

4-2006

The Legal Status of Pregnant and Parenting Youth in Foster Care

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Recommended Citation

17 U. Fla. J. L. & Pub Pol'y 1 (2006)

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University of Florida Journal of Law and Public Policy

VOLUME 17

APRIL 2006

NUMBER 1

ARTICLES

THE LEGAL STATUS OF PREGNANT AND PARENTING YOUTH IN FOSTER CARE

Eve Stotland & Cynthia Godsoe***

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I. INTRODUCTION

Minor parents¹ present a legal conundrum. While many expectant teens believe they will be automatically emancipated upon the birth of their child, parenthood does not emancipate minors.² Rather, minor parents remain children in the eyes of the law and as such are dependent upon adults to act on their behalves. In most of the fifty states minor parents cannot bring or sustain a lawsuit, enroll themselves in school, or enter into

1. While pregnant foster youth are by definition female, “expecting” or parenting foster youth include young women and young men. Anecdotal evidence indicates that the majority of parenting wards who seek to live with their children are female. For this reason, and for convenience, this Article centers around the needs of pregnant and parenting girls in foster care. Nevertheless, the authors believe that fathering wards should have access to the same services and placement options as their female counterparts, as well as special programs designed to meet their particular needs.

2. See *infra* Part III.B.

binding contracts. Somewhat ironically, these same adolescents are legally responsible for their offspring. Thus, a teen mother who is unable to consent to her own appendectomy may consent to her child's appendectomy. Additionally, minor parents are accountable to charges of child abuse and neglect to the same extent as other parents.

This conundrum is further complicated when the young parents in question are wards of the state. Is a baby born to a foster child entrusted to the care of his mother or to the care of the state? If the infant is in his mother's custody, what is the state's role in caring for the infant? Another complication arises in those states where youth may remain in foster care until the age of twenty-one. While foster children who have reached the age of eighteen are adults in the eyes of the law, they remain entitled to the protections and subject to restrictions imposed by the foster care system. The support and supervision that young mothers receive from the system can be invaluable. On the other hand, mothers in foster care are exposed to constant scrutiny, with social workers and foster parents on hand to report any real or perceived maltreatment of the wards' infants.

The situation becomes still more complex where a report of abuse or neglect leads the state to bring formal charges of child maltreatment against the parenting ward. In this context, a finding that the mother has abused or neglected her child is particularly tragic. A teen, who herself was a victim of maltreatment, faces the removal of her child on similar grounds. In fact, separate but related cases regarding the ward and her child may be pending at the same time, in the same courthouse, and possibly before the same judge.³ Advocates for mothers in care must struggle to define their roles and protect their clients' interests on this uncertain legal terrain.

This Article examines the legal status of young mothers in foster care in order to parse out the thorny issues surrounding the treatment of parents accused of child maltreatment who are themselves wards of a court. All too often, judges, social workers, and advocates abdicate their responsibilities to the adolescents in their care the moment those teens become respondent parents. In part, this abdication is the result of a profound confusion about how to balance the competing interests of the foster child and the infant. This lack of understanding tips the balance against the young parent and robs her of the protections her status might otherwise afford.

In Part II of this Article, we examine the demographics of pregnant and parenting wards in the United States and conclude that the group represents a significant portion of foster youth. For actors in the child

3. For example, one case may be pending against the minor parent for the abuse or neglect of the infant, and another against the teen's parent for abuse or neglect of the teen.

welfare system to treat young parents fairly, we must understand their rights and responsibilities under law. Thus, Part III examines federal and state laws concerning the status of parenting wards. It begins with a discussion of federal law and policies. First, it addresses constitutional jurisprudence regarding the rights of parents to control the care and custody of their children. These constitutional protections apply to all parents, regardless of age, and form the bedrock on which teen parents must stake their claims to their children.

Part III also discusses the federal funding streams for state foster care systems. States which draw down dollars from these streams must comply with federal rules in running their foster care systems, several of which bear directly on the treatment of pregnant and parenting wards. The Article then turns to state law. Since a survey of law and practice in all fifty states is beyond the scope of this project, the Article focuses on the law and jurisprudence of the four states with the largest number of children in care: California, New York, Illinois, and Florida. Together, these states present a diverse picture of foster care practices. They loosely represent the Northeast, West, South, and Midwest; Illinois and Florida have state-run child protective systems, whereas New York and California's child protective systems are, for the most part, county-run.

Part IV examines the practical and ethical issues that arise when foster youth return to court as respondent parents. It begins by addressing the role of the court in concurrent cases, that is, those instances where a particular young parent is involved in two simultaneous child protective cases — one as subject child and another as respondent parent. In proceedings which pit the rights of the parenting ward directly against those of her infant, how can the court maintain its duty to promote the best interests of each? In responding to that question, we examine the implications of assigning concurrent cases to the same or to different judges. We also examine contemporary theories of the role of the family court, including the unified family court movement and the notion of therapeutic jurisprudence. We next turn to the parenting ward's right to counsel and the role of that counsel. We ask whether there is a conflict of interest when the same lawyer represents the parenting ward both in her case as a neglected child and in her case as a respondent parent, concluding that the existence of such a conflict depends on the model of representation adopted. Like the role of the family court, the role of the child protective agency is also put into question in concurrent cases. We next examine this role to determine if and when it is appropriate for an agency charged with protecting a parenting ward to prosecute that ward for child maltreatment.

Finally, Part V examines best practices for courts, agencies, and advocates working with pregnant and parenting wards. This section covers practices in seven areas: joint placement, parenting skills, childcare,

education, family planning, services for fathers in care, and discharge planning. The Article concludes with a brief examination of why the issue of parenting wards has been so overlooked by advocates, scholars, and child welfare administration.

II. DEMOGRAPHICS FOR PREGNANT AND PARENTING WARDS

Nationwide, there are 523,085 children and youth in foster care.⁴ Of these children, approximately half are 11 or older.⁵ Of the majority of children and youth in foster care, 39% are non-Hispanic white, 35% are African-American, and 17% are Hispanic. A disproportionate number of foster youth are children of color.⁶ In fiscal year 2003, of the 281,000 children that left foster care, a majority (55%) were reunified with a parent or primary caretaker, and 18% were adopted.⁷ Generally, only young children tend to get adopted from foster care, at an average age of 6 to 7 years old.⁸ About one-fifth of the 100,000 youth in foster care who are 16 years or older become legally emancipated each year.⁹

Little data is available on the number and demographics of pregnant and parenting wards. Although the federal government collects and publishes extensive data on children in the foster care system, that data does not include information on this crucial subclass.¹⁰ Of the four states surveyed, only Illinois collects information on the number of pregnant and parenting youth in its care.¹¹ As of July 29, 2004, the latest date for which

4. See ADMIN. OF CHILDREN & FAMILY, HEALTH & HUMAN SERV., THE REPORT (data for fiscal year ending Sept. 30, 2003), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report10.htm (last visited Mar. 28, 2006) [hereinafter AFCARS REPORT].

5. *Id.*

6. *Id.*; Casey Family Programs, Disproportionality, at <http://www.casey.org/MediaCenter/MediaKit/DisproportionalityBackgrounder.htm>.

7. AFCARS REPORT, *supra* note 4.

8. *Id.*

9. Casey Family Programs, Child Welfare Fact Sheet: Statistics Illustrating Major Trends and Issues in the Child Welfare System, at <http://www.casey.org/MediaCenter/MediaKit/FactSheet.htm>.

10. For example, the primary federal tabulation of information on foster youth, the AFCARS Report, does not include any information on the incidence of pregnancy or childbirth among foster youth. Pursuant to the Freedom of Information Act, the authors made a request to the Children's Bureau of the U.S. Department of Health and Human Services seeking information regarding the number of pregnant and parenting youth in substitute care. The Bureau responded that it did not have the information requested. The authors' request and the government's response are on file with the authors.

11. Pursuant to the relevant Freedom of Information Laws, the authors wrote to all four of the survey states requesting information regarding the number of pregnant and parenting youth in their care. California responded that it did not collect such information. Despite repeated requests,

Illinois provided data, the state identified 1,306 pregnant and parenting foster youth in the state, constituting approximately 7% of the state's foster care population.¹²

A recent survey in New York City found a higher rate of parenting among foster youth. The report, produced by the New York City Public Advocate's Office, found that about one in every six girls in New York City foster care is either pregnant or a parent.¹³ The report noted that this estimate is probably artificially low, as the survey relied on voluntary responses from foster care agencies throughout the city. Since many of the agencies failed to respond, the survey data accounted for only 40% of the children in care.¹⁴

The available data demonstrates not just that a significant number of foster youth are pregnant and parenting, but that the incidence of pregnancy and parenthood is higher among foster youth than among their peers. For example, a national study found that the rate of teen parenthood for girls in foster care was 17.2% as compared with 8.2% for girls outside of the system.¹⁵ Studies of youth who have aged out of the foster system have also found disproportionately high rates of pregnancy and parenting among foster care alumni. For example, one recent study of youth leaving foster care systems in the Midwest found that one-third of the girls had been pregnant by age 17 and nearly half had been pregnant by age 19.¹⁶ These girls — and their male counterparts — were more than twice as likely to have at least one child when compared with 19-year-

New York and Florida failed to provide any response whatsoever. Only Illinois furnished a written response, including a redacted list of all pregnant and parenting youth known to the Illinois Department of Children and Family Services on five separate dates: July 29, 2004, February 14, 2003, September 18, 2002, November 15, 2001, and November 30, 2000. All requests and responses are on file with the authors.

12. To determine that there were 1,306 pregnant and parenting youth in foster care on July 29, 2004, the authors counted the entries on the redacted list of such youth provided by Illinois DCFS.

13. Jill E. Sheppard & Mark A. Woltman, *The Public Advocate for the City of New York, Children Raising Children: City Fails to Adequately Assist Pregnant and Parenting Youth in Foster Care* (May 2005) available at <http://pubadvocate.nyc.gov/policy/documents/FosterCareSurveyReportFinal.pdf> (last visited Mar. 28, 2006).

14. *See id.*

15. Peter J. Pecorca et al., *Assessing the Effects of Foster Care: Early Results from the Casey National Alumni Study 23* (2003), available at http://www.casey.org/NR/rdonlyres/CEFBB1B6-7ED1-440D-925A-E5BAF602294D/302/casey_alumni_studies_report.pdf (last visited Mar. 28, 2006).

16. Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 19, at 52-54* (May 2005), available at http://www.chapinhall.org/article_abstract.aspx?ar=1355 (last visited Mar. 28, 2006).

olds who had never been in foster care.¹⁷ A study in Utah similarly found that among former foster youth ages 18 to 24, the birth rate was nearly three times the rate for 18 to 24-year-old women in the general Utah population.¹⁸

While the existing evidence clearly indicates that there is a high incidence of pregnancy and parenting among foster youth, the population's importance is far greater than its numbers. Parenting wards present a crucial point of intervention in the foster care cycle. Failure to meet the needs of this population places both the foster youth and their children at increased risk of homelessness and poverty,¹⁹ and sets the stage for yet another generation of children to be removed from their parents and raised by the state.

III. SURVEY OF LAWS AND POLICIES

A. Federal Laws Governing Parenting Wards

Laws regarding the rights and obligations of children and parents, as well as laws providing for the care and protection of children, vary widely from state to state. For the most part, these laws are determined by state legislatures and local tribunals. Nevertheless, there are two sources of federal law that merit examination. First, there is a significant body of federal constitutional jurisprudence that forms the basis for parents' rights across the nation. Second, through the federal government's provision of foster care funds to the various states, Congress has imposed regulations regarding the treatment of parents and foster children on all participating states. This section discusses each body of federal law, with a focus on its significance for pregnant and parenting wards.

17. *Id.* at 55-57.

18. Lois Thiessen Love et al., *Fostering Hope: Preventing Teen Pregnancy Among Youth in Foster Care* 7 (2005) available at <http://www.teenpregnancy.org/> (last visited Mar. 28, 2006).

19. *See infra* Part V.G.

1. Constitutional Jurisprudence Regarding Parents' Rights

A parent's right to raise her child,²⁰ and to do so in the manner she sees fit, is among the strongest rights implied from the substantive due process clause as applied to the states through the Fourteenth Amendment of the Constitution.²¹ Beginning in the 1920s, the U.S. Supreme Court developed a jurisprudence guaranteeing parents the right to make choices central to their children's upbringing and welfare, including choosing foreign language instruction,²² selecting nonpublic education for their children,²³ and educating their children outside of state-approved schools.²⁴ Time and again, the Supreme Court has affirmed the primary role of parental rights in our culture.²⁵

The Supreme Court most recently reiterated the constitutional basis of parental rights in *Troxel v. Granville*.²⁶ *Troxel* involved a challenge to the application of a Washington statute that provided that "any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings."²⁷ In *Troxel*, paternal grandparents brought suit in Washington Superior Court for increased visitation with their two granddaughters after the death of Brad Troxel, their son and the girls'

20. We use the term "parents," but we are mostly discussing mothers in this article. The rights for biological mothers and fathers are quite different. Under federal constitutional jurisprudence, "unwed fathers" must take some step beyond biological parenting, such as holding themselves out as the father, being on the child's birth certificate, or paying support, in order to merit full notice and due process before losing physical and/or legal custody of their children. *See, e.g., Lehr v. Robertson*, 463 U.S. 248 (1983) (refusing to grant a right to notice or an opportunity to be heard in his child's termination and adoption proceedings to a father who had not lived with nor financially supported his daughter and did not register as the putative father, though he had visited her); *Caban v. Mohammed*, 441 U.S. 380, 392-94 (1979). *But see Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (finding unconstitutional a law presuming unwed fathers are unfit parents without an individual hearing). Although biological parents have been given priority over other kinds of parents, the U.S. Supreme Court has diminished the importance of biological fathers by according parental rights to a husband over a child's biological and, in part, psychological father to uphold traditional relationships such as marriage. *See Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

21. For an explication of the underpinnings of parental rights or "family integrity" rights, see, *e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000).

22. *See Meyer v. Nebraska*, 262 U.S. 390 (1923).

23. *See Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925).

24. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972).

25. *Id.* at 232 ("Th[e] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

26. 530 U.S. 57 (2000).

27. *Id.* at 58.

father. Over the objection of Tommie Granville, the girls' mother, the trial judge ordered visitation far in excess of the amount of visitation the mother had previously allowed. The girls' mother appealed the decision, which eventually made its way to the Supreme Court. The Court held, six to three, that the application of the Washington statute to the case at hand had violated Tommie Granville's right under the Fourteenth Amendment to make decisions "concerning the rearing of her own daughters."²⁸

The *Troxel* Court was not unanimous, and even the plurality disagreed about the appropriate standard of review for laws bearing on a parent's right to raise her children.²⁹ Nevertheless, *Troxel* stands as a resounding affirmation of that right. Under the plurality's balancing test, "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."³⁰ All of the justices joining the plurality, and indeed some of the dissenters, affirm the Court's long-standing jurisprudence which finds in the Due Process Clause of the Fourteenth Amendment the right of "the custodial parent. . . . to determine, without undue interference by the state, how best to raise, nurture, and educate the child."³¹ Subsequently, courts around the country, including the courts of the states surveyed here, have cited *Troxel* for the proposition first set forth in *Meyer v. Nebraska* over eighty years ago: Parents have a fundamental right to control the care and custody of their children.³²

These strong substantive due process parental rights are protected by a series of procedures that must be followed before a parent is found unfit or deprived custody of his or her child. For instance, states must prove parental unfitness in termination of parental rights cases by clear and convincing evidence, the highest civil evidentiary standard.³³ Parents,

28. *Id.* at 67-70.

29. Writing for the plurality, Justice O'Connor applies an intermediate-level test which balances a parent's right to raise her children with the state's role as *parens patriae* to protect the welfare of children. *Id.* at 67-73. *But see id.* at 80 (Thomas, J. concurring) (calling for a strict scrutiny analysis of laws infringing on the fundamental rights of parents).

30. *Id.* at 68-69.

31. *Troxel*, 530 U.S. at 74 (Kennedy, J. dissenting).

32. See *Miller v. California Dep't of Soc. Servs.*, 355 F.3d 1172, 1175-76 (9th Cir. 2004); *Terry v. Richardson*, 346 F.3d 81, 784 (7th Cir. 2003); *In re Nicholson*, Nos. 00-2229, 00-5155 & 00-6885, 2001 WL1338834, at *2 (E.D.N.Y. Oct. 24, 2001); *N.S.H. v. Fla. Dep't of Children & Family Servs.*, 843 So. 2d. 898, 905 (Fla. 2003).

33. See *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982) (holding that before a state may sever a parent's rights, due process requires that the state support its allegations of parental unfitness by at least clear and convincing evidence).

including unwed fathers, have the right to an individual hearing on their fitness, rather than being denied custody of their children based on a presumption.³⁴ However, the Supreme Court determined that a parent's right to a fair hearing in the termination of his or her parental rights, albeit "commanding," does not necessarily include the right to appointed counsel.³⁵

2. Federal Funding Schemes for Pregnant and Parenting Wards

The federal government also plays a significant role in the child protection arena through its provision of federal monies to various states. Federal foster care policies directing the use of these monies reflect the constitutional jurisprudence regarding the right of parents to control the care and custody of their children. Title IV-E of the Social Security Act sets up the structure for federal funding of state foster care systems, whereby the Department of Health and Human Services reimburses state systems for a portion of the funds they expend for care to foster children.³⁶ Title IV-E imposes a plethora of requirements on states wishing to recover a portion of their foster care costs from the federal government.³⁷ While compliance varies from state to state, title IV-E has established national criteria for both dependency courts and foster care systems.

Title IV-E speaks directly to the issue of children born to parenting wards.³⁸ Since 1987, federal law has anticipated that infants born to youth in foster care will remain in the physical and legal custody of their mothers.³⁹ Specifically, statutes and regulations provide that where an infant is born to a teen in foster care, and the parent and child reside together, payments made by the state for the teen's maintenance must include an additional amount for the infant's support.⁴⁰ Conversely, if the

34. *Stanley v. Illinois*, 405 U.S. 645 (1972) (finding unconstitutional a law that presumed unwed fathers to be unfit parents without an individual hearing).

35. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32 (1981).

36. See 42 U.S.C. §§ 670-679. Eligibility for title IV-E funds is linked to a child's eligibility for the old Aid to Families with Dependent Children (AFDC), now known as Temporary Assistance for Needy Families (TANF). 45 C.F.R. § 1356.21(L). In the simplest terms, to receive federal title IV-E payments, a child must have been eligible for AFDC benefits prior to entering foster care. *Id.* For a summary of federal child protective programs, see 2000 Green Book, Committee on Ways and Means, U.S. House of Representatives, § 11 (2000), available at <http://aspe.hhs.gov/2000gb/> (last visited Mar. 28, 2006).

37. See 42 U.S.C. § 671.

38. See 42 U.S.C. § 675(4)(B) (2005).

39. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9133(b)(2).

40. 42 U.S.C. § 675(4)(B) (2005); 45 C.F.R. § 1356.21(j) (2005) ("Foster care maintenance payments made on behalf of a child . . . who is the parent of a son or daughter in the same home

state removes the infant from its mother's physical custody, the state may not use federal foster care funds to support the infant unless the separation is sanctioned by a court order.⁴¹

Thus, an infant born to a young parent in foster care is effectively "covered" by the foster care maintenance case of his or her parent. If the foster child and infant remain in the same home, the state does not need to make a separate determination of eligibility for the baby.⁴² In the same vein, infants born to foster children who receive Medicaid are themselves categorically eligible for Medicaid if they remain in the physical and legal custody of their parents.⁴³ Once again, the infant is covered by his or her parent's status as a beneficiary of federal foster care funds. Finally, the same rule applies to an infant's receipt of title XX Social Services Block Grant funds.⁴⁴ If the infant remains in the foster child's custody, the infant is automatically eligible for these funds.⁴⁵

The Children's Bureau, the arm of the U.S. Department of Health and Human Services responsible for federal programs regarding foster care, answers a question on this exact issue in its Child Welfare Policy Manual:

Section 475(4)(B) of the [Social Security] Act requires that foster care maintenance payments for a minor parent in foster care cover a child of such parent if the child is placed with the minor parent. . . . Good social work practice suggests that . . . the child's needs and interests be addressed during the [periodic court reviews] held on behalf of the minor parent. However, the State is not required to satisfy these requirements independently on behalf of the child because s/he [has not been removed from her/his biological parent] and therefore, pursuant to Federal law and regulations, is not in foster care.⁴⁶

or institution, must include amounts which are necessary to cover costs incurred on behalf of the child's son or daughter.").

41. See 42 U.S.C. § 675 (4)(B).

42. *Id.*

43. 42 U.S.C. § 672(h).

44. *Id.* The Social Services Block Grant (SSBG) is a program under which the federal government disburses funds to the various states. States have considerable discretion in how to use the funds, and states are not required to match the funds. Among other things, a state's SSBG may be used to prevent or remedy child abuse and neglect. See 2000 Green Book, *supra* note 36.

45. *Id.*

46. ADMIN. OF CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUM. SERV., CHILD WELFARE POLICY MANUAL, ch. 8.3A.5 [hereinafter CHILD WELFARE POLICY MANUAL], available at <http://www.acf.hhs.gov/j2ee/programs/cb/laws/cwpm/index.jsp?idFlag=0> (last visited Mar. 28, 2006).

The Manual also explains that children born to and living with parents in foster care are categorically eligible for Medicaid and other social services:

Section 472(h) of the [Social Security] Act makes clear that a child whose costs are covered by the title IV-E payment made with respect to the minor parent is a child with respect to whom foster care maintenance payments are made under title IV-E and is thus eligible for medical assistance and social services under titles XIX and XX.⁴⁷

Congress has even spoken to the particular needs of minor parents in foster care who are freed for adoption. To ensure that teen mothers have the same opportunities for adoption as other foster youth, the government will provide the adoptive family with a subsidy for the teen which also covers the needs of her child.⁴⁸ Thus, a foster family who adopts a teen mother may receive an adoption assistance grant adjusted to meet the needs of the teen and her baby.⁴⁹ The minor parent gains a new mother and/or father but retains custody of her infant. The infant, in turn, remains with his mother and gains a new grandmother and/or grandfather. Once again, the Children's Bureau of the U.S. Department of Health and Human Services has clarified this policy in its Child Welfare Policy Manual.⁵⁰

Thus, in accordance with constitutional jurisprudence, these laws and regulations require states receiving federal financial participation to leave infants born to teens in foster care in the custody of their mothers. States may be excused from this mandate solely on a case-by-case basis, where either the mother has voluntarily placed her child in the state's custody⁵¹ or there has been a judicial finding that it would be contrary to the infant's welfare to remain in his or her mother's care.⁵² Failure to act accordingly jeopardizes the state's receipt of federal foster care dollars.⁵³ The amount of money at stake is significant; in fiscal year 2001, the federal appropriation for the title IV-E program alone was \$5,063,500,000.⁵⁴

47. *Id.*

48. 2 U.S.C. § 673(a)(2)(A) (2005).

49. *Id.*

50. See CHILD WELFARE POLICY MANUAL, *supra* note 46, ch. 8.2B.3.

51. 42 U.S.C. § 672(e).

52. 42 U.S.C. § 672(a).

53. 45 C.F.R. § 1355.36(b),(c) (2005).

54. ADMINISTRATION FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUM. SERV., TITLE IV-E FOSTER CARE, available at www.acf.hhs.gov/programs/cb/programs/4efc.htm (last visited Mar. 28, 2006).

Beyond the threat of sanctions for noncompliance, states have several other economic incentives to allow teens in foster care to maintain physical custody of their children. Most importantly, by enabling foster youth to maintain custody of their children, the state avoids the need to place a second generation of children in foster care.⁵⁵ Though it still bears the costs of supporting the infant, the state avoids many of the secondary costs associated with foster care placement. First, by leaving the infant in the custody of its mother, the state avoids the financial demands of litigating and managing a second dependency case. Second, the state saves money by avoiding the need to find, license, and monitor an additional foster care placement. Third, the federal scheme allows states to avoid making complicated eligibility determinations for benefits paid on behalf of infants in the custody of foster children. Because the eligibility criteria for federal foster care payments are complicated and arcane, this represents a significant gain in efficiency.

Finally, states which forcibly remove an infant from a minor parent without good cause face suit for violating the mother's and the infant's constitutional procedural due process rights. Reflecting the reciprocal nature of the right to family integrity, plaintiffs in such actions include both the foster child and her child or children. In one case, New York City unlawfully separated a foster child and her twin sons for almost two years.⁵⁶ The young mother brought suit under section 1983 of the Civil Rights Act. The suit named as defendants both the City and Lakeside Children's and Family Services, the nonprofit agency which had contracted with the City for her care.⁵⁷ The suit settled for approximately \$250,000.⁵⁸ In a similar case, the City separated a foster child and her baby after the foster mother who was housing them admitted to hitting and shaking the baby.⁵⁹ The mother and her child were separated for approximately four months.⁶⁰ The teen mother sued the City and the foster care agency, Harlem Dowling.⁶¹ The case settled for \$525,000, with the City paying \$200,000 and Harlem Dowling paying \$325,000.⁶²

55. For a portrait of two generations raised in foster care, see NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE* (2001).

56. *Fraser v. Scoppetta* (03 CV 2815) (S.D.N.Y. Apr. 23, 2003) (on file with authors).

57. *Id.*

58. *Id.* Settlement on file with Plaintiffs' counsel, Lansner and Fubitschek.

59. *Rosado v. Bligen*, 98 CV 6420 (S.D.N.Y. 1998). Pleadings on file with the Plaintiffs' counsel, Lansner & Kubitschek.

60. *Id.*

61. *Id.*

62. *Id.*

Despite the myriad economic incentives to allow foster children to maintain custody of their infants, states have been slow to adopt this policy. There is widespread ignorance about both the federal policies and the constitutional rights of young parents, even among their advocates. In just one example, a report published by the University of North Carolina on pregnant and parenting adolescents, including those in foster care, misstates title IV-E policy regarding parenting wards and fails to acknowledge that parenting wards and their children have a legal right to reside together.⁶³ In fact, at the local level, advocates report that there is relatively little compliance with either the spirit or the letter of federal law and regulation.⁶⁴ To understand why federal policy has not resulted in more consistent protection of the minor parent and infant's reciprocal right to live as a family, we move to an examination of the four survey states.

B. State Laws Regarding the Status of Minor Parents

Before focusing on the situation of parenting wards, it is helpful to review laws regarding minor parents in general. Despite variation, the laws of the four survey states reflect the same conundrum: Minor parents have the rights of other parents with regards to their children, yet in most other aspects retain the legal incapacity imposed by their age. All four survey states set the age of majority at eighteen,⁶⁵ and in no state does pregnancy or parenthood cure a minor's incapacity. Unlike pregnancy or parenthood, marriage emancipates a minor.⁶⁶ However, in none of the four states may

63. ANNE DELLINGER, INSTITUTE OF GOVERNMENT, UNIVERSITY OF NORTH CAROLINA, SOCIAL SERVICES FOR PREGNANT AND PARENTING ADOLESCENTS: A LEGAL GUIDE 56-59 (July 2002), available at <http://www.adolescentpregnancy.unc.edu/pdf/appbook2.pdf> (last visited Mar. 28, 2006). The report erroneously suggests that the state may be reimbursed for an infant placed separately from the parenting ward even when such removal is not made pursuant to court order. *Id.* at 57. It implies that the state may take custody of a ward's child simply because foster parents "may be more comfortable" caring for the mother and child if they are both in state custody. *Id.* at 58. Finally, it notes, absent any critique, that "some DSS attorneys and staff in North Carolina report that their agency always asks the court for custody of both children, on the theory that the younger child is dependent because her custodial parent is." *Id.* at 58.

64. See, e.g., YOUTH ADVOCACY CENTER, CARING FOR OUR CHILDREN: IMPROVING THE FOSTER CARE SYSTEM FOR TEEN MOTHERS AND THEIR CHILDREN 25-29 (1995) (documenting the wide-spread illegal separation of foster youth from their new babies).

65. CAL. FAM. CODE §§ 6500-6502 (West 2005); FLA. STAT. ch. 743.07 (2005); 755 ILL. COMP. STAT. 5/11-1 (2005); N.Y. GEN. OBLIG. LAW § 1-202 (McKinney 2005).

66. See, e.g., CAL. FAM. CODE § 7002 (West 2005).

a minor marry without parental or judicial approval.⁶⁷ Thus the key to the minor's emancipation is in the hands of adult authorities.

In contrast, with regard to her child, a minor may act as an adult.⁶⁸ For example, no state requires that a minor have parental permission to deliver or keep a child, and in all four states a minor may surrender her child for adoption without parental consent.⁶⁹ Rules regarding medical consent also follow this pattern. In Florida, a pregnant minor may consent to medical care relating to her pregnancy and to medical or surgical care for her child,⁷⁰ but not for her own surgical care. Of the four survey states, Illinois is the only state that has resolved this incongruity by granting pregnant and parenting teens the right to consent not just to their children's medical care but to their own medical care as well,⁷¹ whether or not it is related to the pregnancy.⁷² For the most part, however, state laws reflect the tension embodied by the legal status of the minor parent.

C. State Laws Regarding the Status of Parenting Wards

The double standard — whereby minor parents are adults for pregnancy and parenting purposes, yet children for other purposes — is reflected in the policies regarding parenting wards in the four survey states. These policies are discussed in detail below.

1. New York

Of the four states surveyed, New York is the only state with written policies that clearly comply with the federal rules regarding parenting wards. In 1993, New York State's Department of Social Services promulgated regulations providing that title IV-E eligible foster children who are minor parents, and the children of such minor parents, are eligible for federally reimbursable foster care maintenance payments, as long as

67. CAL. FAM. CODE §§ 302-303 (West 2005); FLA. STAT. ch. 741.0405 (2005); 755 ILL. COMP. STAT. 5/203, 208 (2005); N.Y. DOM. REL. LAW § 14-a(2) (McKinney 2005).

68. To some extent, abortion is an exception to the general rule that minors are treated as adults for the purposes of pregnancy. In three out of the four survey states — Florida, Illinois, and California — the legislature has passed laws requiring parental notification and/or consent for a minor to obtain an abortion. However, in all three states, the laws were blocked by court action, and are currently not in effect. See Heather Boonstra & Elizabeth Nash, *Minors and the Right to Consent to Health Care*, in THE GUTTENMACHER REPORT ON PUBLIC POLICY 6-7 (Aug. 2000).

69. CAL. FAM. CODE § 8700(b) (West 2005); FLA. STAT. ch. 63.085 (2005); 750 ILL. COMP. STAT. 50/11(a) (2005). *But see* § 63.082(1)(g) (requiring that a parent or a guardian ad litem must witness the consent to adoption when the relinquishing parent is fourteen years old or younger); N.Y. DOM. REL. LAW § 111 (McKinney 2005).

70. FLA. STAT. ch. 743.065 (2005).

71. 410 ILL. COMP. STAT. 210/2 (2004).

72. *Id.*

parent and child both reside together in the same foster family home or residential facility and the child is not in the care and custody of the local commissioner of social services.⁷³ This regulation directly tracks the federal foster care policies discussed above.⁷⁴

Similarly, New York State's Adoption Assistance and Medicaid rules for parenting wards parallel those promulgated by the federal government.⁷⁵ As provided for by federal regulation, the children of parenting wards in New York are covered by their mothers' title IV-E foster care case; as long as the parenting ward is eligible for adoption assistance and/or Medicaid, the infant in her care is presumptively eligible as well.⁷⁶ Finally, minor parents in New York foster care are specifically eligible for preventive services aimed at keeping families intact.⁷⁷

In 1994, a year after the above regulations took effect, the New York Department of Social Services disseminated an Administrative Directive summarizing the Department's new policies regarding pregnant and parenting wards.⁷⁸ The Directive goes beyond the scope of the regulations, setting a clear policy respecting the rights of parenting wards to assume and retain custody of their children. The Directive states that:

[W]hen it is necessary to place a minor parent in foster care and a decision is made that it would be in the best interests of both the minor parent and his or her child to be together . . . custody of the minor parent's child should remain with the minor parent. The same rule should be applied if a foster child gives birth while in foster care.⁷⁹

Moreover, the Directive clarifies that when the state contemplates forcibly removing a child from a parent's care, the same legal criteria must be met whether that parent is a foster child or not.⁸⁰ Thus, the Directive complies with federal constitutional jurisprudence in recognizing the fundamental

73. N.Y. COMP. CODES R. & REGS. tit. 18, § 426.3(i) (2005).

74. *See supra* Part III.A.2.

75. *See supra* Part III.A.2.

76. N.Y. CODES R. & REGS. tit. 18, §§ 426.5(b), 426.7.

77. N.Y. CODES R. & REGS. tit. 18, § 423.4(g)(2). Such services include individual and group activities to meet case planning goals, day care, homemaker services, housekeeping assistance, transportation, and housing. For the enumerated list of services, see N.Y. CODES R. & REGS. tit. 18, § 423.2(b).

78. Admin. Directive 94 ADM-12, N.Y. Dep't of Soc. Serv. (July 7, 1994) [hereinafter 94 ADM-12], available at http://www.otda.state.ny.US/directives/1994/ADM/94_ADM-12.pdf (last visited Mar. 28, 2006).

79. *Id.* at 3.

80. *Id.*

right of every parent to the custody, care, and control of her children.⁸¹ “Factors such as the minor parent’s age, previous history, perceived abilities, etc. should never be the sole criteria for taking legal custody of the child of a minor parent in foster care.”⁸²

In New York, the new regulations promulgated in 1993 prompted litigation to determine their impact on minor parents in foster care and the concomitant obligations of the local child protective agencies. Courts, including the New York Court of Appeals, interpreted the regulations as allowing greater custodial rights to minor parent wards, since they were no longer required to place their children in foster care to receive financial support and services for their care. In the first such case, in 1994, a New York City Family Court found that the new regulations allowed a baby born to a minor ward to be supported by the state child welfare agency without removing the baby from his or her parent.⁸³ Once again, this result comported with the constitutional rights framework outlined above.⁸⁴ As the family court wrote, “[t]he Commissioner, the [minor] mother, and the baby have the right to have the baby out of foster care.”⁸⁵ Based on this finding, the Court permitted the agency to withdraw its petition for voluntary placement of the infant.⁸⁶ The family court distinguished the new system from the prior one, wherein minor parent wards had to sign sham voluntary placement agreements as the “door to receiving support” for their children and family court judges had to declare the “‘agreement’ valid largely because the young mother had no real choice; she could not care for the baby [financially].”⁸⁷

The case was subsequently affirmed by the First Department of the New York Appellate Division,⁸⁸ and the New York Court of Appeals.⁸⁹

81. See *supra* Part III.A.1.

82. 94 ADM-12, *supra* note 78, at 4.

83. See *In re Matter of C.*, 607 N.Y.S.2d 1014 (N.Y. Fam. Ct. 1994). Although this decision expands the rights of and resources for minor ward parents, the authors were shocked by the court’s dicta stating that “[s]erious consideration must be given by the Commissioner to the need for educating children in foster care . . . to the wide range of population prevention methods including sterilization.” *Id.* at 1017.

84. See *supra* Part III.A.1.

85. 607 N.Y.S.2d at 1016.

86. *Id.* at 1015.

87. *Id.* at 1016.

88. *In re Tyriek W.*, 613 N.Y.S.2d 146, 146 (N.Y. App. Div. 1994) (finding that the regulations allow minor parent wards to get support for their children without going through the “fiction” of voluntary placements and thus are able to “achieve the desirable and worthy goal of keeping the[ir] children out of foster care.”).

89. See *In re Tyriek W.*, 652 N.E.2d 168 (N.Y. 1995).

The Court of Appeals confirmed that the new regulations required the counties to treat children born to wards and their parents as “family units,” in which the infants were presumptively in the sound custody of their parents and hence beyond the jurisdiction of the family court.⁹⁰ The Court found that children born to minor parent wards are entitled to a full range of services, such as financial support, case management, and preventive services, but are not themselves “foster children.”⁹¹ In reaching this decision, the Court looked to the primary goal of the statute authorizing foster care review — to achieve permanency for children.⁹² The Court concluded that children living with their parents, whether or not the parents were in foster care, had permanency already, rendering judicial review unnecessary.⁹³ The Court rejected the argument put forth by children’s rights groups that children born to minor parents are inherently “at-risk” and reiterated the principle of individual rights underlying abuse and neglect cases.⁹⁴ Like any other parent, a parenting ward in New York has the right to make independent decisions regarding her child’s upbringing. Where the child protective agency is concerned that those decisions are placing her child at risk of harm, the agency may file a petition and seek to place the infant under the protection of the court.⁹⁵

2. California

California law arguably is not in compliance with the title IV-E funding requirements discussed above. California currently pays less to foster parents for the care of a ward and her baby than for two similarly-aged, but unrelated, foster children.⁹⁶ Under this scheme, when a foster youth and her child are placed together, the foster care placement receives a full foster care grant for the ward, plus a small “infant supplement” for

90. *See id.* at 170-71.

91. *Id.* at 170.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Tyriek*, 652 N.E.2d at 171.

96. CAL. DEP’T OF SOC. SERV., ONLINE MANUAL OF POLICY AND PROCEDURES, Div. 11-415.1 [hereinafter CAL. ONLINE MANUAL] (providing that the supplement for an infant residing with a minor parent who receives title IV-E foster care funds shall be \$768/month if the minor parent resides in a group home, or \$354/month if the minor parent is in any other type of placement), available at http://www.dss.cahwnet.gov/ord/CDSSManual_240.htm; CAL. DEP’T OF SOC. SERV., ELIGIBILITY AND ASSISTANCE, Div. 45-200.2, 45-302. 211, available at http://www.dss.cahwnet.gov/ord/CDSSManual_240.htm (last visited Mar. 28, 2006); CAL. DEP’T SOC. SERVS., ALL COUNTY LETTER 88-153 (Dec. 2, 1988).

the baby. This violates title IV-E funding rules, which require that foster care payments made to parenting wards “must include amounts which are necessary to cover costs incurred on behalf of the child’s son or daughter.”⁹⁷ The “infant supplement” clearly does not meet that standard, as it is less than the basic foster care rate that the State of California has determined is necessary to support a child of that age.

California’s lower payment rate for children born to youth in foster care applies whenever the ward and her child are placed together.⁹⁸ Thus, there is a disincentive for foster parents or congregate care facilities to serve minor parents and their children, resulting in a shortage of foster care placements for minor parents. California recently adopted the Teen Parents in Foster Care Act, legislation designed to address the unique issues facing teen parents in foster care. The Teen Parents in Foster Care Act does not propose to change the current infant supplement⁹⁹ but rather includes legislative findings that the supplement limits the supply of foster care placements for mothers and children, thus hurting this population:

(d) The current infant supplemental payment rate paid to a foster parent who provides care for both a minor dependent parent and infant, which is designed to provide for the costs of infant care, such as transportation, food, shelter, clothing, and equipment, including diapers and car seats, as well as the costs of mentoring the foster child who is the infant’s parent and assisting them to develop parenting skills, is less than the basic AFDC-FC rate for an infant placed into foster care and is not commensurate with the rising costs of infant care. Further, the low rate serves as a disincentive in recruiting and retaining trained foster care providers who are willing to care for both a dependent minor parent and infant, and who are skilled in providing the mentoring services and role modeling that these dependent minor parents need in order to become successful parents. Finally, the resulting shortage in qualified foster care providers can cause teen parents and their babies to be separated, disrupting the parent-child bond and potentially severing family ties.¹⁰⁰

Although the new law does not correct the inequality in reimbursement rates for parenting wards, the law encourages state and local child welfare agencies to collect data to develop a rate structure that better compensates

97. 42 U.S.C. § 675(4)(B) (2005); 45 C.F.R. § 1356.21(j) (2005).

98. CAL. ONLINE MANUAL, *supra* note 96, Div. 11-415-1.

99. Although this is a long term goal of advocates, they felt that including a rate increase in the bill would preclude its passage.

100. S.B. 1178, ch. 841, § 2(b)-(c).

foster parents who will care for minor parents, thus expanding this group of caregivers.¹⁰¹

Also, the bill mandates that foster homes and congregate care facilities for teen parents “demonstrate a willingness and ability to provide [them with] support and assistance.”¹⁰² Agencies must, “[t]o the greatest extent possible,” identify and use “whole family placements” and other placements that will support the teen parent and her children, including developing model programs specifically for this population.¹⁰³

The Teen Parents in Foster Care Act makes other important findings about minor parents in foster care and their children, and mandates that they receive certain services and placements. This portion of the bill has the most “teeth.” It specifies that agencies and courts must attempt to place the minor parent and child together in as family-like a setting as possible:

It is the intent of the Legislature in enacting this act to preserve the continuity of the family unit and ensure the maintenance and strengthening of family relationships between a dependent minor parent and his or her child by ensuring that the courts and responsible agencies *shall, whenever possible*, protect the best interests of a dependent minor parent and his or her child as a unit, and *shall* make diligent and active efforts to maintain relationships between minor parents and their children, including, but not limited to, placement of the minor parent and the child together in as *family-like a setting as possible*.¹⁰⁴

Finally, the new legislation requires agencies to provide parenting wards with services for which they are eligible, such as childcare and parenting classes.¹⁰⁵ The statute clarifies that the minor parent must be given the ability to attend school, do her homework, and participate in “ordinary” teenage activities “unrelated to and separate from parenting.”¹⁰⁶ Where the state does gain custody of the infant, the law mandates frequent visitation between the mother and the child as well as contact between the infant and the non-custodial parent, when such contact is in the infant’s best interest.¹⁰⁷

101. CAL. WELF. & INST. CODE § 16004.5(2), (d) (2005).

102. CAL. WELF. & INST. CODE § 16002.5(C) (2005).

103. CAL. WELF. & INST. CODE § 16004.5(b) (2005).

104. S.B. 1178 ch. 841, § 2(e) (emphasis added).

105. *Id.*

106. CAL. WELF. & INST. CODE § 16002.5(b) (2005).

107. CAL. WELF. & INST. CODE § 16002.5(a),(d) (2005).

In addition to the statewide legislation, Los Angeles County has adopted its own policies for parenting teens in foster care.¹⁰⁸ Policy and practice in Los Angeles merit independent examination. Not only is Los Angeles County the largest county in California, it runs the single largest county-based child welfare system in the United States, with responsibility for over 30,000 foster children, approximately 9,000 of whom are fifteen or older.¹⁰⁹ The Los Angeles Child Welfare Services (CWS) Policy Handbook sets forth specific placement and service policies, and makes clear the agency's responsibility to provide supportive services for teens in foster care who become parents, including locating a school with childcare, and referring non-custodial fathers to appropriate community programs.¹¹⁰

The Policy Handbook clarifies that "the fact that a teen [dependent] has a child is not in itself reason for our Department to intervene on behalf of the infant."¹¹¹ Nonetheless, it singles these teens out for heightened review of their parenting abilities: "Anytime a teen receiving services from our Department becomes a parent, the ability of the teen to care for the infant must be assessed."¹¹² Moreover, its assessment regarding the necessity of intervention with respect to the infant does not discuss the pertinent legal standards for abuse or neglect, but rather discusses "the teen's ability to care for the infant" and "the teen's family's attitude toward the infant and . . . ability/willingness to provide assistance to the teen."¹¹³ This language reflects a possible disregard for the constitutional rights of all parents to the same process and standard for removal. However, the policy does mandate that caseworkers consider whether the use of community resources and "voluntary services" might allow the young family to stay together without court supervision.¹¹⁴

3. Illinois

In contrast to New York and California, the policy in Illinois regarding parenting wards was developed in response to litigation by advocates. In

108. Cal. Dep't of Soc. Serv. Policy Manual 0600-507.11, (issued Sept. 20, 2001); Cal. Dep't of Soc. Serv. Policy Manual 0600-507.10 (issued Oct. 31, 2001).

109. CAL. DEP'T OF SOC. SERV., CHARACTERISTICS OF CHILDREN IN OUT-OF-HOME CARE, available at http://www.dss.cahwnet.gov/research/CWS-CMS2-C_412.htm (last visited Mar. 28, 2006). California reports that there were 33,017 children in foster care in Los Angeles County on December 31, 2003, the last date for which information is available. *Id.*

110. Cal. Dep't of Soc. Serv. Policy Manual 0600-507.10 at 1, 5-6; *see also* Cal. Dep't of Soc. Serv. Policy Manual 0600-507.11, at 5.

111. Cal. Dep't of Soc. Serv. Policy Manual 0600-507.10 at 1.

112. *Id.*

113. *Id.* at 5.

114. *Id.* at 6-7.

1988, a parenting ward in the custody of the Illinois Department of Children and Family Services (DCFS) filed a writ of habeas corpus to regain physical custody of her child.¹¹⁵ She alleged that DCFS had improperly separated her from her child by placing them in separate facilities.¹¹⁶ After the court granted her requested relief, plaintiff's counsel amended the original complaint to state a class action on behalf of all pregnant and parenting minors in the care of DCFS.¹¹⁷ In *Hill v. Erickson*, the plaintiffs alleged that DCFS, along with the Illinois Department of Mental Health and Developmental Disabilities (DMHDD), inappropriately placed them in shelters, mental health facilities, and other temporary settings, separating them from their children.¹¹⁸ The plaintiffs further alleged that DCFS failed to provide them with appropriate treatment and services for adolescent or expectant parents.¹¹⁹ The plaintiffs claimed that these policies and practices violated their federal and state statutory and constitutional rights.¹²⁰

The suit was settled by the entry of a Consent Decree in 1994, which remains in effect.¹²¹ Under the Decree, wards in Illinois have the right to assume and retain custody of their children.¹²² Parenting wards must be placed with their children unless separate placement is necessary for the safety of the child, and separation is permissible only with prior or subsequent court approval.¹²³ The Decree vests parenting wards in Illinois with the right to education, day care for their children, access to family planning information, and transportation to school and medical appointments.¹²⁴ The Decree also gives parenting wards the right to receive shelter, food, clothing, and other services from DCFS until the ward turns twenty-one.¹²⁵ DCFS subsequently codified many of these rights in the Illinois Administrative Code.¹²⁶

The Consent Decree and subsequent regulations protect parenting wards not just from the arbitrary or retaliatory removal of their children,

115. *Hill v. Erickson*, No. 88 CO 296 (Circuit Court of Cook County, Illinois).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Hill*, No. 88 CO at 296.

121. Consent Decree, *Hill v. Erickson*, No. 88 CO 296 (Circuit Court of Cook County, Illinois), entered Jan. 3, 1994 (on file with the authors).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. ILL. ADMIN. CODE tit. 89, § 302, app. J (1996).

but also from arbitrary or retaliatory threats of removal. The Illinois regulations state that:

Pregnant and parenting teens shall not be threatened with release from DCFS custody or guardianship, with termination of their parental rights . . . or with false reports of abuse or neglect . . . in order to coerce the ward into cooperating with the ward's placement or service plan or to punish the ward for complaining about the quality of her/his placement or services.¹²⁷

This addresses a problem noted by advocates for parenting wards in all of the survey states — threats by foster care staff to remove a parenting ward's child if the parenting ward fails to follow program rules or the ward's service plan, even though the ward's behavior clearly does not rise to the level of abuse or neglect as defined by relevant state law.¹²⁸

The need for such a proscription against coercive threats of removal reflects the power that DCFS and agency employees have over the lives of young parents in care, as well as the vulnerability of those young parents. Such threats are a clear abuse of power. A parenting ward commonly has little family beyond her children. The possibility that her child will relive her fate may be particularly devastating. The pervasiveness of such threats also reflects the foster care system's readiness to switch alliances as a ward reaches adolescence. Now that she has a child, the same system that cast the ward as a helpless victim is quick to cast her as the enemy. The Consent Decree in *Hill v. Erickson* recognizes this pattern and attempts to disrupt it, by insisting that wards do not forfeit their right to support and protection upon becoming parents.

While Illinois has the most comprehensive and favorable policies in place for the care of parenting wards, actual practice does not always reflect those policies. Pursuant to the Consent Decree, the state keeps statistics regarding the plaintiff class. Pregnant and parenting wards who reside in Cook County and the "collar counties" — that is, Chicago and the neighboring areas — are served by the Teen Parenting Service Network (TPSN), which publishes an annual report.¹²⁹ These reports show mixed results. Since 1999, the first year the program was implemented, TPSN has increased the number of fathering wards receiving services, transferred many pregnant and parenting teens to more appropriate

127. *Id.* at (2).

128. For example, the ward's returning home, with her child, thirty minutes after curfew.

129. Teen Parenting Service Network, Uhlich Children's Home, TPSN Year in Review, FY 1999, 2000, 2001, 2002 & 2003 [hereinafter TPSN] (on file with authors).

placements, located many runaway clients, and provided caseworkers with targeted training on working with parenting wards.¹³⁰

However, TPSN has consistently failed to meet its goals regarding education, stability, and family unity. In fiscal year 2003, only 42.7% of pregnant and parenting wards obtained a high school diploma or GED prior to exiting the system, a decrease from the previous year.¹³¹ In fiscal year 2002, over half of pregnant and parenting teens lived in more than one foster placement, and 40% experienced at least one change in the caseworker assigned to them.¹³² Most disturbingly, over the five years of the program, the number of pregnant and parenting teens has decreased, while the number of infants removed from their care has increased.¹³³ Five percent of parents in the program had their children removed during FY 2002, an increase from the previous year.¹³⁴ Finally, TPSN only serves parenting wards in Chicago and outlying areas. Almost no information is available regarding the well-being of pregnant and parenting wards in the “downstate” counties, who comprise about 30% of the pregnant and parenting wards in the state.¹³⁵ While the available data suggest that pregnant and parenting wards in Illinois are not getting all of the services they need, it is impossible to compare Illinois’s performance with that of the other survey states, because Illinois is the only state to keep such statistics.

4. Florida

Florida’s policy regarding parenting youth in foster care does not seem to comply with rules regarding state use of federal IV-E funds.¹³⁶ The Florida Department of Children and Families (DCF) does recognize that “the needs of the child living with a minor parent in the same licensed foster home” may be “included in the Title IV-E payment being made on behalf of the minor parent.”¹³⁷ Nevertheless, the policy violates IV-E rules

130. *Id.* FY 2003.

131. *Id.* FY 2003, at 5.

132. *Id.* FY 2002, at 5.

133. *Id.* at 1.

134. TPSN, *supra* note 129, FY 2002, at 5.

135. TPSN reports that it served 985 pregnant and parenting wards in 2003, while records produced by DCFS indicate that there were 1411 pregnant and parenting wards in Illinois during the same year. *Id.* FY 2003 (records listing all pregnant and parenting wards in Illinois) (on file with authors). Thus, TPSN served an estimated 70% of Illinois’s pregnant and parenting foster youth in 2003. TPSN Year in Review FY 2003; Response to authors’ FOIA request (on file with authors).

136. *Supra* Part III.A.2.

137. Operating Procedure No. 175-71, Section 3-11, Fl. Dept. of Children and Families, (Sept. 6, 2005).

to the extent that it leaves payment for such needs up to the discretion of the counties. DCF also fails to specify how the amount necessary to cover the needs of the foster child's infant is to be calculated, inviting counties to provide parenting wards and their caregivers with a "supplement" or "enhancement" which is patently insufficient to meet the infant's needs.¹³⁸ Florida policy does, however, provide that the children of parenting wards are eligible for Medicaid to the same extent as their parents.¹³⁹

Unfortunately, advocates in Florida report that DCF regularly violates the rights of parenting wards to raise their children.¹⁴⁰ Advocates also note that the state has a pattern of removing the children of teen wards just as the teen is about to "age out" of the foster care system at age eighteen.¹⁴¹ Such removals are sometimes triggered by accusations of abuse or neglect by foster parents, who may wish to retain custody of the baby after the teen ward ages out. In some cases, DCF illegally seeks to remove children from former foster youth who have become destitute after being discharged from care.¹⁴² DCF policy implicitly encourages discrimination against parenting wards, as it mandates that protective workers consider the "[h]istory of the parent being abused as a child or adult" and "[t]he parent's age . . ." in assessing a child's safety and need for protective intervention.¹⁴³

The preceding survey of the laws and practices regarding the treatment of pregnant and parenting wards in New York, California, Illinois, and Florida, indicates that wards face an up-hill struggle to maintain custody of their children even where no one has accused them of being unfit to parent. In the next section, we examine what happens when the state alleges that a foster child — who is herself the victim of abuse or neglect — has similarly mistreated her own child.

138. *Id.*

139. *Id.*

140. *See, e.g.,* Carolyn S. Salisbury & Bernard P. Perlmutter, *Avoiding Pot Holes on Florida's "Road to Independence": Advocacy for Independent Living Services For Foster Youth* 13, 23 (Mar. 31, 2005), available at http://floridaschildrenfirst.org/fcf_052_indep_living.htm.

141. *Id.* at 13. But, note, effective July 1, 2005, foster youth in Florida may petition the court to retain jurisdiction over them until they reach the age of nineteen. FLA. STAT. ch. 39.013 (2005).

142. *See* Salisbury & Perlmutter, *supra* note 140, at 12. Florida advocates also note that there is a desperate need for "attorneys to advocate for family preservation for foster youth who have children." *Id.*

143. Fla. Dept of Children and Families Operating Procedure No. 175-41, at (6)(b)(1)(i)-(j) (Apr. 2, 1997).

IV. CONCURRENT CHILD PROTECTIVE CASES

As discussed above, a parenting ward has the same right to raise her child as any other parent. As with other parents, the state may abrogate that right where necessary to protect the ward's child from harm. But where the parent is herself a ward of the state, the state's decision to bring a child protective action against her raises a host of unique ethical and procedural questions. In this section, we examine the problematic nature of what we have termed "concurrent cases" — that is, two overlapping child protective cases, the first of which involves the teen ward as a subject child, and the second of which presents the teen's infant as the subject child. There is a great gap in information regarding concurrent cases. The authors could not locate any studies or statistics on the incidence of the removal and/or commitment to state care of children born to parents in foster care. Yet advocates in every survey state indicate that concurrent cases involving parenting wards and their children are a significant problem.

As with information regarding the incidence of concurrent cases, there is a lack of information regarding how courts process and manage these cases. Once again, the authors could not find studies regarding the handling of these cases. Such an inquiry is particularly difficult given the exceedingly local nature of child protective proceedings, which vary not only from state to state but often within states from county to county. For instance, in New York City alone, the removal rates of children from their parents for similar incidents varies by borough, as it is highly dependent upon both the management of the borough branch of the child welfare agency and the discretion of individual family court judges. The tremendous variation in case processing makes it difficult to address the ethical issues confronted by courts in concurrent child protective cases. Certainly, what is appropriate or even desirable practice for a court of general jurisdiction staffed by a single judge in a rural county may not be applicable or desirable for a court of limited jurisdiction staffed by dozens of judges in a major metropolitan area.

Nevertheless, in any system, concurrent cases present multiple ethical problems as the system is turned on its head. The parenting ward is forced to occupy a second role as the respondent parent; the agency responsible for the teen's daily care and permanency planning may be called to testify against her; the law office which prosecuted the ward's parents for abuse or neglect now seeks a finding against the ward; and, more often than not, the attorney who represents the ward in her case as subject child is unable or unwilling to represent her as a respondent parent.

This section examines several ethical dilemmas that arise in concurrent cases: whether it is appropriate for the same judge to hear both cases, whether it is appropriate for the same attorney to represent the ward in

both proceedings, and whether it is ethical for the governmental agency charged with protecting the teen ward to seek a finding against her. The discussion below does not aim to resolve these dilemmas, but to highlight the issues they raise and present examples of how various practitioners and courts have addressed them.

A. *The Role of the Court in Concurrent Cases*

In some jurisdictions, when the government seeks to remove a ward's child based on allegations of abuse and neglect, the infant's case is assigned to the same judge who has jurisdiction over the teen.¹⁴⁴ In others, the case is assigned in the regular manner, and depending on the size of a court, is likely to come before a different judge. Either system raises serious questions regarding the judge's mandate, the court's role, and the minor parent's right to due process. None of the four survey states have a written protocol on this issue. Because of the pros and cons of having the same or different judge, advocates have differing views on the best practice. Not surprisingly, the biggest factor influencing an advocate's view is the advocate's feeling about the judge's competence and attitude toward his or her client in any one case. If the judge presiding over the teen's placement has a good impression of the teen, then advocates prefer to have the same judge hear the allegations against the teen. On the other hand, if the original judge is not sympathetic to the teen, advocates prefer to have a new judge preside over the subsequent case.

A judge presiding over both the case of an adolescent ward and that of her child whom she has allegedly mistreated faces a conundrum. In most states, a court in a child protective case must consider the "best interests" of the child at various junctures, including disposition and proceedings to terminate parental rights.¹⁴⁵ In many states and counties, child protective cases are assigned to a specialized court of limited jurisdiction with a statutory mandate to promote the best interests of the children under its authority.¹⁴⁶ In many situations, a judge may be able to make findings and fashion remedies which serve the best interests of both the mother and the child, reflecting the reality that children generally benefit from an increase

144. According to local advocates, Los Angeles County assigns the infant's case to the same judge responsible for the teen's case. Telephone interview with Leslie Starr Heimar, Children's Law Center, in L.A., Cal. (Sept. 15, 2004). But note that the California court system as a whole does not have any policy on the matter.

145. See, e.g., FLA. STAT. ch. 39.810 (2005) (stating that "in a hearing on a petition for termination of parental rights, the court shall consider the manifest best interests of the child."); N.Y. SOC. SERV. LAW § 384-b (2005) (requiring that judicial orders to terminate parental rights or suspend judgment be necessary to protect "the best interests of the child.").

146. For example, California law mandates that its juvenile courts consider "the best interests of the minor in all deliberations." CAL. WELF. & INST. CODE § 202(d) (2005).

in their parents' well-being.¹⁴⁷ But in the most acute situations — where the state moves to terminate the teen's parental rights — a court's ability to honor its mandate to protect both the teen and the infant becomes all but impossible.

The termination of her parental rights will have permanent, devastating effects for the teen. Not only will she have no right to parent, visit, or even receive information about the well-being of this particular child, if the state brings charges of child maltreatment against her in the future with regards to another child, she will have no right to reasonable efforts to keep her family intact. Instead, under the Adoption and Safe Families Act (ASFA), the court will have the discretion to terminate her rights to that child in an expedited manner.¹⁴⁸ These provisions will apply no matter how much time has passed, so that a girl who loses her rights to a child at the age of fifteen may have that termination used against her regarding her right to raise children she bears in her twenties or thirties. The termination itself thus becomes an act contrary to the best interests of the parenting ward.

In addition, consolidating the cases before the same judge may compromise the teen ward's procedural rights. The judge, in the role of the teen's protector, may have access to psychological reports, psychiatric records, drug tests, and school records about the teen that would otherwise be unavailable to the court.¹⁴⁹ The same judge may also know if the ward has a history of risky or defiant actions — i.e., running away from her placement, missing curfew, truancy — and may hold such actions against the ward even where the actions occurred prior to the baby's birth or conception. Equally important, the judge has knowledge of the poor parenting and trauma to which the teen herself has been exposed. This information, which would otherwise be irrelevant and inadmissible, has

147. Many scholars have posited a dichotomy between children's well-being and parents' rights. See, e.g., ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* (1993); David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139 (1992). A significant number, though, have refuted the notion that children's rights stand in opposition to the rights of parents or families. See, e.g., Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189 (1999); Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112 (1999).

148. 42 U.S.C. 671(a)(15). For a detailed discussion of AFSA's impact on the requirement that states make reasonable efforts to preserve and reunify families, see Will L. Crossley, *Defining Reasonable Efforts: Demystifying the States's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259 (2003); Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

149. Under normal circumstances, these items only become available through court order or discovery and submission by opposing counsel.

the potential to prejudice the judge against the teen. Ironically, the more the teen herself suffered at the hands of the adults responsible for her care, and the more egregious the abuse inflicted upon her, the more dubious the judge may be with regards to her own ability to parent.

On a pragmatic level, however, it would be hard to overstate the benefits of assigning both cases to a single judge. Most importantly, consolidating the cases before one judge eliminates the maddening problem of judges issuing conflicting and overlapping orders and service plans.¹⁵⁰ For example, where there are two judges, the judge overseeing the ward's dependency case may approve the agency's plan to place the ward in a residential program far from her children, making it impossible for her to comply with the visitation plan ordered by the judge in her children's dependency case. In addition, consolidation decreases the number of court appearances for all parties, and thereby reduces the likelihood of scheduling conflicts and adjournments.

A judge who presides over both cases is also in the best position to know if the agency has made reasonable efforts to prevent the removal of the child and/or to reunify the family, a finding required by federal legislation and mirrored in most states' laws.¹⁵¹ Such a judge is also best situated to ensure that the agency's reasonable efforts include providing services for which the teen parent may be eligible by virtue of being in foster care — i.e., independent living classes, financial support for higher or vocational education, comprehensive health services,¹⁵² and most importantly, an appropriate foster care placement with or near her child.

In many ways, the benefits of uniting the cases before a single judge mirror those more generally promoted by two related trends in family court policy: the movement for unified family courts, and the development

150. See Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3 (1998) (discussing the adverse consequences of family courts with overlapping jurisdiction for family law decision making).

151. See *supra* note 143.

152. Mandated under the Early and Periodic Screening, Diagnosis and Treatment provision of Medicaid.

of “therapeutic jurisprudence.”¹⁵³ As defined by the American Bar Association, the Unified Family Court:

is a comprehensive court with jurisdiction over all family-related legal matters. The structure of a unified family court promotes the resolution of family disputes in a fair, comprehensive, and expeditious way. It allows the court to address the family and its long-term needs as well as the problems of the individual litigant.¹⁵⁴

Both therapeutic jurisprudence and the unified family court movement posit a new role for the family court judge. Instead of a trier of fact and neutral arbiter of law, the appropriate role of the family court judge is one of a case manager or counselor. Particularly given the judge’s responsibility under federal law to ensure that reasonable efforts are taken to maintain or restore family unity,¹⁵⁵ a judge may not limit the scope of a proceeding to the consideration of whether the moving party has met the relevant standard of proof in establishing the elements of abuse or neglect. Rather, the judge becomes a “therapeutic agent,” whose “role is to try to prevent further disruptions and further trauma to the child.”¹⁵⁶

Given the enormous prejudice parenting wards face when the state removes their children, it is hard to balance the need for the procedural protections promised by a traditional court proceeding with the “therapeutic” and pragmatic advantages of the case management approach.¹⁵⁷ But the success of each model depends in substantial part on

153. See, e.g., Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998); Barbara A. Babb, *Where We Stand: An Analysis of America’s Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 32 FAM. L.Q. 31 (1998) (illustrating the integrated court reform initiatives around the nation); Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 FAM. L.Q. 147 (1998); Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 WIS. L. REV. 331. Although the unified court movement began almost a decade ago, it is still more theory than reality in many states. For example, in interviews with the authors, advocates in Florida joked about how “not unified” the judicial processes regarding children and families are in that state.

154. American Bar Association, *What is a United Family Court?*, available at <http://www.abanet.org/unifiedfamcrt/about.html> (last visited Mar. 28, 2006). The federal government is actively promoting this model, providing grants to states and localities to create uniform family courts through the Child Welfare Court Improvement Project (CIP) of the Children’s Bureau of Department of Health & Human Services.

155. *Supra* note 143.

156. Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach*, 5 PSYCHOL. PUB. POL’Y & L. 951, 955 (1999).

157. Advocates have noted that the same problem exists in other proceedings, particularly juvenile delinquency proceedings which are often criticized for neglecting a young person’s due process rights in favor of the judge’s supposed consideration of a child’s interests. For example,

the role of the respondent's lawyer. The traditional, adversarial model can only function to preserve parents' rights where those parents are zealously represented by qualified counsel. On the other hand, the case management model functions best where not only the judge, but also the teen's lawyer, participate both in the ward's case and that of her child.

B. *The Role of Counsel for the Parenting Ward*

The parenting ward facing allegations of child maltreatment may or may not already have a lawyer. As with court procedures, practices regarding the representation of children in child welfare proceedings vary widely from state to state. The federal government has tied the receipt of certain child welfare funds to the state's provision of guardians ad litem to children in protective proceedings.¹⁵⁸ The guardian ad litem may be a lawyer, but the state may choose instead to employ a court-appointed special advocate (CASA) to represent the child.¹⁵⁹ Many states have chosen the latter, far less expensive route, relying predominantly on lay advocates and volunteers to advocate on behalf of children in abuse and neglect cases. Indiana is the only state that does not mandate the appointment of some type of guardian ad litem.¹⁶⁰ Of the states surveyed here, Florida is the only one to rely solely on lay advocates.¹⁶¹ In contrast, California, New York, and Illinois all require that children in abuse and neglect proceedings be represented by counsel.¹⁶²

On the other hand, when the ward becomes a respondent parent, she is more likely to have assigned counsel. Although the U.S. Supreme Court has determined that the Constitution does not require that every parent be provided with counsel in every proceeding to terminate parental rights,¹⁶³ most states require the appointment of counsel at certain stages of a child protective proceeding.¹⁶⁴ Nevertheless, practitioners and policymakers

in New York, bench trials repeatedly before the same judge usually result in the imposition of longer "sentences" to juveniles than they would get in a criminal court.

158. 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2005).

159. *Id.*

160. Astra Outley, *Representation for Children and Parents in Dependency Proceedings*, at 11 n.12, available at <http://pewfostercare.org/research/docs/Representation.pdf> (last visited Mar. 28, 2006).

161. FLA. STAT. § 39.822, 39.807, & 39.820 (2005); ILL. COMP. STAT. 705/2-17 (2005); CAL. WELF. & INST. CODE § 317.5 (West 2005); N.Y. FAM. CT. ACT § 241 (McKinney 2005).

162. *See supra* note 161.

163. *Lassiter v. Dep't of Soc. Servs.*, 42 U.S. 18 (1981).

164. For instance, during fact-finding, disposition, and proceedings to terminate rights.

have noted a crisis in the representation of parents in child protective proceedings.¹⁶⁵

The lack of skilled and properly-resourced counsel for parents can be particularly acute in the case of parenting wards. Although many parenting wards already have a guardian ad litem assigned to them, this person is unlikely to represent them in the subsequent case. For example, most institutional providers of legal representation for children decline to represent their clients in a second proceeding as respondent parents.¹⁶⁶ Many organizations representing children see the representation of parents — even minor parents — as conflicting with the fundamental mission of their agency.

In this subsection, we examine the role of counsel for the parenting ward. Is it a conflict of interest for institutional and/or individual attorneys representing children in child protective proceedings to represent those same children as respondent parents? If there is no conflict, is such representation advisable?¹⁶⁷ Can an attorney comfortably occupy both roles? Finally, we examine one case, *In re Rose Lee Ann*, in which a lawyer struggled with precisely these issues.

1. The Role of Counsel for the Teenager in a Child Protective Proceeding

The appropriate role of the attorney for the child in a child protection proceeding lies at the heart of the questions raised above. As Jean Koh Peters relates in her comprehensive treatise on the subject, an examination

165. See, e.g., Kathleen A. Baille, *The Other Neglected Parties in Child Protective Proceedings: Parents in Poverty and the Lawyers Who Represent Them*, 66 *FORDHAM L. REV.* 2285, 2305-09 (1998); Sheri Bonstelle & Christine Schessler, *Adjourning Justice: New York State's Failure to Support Assigned Counsel Violates the Rights of Families in Abuse and Neglect Proceedings*, 28 *FORDHAM URB. L.J.* 1151, 1173-77, 1186-93 (2001); Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Case: The Challenge for Appellate Courts*, 6 *J. APP. PRAC. & PROCESS* 179, 184-87 (2004).

166. For instance, the biggest institutional providers of representation to children and young people in New York City all decline to have the same attorney who represented the child as a ward to represent the teen ward as a respondent-parent. These include the Juvenile Rights Division of the Legal Aid Society and Lawyers for Children. However, at least one California organization has developed an alternate system to ensure that the teen ward is adequately represented in her role as parent. Los Angeles's Children's Law Center allows attorneys in another department to represent teen wards as respondents in child protective cases, but builds a "firewall" so that information is not shared. In contrast, no division of New York City's Legal Aid Society represents any parent in a child protective proceeding because of its concern about conflicts from its Juvenile Rights Division's representation of children in the vast majority of NYC's child protective cases.

167. For a broader discussion of the various conflicts of interest which arise in the representation of children in child protection proceedings, see Christopher N. Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases*, 64 *FORDHAM L. REV.* 1857 (1996).

of the role of the attorney for the subject child in all fifty states reveals “chaos.”¹⁶⁸ The role of the lawyer as defined by local statute and regulations varies widely from state to state. To make matters more difficult, Peters notes that: “[I]n almost any state in which one represents clients, one will encounter within the state a deep disagreement *in practice* about the role of the child’s lawyer and what the content of the best interests of the child is, regardless of the wording of the governing law.”¹⁶⁹ Literature on this front generally addresses two predominant — and conflicting — models for the role of the child’s lawyer: the guardian *ad litem*, who is charged by the court with representing the child’s best interests, and the traditional attorney, who is charged with representing the child’s stated interests.

Where teenage clients are concerned, there is more of a consensus — at least in the literature¹⁷⁰ — that lawyers representing adolescents should follow the same rules for professional conduct that govern the representation of adults.¹⁷¹ Although all children under the age of eighteen suffer from a legal disability, teenagers on the whole are able to communicate concrete wishes regarding case outcomes and understand the risks and benefits of alternate courses of action.¹⁷² Therefore, teenagers are better able than younger children to play the traditional role of an adult client in a legal proceeding.

168. JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 33 (2d ed. 2001). For information on standards for representing children in the United States and around the world, see Representing Children Worldwide, available at www.law.yale.edu/rcw.

169. PETERS, *supra* note 168, at 42.

170. See *id.* at 48 (noting that “very few authors currently suggest that a teenage child, for instance, should be represented in the mode espoused by the early writers on the guardian *ad litem*” that is, by having the lawyer set the goals of and direct the representation); Wu, *supra* note 167, at 1859 (noting that “[i]ncreasingly, the academic literature reveals a growing consensus that the proper role of an attorney for a child is to represent the client’s wishes (as opposed to the attorney’s conception of the minor’s best interests) consistent with the minor’s age and cognitive ability.”).

171. This is the approach supported by the ABA Model Rules of Professional Conduct. CENTER FOR PROFESSIONAL RESPONSIBILITY ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (6th ed. 2004).

172. *Id.* R. 1.14.

[A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.

Id.

There is also a pragmatic reason for attorneys representing teens to advocate for their clients' expressed interests. As social workers in the field sometimes put it, "teenagers can walk." Adolescents easily and readily defy decisions made by their attorneys or by the court.¹⁷³ Unlike infants and small children, they can run away from placements, refuse to attend visits with parents or siblings, and fail to keep counseling appointments scheduled by others. Given that a teenager has sufficient autonomy to disregard court and agency decisions regarding her care, an attorney who wants to ensure compliance with court orders has no choice but to enlist her client's active participation in setting the goals of representation. Nevertheless, a lawyer may find that state laws or local practice may require her to represent the "best interests" of an adolescent client, even where those interests diverge from the client's expressed wishes.

2. Applying a Conflict-of-Interest Analysis to Concurrent Child Welfare Proceedings

As discussed above, lawyers for adolescents in child protective proceedings may variously be charged with representing the client's stated interests, the client's best interests, or something else entirely. While both the court and appointed counsel may treat a teenager as a child for purposes of her representation, that presumption disappears when the teen herself faces allegations of mistreating her own child.¹⁷⁴ In order to determine if representing the client in both cases raises a conflict, the lawyer must first determine his or her role. Thus, the rules governing conflicts of interest must be applied to two situations: first, where the lawyer is appointed to represent the child's best interests, and second, where the lawyer is appointed to represent the child's stated interests.¹⁷⁵

173. Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing A Child's Capacity to Choose*, 64 *FORDHAM L. REV.* 1873, 1875 (1996) (observing that "[judges] know . . . that enforcing orders that conflict with a child's desires is difficult. For example, older children may just run away from the home or hospital in which the judge places them.").

174. *See, e.g., M.C. v. Dep't of Children and Family Services*, 814 So. 2d 449 (Fla. Dist. Ct. App. 2001) (holding that respondent mother, who was a minor, was not entitled to the appointment of a guardian ad litem in a proceeding to terminate her parental rights, because the role requiring that a child be represented by a guardian ad litem in such a proceeding does not include a parent who happens to be a minor).

175. Materials specifically addressing concurrent conflicts are rarely written with poverty law or child representation in mind, and hence can be difficult to apply to those arenas. *See, e.g.,* PETERS, *supra* note 168 (stating that there is a "general consensus in literature that model rules offer the practitioner inadequate guidance when representing children"); Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 *N.D.L. REV.* 939, 944 (1995) (observing that the "ethical rules were not drafted with child advocacy in mind").

Rule 1.7 of the Model Rules of Professional Conduct prohibits lawyers from representing a client where there is a conflict of interest among current clients.¹⁷⁶ The Rule sets up a distinction between two types of conflicts — those which can be overcome, and those which are in all instances prohibited.¹⁷⁷ Conflicts which cannot be overcome include the representation of one client against another client in the same or a different proceeding, and representation which is prohibited by law.¹⁷⁸ Other conflicts may be overcome if the lawyer reasonably believes in his ability to represent both clients diligently and each client gives informed consent in writing.¹⁷⁹

Representing a parenting ward as both a subject child and as a respondent parent does not constitute prohibited representation. Such representation is not prohibited by law, and although the parenting ward has a very different status in her two cases, she is one client. This is true regardless of whether the attorney represents the client's stated interests or best interests. Thus, by representing her in both cases the attorney or firm does not engage in prohibited representation under Rule 1.7.

Rule 1.7 also delineates two types of conflicts which may be overcome. First, subsection (a)(1) describes situations in which the representation of

Nonetheless, the Model Rules and the literature discussing them provide an important foundation for any discussion of professional conduct.

176. CENTER FOR PROFESSIONAL RESPONSIBILITY ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (5th ed. 2003) [hereinafter MODEL RULES]. The Rule provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

Id. R. 1.7.

177. *Id.* R. 1.7 cmt. [14-17].

178. *Id.* R. 1.7(b).

179. *Id.*

one client is directly adverse to another client.¹⁸⁰ Once again, regardless of the model of representation, the teen is only one client, and hence representing her in two cases is not a conflict under this section. Second, subsection (a)(2) describes situations which present a significant risk that the representation of a client will be materially limited by a range of factors, including not just another client, but also a third person or the attorney's personal interests.¹⁸¹ The Comment accompanying the Rule defines a "material limitation" as a "significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."¹⁸²

Here, the role of the attorney is vital to determining whether or not there is a conflict. If a lawyer follows the model of the guardian ad litem, it will be difficult for that lawyer to extend his representation to the teen as a respondent parent. Such a situation would require that the lawyer represent the client's best interests in one case, and the client's stated interests in the second. The need for the attorney to juggle these two roles poses a significant risk that the attorney's ability to consider an appropriate course of action will be compromised. Where the lawyer and the client disagree about the client's best interests, the attorney will be in the untenable situation of zealously representing the client's stated wishes in one case and undermining those same wishes in the second. Particularly where the cases are pending before the same tribunal, the attorney's ability to effectively argue either position would be severely compromised.

If, on the other hand, the lawyer in the teen's own child protective case represents the client's stated interests, no such conflict arises when the lawyer extends her representation to include the teen's case as a respondent parent. Instead, the lawyer may present a consistent story regarding her client's wishes to the court, opposing counsel, and social services staff. In this way, the lawyer can protect her client's rights both as a foster child and as a parent.

3. An Area for Caution: Positional Conflicts

The above discussion focuses on the representation of a single client. But few if any lawyers represent only one client at a time. In fact, both independent and institutional providers of representation for children tend

180. *Id.* R. 1.7(a)(1), (2)(2).

181. MODEL RULES, *supra* note 176, R. 1.7(a)(2).

182. *Id.* R. 1.7 cmt. [8].

to have heavy caseloads, and institutional providers¹⁸³ in large cities have hundreds if not thousands of clients.¹⁸⁴ As discussed below, there is no per se conflict for a practitioner or legal aid office to regularly represent both parents and children in child protection cases, as long as they do not represent adverse parties in any particular case. In fact, more often than not, advocates for children seek to secure services for their clients' parents that directly benefit both parties. However, problems may arise where the attorney or office engages in appellate advocacy and/or law reform efforts.

Lawyers and law offices are permitted to represent clients whose positions may at times be ideologically or legally opposed. As the Comments to Rule 1.7 state:

Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create a precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest.¹⁸⁵

Nevertheless, a conflict may arise where actions that a lawyer takes on behalf of one client will materially limit the lawyer's effectiveness in representing another client. For example, "when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client."¹⁸⁶ This is generally known as a "positional conflict."¹⁸⁷

Accordingly, representing both parents and children in child protective proceedings does not itself present a conflict, even where such representation requires the lawyer or firm to take "inconsistent legal positions" before different judges, at different times, on behalf of those various clients.¹⁸⁸ A conflict arises only when the lawyer's advocacy on behalf of one client "materially limits" her effectiveness as counsel for a second client. The Comment to Rule 1.7 list several relevant factors in determining when such a conflict is likely to arise, including where the cases are pending, whether the issue is substantive or procedural, whether

183. For purposes of conflicts of interest, the Model Rules state that, "depending upon the structure of the organization [of a legal aid or services entity] the entire organization or different components of it may constitute a firm or firms." *Id.* R. 1.10.

184. PETERS, *supra* note 168, at 51.

185. MODEL RULES, *supra* note 176, R. 1.7 cmt. [24].

186. *Id.*

187. See R. David Donoghue, *Conflicts of Interest: Concurrent Representation*, 11 GEO. J. LEGAL ETHICS 319 (1998).

188. MODEL RULES, *supra* note 176, R. 1.7 cmt [24].

the matters will be heard at precisely the same time, the significance of the issue to the interests of the clients involved, and the client's reasonable expectations in retaining the lawyer.¹⁸⁹ In the clearest example, it is almost always a conflict of interest for a lawyer or organization to argue two opposing interpretations of a law in front of one appellate court during the same period of time.¹⁹⁰

Although positional litigation conflicts may arise in practices representing both parents and children, it is just as likely that in appellate cases regarding a particular question of law, the interests of both the child client and the respondent parent client will be promoted by the same argument. For example, say a child and a respondent parent both brought independent suits claiming that the county's policy regarding visitation of children in foster care unlawfully and unreasonably limits interaction between foster children and their biological families. Even in the unlikely case that the appeals were heard close in time and by the same judge, representing both clients would present no conflict of interest.¹⁹¹

Positional conflicts may also arise where an organization engages in law reform. The classic lobbying conflict arises "when a firm is hired by a client to promote a position for one client on an issue and then a second client retains the firm to promote or litigate another position on the same issue that is adverse to the first client's interests."¹⁹² In such cases, it may be appropriate for the firm to represent both clients, but only after obtaining written, informed consent from both parties.¹⁹³ This is not readily applicable to legal aid offices, which are rarely, if ever, retained by clients for lobbying services. Rather, most legal aid offices engage in lobbying efforts on their own initiative and, in a sense, on their own behalf or on behalf of the public good. If the office regularly represents both parents and children in child protective proceedings, each client may reasonably expect that the office, when engaging in law reform activities, will espouse a position which reflects the balance of its experience and practice, and not the position that would best promote his or her particular interests. As above, it is important to note that the interests of respondent parent and children clients are not necessarily in conflict. For example, a

189. *Id.*

190. Donoghue, *supra* note 187, at 324.

191. In fact, lawyers for children report that the parent's and child's positions very often align at the trial level, too, such that the child's lawyer and the parent's lawyer work collaboratively to get services for the parent so that the child can be returned home.

192. Donoghue, *supra* note 187, at 325.

193. See MODEL RULES, *supra* note 176, R. 1.7(b)(4). It is important to note that the Model Rules specifically permit individual lawyers to engage in law reform activities via an institution or entity which is independent of their practice, such as a committee of the bar association, even where such efforts may affect the interests of their clients. See *id.* R. 6.4.

bill to improve case processing times or to ensure adequate access to mental health services for a child in foster care may equally serve the interests of parents and children.

4. Discomfort with Representing Teen Parents

The parenting ward accused of child maltreatment embodies a direct challenge to the presumption that parents' and children's interests are at odds. The parenting ward is both a parent and a neglected child, and yet her interests are unified: to keep or regain custody of her child, to obtain those services to which she is entitled as a foster child, and to have a say in decisions regarding long-term goals for herself and her child. Given the absence of any conflict of interest in representing a teen in concurrent cases, why is it so rare for attorneys and law offices to do so? Perhaps, in the end, the decision by children's attorneys not to extend representation to clients who become respondents is less about perceived (and generally specious) conflicts of interest, and more about such advocates' reluctance to stray from a narrow professional role.¹⁹⁴ This is a common phenomenon in the representation of children in family court. As one author explains:

Lawyers for children have been less successful than we would like in representing the child-in-context, because the lawyer has inadvertently *become* the context for most child representation. Both the lawyer's personal and professional context have tended to overwhelm the child-in-context.¹⁹⁵

This tendency is exacerbated by the enormous burdens under which most lawyers for children operate: high caseloads, low pay, inadequate supervision, little or no support staff, cramped offices, crowded courtrooms, case backlogs, overwhelmed judges, insufficiently trained child protective workers, and inattention to the vicarious traumas of working with children and families in crisis.¹⁹⁶ The following discussion of *In re Rose Lee Ann* presents one example of an attorney's struggle to reconcile his "personal and professional context" with his teen clients' advocacy needs.

194. For a discussion of how lawyers who represent parents accused of child maltreatment are vilified by the prosecution, the public, and sometimes a court, and of the extreme discomfort such cases may raise for lawyers, see Bruce A. Boyer, *Ethical Issues in the Representation of Parents in Child Welfare Cases*, 64 *FORDHAM L. REV.* 1621 (1996).

195. PETERS, *supra* note 168, at 24.

196. *Id.* at 51 (noting that "practitioners . . . are often working under such strained and under-resourced circumstances that they have little time for reflection and evaluation of their work"); *id.* at 40, n.11 (detailing survey of compensation rates for lawyers for children in child protective proceedings).

5. A Case Study: *In re Rose Lee Ann*

In *In re Rose Lee Ann L.*,¹⁹⁷ Cook County filed a neglect petition against Lisa Ann Ramos and Melvin Lewis, two teenaged wards of the State of Illinois, alleging that they had neglected their daughter, Rose.¹⁹⁸ In their own cases as abused and neglected children, Lisa Ann and Melvin were both represented by the Cook County Public Guardian, Patrick Murphy.¹⁹⁹ At the initial hearing regarding Rose's custody, the court appointed Murphy to again represent Lisa Ann and Melvin, this time in their capacity as respondent parents.²⁰⁰ Murphy, accustomed to the role of attorney for the subject child, asked the trial court to clarify his role as respondents' attorney.²⁰¹ Specifically, he asked whether he was supposed to "play a traditional role in an attempt to vigorously represent [his] clients irrespective of the facts and to vigorously cross-examine and keep certain facts out" or if he should "play a more general role and try to advocate for what is in the best interest of the little girl" — that is, his clients' child, Rose.²⁰² The trial court replied that his role in the proceeding was "the traditional role as attorney for mother and father."²⁰³ Over the course of the case, Murphy made various attempts either to certify for appeal certain questions regarding his role or to withdraw as counsel for Lisa Ann and Melvin, all of which were denied by the trial court, despite the fact that the requests to withdraw were supported by his clients.²⁰⁴

Murphy's repeated attempts to withdraw and/or obtain clarification regarding his role indicated his extreme reservations regarding his clients' ability to care for Rose. For example, shortly after the initial hearing, Murphy filed a motion asking the trial court to certify the following questions for immediate appeal:

A. Does an attorney representing a parent in a child protection proceeding have an obligation to disclose to the court information

197. 718 N.E. 2d 623 (Ill. App. Ct. 1999). Although the authors found a handful of cases discussing the rights of parenting wards who become respondents, the authors could only locate one published decision specifically addressing the role of counsel for the ward-cum-respondent. Nevertheless, that decision, by an Illinois Appellate Court, touches on almost all of the issues discussed above.

198. *Id.* at 624.

199. *Id.* at 625.

200. *Id.*

201. *Id.*

202. *Rose*, 718 N.E. 2d at 625.

203. *Id.* at 625.

204. *Id.* at 625-26.

that demonstrates that the parent may present a risk of serious bodily harm to the parent's defenseless child?

B. If the attorney obtains information that his client may present a risk of serious bodily harm to the client's child, in his role as attorney and guardian *ad litem* for the parent in the parent's case as an abused and neglected child, does the attorney have an obligation to attempt to keep this information out of evidence in the case of the parent's child?²⁰⁵

Although ostensibly hypothetical, Question A leaves the reader with a distinct impression that Murphy had information demonstrating that his clients presented "a risk of serious bodily harm" to their "defenseless" child. Question B then further indicates that Murphy not only possesses such information about his clients, but that the information is so compelling that he seeks to waive attorney-client privilege in order to disclose it to the trial court. Later in the proceedings, Murphy explicitly states as much. In a motion to withdraw, Murphy indicates that he is in a "quandary."²⁰⁶ He writes that he "has information in his file of a work product nature which he and other lawyers on his staff have gleaned from both conversations with the respondent-parents as well as their analysis of documents in the case which lead them to a certain conclusion."²⁰⁷ Not surprisingly, the trial court reached the same conclusion, entering a dispositional order declaring Rose to be a ward of the state and placing her in foster care.²⁰⁸

Murphy then appealed the trial court's denial of his motion to withdraw, including in his brief several hypothetical questions along the lines of those discussed above.²⁰⁹ The appellate court refrained from addressing any of Murphy's hypothetical questions, as that would have required the issuance of an advisory opinion.²¹⁰ Instead, the appellate court applied local laws governing the withdrawal of counsel.²¹¹ The court held that a trial judge has discretion to deny such a motion only "if the granting

205. *Id.* at 625.

206. *Id.* at 626.

207. *Rose*, 718 N.E. 2d at 625. At another juncture, Murphy asked the appellate court, "[w]hat do I do if I think that there is no way that this kid should ever live with the parents?" *Id.* at 627. And again, "what do we do if we know that these parents — or very firmly believe — no one can know everything in this life, but as much of our experience and intelligence permits, we really believe that the parents should not parent the child?" *Id.*

208. *Id.* at 626.

209. *Id.*

210. *Id.* at 627.

211. *Id.*

of it would delay the trial of the case, or would otherwise be inequitable.”²¹² As Lisa Ann and Melvin would not have been prejudiced by the withdrawal, the appellate court concluded that the trial court improperly denied Murphy’s request to withdraw from the case.²¹³

In addition, the appellate court reasoned that Murphy had not only the right to withdraw, he had an ethical duty to withdraw based on his expressed inability to abide by his clients’ objectives concerning the litigation as required by the Illinois Code of Professional Conduct.²¹⁴ Thus, the appellate court implicitly assumed that the role for the attorney representing parenting wards accused of child maltreatment is not that of representing the clients’ best interests, or presenting facts to the court, but the traditional role of zealous advocate as governed by the professional rules of conduct.

Certainly, an attorney assigned to represent parents she believes — often based on overwhelming evidence — to pose a serious threat to their children will find the task emotionally difficult. At the same time, such parents generally have a right to be represented by counsel.²¹⁵ In addition, the Model Rules of Professional Conduct suggest that the legal profession has a duty to ensure the representation of destitute, controversial, or unsympathetic clients.²¹⁶ Parenting wards accused of child maltreatment are often all three.

Unfortunately, as discussed above, in most of the country there is a lack of adequate counsel for parents that may exceed the lack of quality counsel for children. For example, in Chicago, there is an institutional provider of legal services for children in child protective proceedings — the Public Guardian’s Office, in which Murphy was employed.²¹⁷ Yet there is no parallel institution charged with representing parents. Perhaps, if such an organization existed, the trial court in *In re Rose Lee Ann* would have been less reluctant to relieve Murphy of his duties — or may never have appointed him to the case at all. Murphy acknowledged the relative power of his office when he asked the trial court:

212. *Rose*, 718 N.E. 2d at 627.

213. *Id.*

214. *Id.*

215. This right is based variously on state laws, state constitutions, and on a case-by-case basis, the U.S. Constitution.

216. MODEL RULES, *supra* note 176, R. 1.2, cmt. [5]. “Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client’s views or activities.” *Id.*

217. *Rose*, 718 N.E. 2d at 624. This is true in other large jurisdictions as well, including New York City.

Assuming, for purposes of argument, that the conclusion is that it would be harmful for . . . the child to live with the parents, must the Public Guardian vigorously pursue, with all of his legal acumen, and with all of his legal staff's resources, the litigation strategy set forth by the clients, or must he attempt to somehow reach a non-adversarial compromise which would protect the child and, at the same time, advance the cause of his clients?²¹⁸

Parenting wards deserve the benefit of counsel who will “vigorously pursue” their interests with “legal acumen” and with the resources of a well-staffed office. Whether such representation should be provided by the same attorney who represented the parenting ward in her case as an abused or neglected minor, or whether the ward should be assigned new counsel, is a matter of debate. Either way, advocates and courts alike have an obligation to create procedures that ensure parenting wards who become respondents have access to at least the same level of counsel they enjoy as subject children.²¹⁹

C. *The Role of the Child Protective Agency in Concurrent Proceedings*

Arguably there is a conflict where the child protective agency charged with the custody and protection of a ward is the same agency prosecuting (in the civil sense) the child protective case against the minor parent. Nonetheless, this is the practice in all four survey states, none of which require appointment of a “special prosecutor” in such cases.²²⁰

Two New York courts recently declined to find that the relationship between a child protective agency and a minor ward created an unacceptable conflict of interest that would require the agency attorney to withdraw from the case to be replaced by a special prosecutor. In *In re Ta Fon Edward J.B.*,²²¹ the child protective agency initiated a proceeding to terminate the parental rights of one of its own wards.²²² The respondent ward argued that the agency had a conflict of interest in that pursuing the termination of her rights was an implicit violation of the agency's statutory mandate to protect her best interests.²²³ She therefore called for the

218. *Id.* at 626.

219. Or where, as in Florida, wards are not entitled to the appointment of a lawyer, that upon becoming respondents they are provided with competent counsel.

220. The authors could not find a decision to the contrary.

221. 774 N.Y.S. 2d 821 (N.Y. App. Div. 2004).

222. *Id.* at 821.

223. *Id.*

dismissal of the agency attorney and the appointment of a special prosecutor.²²⁴

The *Ta Fon* court refused, concluding that the respondent parent's status as a ward of the state had no impact whatsoever on the case.²²⁵ The agency's duties were the same whether the respondent was totally unknown to it or a ward in the agency's own care: "Nothing in the Family Court Act or the Social Services Law," the *Ta Fon* court wrote, "lessens, increases, or otherwise changes the responsibilities of either ACS or its contract agencies when faced with caring for the offspring of a foster child."²²⁶ Similarly, in a case affirming the right of parenting wards to maintain physical and legal custody of their infants, the New York Court of Appeals pointed out that if "there is concern that a particular child is being neglected or abused in the foster care placement [with his or her parent]," the agency can file a child protective proceeding against the parent, as in any other case.²²⁷

However, while not going so far as to mandate a special prosecutor, some courts have found suspicious the fact that the same agency charged with protecting the parenting ward is also charged with protecting the infant.²²⁸ In *In re Lawrence Children*,²²⁹ the child welfare agency filed a neglect petition against a teenaged ward in the agency's care.²³⁰ As in *In re Ta Fon J.B.*, the ward argued that it was a conflict of interest for the agency charged with caring for her to bring a neglect action against her.²³¹ While declining, like the *Ta Fon* court, to appoint a special prosecutor, the judge in *Lawrence* asserted that child protective cases against wards were not like other cases.²³² Unlike other respondent parents, parenting wards are in the care of an agency which is both statutorily mandated and court-ordered to educate, support, encourage, and monitor them. Where a ward has failed in her role as parent, there is a high likelihood that the agency has failed in *its* role of caring for the ward. Thus, the *Lawrence* court found that the child protective agency should exercise its discretion not to

224. *Id.*

225. *Id.*

226. *Ta Fon Edward*, 6 A.D. 3d at 821.

227. *In re Tyriek W.*, 85 N.Y.2d 774, 780 (N.Y. 1995).

228. *See, e.g., In re Tricia M.*, 451 N.Y.S.2d 553, 554 (N.Y. Fam. Ct. 1982) (stating that the circumstances were "highly questionable" when the mother teen ward's signature of a voluntary placement agreement for her child was obtained half an hour after regaining consciousness after giving birth by "the very agency whose ward she was.").

229. 768 N.Y.S.2d 83 (N.Y. Fam. Ct. 2003).

230. *Id.* at 87. The minor at issue was represented by an attorney Law Guardian in her child protective case and by a different attorney in the child protective case brought against her as a parent. *Id.*

231. *Id.*

232. *Id.*

pursue a neglect or abuse finding “if a lack of supervision of the respondent [parent] by her caretaker contributed to the commission of the neglectful act.”²³³ The *Lawrence* court concluded that the exercise of such discretion was particularly appropriate where, as in the case before it, the caregiver who failed to supervise the respondent is the same state agency prosecuting her for abuse or neglect.²³⁴

In practice, advocates for minor wards frequently make the argument that the foster care system is at least partially responsible for any parenting failures; the foster care agency is akin to a person legally responsible for the infant. Following the same logic, the Illinois child protective agency will often refuse to initiate a child protection investigation if the report of abuse or neglect was made by the minor parent’s foster parent or institutional caregiver since such adults are charged with supervising both the mother and the child’s care.

V. BEST PRACTICES FOR REPRESENTING PREGNANT AND PARENTING WARDS

While determining the fairest or most efficient method for processing concurrent cases is problematic, best practices regarding the representation of pregnant and parenting wards in general are easier to identify. Better yet, an advocate’s creative and zealous work on behalf of a parenting ward may prevent the teen from ever becoming a respondent. The advocate’s goal is to ensure that the individual client obtains the services she needs to exit from the foster care system with her parental rights intact, and with the ability to care for herself and her child. While the panoply of services necessary for any foster child to successfully exit the system are beyond the scope of this Article, seven services which are of particular importance to parenting wards are addressed below: joint placement, parenting skills, childcare, education, family planning, services for young fathers, and discharge planning.

A. Joint Placement

If young parents are to assume daily responsibility for the care of their children after discharge, they must be allowed to practice that responsibility while in foster care. Ensuring that the young mother and her child are placed together is a primary responsibility of the ward’s attorney. Reports and anecdotal evidence suggest that local child welfare systems do not have enough mother/child placements to meet the population’s

233. *Id.* at 90.

234. *Lawrence*, 768 N.Y.S.2d at 90-91.

needs.²³⁵ In Illinois, the lack of appropriate placements too often results in postnatal stays in temporary shelters.²³⁶ In California, the legislature has officially acknowledged that the dearth of placements results in temporary separations of parenting wards and their children.²³⁷ In New York, the scarcity of mother/child beds often results in the mother and infant remaining in the hospital long after they are medically ready for discharge.²³⁸ In other instances, the mother is discharged to her prior placement while her baby remains in the hospital nursery.²³⁹ This separation of mother and infant is damaging to both.²⁴⁰ The baby is left alone in the hospital for the entire night and portions of the day, precluding breast feeding and crucial bonding with the mother. The state, in turn, pays an enormous price to keep a healthy child in the hospital.

Such separations are counterproductive and inhumane. They are also illegal.²⁴¹ Attorneys for parenting wards can address this problem from several angles. First, in some cases, steps may be taken while the ward is pregnant to ensure that the relevant agency is making appropriate plans for the client's post-pregnancy placement. In New York City, as in other locales, this is difficult at best because mother/child placements are awarded on a first-come, first-served basis.²⁴² Additionally, due to the higher demand for beds and the high cost of leaving beds vacant, programs are unable to reserve beds for pregnant teens.²⁴³ Nevertheless, advocates can seek court orders directing the ward's agency to make appropriate plans for the teen's placement following delivery.

Next, when a client is illegally separated from her child, attorneys have several options. In most states, the parent may file a writ of habeas corpus against the child welfare or foster care agency, demanding that the child be returned to the mother.²⁴⁴ In some circumstances, an attorney's threat to initiate such action will be sufficient to motivate the agency to reunite

235. TPSN, *supra* note 129, at 6; Youth Advocacy Center, *Caring for Our Children*, at 3-4, 8, 28 (1995), available at <http://www.youthadvocacycenter.org/pdf/caringforourchildren.pdf>; S.B. 1178, 154th Leg. Reg. Sess. (Cal. 2004); Sheppard & Woltman, *supra* note 13, at 3, 6.

236. Youth Advocacy Center, *supra* note 235, at 19.

237. S.B. 1178, ch. 841.

238. See Youth Advocacy Center, *supra* note 235, at 24.

239. *Id.* at 23-24.

240. See *id.* at 25-28.

241. *Id.*

242. This system was initially mandated by the settlement in *Wilder*. See BERNSTEIN, *supra* note 55. Although the *Wilder* settlement is no longer binding, the city has by and large continued the practice of assigning beds on a first-come, first-served basis. *Id.*

243. See *id.*

244. See, e.g., N.Y. FAM. CT. ACT § 115(b) & 651.

mother and child in an appropriate placement. Another option is to seek relief from a court with jurisdiction over the teen's foster care placement. The attorney should avail herself of state policies, such as those discussed above,²⁴⁵ to argue that the ward has a right to placement with her child. For example, attorneys in California can now argue that the court or the agency has failed to make diligent and active efforts to place "the minor parent and the child together in as family-like a setting as possible" as mandated by state statute.²⁴⁶ In all jurisdictions, the attorney should also argue that separating the ward from her child is clearly contrary to the ward's best interests. Finally, in negotiating with state or local bureaucrats, advocates should point out that as long as the parenting ward retains legal custody of the infant, failure to place the mother and child together will compromise the state's ability to receive federal reimbursement for the infant's care.

B. Parenting Skills

To ensure that parenting wards are able to care for their children properly, and thereby end the cycle of foster care placements, these young parents must have access to effective training and support. Foster care placements developed specifically for this population often offer on-site child development and/or parenting classes to the youth in their care. However, some do not, and many pregnant and parenting teens are in regular foster boarding homes lacking any programs targeted to this population.

Regardless of placement type, parenting wards may be exposed to coercive threats by adults to remove their children from their care. These threats are exacerbated by caseworkers' ignorance of the legal status of parenting wards and their children. Caseworkers may mistakenly assert that children born to foster youth are automatically in the custody of the child protective system. Alternatively, caseworkers may insist that since the parenting ward is unable to support the infant on her own, any behavior which results in her dismissal from the program will empower the agency to assume custody of her child. In an environment of arbitrary and coercive threats, wards may come to view all allegations of abuse or neglect as retaliatory, and lose sight of which actions actually pose a threat to the safety of their children.

With so much misinformation afoot, attorneys need to educate their clients about their rights as parents, and help each client identify and obtain those services that she feels will help her become a better parent. Advocates working with this population should offer their clients

245. *Supra* Part III.C.

246. S.B. 1178 ch. 841 § 2(e).

brochures or guides explaining the rights of teen parents in care,²⁴⁷ and should take the time to ensure that the teen actually understands her legal relationship to her baby. In addition, advocates should provide parenting wards with information about child abuse and neglect, both to encourage teens to think critically about parenting and so that teens may protect themselves from allegations.²⁴⁸ In California, for example, agencies are now mandated to provide parenting wards with parenting classes.²⁴⁹ Attorneys should ask judges for an order enforcing this mandate where necessary. Finally, in every jurisdiction, advocates should assist clients in accessing parenting classes, young parents' support groups, and counseling, both by making appropriate referrals and, where necessary, by asking a court to order the provision of the needed services.

C. Childcare

Parenting wards are unable to prepare to exit foster care absent childcare services. For a single parent to work or attend school, she must have someone to look after her child. Among the survey states, Illinois and California alone explicitly provide childcare for all parenting wards.²⁵⁰ In New York, while childcare is not mandated by statute or regulation, there is a written state policy to provide childcare to parenting wards where, absent such services, the ward would have to choose between participating in work or school and maintaining custody of her child.²⁵¹

Where childcare is not mandated by statute or regulation, the right may nevertheless be inferred from the state's duty to prepare foster youth for independent living. For example, while New York law does not contain an outright duty for the state to provide childcare to parenting wards, such a duty is implied by two underlying mandates: the provision of preventive services, including childcare, to families at risk of child protective intervention,²⁵² and the provision of independent living services, including vocational and higher education and job placement, to adolescent wards.²⁵³

247. See, e.g., Barbara Winter & Maxine A. Ketcher, *The Rights of Teen Parents Who are in Foster Care: A Bronx Legal Services Handbook*; YOUTH LAW CENTER, THE LEGAL RIGHTS OF TEENS IN OUT-OF-HOME CARE 19 (rev. Aug. 2004), available at http://www.ylc.org/ylc_yrht.htm (last visited Mar. 28, 2006).

248. See, e.g., STREET LAW, INC., TEEN PARENTS AND THE LAW PROGRAM: TEACHING YOUNG PARENTS PRACTICAL LAW AND LIFE SKILLS, available at <http://www.streetlaw.org/tpal.asp> (last visited Mar. 28, 2006).

249. CAL. WELF. & INST. CODE § 16002.5 (2005).

250. CAL. WELF. & INST. CODE § 16002.5; ILL. ADMIN. CODE tit. 8, § 302 app. J (1996).

251. See 94 ADM-12, *supra* note 78.

252. N.Y. COMP. CODES R. & REGS. tit. 18, § 423.4(g)(2) (2005).

253. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(f).

The state cannot meet the latter mandate with respect to parenting wards absent the provision of childcare.

Like New York, most states have rules mandating that preventative services be provided to at-risk families as well as regulations regarding the provision of independent living services to foster youth. Lawyers should use these regulations to obtain childcare for their clients. If made to the presiding judge, a plea for an order that the district provide childcare should always be accompanied by an argument that the provision of such services is in the ward's best interest.

D. Education

Under title IX of the Civil Rights Act,²⁵⁴ pregnant and parenting wards, and pregnant and parenting students in general, have the same rights to a public education as all other students. This includes both classes and extracurricular activities. The majority of parenting wards are within the mandatory school age of their state and thus must attend school regularly or face serious repercussions.²⁵⁵ Moreover, completing a high school education or obtaining a GED are essential steps for any teen parent to achieve employment and income stability in the future.

Parenting students, however, face significant challenges in continuing with school during pregnancy and after the birth of their children.²⁵⁶ Primary among these is securing affordable, safe, and accessible childcare for their babies while they are in school. To ensure that mothers can focus on their schoolwork without distraction and care for their children, including breast-feeding if they so choose, schools should provide on-site

254. 20 U.S.C. § 1681; 34 C.F.R. § 106.40. Title IX covers only those schools which receive money from the federal government, but this includes virtually all schools.

255. For instance, the mandatory school age in New York State is up to and including 16 years old. N.Y. EDUC. LAW § 3202 (2005). New York City has opted to extend it to 17. Students in New York have the right to attend school until the end of the year in which they turn 21 years old. § 3202(1).

256. Although educational challenges for pregnant students are beyond the scope of this Article, they are related to those facing parenting students. Many of the students who "drop out" of school while they are pregnant never return to the educational system after giving birth. For an in-depth discussion of the barriers facing pregnant and parenting students, see Tamara S. Ling, *Lifting Voices: Toward Equal Education for Pregnant and Parenting Students in New York City*, 29 FORDHAM URB. L.J. 2387 (2002); Aleeza Strubel & Wendy Pollock, Illinois Advocates Promote School Success and Safety for Young People Who Are Expectant Parents, Parents, or Victims of Domestic or Sexual Violence, *Clearinghouse Review* (July-Aug. 2005); Monica J. Stamm, *A Skeleton in the Closet: Single-Sex Schools for Pregnant Girls*, 98 COLUM. L. REV. 1203 (1998). If they do return to school, they will often have accumulated significant educational deficits during their time away from school. Unfortunately, they do not often receive assistance in overcoming these deficits or the other challenges they encounter.

childcare. While some schools already provide childcare, not nearly enough do so.²⁵⁷ Those that do have long waiting lists for entry.²⁵⁸

Another educational barrier for teen parents is the distance they must travel between their homes, their babies' daycare provider, and their schools. School hours may also be a barrier, for example, very early start times which are incompatible with childcare hours. Schools also lack flexibility in educational programs and services offered. Many children in foster care have disabilities²⁵⁹ and have the right to special classes and services under the Individuals with Disabilities Act (IDEA).²⁶⁰ These programs are not offered at many schools, and are often not available at those schools serving parenting teens.²⁶¹ Also, schools for pregnant and parenting teens often do not include advanced or otherwise specialized courses, while high schools offering such courses usually do not include childcare or other support services for minor parents.²⁶²

Advocates can work with local schools to expand the array of options for young parents. In particular, teens and school officials should be informed about rights under title IX and other laws such as the rights to not be segregated and to have the same educational opportunities available to other students. Advocates can also work with minors and their schools to craft attendance and academic policies that accommodate parents' schedules, and allow them flexibility in attending school, doing course work, and caring for their children.²⁶³ They can also ensure that schools follow the law in excusing a pregnant or parenting student's absences for

257. For instance, as of 2004, the LYFE program in New York City provided on-site childcare and parenting classes to about 500 teen mothers at schools and educational programs, but city statistics show that there are more than 20,000 school aged mothers in New York City, 8,000 of whom are within the mandatory school age. Office of the City Comptroller, Undercounted and Underserved: New York City's 20,000 School-Aged Young Mothers (June 19, 2003) [hereinafter City Comptroller], available at www.comptroller.nyc.gov/bureaus/opm/reports/Teen_Mothers.pdf. Moreover, some of the childcare centers are at risk of being closed in the near future. See Deborah Apsel, *Child Care Centers for Teen Mothers May Close* (Apr. 13, 2004), available at http://www.insideschools.org/nv/NV_lyfe_centers_apr04.php (last visited Mar. 28, 2006).

258. City Comptroller, *supra* note 257.

259. Karen Shelley Smucker et al., *School-Related Problems of Special Education Foster-Care Students with Emotional or Behavioral Disorders: A Comparison to Other Groups*, 4 J. EMOTIONAL & BEHAV. DISORDERS 30 (1996); Matthew B. Bogin & Beth Goodman, *Special Education for Children in State Custody*, 7 CHILDREN'S LEGAL RTS. J. 8, 10 (1986).

260. Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education*, 19 YALE L. & POL'Y REV. 81, 91-98.

261. Additionally, teen parents, including those not in foster care, have a high prevalence of educational deficits and possible undetected learning disabilities. See CENTER FOR ASSESSMENT AND POLICY DEVELOPMENT, *HELPING THE EDUCATION SYSTEM WORK FOR TEEN PARENTS AND THEIR CHILDREN* (Oct. 1999).

262. *Id.*

263. *Id.*

medical reasons as they would for any other medical condition.²⁶⁴ Finally, advocates can argue that educational services form an inherent part of both the independent living services which must be provided to foster youth, and of the reasonable efforts required to keep families together or reunify families.

E. Family Planning

While many campaigns and policies focus on preventing teen pregnancy — or on preventing unmarried teens from engaging in sexual intercourse — preventing young mothers from having a second child is equally important.²⁶⁵ More than one in five teen mothers has more than one child.²⁶⁶ As compared to teen mothers with only one child, teen mothers with more than one child face lower educational and vocational attainment, a greater risk of poverty, heavier reliance on public assistance, and impaired infant health and well-being.²⁶⁷ Preventing second births is particularly important to stopping the generational foster care cycle. Research indicates that second and higher-order children are more likely to become victims of child abuse or neglect and to be placed in foster care for longer periods of time.²⁶⁸

Given the close relationship between rates of abuse, family size, and maternal age, advocates for parenting wards should take steps to ensure that their clients have access to appropriate family planning services. In general, foster youth have the same right to confidential reproductive healthcare as other youth. In all four of the survey states, state laws permit minors to obtain contraception, testing, and treatment for sexually transmitted diseases, and abortion services absent parental consent.²⁶⁹ Not surprisingly, those states which permit minors to obtain confidential family planning services are more likely to have rules specifically mandating that family planning services be provided to youth in foster

264. *Id.*

265. For a study on preventing initial pregnancies among foster youth, see LOIS THIESSEN LOVE ET AL., *FOSTERING HOPE: PREVENTING TEEN PREGNANCY AMONG YOUTH IN FOSTER CARE* (2005).

266. FLORENCIA M. GREER & JODIE LEVIN-EPSTEIN, CTR. FOR LAW AND SOC. POLICY, *MORE THAN ONE: TEEN MOTHERS AND SUBSEQUENT CHILD BEARING 2* (Aug. 1998), available at http://www.clasp.org/publications/more_than_one_teen_mothers.pdf (last visited Mar. 28, 2006).

267. *Id.* at 2, 4.

268. *Id.* at 4-5.

269. Boonstra & Nash, *Minors and the Right to Consent to Health Care*, in THE GUTTENMACHER REPORT ON PUBLIC POLICY, *supra* note 68, at 6-7.

care upon request. Among the survey states, New York and Illinois both carry such a mandate.²⁷⁰

In many other states, however, there is either no law permitting minors to access contraceptive services, or there are laws restricting minors' access to such services.²⁷¹ While a foster child's right to access confidential family planning services varies from state to state, all states must make family planning services and supplies available to foster children under the Federal Early Periodic Screening, Diagnosis, and Treatment (EPSDT) program.²⁷² EPSDT is a comprehensive bundle of medical services which must be made available to persons under twenty-one enrolled in Medicaid.²⁷³ The vast majority of foster youth are Medicaid eligible, and hence entitled to EPSDT services.²⁷⁴ It is unclear whether minors in foster care have the right to independently access reproductive services covered by EPSDT in those states which otherwise require minors seeking contraceptive or abortion services to obtain parental consent.

Locating adolescent family planning services may also be difficult, particularly in rural areas or in states such as Texas and Utah, where the legislatures have prohibited the use of state funds in providing confidential contraceptive services to minors.²⁷⁵ At the same time, the federal government has greatly curtailed funding for adolescent reproductive healthcare in favor of abstinence-only sexual education.²⁷⁶

270. N.Y. COMP. CODES R. & REGS. tit. 18 § 507.1 (c)(9) (2005); ILL. ADMIN. CODE tit. 89 § 302.350 (2005).

271. Boonstra & Nash, *Minors and the Right to Consent to Health Care*, in THE GUTTENMACHER REPORT ON PUBLIC POLICY, *supra* note 68, at 6-7. For example, Delaware, Hawaii, Kentucky, Maryland, Minnesota, Montana, Oklahoma, and Oregon, all permit the health provider to notify the minor's parents. *Id.*

272. See 42 U.S.C.A. §§ 1396a(a)(10), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r) (2005).

273. JANE PERKINS, NAT'L HEALTH LAW PROGRAM, FACT SHEET: EARLY & PERIODIC SCREENING, DIAGNOSIS AND TREATMENT, available at <http://www.healthlaw.org/library.cfm?fa=download&resourceID=64084&appView=folder&folderID=57647&print> (last visited Mar. 28, 2006).

274. KATHLEEN MCNAUGHT & LAUREN ONKELES, NAT'L RES. CTR. FOR YOUTH DEV., IMPROVING OUTCOMES FOR OLDER YOUTH: WHAT JUDGES AND ATTORNEYS NEED TO KNOW, at 35, available at www.nrcys.ou.edu/nrcyd/publications/pdfs/improveoutcomes.pdf (last visited Mar. 28, 2006).

275. Boonstra & Nash, *Minors and the Right to Consent to Health Care*, in THE GUTTENMACHER REPORT ON PUBLIC POLICY, *supra* note 68, at 5.

276. Of the \$19 million in AFLA funding available in FY 2000, only a small proportion — approximately \$4 million — was available for projects to provide reproductive healthcare and counseling. Cynthia Dailard, *Reviving Interest in Policies and Programs to Help Teens Prevent Repeat Births*, in THE GUTTENMACHER REPORT ON PUBLIC POLICY, *supra* note 68, at 1, 11. The remainder of the funds were restricted to projects which adhere to a stringent eight-point definition

These barriers to access are compounded in states or localities where foster care services are provided by sectarian agencies. In New York City, for example, the local child welfare agency contracts with over thirty nonprofit agencies to provide placement, daily care, and case planning services to youth in foster care.²⁷⁷ As their names — Catholic Guardian, Jewish Board of Children and Family Services, the Salvation Army — indicate, many of these agencies are religiously affiliated. The Catholic agencies have historically refused to allow their staff to provide family planning information and services to children in the agencies' care.²⁷⁸

In *Wilder v. Sugarman*,²⁷⁹ advocates brought suit against New York City and its contract agencies, claiming that the arrangement violated the Establishment Clause of the Constitution.²⁸⁰ The ensuing settlement stated that Catholic agencies did not have to provide reproductive health services, but had to make the children available to the City, which would provide the services and instruction itself.²⁸¹ The settlement was vacated in 1998.²⁸² Currently, the local child welfare agency does not provide such instruction, and no policy is in place to ensure that children placed with Catholic agencies — or any other agency, for that matter — have meaningful access to contraceptive and abortion services.

F. Services for Fathers

Although most wards who live with and assume primary care for their children are female, it is likely that a significant number of young men in foster care are also parents. Once again, among the states surveyed here, Illinois offers the only relevant data. In 2003, 16%, or approximately 158, of pregnant and parenting wards in Cook County and the surrounding counties were male.²⁸³ However, in contrast with pregnant and parenting females, it is relatively easy for a young man to conceal his status as a father, expectant or otherwise; a status of which he may in fact be

of abstinence-only education, in which even the discussion of contraception beyond failure rates is prohibited. *Id.*

277. For a list of ACS contract agencies, see Administration for Children's Service Introductory Booklet, at 20, available at www.nyc.gov/html/acs/html/about/about.shtml.

278. See BERNSTEIN, *supra* note 55, at 322-23, 331-32.

279. 385 F. Supp. 1013 (S.D.N.Y. 1974).

280. *Id.* at 1017-18. See also *Wilder v. Bernstein*, 499 F. Supp. 980 (S.D.N.Y. 1980); *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988). For an in-depth analysis of the suit, see BERNSTEIN, *supra* note 55.

281. BERNSTEIN, *supra* note 55, at 322-23, 331-32.

282. Settlement Agreement at paragraph 30, entered December 2, 1998, *Marisol v. Pataki* (S.D.N.Y.) (No. 95-10533) (dismissing with prejudice the *Wilder* case on consent of the parties).

283. TPSN, *supra* note 129.

ignorant. Thus, it is likely that the numbers listed above under-represent the number of young fathers in foster care.

Social science research similarly indicates that males who are or have been in foster care are more likely than their counterparts to be teen fathers. One study found that men who had been exposed to one of three factors — childhood physical abuse, a battered mother, or childhood sexual abuse — were more likely than other men to be involved in a teen pregnancy.²⁸⁴ In fact, the study found that “more frequent exposure to physical abuse, a battered mother, or sexual abuse that occurs at younger ages or involves threats or violence all approximately double a male’s risk of impregnating a teenage girl — during both adolescence and adulthood.”²⁸⁵ Young men in foster care are disproportionately likely to have been exposed to the three risk factors identified by the researchers. It is thus likely that they are at heightened risk of involvement in a teen pregnancy.

Despite the evidence that males in foster care face a heightened risk of impregnating a teenaged girl and becoming a father at an early age, Illinois is the only state surveyed here with a written policy regarding the provision of services to fathers in care. Illinois regulations state that “the needs, rights and responsibilities of young fathers . . . are equally important and should also receive full attention in the provision of services.”²⁸⁶ Services to which fathers are entitled include placements that support and encourage them to care for their children, day care services, counseling, and parenting classes.²⁸⁷ Finally, workers in Illinois are mandated to provide fathers with information about the Putative Father Registry, child support, and the establishment of paternity.²⁸⁸ Unfortunately, data indicate that the state is having a difficult time meeting these mandates.²⁸⁹

G. Discharge Planning

Foster youth who “age-out” to independent living are at severe risk of homelessness. Across the country, a disproportionate number of homeless

284. See Robert F. Anda et al., *Abused Boys, Battered Mothers, and Male Involvement in Teen Pregnancy*, PEDIATRICS, Feb. 2001.

285. *Id.* at 8.

286. ILL. ADM. CODE tit. 89, § 302.350, app. J (1996).

287. *Id.*

288. *Id.*

289. TPSN, *supra* note 129, FY 2002, at 18 (noting that “the identification of male parenting” foster youth in the Chicago area “has been an ongoing challenge”).

people have a foster care history.²⁹⁰ For example, almost half of the homeless youth interviewed in a Chicago study reported that they had been wards of the Illinois DCFS.²⁹¹ In addition, homeless individuals with foster care histories become homeless at an earlier age and remain homeless for longer periods of time than other homeless individuals.²⁹²

Mothers with a history of foster care are at particular risk of homelessness. The vast majority of such women are unmarried and receive little or no support from their children's fathers, who tend to be poor themselves. Friends and relatives who have a spare couch for one person may balk when that person brings along a toddler and a crying baby. Landlords who rent individual rooms and studios prefer single tenants to those with children. The cost of basic necessities for their children, such as diapers and baby formula, drains away what little income former wards may have to pay for housing.

Most disturbingly, examining the connection between homelessness and foster care reveals a generational cycle of foster care placement. Homeless parents in New York City who grew up in foster care are almost twice as likely as parents without such a history to have their children placed in the system.²⁹³ Similarly, a nationwide survey of homeless families in shelters showed that 77% of parents with a foster care history had at least one child who was or had been in foster care, as compared with 27% of parents without such a history.²⁹⁴

The issue of housing is perhaps the most intractable one for advocates representing individual foster youth. An advocate cannot help a client locate affordable housing if none exists, nor can he or she increase the client's patently insufficient wages or monthly public benefit grant to an amount that would permit the client to obtain housing at market rates. Rather, the problem of housing for former foster youth, and the problem of homelessness in general, is best addressed on a systemic level beyond the scope of this Article. Nevertheless, there are concrete steps advocates can take on behalf of their clients to reduce the risk and duration of homelessness.

Advocates can reduce the age at which clients face homelessness by ensuring they remain in care as long as possible. First, advocates should fight for appropriate placements for their clients, such that their clients are

290. N.P. ROMAN & P.B. WOLF, NAT'L ALLIANCE TO END HOMELESSNESS, WEB OF FAILURE: THE RELATIONSHIP BETWEEN FOSTER CARE AND HOMELESSNESS (1995), available at <http://www.endhomelessness.org/pub/fostercare/webrept.htm>.

291. *Id.*

292. *Id.*

293. RALPH DA COSTA NUNEZ, THE NEW POVERTY: HOMELESS FAMILIES IN AMERICA (1996), ch. 5, Family Preservation: The Foster Care Connection.

294. ROMAN & WOLF, *supra* note 290.

willing to remain in foster care as long as permitted — until the age of 18, 19, or 21, depending on the state.²⁹⁵ Far too many foster youth run away from foster care placements only to end up homeless. While youth run away for myriad and complex reasons, many leave because of the conditions of their current placement. Young mothers leave their group homes because of indifferent or abusive staff, staff's refusal to allow them to visit with their children's fathers, and staff's constant and coercive threats to remove their children from their care.²⁹⁶ In addition, youth who have been subject to multiple changes in placement experience a sense of hopelessness and worthlessness.²⁹⁷ Running away — choosing for themselves where they will live — is an attempt at self-determination.²⁹⁸

To prevent a young mother from leaving care prematurely, an advocate must help her identify the type of placement she feels would best meet her needs. Does the client feel safe in her current placement? Does her current placement allow her access to the people and institutions — her child's father, her school, her old neighborhood — on which she relies for support? Or does her current placement render those resources geographically inaccessible? Is she more comfortable in a foster family home or in a group home? Advocates should demand that the system provide each client with an appropriate placement, and, when necessary, should ask the judge to order a change of placement.

In addition, advocates must ensure that their clients receive the independent living services to which they are entitled. Agencies are particularly likely to deny independent living services to pregnant and parenting teens, mistakenly assuming that their status as parents renders them ineligible.²⁹⁹ If foster youth are receiving services they value from

295. In Florida, youth age-out at 18 but may petition a court to retain jurisdiction for an additional year, until they turn 18. FLA. STAT. ch. 39.013; N.Y. FAM. CT. ACT § 1087(a) (youth age-out in New York at 21); ILL. COMP. STAT. ch. 705 (youth may remain in care until 21 if certain findings are made by a court in Illinois); CAL. WELF. & INST. CODE § 303 (youth may remain in care until 21 if certain findings are made by a court in California).

296. MADELYN FREUNDLICH, CHILDREN'S RIGHTS, INC., JUVENILE RIGHTS DIVISION OF THE LEGAL AID SOCIETY, LAWYERS FOR CHILDREN, TIME RUNNING OUT: TEENS IN FOSTER CARE (2003).

297. MARK COURTNEY ET AL., YOUTH WHO RUN AWAY FROM SUBSTITUTE CARE, CHAPIN HALL CENTER FOR CHILDREN 32, 31 (2005) (finding that placement instability is positively correlated with the likelihood that a foster child will run away from care).

298. *Id.* at 46, 52-54 (finding that the struggle for autonomy (i.e. the ability to make choices) is a major theme in the patterns of motivation that cause foster youth to run away).

299. Kathi Grasso, *Litigating the Independent Living Case*, ABA CHILD LAW PRACTICE, Vol. 18(8), Oct. 1999 (observing that "pregnant women and young mothers [are] often denied independent living services" and discussing a case in which the local child protection agency responded to her teen client's pregnancy by attempting to terminate foster care services, and how she and her client overcame the agency's efforts to do so), available at <http://www.abanet.org/child/converted.html> (last visited Mar. 28, 2006).

the system, such as career and college counseling, vocational education, or tutoring, they are more likely to stay in care.

Next, advocates must challenge the premature discharge of their clients from the system. In most states, foster children can remain in care until age eighteen. Among the survey states, New York, Illinois, and California allow foster youth to remain in care until age twenty-one under certain circumstances. In New York, foster youth have a right to remain in care if they are in school, engaged in vocational training, or lack the skills or ability to live independently.³⁰⁰ In addition, New York's regulations prohibit the discharge of a child from foster care to homelessness.³⁰¹ Illinois's standard is narrower; the presumption is that a child's dependency will terminate at eighteen, but the law provides for an exception "for good cause when there is satisfactory evidence presented to the court and the court makes written factual findings that the health, safety and best interest of the minor and the public require the continuation of the wardship."³⁰²

In 2000, California amended its own law on this point.³⁰³ Although previous law had granted the juvenile court discretion to retain jurisdiction over a foster child between the ages of eighteen and twenty-one,³⁰⁴ it was common practice for judges to terminate jurisdiction at eighteen.³⁰⁵ The new law requires that, at a hearing to terminate jurisdiction, the county must establish that it has fulfilled several duties to the child, including: ensuring the child is present in court; providing the ward with his or her personal identity documents; assisting the ward in applying for health insurance, transitional housing, college or vocational education, and employment or other financial support; and, where appropriate, informing the ward of the whereabouts of his or her siblings.³⁰⁶ Nevertheless, the county's failure to do so does not entitle the child to remain in foster care, but merely permits the judge, in his or her discretion, to continue the child's placement until these obligations are met.³⁰⁷ The judge also has

300. N.Y. COMP. CODES R. & REGS. tit. 18, § 427.2(c)(1) (2005).

301. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(f)(3)(c) (2005).

302. 705 ILL. COMP. STAT. 405/2-31(1),(3) (2005).

303. CAL. WELF. & INST. CODE § 391 (2005).

304. CAL. WELF. & INST. CODE § 303.

305. Cal. Senate Rules Comm., Office of Senate Floor Analyses, 3d reading analysis of Assembly Bill No. 686 (1999-2000 Regular Sess.) as amended Aug. 29, 2000 (stating that "although the juvenile court has the authority to retain jurisdiction over a dependent child until the age of 21, the reality is that federal funding for foster youth ends at the age of 18 and common practice is for the juvenile court to terminate jurisdiction at that time.").

306. CAL. WELF. & INST. CODE § 391.

307. See § 391(c).

discretion to continue jurisdiction “for other reasons.”³⁰⁸ Conversely, the law specifically states that a court may terminate jurisdiction where the ward has refused services or cannot be located “after reasonable efforts.”³⁰⁹

Even in states with such provisions, courts and agencies regularly close the cases of youth who have not yet reached the age of twenty-one. Rather than making the determination to extend or terminate placement based on the young person’s best interests, courts and agencies often make case closure decisions based on whether a particular ward is deemed “cooperative.”³¹⁰ Too often, courts, agencies, and even children’s attorneys have adopted this approach, and accept the departure from the requisite statutory standard without question. Instead, advocates must know the standard for extending placement until or beyond age eighteen, and be prepared to demonstrate to a court that the facts of a particular child’s case meet that standard.³¹¹

In *In re Natasha H.*,³¹² the lawyer for a sixteen year-old foster child in California successfully appealed the juvenile court’s termination of her client’s dependency.³¹³ Natasha had run away from every one of her placements and, at the time of the termination, had been away for almost two years.³¹⁴ The juvenile court found that the minor was four months pregnant, living on the streets, and had no source of income.³¹⁵ Nevertheless, it released Natasha to “her own custody.”³¹⁶ The Appellate Court reversed. While acknowledging that Natasha had “resisted efforts to help at every turn,” the Appellate Court found that neither a minor ward’s wish to rid herself of court supervision nor the county’s desire to rid itself of “the burden of a troublesome child” justified the termination of dependency where the child was desperately in need of services and termination was patently contrary to her best interests.³¹⁷

Advocates should also assist clients who have run away or have been improperly discharged to re-enter the system. This is particularly difficult where the young person has already reached age eighteen. For example,

308. *Id.*

309. *Id.*

310. MCNAUGHT & ONKELES, *supra* note 274, at 7 (noting the prevalence of “unnecessary discharges from care due to ‘noncompliance’ that may actually result from a youth’s normal, developmentally appropriate, behavior.”); *see also* Laurene Heybach & Stacey Platt, *Termination of Older Youth from Foster Care: A Protocol for Illinois*, PUB. INT. L. REP. (Spr. 2000).

311. Grasso, *supra* note 299.

312. *In re Natasha H.*, 46 Cal. App. 4th 1151 (3d App. Dist. 1996).

313. *Id.*

314. *Id.* at 1153-54.

315. *Id.* at 1154.

316. *Id.* at 1151.

317. *Natasha*, 46 Cal. App. 4th at 1153, 1158.

in *In re Holly H.*,³¹⁸ a California Appellate Court affirmed an order by the juvenile court terminating the dependency of a nineteen year-old ward.³¹⁹ Holly had been in foster care since the age of three, and had been diagnosed with a severe learning disability, lupus and kidney disease, and dysthymic disorder.³²⁰ The court held that the appropriate standard for the termination of jurisdiction was “whether termination would give rise to an existing or reasonably foreseeable future harm to the young adult.”³²¹ While acknowledging that Holly had no stable housing, no source of income, and lacked the ability to manage her finances, the court noted that she was legally an adult and had indicated her desire to be free of the system by leaving her group home and consistently refusing services offered by the county.³²² The court thus found that Holly’s “continued participating in the juvenile dependency system cannot reasonably be expected to prevent any future harm” to her.³²³

Nonetheless, lawyers have had significant success in enforcing the rights of older youth – even those who have reached age eighteen – to the protection of the family court particularly when the youth in question expressed a strong wish to remain under court supervision.³²⁴ For example, in *In Re Shawn B.*,³²⁵ the Illinois Appellate Court granted a minor’s counsel leave to petition the juvenile court to resume jurisdiction over the minor at any time prior to the minor’s twenty-first birthday, should the minor require further care, protection, or education.³²⁶ Finally, where the agency or district has failed to plan appropriately for the child’s discharge,

318. *In re Holly H.*, 104 Cal. App. 4th 1324 (1st App. Dist. 2002).

319. *Id.*

320. *Id.* at 1328.

321. *Id.* at 1336.

322. *Id.* at 1337.

323. *Holly*, 104 Cal. App. 4th at 1337.

324. *But see, e.g., In re Robert L.*, 68 Cal. App. 4th 789 (1998) (reversing a trial court’s decision to maintain jurisdiction over siblings, 18 and 20, at their request, to facilitate their college attendance).

325. 578 N.E.2d 269 (Ill. App. Ct. 1991).

326. The court noted that:

[t]urning Shawn B. and other young people like him out to fend for themselves merely because they have reached the age of 18, without ensuring that they are prepared to become useful and independent members of society, does an injustice to both the minor and society and fails to satisfy the court’s statutory obligation to act in the best interest of the child.

Id. at 274. *But see, contra, In re Bettie Jo R.*, 660 N.E.2d 52, 55-56 (Ill. App. Ct. 1995) (upholding the Circuit Court’s termination of care of a 19-year-old parenting ward, despite the fact that she relied on the foster care agency to pay her tuition and day care costs, on the ground that her best interest did not necessitate the continuation of her wardship).

advocates should argue that the agency is obliged to continue to shelter the child until alternative arrangements can be made.

VI. CONCLUSION

Youth who have children themselves raise significant dilemmas for child advocates. In some respects, parenting wards call into question the very notion of “children’s rights.” After all, which child do we seek to protect — the struggling teen or vulnerable infant? In many situations, the minor parent’s and child’s interests are aligned in remaining together, presenting the possibility of a mutually beneficial outcome. Nevertheless, hard cases exist in which the interests of the ward and her child clearly diverge.³²⁷ Even if parents and children are kept together, the failure of the foster care system to prepare youth for economic self-sufficiency in adulthood leaves mother and child at an increased risk of poverty and homelessness.

The overlay of racial bias and economic inequality is impossible to ignore. A disproportionate number of the families involved in the child protective system are poor and African American.³²⁸ When foster youth — who are already disproportionately poor and minority — lose their children to the system, the social inequalities that contributed to the wards’ initial placement are revisited upon a second generation. As Dorothy Roberts writes,

Without careful attention to social justice, rights tend to reinforce social hierarchies and benefit the most privileged members of society. To be just, children’s rights must be part of a broader

327. A tragic recent case in Florida illustrates this point. A 20-year-old former foster child, Yusimil Herrera, is being prosecuted for first degree murder in the beating death of her three-year-old daughter, Angel. Herrera had her child while in foster care. As a teenager she and her sister, Tasha Ruiz, won a suit against the state child welfare agency for physical and sexual abuse they suffered in foster care beginning at the ages of two and five. Herrera was allegedly never provided with independent living skills or other services that would have helped her transition to adulthood. See Abby Goodnough, *Youth Who Won Abuse Suit is Held in Daughter’s Killing*, N.Y. TIMES, May 19, 2004, at A16. One month after Angel’s death, in May 2004, Herrera had her second child, who was immediately taken into foster care and placed with Herrera’s mother. See Carol Marbin Miller, *Mom, 20, Facing Murder Charge, Loss of Newborn*, MIAMI HERALD, June 9, 2004. In June 2005, the Florida Department of Children and Families removed Tasha Herrera’s four children from her care, claiming she was “too overwhelmed” to care for them properly. Tragically, Tasha had tried to protect her niece Angel by calling the state’s child abuse hotline and begging investigators to take Angel into protective custody. See Carol Marbin Miller, *Whistle-Blower’s Kids Put In DCF’s Custody*, MIAMI HERALD (June 9, 2005).

328. Robert B. Hill, *Disportionality of Minorities in Child Welfare: Synthesis of Research Finding*, available at <http://www.racemattersconsortium.org/docs/whopaper4.pdf>.

struggle to eradicate oppressive structures that imprison children and to create a more egalitarian society that cherishes all children.³²⁹

The current system's failure to support parenting wards creates foster care "legacy" families, every generation of which is raised in the state-controlled environment of foster care. Upon having children of her own, a foster child must parent beneath the shadow of a judge, gavel in hand, poised to remove her children forever. The vindication of "children's rights" may promote the protection of certain children from certain forms of harm, but it is not helpful in ending this cycle.

In fact, it is possible that a narrow focus on children's rights has led advocates to overlook the plight of parenting wards. The population is nearly invisible in the academic literature of both law and the social sciences, in state policies, in practice guides for children's attorneys and guardians ad litem, and in the demographic data on children in foster care. Worse still, states have failed to take advantage of the resources that are available. Although the federal government will reimburse states for the care of a parenting ward and child who are placed together (provided the child remains in the ward's custody), only one of the four survey states — New York — appear to take full advantage of this. Most disturbingly, advocates across the country report that states and counties frequently violate parenting ward's due process rights by coercing teens into "voluntarily" placing their child in government custody, separating wards from their children absent proper judicial findings, and threatening to remove infants from the ward's care based on infractions which do not pose an imminent risk of harm to the baby. By raising these issues, gathering what information exists, and presenting best practices from around the country, we hope to start a conversation which will lead to greater attention to the needs of parenting wards and their children.

329. Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*. 2 U. PA. J. CONST. L. 112, 140 (1999).

