authority to the state child welfare agency. If the GAL independently believes that a PPLA placement is in the child's best interests and advocates that disposition to the juvenile court, the judge is prohibited from agreeing with the GAL unless the agency also agrees. Only when the agency has first determined a PPLA placement to be in the child's best interests may a judge determine that the placement is in fact in the child's best interests. This is, to put it mildly, an illogical result. Such a result ties the hands of judges and GALs who disagree with the agency's determination of the child's best interests, and it may even prevent the child's true best interests from being achieved.

III. PPLA PLACEMENTS IN OHIO AND ELSEWHERE

A. Ohio

Until the Ohio Supreme Court decided *A.B.*, the appellate districts were split on the issue of when a juvenile court had authority to place a child in a PPLA, and this split had lasted for years. More than one appellate district had determined that the pre-ASFA version of section 2151.353, which referred to "long-term family foster care" instead of PPLAs, gave the juvenile court "the inherent right to provide for less restrictive relief than is prayed for in a juvenile complaint," and, thus, the right to order a long-term foster care placement when the county agency's *initial complaint* sought termination of parental rights.⁹⁷ Other districts disagreed.⁹⁸ Several appellate courts held that the pre-ASFA statutes permitted a court to order another disposition,

⁹⁷ *In re Duncan/Walker Children*, 673 N.E.2d 217, 218 (Ohio Ct. App. 1996) ("[T]he trial court is vested with the inherent right to provide for less restrictive relief than is prayed for in a juvenile complaint."); *In re Stoffer*, No. 94-CA-0153, 1995 WL 347906, at *3 (Ohio Ct. App. Feb. 6, 1995); *In re Cremeans*, Nos. 61367, 61368, 61369, 1992 WL 47278, at *4 (Ohio Ct. App. March 12, 1992). The substitution of "planned permanent living arrangement" for "long-term foster care" was the only substantive change that 1998 HB 484 made to the relevant provisions of the statute after ASFA's enactment.

⁹⁸ *In re McDaniel*, No. 92-CA-539, 1993 WL 33308 at *8 (Ohio Ct. App. Feb. 11, 1993) ("[T]he statute leaves no doubt that a court may not place a child in long-term foster care unless the complaint contains a prayer requesting [such action]."). See also *In re Shackelford*, No. 11783, 1990 WL 68954 at *7 (Ohio Ct. App. May 22, 1990).

including long-term foster care, when denying a motion for permanent custody that arose after the initial complaint.⁹⁹

Similarly, although the current version of section 2151.353 provides that a court may issue a PPLA order as an initial disposition only "if the public children services agency or private child placing agency requests" it, several appellate districts ruled that a juvenile court has authority to place children in a PPLA *sua sponte* as a modification of the initial disposition, based on other provisions of the Ohio Revised Code that grant juvenile court judges broad discretion to determine children's placement.¹⁰⁰ The Eighth District repeatedly took the opposite view, after repudiating its own 1992 decision that interpreted the pre-ASFA statute to permit *sua sponte* PPLA placements upon an initial complaint, and its own 2000 decision holding that a judge had authority to order any disposition, including a PPLA, after denying a motion for termination of parental rights.¹⁰¹ After a flurry of cases in 2005 coming down on both sides of the issue,¹⁰² the Ohio Supreme Court took up the question and sided

⁹⁹ *In re Buchanan*, Nos. 96-CA-0062, 96-CA-0063, 1997 WL 451472, at *4 (Ohio Ct. App. July 25, 1997) (Upon a motion for permanent custody that arises after the initial complaint, "[a] court may consider in its discretion the option of long-term family foster care even when, as here, the agency does not request it"); *In re McDaniel*, No. 92 CA 539, 1993 WL 33308, at *10 (Ohio Ct. App. Feb. 11, 1993) (under Ohio's statutory scheme, when a juvenile court is proceeding on a later motion for permanent custody, it "has authority to order any of the dispositional alternatives it deems appropriate, as long as that alternative is in the best interest of the child. There is no language in either of these sections which limits the court to the disposition requested in the original complaint.") (quoting *In re Smith*, No. CA89-96-037, 1990 WL 70926, at *5 (Ohio Ct. App. May 29, 1990) (*superseded by statute*, JUV. R. 40(E)(4)(a), as recognized in *In re Comer*, No. CA89-06-037, 1997 WL 596286 (Ohio Ct. App. Sept. 23, 1997)). See also *In re Sullivan*, No. 13-91-28, 1992 WL 42813, at *1-2 (Ohio Ct. App. March 4, 1992) (ruling that the trial judge could grant permanent custody, though it was not originally sought, because the natural mother had been put on notice that her parental rights could be terminated).

¹⁰⁰ *In re Moody*, Nos. 01CA11, 01CA14, 2001 WL772229, at *4 (Ohio Ct. App. June 28, 2001) (affirming trial judge's decision to place a child in a PPLA); *In re Lane*, No. 18467, 2001 WL 109154 (Ohio Ct. App. Feb. 9, 2001) (same); *In re Campbell*, Nos. 77552, 77603, 2000 WL 1514365, at *5 (Ohio Ct. App. Oct. 12, 2000) ("Whereupon hearing a motion requesting permanent custody of a child a court decides to deny the motion, the court may proceed in accordance with R.C. 2151.415 and make any disposition listed in that statute, including a PPLA."). See also *In re Priser*, No. 19861, 2004 WL 541124, at *4 (Ohio Ct. App. March 19, 2004). ("The court's option . . . to place the child in a planned permanent living arrangement . . . is available on only three limited situations.")

¹⁰¹ "[A] planned permanent living arrangement can only be ordered if the county seeks it first." *In re M.W.*, No. 83390, 2005 WL 678111, at ¶ 22 (Ohio Ct. App. Mar. 24, 2005). See also *In re M.E.*, No. 86274, 2006 WL 951448 (Ohio Ct. App. Apr. 13, 2006); *In re A.B.*, No. 83971, 2004 WL 2491677 (Ohio Ct. App. Nov. 4, 2004), *In re B.N.*, No. 83704, 2004 WL 1902115 (Ohio Ct. App. Aug. 26, 2004); *In re K.P.*, No. AD 02901679, 2004 Ohio App. LEXIS 1494 (Ohio Ct. App. March 31, 2004); *In re I.M.*, Nos. 82669, 82695 2003 WL 23010024 (Ohio Ct. App. Dec. 24, 2003). *Contra In re Cremeans*, Nos. 61367, 61368, 61389, 1992 WL 47278 (Ohio Ct. App. Mar. 12, 1992); *In re Campbell*, Nos. 77552, 77603, 2000 WL 1514365 (Ohio Ct. App. Oct. 12, 2000).

¹⁰² See *In re A.S.*, 839 N.E.2d 972 (Ohio Ct. App. 2005) (holding that a juvenile court has

with those who read the statute as forbidding all PPLA placements unless the agency has first requested them.

As noted in Section I, the majority of the Ohio Supreme Court found the language of section 2151.353 to be “unambiguous.”¹⁰³ Despite the majority’s confidence that its interpretation is the only legitimate interpretation of the statute, however, the language is not necessarily unambiguous. Indeed, several strong arguments can be made for interpreting the statute differently. The dissenters at the Ohio Supreme Court, as well as the majority on the court below, read section 2151.353 as applying only to *initial* disposition, and section 2151.415 as applying to *subsequent* dispositions or modifications of the initial disposition. This view seems plausible from several different theories of statutory interpretation.

First, the “unambiguous” plain meaning the majority cited may not be so unambiguous. Nearly all other states use the term “dispositional hearing” to refer to the initial disposition and/or journalizing of the case plan, but use another term (most commonly “permanency hearing”) to refer to the later hearing and review at which a child’s permanent plan is determined and/or ordered.¹⁰⁴ Ohio’s statutes and

the authority to order a PPLA on its own initiative), *rev’d* 853 N.E.2d 291 (Ohio 2006); *In re A.B.*, No. 22659, 2004 WL 2291869 (Ohio Ct. App. Sept. 21, 2005) (same); *In re M.W.*, No. 83390, 2005 WL 678111, (Ohio Ct. App. Mar. 24, 2005) (holding that the county must request a PPLA); *Miller v. Greene County Children’s Serv. Bd.*, 833 N.E.2d 805 (Ohio Ct. App. 2005) (affirming the trial court’s denial of county agency’s motion for termination of parental rights and finding by clear and convincing evidence that the child’s profound disabilities and health problems made a PPLA placement in a specialized foster home in his best interest).

¹⁰³ *In re A.B.*, 852 N.E.2d 1187, 1193 (Ohio 2006).

¹⁰⁴ For statutes referring to “permanency hearings,” see ALA. CODE § 12-15-62(c) (2005), ALASKA STAT. § 47.10.990(24) (2006), ARIZ. REV. STAT. ANN. § 8-862(A) (2007), COLO. REV. STAT. § 19-1-103(83.5) (2006), CONN. GEN. STAT. § 46b-129(k) (2004 & Supp. 2007), Del. Fam. Ct. R. Civ. Pr. 216 (defining a permanency hearing and setting requirements therefore), D.C. CODE § 16-2323(a)(4) (2005 & Supp. 2007), FL. STAT. § 39.621 (2003 & Supp. 2007), GA. CODE ANN. § 15-11-58(o) (2005), IDAHO CODE ANN. § 16-1602(26) (2007), 705 ILL. COMP. STAT. 405/1-3(11.2) (1999 & Supp. 2007), IND. CODE § 31-34-21-7 (1999 & Supp. 2007), IOWA CODE § 232.58 (2006), KANSAS STAT. ANN. § 38-1502(y) (2000), KY. REV. STAT. ANN. § 610.125 (West 2006), LA. CHILD. CODE ANN. Art. 702(B) (2004), MASS. GEN. LAWS ch. 119, § 29B (2003 & Supp. 2007), MINN. STAT. ANN. 260C.201-Subd. 11-11a (West 2007), MISS. CODE ANN. § 43-21-613(3)(A) (Supp. 2006), MO. REV. STAT. § 210.720 (2004), MONT. CODE ANN. § 41-3-445 (2006), NEB. REV. STAT. § 43-1312(3) (2004), N.J. STAT. ANN. § 30:4C-61.2 (Supp. 2007), N.M. STAT. ANN. § 32A-4-25.1 (WEST 2007), N.Y. FAM. CT. ACT § 355.5 (McKinney Supp. 2007), N.D. CENT. CODE § 27-20-02(13) (2006), OKLA. STAT. tit. 10, § 7003-5.6d (2007), OR. REV. STAT. § 419B.470 (2005), 42 PA. CONS. STAT. § 6351(e) (2000 & Supp. 2007), R.I. GEN. LAWS §40-11-12.1 (2007), S.D. CODIFIED LAWS § 26-8A-21.2 (1999), TENN. CODE ANN. § 37-2-409 (2005), TEX. FAM. CODE ANN. § 263.301 and following (Vernon 2002 & Supp. 2006), UTAH CODE ANN. § 78-3a-310(3) (2006), VT. STAT. ANN. tit. 33, § 5531 (2001 & Supp. 2006), WASH. REV. CODE § 13.34.145(3) (2004 & Supp. 2007), W. VA. CODE § 49-6-5a (Supp. 2007), WYO. STAT. ANN. § 14-3-431(d)-(k) (2007). For statutes using slightly different terms in the same vein, see ARK. CODE ANN. §9-27-338 (2002 & Supp. 2005) (“permanency planning hearing”), CAL. WELF. & INST. CODE § 366.22 (West Supp. 2007)

case law, on the other hand, use the word “disposition” in multiple contexts—the initial disposition, any subsequent modifications of the original disposition, and the final disposition.¹⁰⁵ The leading work on Ohio juvenile law, for instance, refers in a single paragraph to “dispositional hearings,” “dispositional review hearings,” “post-dispositional hearings,” and “post-disposition motions . . . requesting new dispositional orders.”¹⁰⁶ With such repetitive and confusing language, perhaps it is no wonder the Ohio Supreme Court disagreed about which dispositions section 2151.353 governed.

From a textualist perspective, it is entirely possible to read section 2151.353(A)(5) as applying only at the initial dispositional hearing. The first sentence of the statute indicates that “[i]f a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition.”¹⁰⁷ The text of this sentence suggests that the dispositions listed are available upon the initial determination of abuse, neglect, or dependency. Indeed, several Ohio appellate districts had previously interpreted section 2151.353 to be inapplicable to proceedings after the initial disposition hearing, holding that section 2151.415 governed “motions for dispositional orders upon expiration of temporary custody”¹⁰⁸ and that a “court has discretion under [section] 2151.415(A) at post-dispositional hearings to impose any of the dispositional options contained in that section according to the child’s best interest.”¹⁰⁹

(“permanency review hearing”), HAW. REV. STAT. § 587-73 (Supp. 2005) (“permanent plan hearing”), ME. REV. STAT. ANN. tit. 22, § 4038-B (Supp. 2006) (“permanency planning hearing”), MD. CODE ANN., CTS. & JUD. PROC. § 3-823(b) (West 2006) (“permanency planning hearing”), MICH. COMP. LAWS ANN. § 712A.19a (West 2002 & Supp. 2007) (“permanency planning hearing”), N.C. GEN. STAT. § 7B-907 (2005) (“permanency planning hearing”), S.C. CODE ANN. § 20-7-766 (Supp. 2006) (“permanency planning hearing”), VA. CODE ANN. § 16.1-282.1 (2003 & Supp. 2007) (“permanency planning hearing”). Additionally, Puerto Rico’s statutes use the terms “final dispositional hearing” and “permanency hearing” apparently synonymously. P.R. LAWS ANN. tit. 8, §§447(k), 447(s) (2006).

¹⁰⁵ See OHIO REV. CODE ANN. §2151.353 (West 2005 & Supp. 2006) (“the court may make any of the following orders of disposition”) and OHIO REV. CODE ANN. §2151.415(B) (West 2005 & Supp. 2006) (“upon the filing of a motion pursuant to division (A) of this section [to modify the initial disposition], the court shall hold a dispositional hearing on the date set at the dispositional hearing held pursuant to section 2151.35 of the Revised Code”). See generally PAUL C. GIANNELLI & PATRICIA MCCLOUD YEOMANS, OHIO JUVENILE LAW § 17.14 (2006 ed.).

¹⁰⁶ GIANNELLI & YEOMANS, *supra* note 105, at § 17.14.

¹⁰⁷ OHIO REV. CODE ANN. § 2151.353(A).

¹⁰⁸ *In re Sullivan*, No. 13-91-28, 1992 WL 42813, at *1 (Ohio Ct. App. March 4, 1992). This was also the conclusion of the court below in *In re A.B.*, 2004 WL 2291869, No. 22659 (Ohio Ct. App. Sept. 21, 2005).

¹⁰⁹ GIANNELLI & YEOMANS, *supra* note 105, at § 17.14 (citing *In re Sullivan*, No. 13-91-28, 1992 WL 42813, at *1 (Ohio Ct. App. March 4, 1992), and *In re Smith Children*, No. CA89-06-037, 1990 WL 70926, at *5 (Ohio Ct. App. May 29, 1990)).

Reading section 2151.415 lends great weight to this argument. Section 2151.415 provides, in relevant part:

Except for cases in which a motion for permanent custody [i.e., termination of parental rights] . . . is required to be made, a public children services agency or private child placing agency that has been given temporary custody of a child pursuant to section 2151.353 of the Revised Code, not later than thirty days prior to the earlier of the date for the termination of the custody order . . . or the date set at the dispositional hearing for the hearing to be held pursuant to this section, shall file a motion with the court that issued the order of disposition requesting that any of the following orders of disposition of the child be issued by the court.¹¹⁰

The text of this statute indicates that it is applicable to motions filed after the initial disposition of temporary custody (a disposition granted under section 2151.353) expires. In the *A.B.* case, this is precisely what happened; the court had granted temporary custody to the Summit County Children's Services Board.¹¹¹ It then issued an order for a PPLA after the temporary custody order expired and the agency sought permanent custody of the children.¹¹² Regarding PPLA placements, section 2151.415 provides that an agency must document the reasons a PPLA is appropriate if it has requested such a placement,¹¹³ and then states:

If the court issues an order placing a child in a planned permanent living arrangement, both of the following apply:

(a) The court shall issue a finding of fact setting forth the reasons for its finding;

(b) The agency may make any appropriate placement for the child and shall develop a case plan for the child that is designed to assist the child in finding a permanent home outside of the home of the parents.¹¹⁴

The text of section 2151.415 contains no requirement that the agency request a PPLA placement before a juvenile court can order one. The dissent's textual argument about sections 2151.353 and

¹¹⁰ OHIO REV. CODE ANN. §2151.415(A).

¹¹¹ *In re A.B.*, No. 22659, 2005 WL 2291869, at ¶ 1-12 (Ohio Ct. App. Sept. 21, 2005).

¹¹² *Id.*

¹¹³ OHIO REV. CODE ANN. § 2151.415(C)(1).

¹¹⁴ OHIO REV. CODE ANN. § 2151.415(C)(2).

2151.415 thus appears to be a strong one; if section 2151.415 is applicable to dispositions arising after the initial disposition of temporary custody, the court should have discretion to order a PPLA when appropriate even if the agency has not requested it.

When faced with multiple possible meanings of the statute's text here, it does not seem unreasonable to consider the consequences of adopting each meaning. Even Justice Scalia, an ardent textualist, has ignored clear statutory text in more than one case because the plain meaning of the text would produce "absurd" results.¹¹⁵ This case presents a stronger argument for invoking the anti-absurdity canon, because the text of section 2151.353 is not unambiguous. It seems that textualists justifiably could examine the text of the statute, find that the text has two potential meanings, and then consider the results of reading the statute each way. In the *A.B.* decision, the consequences of reading the statute as broadly as the Ohio Supreme Court did are potentially devastating, possibly preventing children from achieving appropriate permanent placements.

The dissenters' reading of the statute's text looks to the whole act, not a single statute in isolation. The dissent wryly commented that "the result reached by the majority is reasonable—if you read only [section] 2151.353(A)(5), and out of context at that. You must ignore the fact that [section] 2151.353(A)(5) applies only upon the initial adjudication And you must ignore [sections] 2151.01, 2151.414, and 2151.415."¹¹⁶ Section 2151.353 is part of a larger statutory scheme for child protection. All of chapter 2151 relates to juvenile court, and many child protection statutes are found within the chapter. Therefore, it plausibly could be argued that the preferable meaning of the words of section 2151.353 "is the one consistent with the rest of the statute and statutory scheme,"¹¹⁷ that is, the one that restricts

¹¹⁵ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419–2420 (2003). Manning argues that Scalia and other modern textualists should not use the absurdity doctrine to avoid the plain meaning of a text, because doing so undermines the philosophical bases of textualism itself:

[J]udicial reliance on the absurdity doctrine risks disturbing the outcomes of the legislative process by 'correcting' wording that Congress itself might have been unable—or at least unwilling—to correct. Because the absurdity doctrine is triggered by the conclusion that Congress could not conceivably have intended the results otherwise compelled by a clear statutory text (taken in context), the foregoing uncertainty about the legislative process makes the doctrine questionable, at least as it is now understood.

Id. at 2431. Here, however, the statutory text is less than clear, and it seems that examining the consequences of adopting each possible statutory meaning would not undermine textualism.

¹¹⁶ *In re A.B.*, 852 N.E.2d 1187, 1194 (Ohio 2006) (Pfeifer, J., dissenting).

¹¹⁷ WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 272 (2d ed., Thomson/West 2006) (2000).

section 2151.353's applicability to the disposition upon the initial complaint.

Moreover, the dissent's views also find justification in an intentionalist approach to statutory interpretation. The Ohio General Assembly itself enacted section 2151.01, which demands:

The sections in Chapter 2151. of the Revised Code, with the exception of those sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes:

(A) To provide for the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code, whenever possible, in a family environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety;

(B) To provide judicial procedures through which Chapters 2151. and 2152. of the Revised Code are executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.

The majority opinion argued that section 2151.353 places limitations on PPLAs "[b]ecause the General Assembly intended to encourage speedy placement."¹¹⁸ Presumably, the court is referring to speedy *adoptive* placements.

However, the General Assembly's own language in section 2151.01 does not mention speedy adoptive placement among the purposes of the chapter. There may be many reasons why the General Assembly did not enact specific language about speedy adoptive placements, of course, and theorizing about its silence on this matter could lead to different conclusions: the legislators assumed that their purpose to encourage speedy adoptive placement was clear, they simply did not think about including it, or they deliberately omitted it. The Ohio Supreme Court took the first view, finding that the legislators' intent was clear from the text of the statute at issue. Given the ambiguities noted above, though, it is difficult to infer intent from the text. The dissent took the third view, arguing that if the legislature wished to make a clear statement of its purpose to encourage speedy adoptive placement, it surely could have done so. The dissent argued

¹¹⁸ *In re A.B.*, 852 N.E.2d at 1193.

that the reason for the restrictions in section 2151.353 is that, on an initial complaint, the agency knows the situation best; once the judge has presided over several hearings, he or she is in the best position to determine whether a PPLA is in the child's best interests.¹¹⁹ The dissent read other provisions of the Revised Code (like section 2151.415) as evidence of a legislative intent that after the initial complaint, the juvenile court should have discretion to order any placement that is in a child's best interests.¹²⁰

Intriguingly, at least one lower court in Ohio appears not to be persuaded by the Ohio Supreme Court's decision in *A.B.* In an opinion just four months after the Ohio Supreme Court's decision, one Ohio appellate district ruled: "We disagree with the state's assertion that the trial court could not have considered a PPLA in the absence of a request from [the agency] for such a placement. We have previously held that the court may consider, *sua sponte*, the option of a PPLA even when the agency did not request it."¹²¹ This is, of course, in direct opposition to *A.B.*, but the appellate court never once mentioned the *A.B.* decision.¹²²

B. Other States' Approaches

The Ohio Supreme Court's decision in *A.B.*, as discussed above, hinged on one phrase: "if a public children services agency or private child placing agency requests the court to place the child in a planned permanent living arrangement."¹²³ Many states have similar phrases in their statutes, modeled on a federal provision.¹²⁴ Although the statutes may appear similar to Ohio's, other states have taken varying viewpoints on whether a judge may place a child in an alternative planned permanent living arrangement without a prior agency request. Only New Hampshire appears to have reached the same conclusion as the Ohio Supreme Court—that the state child welfare agency must request an alternative planned permanent living arrangement and

¹¹⁹ *Id.* at 1194–95 (Pfeifer, J., dissenting).

¹²⁰ *Id.*

¹²¹ *In re J.R.*, No. 21749, 2007 WL 127729, at *6 (Ohio Ct. App. Jan. 19, 2007).

¹²² The appellate court eventually concluded, however, that "the trial court acted within its discretion in choosing not to consider a PPLA under the circumstances presented in this case." *Id.*

¹²³ OHIO REV. CODE ANN. § 2151.353(A)(5) (1998).

¹²⁴ For more on the federal Adoption and Safe Families Act, see *supra* Section II.A. The relevant phrase in the federal legislation is: "or (in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian) placed in another planned permanent living arrangement." 42 U.S.C. § 675(5)(C) (1998).

document to the court a "compelling reason" justifying the placement.¹²⁵

In Maine, the statute relating to permanency plans provides that a child may be "placed in another planned permanent living arrangement when the department has documented to the court a compelling reason for determining that it would not be in the best interests of the child to be returned home, be referred for termination of parental rights or be placed for adoption, be placed with a fit and willing relative, or be placed with a legal guardian."¹²⁶ The Supreme Judicial Court of Maine, after discussing the Maine legislature's statements prioritizing permanency for children, held that a trial court "must consider the statutorily mandated concept of permanency when making best interest determinations . . . [and] must specifically determine whether a compelling reason exists that supports a disposition that will result in long-term foster care."¹²⁷ It then remanded the case to the trial court because the trial court's best interest determination had not specifically articulated a compelling reason for the order for a long-term foster care placement. Notably, the Maine court appears simply to have assumed that the trial court had authority to make such a placement without agency support, although to some the phrase "when the department has documented" might suggest to the contrary.¹²⁸

Similarly, Vermont's statutes provide that a court may place a child in "another planned permanent living arrangement [when] the commissioner [of the department of social and rehabilitation services] has demonstrated to the satisfaction of the court a compelling reason that it is not in the child's best interests to return home, to have residual parental rights terminated and be released for adoption or placed with a fit and willing relative or legal guardian."¹²⁹

The Supreme Court of Vermont upheld a trial court's denial of a petition for termination of parental rights and subsequent order for a long-term foster care placement, holding that the trial court had documented a "compelling reason" to justify the placement.¹³⁰ Like the Maine high court, the Vermont Supreme Court did not discuss the portion of the statute that might suggest agency approval is necessary,

¹²⁵ *In re Juvenile* 2005-426, 910 A.2d 1240, 1242 (N.H. 2006).

¹²⁶ ME. REV. STAT. ANN. tit. 22, § 4038(7-A)(B)(1)(d) (2004).

¹²⁷ *In re Thomas H.*, 889 A.2d 297, 307 (Me. 2005).

¹²⁸ *Id. passim*.

¹²⁹ VT. ST. ANN. tit. 33, § 5531(d)(4) (2001).

¹³⁰ *In re A.G.*, 868 A.2d 692, 700 (Vt. 2004).

and assumed that the trial court had authority to make such a placement.¹³¹

In Tennessee, an appellate court vacated a trial court's order for a long-term foster care placement, based on the trial court's lack of findings as to the children's best interests.¹³² The Tennessee statute on permanency plans states: "Placement in another planned permanent living arrangement shall only be appropriate in cases where the state agency has documented a compelling reason for determining that the other goals would not be in the best interests of the child because of the child's special needs or circumstances."¹³³ The appellate court discussed the reasons for disfavoring long-term foster care, and remanded the case for the required findings.¹³⁴ However, it never indicated that the trial court lacked authority to order long-term foster care when, as in that case, the agency supported termination of parental rights instead of long-term foster care.¹³⁵

In Iowa, the status of alternative permanent placements seems unclear. In 2005, an appellate court held that a trial court erred in ordering long-term foster care for two children instead of placing them with a maternal aunt. It found that "the juvenile court is to order another planned permanent living arrangement only [if the agency] has documented to the court's satisfaction a compelling reason" that other permanency options, such as placement with the aunt, are inappropriate.¹³⁶ The court wrote:

We note that DHS not only did not attempt to document that guardianship and custody with [the aunt] would not be in the children's best interest, but in fact forcefully argued that it would be in their best interest. We need not and do not decide that the juvenile court cannot order another planned permanent living arrangement in the absence of such documentation. We do conclude, however, that under the facts and circumstances of this case and the [statutory] language . . . the DHS' position is entitled to substantial weight.¹³⁷

¹³¹ *Id.*

¹³² *In re* M.E.W., No. M2003-01739-COA-R3-PT, 2004 WL 865840 (Tenn. Ct. App. April 21, 2004).

¹³³ TENN. CODE ANN. § 37-2-409(b)(2) (2005).

¹³⁴ M.E.W., No. M2003-01739-COA-R3-PT, 2004 WL 865840 at *15-19.

¹³⁵ *Id.*

¹³⁶ *In re* E.K., No 05-0919, 2005 WL 2508542 at *4 (Iowa Ct. App. Oct. 12, 2005) (internal quotations omitted).

¹³⁷ *Id.*

Just a few months later, another panel of the same court affirmed a trial court decision that denied the state's petition to terminate parental rights and placed two girls in long-term foster care.¹³⁸ The state in that case opposed the long-term foster care placement and strongly argued against it, but the appellate court upheld the order despite its earlier suggestion that a long-term foster care order without agency support might be invalid.¹³⁹

IV. CHARTING A COURSE FOR THE FUTURE

The result of *A.B.* is wrong and carries potentially harmful consequences for those children for whom a PPLA is the only appropriate permanency option. How, then, should Ohio, and the nation as a whole, deal with these children? Several potential solutions exist that would better serve children's interests.

First, the Ohio Supreme Court could overturn its own decision and reinterpret section 2151.353 to be applicable only to initial dispositions. Then, a juvenile court judge could not place children in a PPLA upon an initial complaint unless the agency had specifically requested a PPLA, but the judge could place the children in a PPLA later, after an expired grant of temporary custody to the agency. This interpretation would be justifiable both from a textualist and intentionalist approach to statutory interpretation, and it would create far fewer complications for children. Courts in other states have interpreted facially similar language in this way as they struggled to deal with the problems surrounding long-term foster care.

If the court does not reconsider its decision, the Ohio General Assembly should amend the Ohio Revised Code to clarify the circumstances in which each dispositional statute applies. It would be helpful if the General Assembly used different terms to refer to different hearings, such as "dispositional hearing" and "permanency hearing." Currently, the multiple meanings of the word "disposition" in the statutes are confusing even to the Ohio Supreme Court. However the General Assembly chooses to revise the statutes, it should make individualized consideration of a child's best interests the primary concern. "[A] general public policy favoring adoption, which must be preceded by termination of parental rights, over long term foster care cannot substitute for an individualized determination of the best interest of the child who is the subject of the termination proceeding."¹⁴⁰

¹³⁸ *In re R.B.*, No. 06-0594, 2006 WL 1409231 (Iowa Ct. App. May 24, 2006).

¹³⁹ *Id.* at *2.

¹⁴⁰ *In re M.E.W.*, No. M2003-01739-COA-R3-PT, 2004 WL 865840 at *12 (Tenn. Ct.

The General Assembly also should consider establishing a subsidized guardianship program in Ohio. A guardianship with the current foster mother might have been appropriate for the B. children—it would have enabled them to continue living with her, they would have remained together, and they would have some measure of legal permanence. The fact that this option was never mentioned in this case suggests that the foster mother may have needed financial aid that was unavailable to her if she became a guardian. Establishing a subsidized guardianship program would create another option for children for whom the permanency goals of reunification and adoption are inappropriate.

Finally, the General Assembly ought to encourage agencies to offer stronger reunification services to biological families and to seek potential adoptive placements via concurrent planning (including legal risk placements in appropriate cases) early, as soon as it appears that a child will not be able to return to his or her birth family. A legal risk placement is a “placement of a child with a family who is interested in adopting the child [before] the child placed is legally free” for adoption, that is, before his or her parents’ rights have been terminated.¹⁴¹ This approach, which is the one that Allegheny County, Pennsylvania, apparently has chosen, would begin to address the plight of Ohio’s 6,664 legal orphans and could benefit older children by seeking potential adoptive families for them at earlier ages. This would reduce the risk of children being placed into PPLA placements solely because the passage of time has made other placements inappropriate.

Various stakeholders in the Ohio child welfare system currently are working to revamp Ohio’s child welfare statutes.¹⁴² The draft bill changes Ohio’s system to a non-fault-based, “Child in Need of Protective Services” system.¹⁴³ The proposed language removes much of the ambiguity that currently exists in the Ohio Revised Code statutes relating to abused, neglected or dependent children. However, the draft bill does not currently change any of the dispositional statutes (with the exception of changing the definitions therein) or the circumstances under which certain dispositions are available.

App. April 21, 2004).

¹⁴¹ OHIO DEP’T OF JOB & FAMILY SERV., OHIO ADOPTION GUIDE 26, <http://www.odjfs.state.oh.us/forms/file.asp?id=44766> (last visited March 21, 2007).

¹⁴² See Ohio Children Protection Law Reform Initiative (OCPLRI), <http://www.ohiochildlaw.com> (last visited July 18, 2007).

¹⁴³ Ohio Children Protection Law Reform Initiative, *Child in Need of Protective Services*, http://www.law.capital.edu/adoption/ocplri/Draft_Statute_at_4_10_final.pdf (last visited July 18, 2007).

CONCLUSION

Adoption gives children a chance to thrive and grow in a “forever family,” and it is a good and worthy goal for many of the children in America’s foster care system. A myopic focus on adoption, however, can obscure other permanency options that may be more appropriate for certain children.¹⁴⁴ Although adoption is good, it is not the best option for all children. Terminating parental rights for those children, in the hopes that the permanency goal of adoption could one day be appropriate or achievable, has the potential to do more harm than good.

In the *A.B.* case, a PPLA placement would enable the siblings to continue living together, with a foster mother who all agreed was wonderful. Terminating their father’s rights could have led to them being separated through adoption—and all agreed that separating the siblings was not in their best interests. Yet this is precisely the result that may follow, based on the Ohio Supreme Court’s prohibiting juvenile courts from considering a placement that may be in the child’s best interests. The PPLA might not have been an ideal placement, because of its legal impermanence, but it seemed to be the only one that fit the B. siblings at that point in time.

Long-term foster care is a bad option for most children, with bad outcomes. The Ohio legislature had these outcomes in mind when it restricted juvenile courts’ ability to place children in a PPLA in the *initial* disposition of the agency’s complaint. For some children, however, a PPLA may be the only appropriate option. The restrictions the Ohio Supreme Court placed on juvenile courts’ ability to order PPLAs at *subsequent* dispositions fetter a court’s ability to order the most appropriate permanent placement for each child.

EMILY W. MCGILL[†]

¹⁴⁴ See Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for ‘Impermanence,’* 34 CAP. U. L. REV. 405 (2005) (arguing that agencies and even GALs pressure kinship caregivers to adopt even when adoption is a culturally and family-inappropriate option).

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