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FOSTER CARE & ADOPTION REFORM LEGISLATION: IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT OF 1997

MONICA DRINANE*

I want to begin by explaining that the Juvenile Rights Division represents the majority of children who come into Family Court in New York City on neglect and abuse cases. Last year, we represented approximately 44,000 children in cases in Family Court. Many of those were children who were in sibling groups. In terms of what is happening to the children we represent in Family Court in New York City, we are in the best of times and we are in the worst of times. This is true because we are at a point in time where there are initiatives within the Family Court giving us an amazing opportunity to do something new and different, to do perhaps less harm, perhaps no harm, perhaps even some actual good. I think we also are at a point in time where resources allotted to the Family Court system and to the kinds of representation of all parties in Family Court are so sorely understaffed that we as children's advocates have an overwhelming responsibility to be very strong and ardent voices for change in that area.

As a child advocate's, and especially in light Professor Jean

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Ms. Drinane is currently the Attorney-in-Charge of the Juvenile Rights Division of The Legal Aid Society in New York City. Ms. Drinane began her Legal Aid career in 1981 in the Criminal Appeals Bureau and transferred to the Juvenile Rights Division in 1985, where she was Deputy Attorney-in-Charge from 1997 to 1998. Prior to this, she served as Attorney-in-Charge of the Division's Manhattan and Bronx offices and as the Assistant Attorney-in-Charge of the Brooklyn office.

Koh-Peters' model of advocacy for children, you realize what a marvelous, overwhelming, troubling, traumatic, impressionable and impressive experience it is to realize that you as an individual and as an attorney literally and daily hold a child's life in your hands. ASFA clarifies the law guardian's role in participating in what happens to a child in Family Court. That role is critical in ensuring that the child's needs are met and that this child's voice is heard within the system. I use the word "voice" very consciously.

When you have a child client that can articulate a position and give you, as the lawyer, input into the kinds of decisions you are making about what happens in this child's life, when you are in that situation with a child who is 11, 12, or 13, and you are having that kind of dialogue and you are aware of what your client wants and you are aware of your role as the advocate for that child and your role to counsel your client, your role of consulting with your client, your informed judgment about what should happen to this child, makes the ultimate decisions and positions that you take in court I think much easier. You feel that you are working in conjunction with someone and trying to effectuate and craft something that fits with what that child needs, wants, wishes, desires.

The reality regarding our Family Court clients, as reflected in these most recent statistics, was that 40 percent of children currently in foster care are under the age of five.¹ The average age of children coming into foster care now is six months old.² The ASFA legislation forces us to think very clearly, consciously, concisely and completely, about what it means to advocate for a very young child who cannot give me an articulated position of what should happen to that child.

Therefore, we are in a position within the Juvenile Rights Division to substitute our judgment for what should happen to this child. We have to do that within the context raised here all day of identifying the children for whom we advocate: Where do they come from? What would they want? What kinds of

¹ See Kristen J. Brandon, *The Liberty Interests of Foster Parents and the Future of Foster Care*, 63 U. CIN. L. REV. 403, 406-07 (1994) (exploring reasons why there are so many children in foster care).

² Russ Buettner, *At Last, City Counts New Families*, DAILY NEWS, June 18, 1997, at 34 (discussing number of years children wait before adoption).

judgments are we making for them? In light of ASFA, I think it clarifies the necessity to advocate, particularly in the Family Court, for equalizing the resources given because the Juvenile Rights Division represents the child in a Family Court proceeding. The Administration for Children's Services has lawyers who represent them as the petitioners in these cases. Private agencies have lawyers who represent them. Then there are the parents, who by and large are represented by 18B attorneys,³ so that there is no formal organization that represents those parents. There are a group of attorneys out there who have been 18B attorneys for a long time and have not received adequate pay, often do not get adequate training, and do not have support systems.

Just as I have to advocate for my client, it is also, I think, in my client's interests, to also advocate for the biological parents' interests in raising the issue of leveling the playing field in Family Court, because a termination proceeding in Family Court is very much comparable to the death penalty. It can become the death penalty for a family; if you terminate parental rights, you really cut that child off from the biological family. If we reflect on our own experience, we can agree that our families are our families. Chekhov was right: basically all dysfunctional families are interesting and all families are dysfunctional probably in some kind of way. I think it is a very dramatic issue to simply try to imagine for yourself what it would mean if at some point in your history, your connection to your biological family was completely terminated. It is an issue, a decision and a fact of life we deal with on a daily basis in Family Court.

How we make those judgments is something we, as the advocate for the child, have to continually ask ourselves, and especially when we are talking about very young children who cannot articulate a position, so that we can be an adequate voice for them within the court proceeding. I think we have to ask the question that Judge Corriero brought up this morning. We have to look at that child and say, what is the destiny of this child? Whose child is this and how do we raise this child, and what does this child want? What would this child want? What skills do I

³ See N.Y. COUNTY LAW §§ 722-(f) (McKinney 1999) (providing representation for indigent adults).

have to develop, do I as the advocate for the child, need to have to be able to articulate that for the child? To do all of this within a system that is, as anyone who is here and a daily advocate in Family Court can tell you, is confused, understaffed, overburdened, and where life-threatening decisions about children's lives are often made in half second moments, and where the clock is always running is no easy task.

To be an advocate in that kind of a system, I tell you, is one of the most remarkable, challenging and rewarding jobs in the world. It is also one where we have to keep asking ourselves how are we doing this job and what are we doing for these children. The context Bernadine Dohrn put forth, in terms of the particular ASFA legislation is that it is hard to say how anybody could be against adoption and safe families. Therefore, I think the name of that act was carefully chosen. We must, however, be careful not to create a group of children who really will become legal orphans.

We represent children from birth up to the age of 18, and some even up to 20, and often see teenage children where parental rights have been terminated when that child was six or seven, who are now 14 or 15, and have never been adopted. They will often come back and say to us, "You know, I want that termination vacated because I want to have a connection with my biological family."

So, when we discuss permanency, adoption, and safe families, we have to ask hard questions. Adoption by whom? Where is this pool of adoptive families who, if we successfully free these children for adoption, would adopt these children?

We must also discuss alternatives because New York State, unlike many other states adopting the Adoption and Safe Families Act, has not applied for a waiver to implement a "subsidized guardianship" option.⁴ This would mean that a child unable to return home to the biological parent could stay with other biological family members. Society would agree to subsidize the relative to care for the child.

New York State, for some unknown and unreasonable position,

⁴ See generally Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441 (1996) (arguing for subsidized guardianship as option for permanency for children in foster care).

from my point of view, has not chosen to apply for that waiver. That would be a way, if we have to move a child to keep the child in the biological family, without the myth of a grandmother or aunt's adoption of the child. The child can remain connected with the biological family and have the support that the child needs.

These are just some of the issues that I wanted to raise, because I think that this legislation, while it has great potential for good, also has great potential for harm. And I believe that its legislation that we have to look at very carefully and we have to work through very carefully and have a very considered approach to anything we do in this area. Thank you.

