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## Seeking Shelter in Tough Times: Securing Housing for Youth who Age Out of Foster Care

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# Child Law Practice

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Helping Lawyers Help Kids

## IN PRACTICE

### Seeking Shelter in Tough Times: Securing Housing for Youth who Age Out of Foster Care

by Dale Margolin

Across the country, everyone is talking about a “housing crisis.” For youth who age out of foster care, just finding a place to sleep each night is always a struggle. We know that nationally, 54% of recently aged-out youth are homeless or unstably housed.<sup>1</sup> In addition, these youth face higher rates of unemployment, undereducation, teen pregnancy, and incarceration.<sup>2</sup>

In the last few years, lawmakers, advocates, and child welfare practitioners have finally started paying attention to adolescents discharged from foster care. This article focuses on laws and programs that target housing issues facing youth aging out of foster care. It also provides tips for child advocates to best navigate and represent clients in the current atmosphere.

#### Youth who Age Out

According to the U.S. Department of Health and Human Services (DHHS), approximately 25,000 youth age out of foster care each year.<sup>3</sup> However, many on the frontline believe this is an underestimate, since it only counts young people whom the state officially discharges. DHHS does not include youth who leave the system (i.e., runaway), which is another estimated 30,000.<sup>4</sup>

Before getting to the nitty-gritty of the law, some perspective on the issue is necessary: The average age that young adults who have never experienced foster care leave their family home for good is 24, and 40% return to

live at home again at least once afterwards.<sup>5</sup> Today in the United States, nearly four million adults between 25 and 34 are living with their parents,<sup>6</sup> and parents provide an average of \$38,000 in assistance to their adult children through age 34.<sup>7</sup> Yet, we expect youth whose lives have been one rejection after another to leave their “home” of state custody permanently at age 18, or at age 21, if they’re lucky, without a dime to their name.

#### Federal Law

##### Chafee Foster Care Independent Living Program

In 1999, Congress created the Chafee Foster Care Independent Living Program (known as “Chafee”), which provides up to \$140 million a year to states for programs that serve youth in foster care between the ages of 14 and 21.<sup>8</sup> Commonly called “independent living services,” these programs assist with employment, education, vocational training, sexual and preventive health, money management, and household skills. All states and contract agencies have independent living programs,

which they are supposed to encourage youth to attend (though they cannot require them to do so). Some states provide stipends to youth who choose to participate.<sup>9</sup>

Chafee also requires that each young person in foster care, age 16 and over, have an independent living plan in writing. The plan must include a “description of the programs and services which will help the youth prepare for the transition from foster care to independent living.”<sup>10</sup> This requirement applies to all young people ages 16 and older, regardless of their permanency plan/goal (i.e., even if it is reunification or adoption).

Although Chafee describes the services and planning states must provide adolescents to receive Chafee funds, it grants states wide latitude in how to use the money.<sup>11</sup> Across the

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## **CASE LAW UPDATE**

### **Caseworker's Child Abuse Exam at Private School Violated Children's Fourth Amendment Rights**

*Michael C. v. Gresbach*, 2008 WL 2079471 (7<sup>th</sup> Cir.).

Following a report to child protective services that an eight-year-old boy had been abused by his stepfather, a caseworker went to the boy's private school to investigate. The caseworker obtained the school principal's consent to interview the boy and his sister. However, she did not obtain permission to physically examine the children and did not notify the children's parents.

During the caseworker's interview with the eight year old, the boy disclosed that his stepfather sometimes hits him. The caseworker examined the boy's wrists and his back for injuries but found none. During the interview with the boy's sister, the sister said that she sometimes receives "whoppings" from her parents. The caseworker then physically examined her legs for injuries but found none.

The caseworker later met with the children's mother, and the agency made unsuccessful attempts to meet with the children's parents and step-parents. The case was later closed since no injuries were found on the children.

The parents and stepparents sued the caseworker and agency officials, alleging: violation of the Fourth Amendment because their children were subjected to an unreasonable search and seizure at their private school; violation of their rights to familial relations under the Fourteenth Amendment; and violation of their rights to procedural due process under the Fourteenth Amendment. The defendants argued they were entitled to qualified immunity because their conduct did not violate any clearly established rights.

The district court granted partial summary judgment in favor of the plaintiffs after finding the caseworker violated the children's Fourth Amendment rights to be free from unreasonable searches and seizures by physi-

cally examining the children for injuries without consent. The court also found the rights were clearly established at the time of the caseworker's investigation and that a reasonable caseworker would have known she had no authority to conduct such a search. Therefore, defendants were not entitled to qualified immunity. Defendants appealed.

The United States Court of Appeals for the Seventh Circuit affirmed. An earlier Seventh Circuit opinion, *Doe v. Heck*, 327 F.3d 492 (7<sup>th</sup> Cir. 2003), established that government officials may not search private schools and seize children in connection with child abuse investigations without a warrant, probable cause or consent and that such searches and seizures are unconstitutional. This case formed the basis for the court's review of the district court's ruling.

In deciding if defendants were entitled to summary judgment, the court first considered whether the caseworker's conduct violated a constitutional right. It focused its inquiry on whether the caseworker's investigation violated the children's Fourth Amendment right to be free from unreasonable searches. The court found the caseworker's physical examination of the children for injuries constituted a "search." Further, it found this search was "unreasonable" based on its opinion in *Heck* since it occurred on private school property where students, and their parents, had a reasonable expectation of privacy.

The court found no exceptions or exigent circumstances to permit the caseworker's search and seizure without a warrant. A search conducted with consent sometimes forms an exception to the warrant requirement. However, in this case, although the school principal consented to the interviews of the children, she did not

consent to search the children's bodies, therefore the exception did not apply.

Further, officials may sometimes conduct a search and seizure under exigent circumstances, where there is reason to believe someone will suffer harm. This was not the case during the caseworker's investigation, thus the caseworker should have followed basic Fourth Amendment principles and taken preliminary steps such as interviewing the child and parent, or obtaining a warrant.

The court next considered if the law at the time of the caseworker's in-

vestigation was clearly established, such that defendants had fair warning that their conduct was unconstitutional. The court emphasized its ruling in *Heck*, which clearly established that a government official's investigation of child abuse on private property without a warrant or probable cause is unconstitutional. The court concluded that a caseworker would have known that physically examining children at a private school without consent or a warrant violated the children's constitutional rights to be free from unreasonable searches.

The court recognized that caseworkers must often make quick decisions to protect children from physical abuse. However, requiring them to follow basic Fourth Amendment principles, especially when intruding upon a child's body, does not place an undue burden on them. The court reemphasized its holding in *Heck* that conducting a search of a child at a private school without a warrant, consent, probable cause or exigent circumstances violates the child's constitutional rights.

## Lawyer's Representation in Custody and Criminal Cases Did Not Raise Conflict of Interest

*Whitmer v. Sullivent*, 2008 WL 1923468 (Ark.).

During visitation with his children, a noncustodial father noticed bruises on his son's buttocks. He reported the bruises to the local police and child welfare agency. An investigation found the mother's live-in boyfriend had whipped the boy, resulting in the bruises. Through his attorney, the noncustodial father filed a petition for a change of custody. The trial court maintained custody with the mother but barred the boyfriend from being present when the children were with the mother.

A month later the mother married the boyfriend and they resumed living together. Nearly a year later, the mother's new husband assaulted her repeatedly in the children's presence. He also stabbed her on one occasion while she was pregnant with his child. The mother filed an order of protection affidavit with the prosecuting attorney's office for the thirteenth judicial district. The affidavit detailed the mother's abuse and her fear that the new husband would kill her or hurt her children.

A few days later, the noncustodial father filed an ex parte petition for temporary custody. The trial court granted his petition. The mother later filed a motion seeking to disqualify the father's attorney, who was also the prosecutor for the thirteenth judicial district where she had filed her protection order. She claimed there was a

conflict of interest because the prosecutor's office was protecting her interest in the criminal prosecution of her new husband while also representing opposing interests in the custody case by serving as the noncustodial father's attorney. The mother's motion was denied because the attorney had recused himself in his capacity as prosecutor, thereby removing the conflict or appearance of a conflict of interest.

Over the next two years, several proceedings were held and custody of the children was changed to the father. The mother's attempts to seek reconsideration or a new trial were denied and she ultimately appealed. The question over whether the trial court abused its discretion by refusing to disqualify the father's attorney in the custody proceedings because he was also the prosecutor in another case was certified to the supreme court.

The Arkansas Supreme Court found no abuse of discretion. Rule 1.7 of the Arkansas Rules of Professional Conduct prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest. Such a conflict arises if (1) representing one client will be directly adverse to another client; or (2) a risk exists that representing one or more clients will be materially limited by the lawyer's responsibilities to another client, former client, third person, or a

personal interest of the lawyer.

The court found that this case involved no direct or concurrent conflict because the attorney, while performing his duties as prosecutor, was representing the people of the thirteenth judicial district, not the mother who was the complaining witness.

Additionally, the case did not involve dual representation. The lawyer represented the noncustodial father when the custody suit was filed against the mother. Later, when the mother filed criminal charges against her new husband, the lawyer was representing the people of the thirteenth judicial district. Therefore, the lawyer was not defending the mother's interests in one case, while also suing her in another.

Finally, although there was no actual conflict of interest, steps were taken to avoid an appearance of conflict. An order to assign a special prosecutor in the case against the mother's new husband was entered once the prosecution began. Further, the father's lawyer recused himself and his staff from the criminal proceedings. The court concluded that withdrawal from both cases was not required since the lawyer had represented the father for a considerable period before the mother filed her affidavit with the prosecutor's office.

**Alaska**

*Thomas H. v. Dep't of Health & Social Servs.*, 2008 WL 2066452 (Alaska). TERMINATION OF PARENTAL RIGHTS, ICWA

Indian Child Welfare Act was not violated in termination of parental rights case where court found active efforts were evidenced by multiple substance abuse treatment referrals and qualified expert testimony generally supported harm to child if returned; court's criticism of the agency for not making a referral for a mental health evaluation and disagreement with some aspects of expert's testimony did not negate findings because court properly examined those facts in light of total circumstances.

**California**

*People v. Humberto S.*, 76 Cal. Rptr. 3d 276 (Ct. App. 2008). DELINQUENCY, DISCOVERY

In delinquency case where minor was alleged to have sexually abused his niece, prosecutors did not have a conflict of interest requiring recusal where they advocated to protect alleged victim's psychotherapy records from discovery; prosecutors did not represent the victim simply because their interest in protecting the privacy of abuse victims aligned with victim's interest in preventing disclosure.

**District of Columbia**

*In re D.B.*, 2008 WL 1990867 (D.C.). VISITATION, HEARSAY

Trial court properly admitted foster parent's hearsay statements regarding father's alleged sexual abuse of children in visitation hearing because District code did not prohibit hearsay in visitation hearings and admitting statements did not violate father's right to due process because he was given an opportunity to challenge the statements; father did not present evidence to contradict the truth of the statements and did not attend three of the four days of trial.

**Florida**

*K.S. v. Dep't of Children & Families*, 2008 WL 1806127 (Fla. Dist. Ct. App.). DEPENDENCY, FAILURE TO PROTECT

Although evidence clearly showed mother's boyfriend intentionally burned child's hand on one occasion, it did not establish that mother failed to protect child or that child was at substantial risk of

imminent abuse or neglect due to mother's negligence to support dependency adjudication; mother did not participate in or witness sole incident of child's burn and evidence was insufficient to find she knew or should have known of boyfriend's abuse.

**Georgia**

*In re T.J.P.*, 2008 WL 1048352 (Ga. Ct. App.). DEPENDENCY, INABILITY TO PARENT

Father was unable to properly care for children to promote their mental and emotional health due to extreme anguish caused by son's death and other emotional and mental issues he faced; father's inability to parent, which started a year earlier and was basis for finding children were deprived, supported children's continued custody with the county child protection agency.

**Indiana**

*In re D.C.*, 2008 WL 2206210 (Ind. Ct. App.). ADOPTION, FAILURE TO NOTIFY Statute that blocks challenges to adoption judgments more than six months after adoption decree is entered was unconstitutional as applied to biological mother's request to set aside decree because she was not properly served notice of adoption proceedings; parent's basic right to decide care, custody, and control of child is protected by due process clause of the Fourteenth Amendment.

**Maine**

*In re Dustin C.*, 2008 WL 2205433 (Me.). DEPENDENCY, GUARDIANSHIP Mother's challenge to order granting guardianship to maternal grandparents was interlocutory and not appealable under state statute; mother was not deprived of due process because she was able to petition to terminate the guardianship or for visitation.

**Maryland**

*Janice M. v. Margaret K.*, 2008 WL 2080681 (Md.). VISITATION, DE FACTO PARENT

Nonadoptive mother was improperly granted visitation with her former same-sex partner's adopted child based on trial court's finding she was a de facto parent having jointly raised the child; like other third parties in a custody or visitation case, a de facto parent must prove the

legal parent is either unfit or that exceptional circumstances exist to overcome the parent's right to raise their child.

**Massachusetts**

*In re Melvin*, 885 N.E.2d 874 (Mass. App. Ct. 2008). TERMINATION OF PARENTAL RIGHTS, FITNESS

Mother was unfit to resume parenting child who had been in foster care for four years and had bonded with foster parents; mother lacked insight to handle trauma child would experience if removed from foster home and her parenting skills had barely improved despite extensive help from child welfare agency.

**Minnesota**

*In re T.R.*, 2008 WL 2229494 (Minn.). TERMINATION OF PARENTAL RIGHTS, REASONABLE EFFORTS

County was required to continue working towards rehabilitating and reunifying parent and could not unilaterally decide to stop making reasonable efforts without first seeking a court determination; county's efforts were unreasonable given considerable disparity between services it offered mother and noncustodial father, its failure to follow up on father's efforts to comply with case plan, and its failure to consider father as a placement resource.

**Montana**

*In re B.P.*, 2008 WL 2030879 (Mont.). CUSTODY, JURISDICTION

Trial court should have granted mother's request to terminate dependency jurisdiction in Montana where child was legally placed with father in California because under the Uniform Child Custody and Jurisdiction Enforcement Act jurisdiction ceased after both parents left Montana and dependency order provisions were enforceable since they were registered in California.

**New Hampshire**

*In re Gendron*, 2008 WL 2097059 (N.H.). PATERNITY, GENETIC TESTING

Trial court improperly ordered genetic paternity testing since formal acknowledgement of paternity was executed shortly after child's birth and had not been challenged for over a year; genetic testing was irrelevant as father had standing to seek custody because paternity acknowledgement established him as the legal father.

## New York

*Ariola v. DeLaura*, 2008 WL 1915136 (N.Y. App. Div.). VISITATION, SIBLINGS  
Trial court properly dismissed half-brother's petition for visitation with his half siblings without a hearing where maternal grandparents established that two orders of protection prohibited him from having contact.

*In re Cloey Y.*, 2008 WL 1901937 (N.Y. App. Div.). DEPENDENCY, CONTEMPT  
Seventeen-year-old mother failed to preserve issue on appeal that underlying orders were not specific enough to support finding that she willfully violated prior orders of disposition and protection; mother admitted to failing to provide a urine sample for drug screening, she was represented by lawyer when she made admission, court informed her of rights she was giving up, she did not raise lack of specificity argument before court, and her admission was knowing and voluntary.

## North Carolina

*In re B.L.H.*, 2008 WL 1946548 (N.C. Ct. App.). TERMINATION OF PARENTAL RIGHTS, GROUNDS  
Original petitions did not properly notify mother that children's time in care was possible ground for termination of her parental rights and in fact mother had been assured that time in care would not be used as a ground without first filing amended petitions; thus, trial court improperly terminated mother's parental rights based on time in care and, absent other grounds, order required reversal.

*In re B.W.*, 2008 WL 1946860 (N.C. Ct. App.). DEPENDENCY, RELATIVE PLACEMENT  
Trial court did not abuse its discretion by failing to order child's placement with grandparents where court properly considered and rejected grandparents after finding placement with them was not viable because they could not acknowledge the children's injuries, lacked any emotional response to children's injuries, and were unwilling to address children's abuse history.

## North Dakota

*In re I.B.A.*, 748 N.W.2d 688 (N.D. 2008). TERMINATION OF PARENTAL RIGHTS, REPRESENTATION  
Trial court should not have granted

lawyer's request to withdraw from representing mother in termination proceeding based on his inability to contact mother, resulting in continued proceedings at which mother was unrepresented; lawyer could have represented mother despite lack of contact because he had knowledge of case and record showed no conduct by mother to support waiver of counsel.

## Oregon

*In re K.M.*, 2008 WL 2120544 (Or. Ct. App.). DEPENDENCY, PSYCHOLOGICAL EVALUATION  
Order for mother to obtain psychological evaluation was proper in dependency case where children were removed after mother repeatedly exposed them to domestic violence; order was rationally related to removal grounds given that agency sought to determine if mental health issues influenced mother's actions.

## Pennsylvania

*In re T.D.*, 2008 WL 1838353 (Pa. Super. Ct.). TERMINATION OF PARENTAL RIGHTS, BEST INTERESTS  
Terminating parents' rights to 12-year-old child was in child's best interests, despite his opposition to adoption, his strong emotional ties to biological parents, and his lack of preadoptive family; biological parents were unable to provide minimal level of acceptable parenting, and preserving parents' rights would block any chance for adoption or alternative permanency by forcing child to stay in foster care until age 21.

## Rhode Island

*In re Natalya C.*, 946 A.2d 198 (R.I. 2008). TERMINATION OF PARENTAL RIGHTS, REASONABLE EFFORTS  
Child welfare agency failed to prove it made reasonable efforts towards reunification to support termination of mother's rights; agency's failure to address mother's depression prevented successful reunification since depression was linked to mother's drug use and her lack of interest in psychiatric counseling should not have factored into whether agency made reasonable efforts.

## Tennessee

*In re S.H.*, 2008 WL 1901118 (Tenn. Ct. App.). TERMINATION OF PARENTAL RIGHTS, BEST INTERESTS  
Termination of father's parental rights was

in child's best interests where agency did everything it could to offer father rehabilitation services, but father failed to comply with case plan requirements, repeatedly engaged in illegal activity and violence, failed to pay child support, and would disappear for long periods.

## Wisconsin

*In re Richard C.*, 2008 WL 2185722 (Wis. Ct. App.).  
TERMINATION OF PARENTAL RIGHTS, REPRESENTATION  
Mother's lawyer was not deficient in failing to object to two questions and answers that arose during doctor's testimony, which she claimed was improper best interests evidence; lawyer's representation was adequate where he declined to object to the disputed questions and answers since he thought they were relevant to decide a key issue in the case — the mother's ability to meet conditions for safely returning child home.

## FEDERAL CASES

### D. N.D.

*Geraci v. Women's Alliance, Inc.*, 2008 WL 1827309 (D.N.D.). NEGLIGENCE, RAPE CRISIS CENTER  
Father's claims on children's behalf against rape crisis center and county for negligence and intentional infliction of emotional distress based on its failure to prevent noncustodial parent from taking and disappearing with children after supervised visit were barred by res judicata; summary judgment favoring center and county relating to same claims raised by father had been awarded in prior matter.

### Tenth Circuit

*Briggs v. Johnson*, 2008 WL 1815721 (10<sup>th</sup> Cir.). LIABILITY, CASEWORKERS  
Denial of summary judgment motion was proper in case where estate sued caseworkers after child died in her mother's care; while there is no general duty to protect children from violent acts of third parties, caseworkers may be found liable if they created or increased chances of danger as facts alleged they discouraged relatives from reporting abuse.

(Continued from front page)

country, the type and efficacy of services vary widely,<sup>12</sup> and serious problems exist, such as a lack of infrastructure to implement programs<sup>13</sup> and inaccurate reporting.<sup>14</sup> Another shortcoming is that Chafee lacks a mandate prohibiting states from discharging a young person to homelessness.

Chafee provides scarcely enough money to serve the aging-out population, whether it is the official 24,000, or the more likely 50,000+ young people per year. Many states struggle to serve even half the youth in their jurisdictions with the funding now available. In this period of tightening state and federal budgets, this problem is getting worse.

Under Chafee, the federal DHHS was also supposed to issue regulations requiring states to collect and report data on outcomes of youth aging out of foster care; final regulations establishing the National Youth in Transition Database were only recently enacted, on February 26, 2008.<sup>15</sup> Beginning in October 2010, the federal government will require states to submit standardized information on all 17 year olds still in foster care, with follow-up from the same group at ages 19 and 21. These reports must include whether the state is providing housing assistance.<sup>16</sup>

### Federal Reimbursement of Foster Care Costs

The other way the federal government is directly involved with state foster care systems is through federal reimbursement for foster care costs under Title IV-E of the Social Security Act. However, states can only claim these funds for youth under age 18. This means the funding available under Chafee is the sole source of federal money for youth ages 18-21 who are in foster care. And, since only 30% of Chafee funds can be used for room and board,<sup>17</sup> states that continue sheltering youth over age 18 in foster placements must do so primarily at their own expense. According to recent federal data, only

three states and the District of Columbia provide full foster care benefits to youth up to age 21, though many others authorize jurisdiction and/or offer various forms of services to youth ages 18-21 (state laws are described below).<sup>18</sup>

If the Foster Care Continuing Opportunities Act passes,<sup>19</sup> federal funding would match that of the state and county for all costs related to foster care for youth ages 18-21. However, even if this legislation takes effect, it would only enable youth to be housed up to age 21. It would not solve the problem of where these young people go after 21; even in states where youth remain in foster care until 21, they still face enormous rates of homelessness.<sup>20</sup>

Although providing young people with more time in foster care probably helps, it only delays the inevitable. Planning must occur for every youth and enough housing programs must be available throughout the country (discussed below).

### Other Supports

Beyond Chafee and federal reimbursement for foster care costs, there are other links between the federal government and potential housing for aged-out youth. Federal statutes provide funding for:

- **Transitional Living Program (TLP) for Homeless Youth.**<sup>21</sup> Facilities supported by this law are only available for youth under age 21.
- **Section 8 vouchers.**<sup>22</sup> Under the Family Unification Program (FUP), local housing authorities can extend priority for Section 8 vouchers to youth aging out. Learn more by visiting [www.hud.gov/progdesc/famuni8.cfm](http://www.hud.gov/progdesc/famuni8.cfm).
- **Public housing.** Some jurisdictions create a preference for aged-out youth (e.g., New York City & Richmond, VA). For more information, see [www.hud.gov/progdesc/pihindx.cfm](http://www.hud.gov/progdesc/pihindx.cfm).

- **Specialized housing for adults with mental disabilities or who seek treatment for substance abuse.** The U.S. Department of Housing and Urban Development's Section 811 Supportive Housing for Persons with Disabilities funds programs such as Iowa City Housing Information, [www.jeonet.com/city/planning/ichi/iid.htm](http://www.jeonet.com/city/planning/ichi/iid.htm); New York State Campaign for Mental Health Housing, [www.campaign4housing.org/members.html](http://www.campaign4housing.org/members.html); West Central Illinois Continuum of Care, [www.wcicc.com/HousingDirectory/](http://www.wcicc.com/HousingDirectory/)

Over 60 federal funding streams are available to states, if they seek them out, to assist youth discharged from foster care.<sup>23</sup>

### Practice Tips

- Find out what your state/county's independent living program entails and make sure your clients are enrolled, starting at age 14.
- Make sure your clients have independent living plans and that these plans are reviewed in court at every hearing. Obtain court orders if necessary so that agencies comply with each aspect of the plans. Follow up with caseworkers outside of court on independent living plans and services.
- Find out about federally funded housing programs in your county and admission requirements. Some programs may not be directly linked with child welfare agencies, and caseworkers might not be aware of them, but youth aging out of foster care can be still eligible.
- Consider engaging in efforts, such as writing your senators and advocating with your organization, about passing the Foster Care Continuing Opportunities Act.



## State Law

State laws vary widely regarding the age of discharge from foster care and what foster care means for youth over age 18.

### Age of Discharge

The U.S. Department of Health and Human Services conducted a study in 2006, to which 45 states and the District of Columbia responded (see chart at right.) Although this survey shows that youth in most states can remain in foster care until age 21, 22 and 23, the survey did not ask whether the states financially support foster placements after 18. If not, then allowing youth to stay “in care” is meaningless. Further, congressional research only confirms that three states (Illinois, New York, and Vermont), and the District of Columbia, provide state foster care maintenance payments (or similar payments) for young people over age 18. The primary support that other states offer youth over age 18 is Medicaid and educational assistance.<sup>24</sup>

### What Happens after Foster Care Payments End

Whenever a youth’s foster care maintenance payment is cut off, the youth must find a place to live. The only way a young person can remain in her foster placement is if the placement is in a supportive housing program that has additional funding from another source (these programs are described below); or if the foster parent lets the young person stay without receiving payment. If neither of these is the case, the youth will become homeless on her birthday, unless she has secured her own apartment (through Section 8, public or supportive housing, or other means) which she can move in to right away.

### Housing Subsidies

Aside from the availability of Section 8, public housing, and supportive housing programs for youth aging out of foster care, some states also offer

## Age of Discharge from Foster Care

Maximum cutoff for foster care is 18.	FL (1)
Youth may remain in care until age 19	CA, NE, NH, WI, VT, UT (6)
Youth may remain in care until age 20.	AK, IA, MI (3)
Youth may remain in care until age 21	AL, AZ, AR, DE, GA, ID, IL, IN, KS, KY, ME, MD, MN, MO, MT, NM, NJ, NV, NY, NC, ND, OH, OK, OR, PA, SC, SD, VA, WA, WV, WY, DC (32)
Youth may remain in care until age 22	MA, TX (2)
Youth may remain in care until age 23	CO, CT (2)
No response	HI, LA, MS, RI, TN, PR (6)

Source: Congressional Research Service, “Services for Youth Emancipating from Foster Care,” Memorandum to Senator Barbara Boxer at 12 (2007).

housing subsidies upon leaving foster care for one-time moving expenses, furniture, and the like. For example, in California all youth receive a one-time grant of up to \$1,000 for security deposit and move-in expenses; while in New York, youth are eligible to receive up to \$3600.<sup>25</sup> These grants are not enough to pay ongoing rent, but they can help youth with ancillary costs as they transition from foster care.

### Preventing Homelessness

Some states mandate that youth cannot be discharged to homelessness,<sup>26</sup> but these laws are difficult to enforce. Once the youth is no longer under the jurisdiction of the juvenile/family court, that court cannot issue any orders. It may be possible to seek recourse in another civil court,<sup>27</sup> but this would only be effective if it forces the agency to continue housing the youth, or to find and pay for a new home. If the civil court cannot or will not issue such an order, or the case gets backlogged on a court calendar, time is probably better spent aggressively seeking housing for the youth through community organizations and programs (described below).

For states that do not support youth financially after age 18, but do allow the family/juvenile court to retain

jurisdiction (the exact number of states like this is unclear; according to the Health and Human Services survey described above, it may be 28, but another study finds it is 22 states<sup>28</sup>), claims could potentially be brought in family/juvenile court when agencies unlawfully discharge young people to homelessness. Again, the goal would be to obtain a court order mandating the agency to continue providing housing to the young person until he can be released without becoming homeless.

### Restoring Juvenile Court Jurisdiction

Some states that can retain jurisdiction/custody of youth after age 18 (whether funded or not) allow a young person to be brought back in to foster care. This occurs if a youth has chosen to leave before the cutoff age but becomes homeless or unable to function on her own.<sup>29</sup> The young person’s case can usually be restored to the calendar through a motion.

### Court Approval before Discharge

Note that in some states, a youth cannot be discharged from foster care unless the court authorizes it.<sup>30</sup> This usually entails a hearing in which the youth and/or agency presents a



discharge plan, which includes where the youth will live upon release from custody. However, if, according to state statute, the youth is no longer under the court's jurisdiction or in state custody by virtue of age, this law has no effect; the court cannot continue reviewing the case, and the agency is not legally responsible for the youth any more.

Even if your state does not require court approval before discharge, there is likely a statute or directive mandating that the agency hold a discharge conference before the youth leaves care.<sup>31</sup> Regardless of whether the case is still on the court calendar or the state technically retains custody, the agency should hold such a meeting, where the details of the young person's discharge plan are discussed and any available supports are put in place (aftercare services are discussed below).

#### ———— Practice Tips ————

- Begin planning for the discharge of all of your adolescent clients *early*, years before they turn 18 (i.e., at age 14). The discharge plan, which is essentially the final independent living plan must first and foremost include where the youth will live, with multiple backup plans. The discharge plan should include alternate housing even if the permanency goal is return to parent or adoption, because these goals often become unrealistic as the youth approaches age 18 and desires to live on her own (and may try to do so even if she does not have a place to go, thus winding up on the street or couch-hopping.)
- Learn the specifics of your state's laws regarding discharge plans, when and how a youth may be discharged, and whether discharge to homelessness is statutorily prohibited. Strategize on how to most effectively use these laws, whether in or out of court.
- If your state allows youth to

remain in foster care in some capacity after age 18, learn what this entails and whether there are "requirements" for the youth (i.e., that he be in school, has special needs, etc.). Counsel your client on the benefits of staying in care, if any.

- If a client becomes homeless or otherwise needs to return to foster care after discharge, bring the case back to court. Be sure the youth is still of an age in which the state can retain custody/court has jurisdiction.

### Housing Programs

A variety of housing programs and subsidies are available to youth who are aging out, though advocates agree there are not enough to serve the enormous need.

#### Federal Housing Programs

As discussed above, the federally funded Section 8 program can help youth obtain their own apartments. Youth must apply as soon as they are eligible because the vouchers take months and sometimes years to process.

In many states, youth aging out are also eligible for public housing. Again, it can take months/years for an apartment to open up, so a young person must apply as soon as he is allowed (*before* his discharge date).

#### Supportive Housing Programs

Across the country, supportive housing programs serve youth aging out of foster care. These programs fall in two categories:

- **Congregate programs** — youth live together in one building
- **Scattered site programs** — youth are placed in apartments (with or without roommates)

In either case, youth almost always must engage in services, such as case management, counseling, and life skills training; youth may also have to

attend school/vocational training and/or be employed. In some programs, youth must pay a portion of their rent, perhaps not at the beginning but in gradually increasing increments; other programs require Section 8 vouchers, or other subsidies, that the youth will have to obtain to be admitted.

Some notable supportive housing programs are:

- First Place for Youth, Oakland, California
- Independent Living Services program, Alameda County, California
- Orangewood Children's Foundation, Orange County, California
- Connecticut's Community Housing Assistance Program
- Rediscovery House, near Boston, MA
- Chelsea Foyer, Edwin Gould Residence, and Schafer Hall in New York City
- Lighthouse Youth Services, Cincinnati, OH

Supportive housing programs can be transitional or permanent. Transitional programs are time-limited, usually housing a young person for 18 to 36 months, during which the program is supposed to help the youth stabilize and find a permanent place to live. Some transitional programs allow youth to start living there while they are still in foster care, but this counts against their time limit in the program.

#### Specialized Housing

As noted above, youth may also be eligible for other kinds of supportive housing, such as programs that serve the mentally disabled or substance abusers. The services in these programs are not tailored to youth aging out, and most residents will be significantly older — both factors to keep in mind when considering whether a client should apply.

## Transitional Living Programs

Youth *under* age 21 can use Transitional Living Programs (TLPs) funded by the Federal Homeless and Runaway Act, such as the Covenant House Program. These are time-limited programs and youth over age 21 will not be admitted for the first time under any circumstance (sometimes a young person can stay in a TLP after her 21<sup>st</sup> birthday if she has been living there successfully and has no other place to go).

More programs like these are needed throughout the country. States can develop a variety of housing types for aging-out youth with special financing programs and incentives. For example, New Jersey has a partnership between its Department of Human Services and its Housing and Mortgage Finance Agency to make low-interest financing available to non-profit agencies and private developers to create affordable housing for aging-out youth.<sup>32</sup>

### Practice Tips

- Make sure your adolescent clients apply as soon as possible to all available housing programs in your area.
  - Be mindful of the vast paperwork and documentation that these programs require—i.e., social security cards, birth certificates, state-issued identification, probation records if applicable, etc.—and start planning how to obtain them immediately. Obtain court orders for the state/agency to assist with this process (most states must give documentation to youth aging out<sup>33</sup>).
  - Zealously advocate for your client to be admitted to these housing programs. It can take considerable follow-up to secure a slot. Also, be aware that many programs attempt to take only the “cream of the crop,” and you may have to highlight the strengths of your client to get him in.
- Find out whether your client has been arrested and/or convicted of anything in juvenile or criminal court. This could affect her applications and you may need to have records sealed, expunged, or provide evidence/documentation that the youth is “rehabilitated.”
  - If your client has children, find out which programs in your area are for families (and how many children are allowed). Be aware that background checks are sometimes required on the non-custodial parent, even if that person has never been in the child’s life. Discuss this with your client and obtain all the necessary information.
  - Make sure any program your client has applied to is specifically detailed in her independent living/discharge plan, and the program is described on the record in court. Court orders may be necessary for documents, admission, etc.
  - For a comprehensive list of supportive housing programs specifically for youth aging out, see: NGA Center for Best Practices, *Issue Brief: State Policies to Help Youth Transition Out of Foster Care*, 2007, 3, available at [www.nga.org/files/pdf0701YOUTH.pdf](http://www.nga.org/files/pdf0701YOUTH.pdf)
  - Engage in efforts, such as administrative and legislative advocacy, to raise awareness among lawmakers, real estate developers, affordable housing professionals, homeless advocates, etc. about the housing crisis facing youth aging out of foster care. Promote tax breaks and other incentives to build and fund housing for this needy population.

## Other Advocacy Efforts

There are other ways to advocate for adolescents in foster care that can improve their housing situation when they age out.

## Adult Connections

Most state statutes now require that adolescents in foster care have “a significant connection” to at least one adult before discharge.<sup>34</sup> This person/people must be identified as soon as possible and should actively participate in the independent living plan. It is the agency’s responsibility to cultivate these relationships early through visitation, phone calls, and other contact between the youth and the adult. The agency assists the adult with whatever is necessary to support the youth before and after foster care.

## Flexible Foster Care Arrangements

Because adolescents in foster care often do not fit into the conventional “return to parent” or “adoption” permanency goals, many states are attempting to be more flexible with foster care arrangements. These arrangements can turn into transitional or permanent homes after foster care. For example, in some states “kinship” foster care includes godparents, neighbors, family friends and others whom the youth identifies.<sup>35</sup> It is far more likely that a friend will become an ongoing resource for a young person after foster care than a non-kinship foster parent. Also consider planning with a youth’s family of origin, as young people invariably return to a biological parent after foster care, if not to live, then for financial, child care, or other supports.<sup>36</sup>

## Subsidized Guardianship

Another option, available in 39 states, that may be especially helpful for adolescents in foster care is subsidized guardianship.<sup>37</sup> Subsidized guardianship allows relatives and other caregivers to become permanent legal guardians for youth (freeing the youth from foster care at any age) when neither return to parent or adoption is appropriate. If a youth is living with a guardian by the time she reaches 18 or 21, she will probably not be arbitrarily thrown out on her birthday.

## Aftercare

Aside from nurturing these invaluable relationships, some states/foster care agencies, as well as independent organizations,<sup>38</sup> offer aftercare services, which youth can access when they are no longer in state custody. In fact, Chafee funding may be used to serve youth who are discharged between 18 and 21 (although because it so limited, states devote most of their Chafee money to youth still in foster care). Some state laws mandate a period of aftercare or casework monitoring following discharge.<sup>39</sup>

Ideally, aftercare services, which include housing, education, employment, and child care assistance, would be available to all young adults aging out of foster care. Too often these youth are unprepared to face challenges which we would never expect other young adults to handle on their own.

### Practice Tips

- Make sure all of your adolescent clients have significant connections to adults that the agency is fostering, and *not* hindering. Make sure these relationships are part of each youth's independent living plan and that they are described in court. Obtain court orders if necessary to force the agency to comply.
- Advocate early and often for alternative foster care arrangements, and/or for a youth to reconnect with her family of origin, if consistent with the youth's wishes. Obtain court orders when necessary.
- Advocate for subsidized guardianship if it is available in your state and is consistent with your client's wishes, after counseling him on this option.
- Find out what kind of aftercare services are available in your area and the laws pertaining to aftercare in your state. If consistent with your client's wishes, advocate for admission into any such

## New Family Law Clinic in Richmond, VA

The University of Richmond School of Law announces the opening of a new clinic specializing in family law. The Richmond Family Law Clinic, opening this fall, will provide direct legal services, along with psychological care, counseling, and social services to low-income children and their families.

The clinic is a joint venture between the law school and the Department of Psychology and School of Social Work at Virginia Commonwealth University (VCU). It will offer law students from Richmond and graduate students from VCU with a year-long opportunity to address the needs of underserved families and to learn from these experiences.

The Richmond Family Law Clinic will be located on the University of Richmond's satellite campus, a new hub of service, learning, research, and collaboration with nonprofit and government partners. The satellite campus is in downtown Richmond, where it will be easily accessible to the community.

### For more information:

Contact Dale Margolin, 804/289-8921 (ph.)  
dmargoli@richmond.edu (e-mail)

program. Where possible or necessary, obtain court orders.

Countless youth struggle to secure housing after aging out of foster care. As a society we should continue to support these young people. So far we have failed to fulfill this responsibility. More housing of all forms is necessary to solve the crisis. Lawyers representing youth can improve the situation through zealous in and an out-of-court advocacy, and by increasing awareness and reforming laws at the local, state, and federal levels.

*Dale Margolin* is an assistant clinical professor of law and the director of the Family Law Clinic at University of Richmond School of Law.

### Endnotes

<sup>1</sup> See Kushel, Margot B., et al. "Homeless and Health Care Access After Emancipation." *Archives of Pediatrics & Adolescent Medicine* 10, 2007, 986, 987.

<sup>2</sup> See, e.g., Mark E. Courtney, Amy Dworsky & Harold Pollack. *Issue Brief: When Should the State Cease Parenting? Evidence from the Midwest Study*. Chicago: Chapin Hall Center for Children, Dec. 2007, 4, available at [www.chapinhall.org/article\\_abstract.aspx?ar=1355](http://www.chapinhall.org/article_abstract.aspx?ar=1355); Christine Vestal. "States Trying to Extend Foster-Care Benefits," Aug. 23, 2007, available at [www.stateline.org/live/details/story?contentId=234381](http://www.stateline.org/live/details/story?contentId=234381).

<sup>3</sup> U.S. Dep't of Health & Human Servs.,

Administration for Children and Families. *The AFCARS Report: Preliminary FY 2005 Estimates*, 2006, available at [www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report13.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.htm)

<sup>4</sup> See [www.pbs.org/newshour/bb/youth/jan-june05/foster\\_care\\_5-19.html](http://www.pbs.org/newshour/bb/youth/jan-june05/foster_care_5-19.html)

<sup>5</sup> U.S. Census Bureau, [www.census.gov](http://www.census.gov)

<sup>6</sup> Torrico, Roxana. "Child Welfare League of America Independent Living Coordinator Questionnaire Results," 2004, 1, available at [www.cwla.org/prgrams/housing/housingreporty.pdf](http://www.cwla.org/prgrams/housing/housingreporty.pdf).

<sup>7</sup> Robert Schoeni & Karen Ross. *Family Support During the Transition to Adulthood*. National Poverty Center Policy Brief, 2004, available at [www.npc.umich.edu/publications/policy\\_briefs/brief3/breif3.pdf](http://www.npc.umich.edu/publications/policy_briefs/brief3/breif3.pdf)

<sup>8</sup> 42 U.S.C. § 677(h). States must match the federal contribution with 20% from state-authorized funds.

<sup>9</sup> For example, N.Y. Comp. Codes R. & Regs. tit. 18, § 430.12(f)(2)(i)(b)

<sup>10</sup> 42 U.S.C. § 675(1)(D).

<sup>11</sup> Benedetto, Michele. "An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation." *U.C. Davis Journal of Juvenile Law & Policy* 9, 2005, 381, 410.

<sup>12</sup> *Ibid.*, 413; Atkinson, Melinda. "Aging Out of Foster Care Towards a Universal Safety Net for Former Foster Care Youth." *Harvard Civil Rights-Civil Liberties Law Review* 43, 2007, 198.

<sup>13</sup> Government Accountability Office. *Foster Youth: HHS Actions Could Improve Coordination of Services and Monitoring of States' Independent Living Programs*, 2004, 14.

<sup>14</sup> Benedetto, 2005, 411-412.

<sup>15</sup> 73 Fed. Reg. 10338 (Feb. 26, 2008)

<sup>16</sup> 45 C.F.R. §§ 1356.82 & § 1356.83(g)

<sup>17</sup> 42 U.S.C. § 677(b)(3)(B).

<sup>18</sup> Fernandes, Adrienne. *CRS Report for Congress: Youth Transitioning from Foster Care: Background, Federal Programs and Issues for Congress*. Washington, DC: Congressional Research Service, May 2008, 14-15, available at [www.nrcys.ou.edu/yd/pdf/RL34499\\_youth%20transitioning.pdf](http://www.nrcys.ou.edu/yd/pdf/RL34499_youth%20transitioning.pdf); Congressional Research Service. "Services for Youth Emancipating from Foster Care," Memorandum to Senator Barbara Boxer, 2007, 9, 12.

<sup>19</sup> Senator Barbara Boxer. "Press Release: Boxer Working to Extend Foster Care." June 22, 2007. Available at <http://boxer.senate.gov/news/outreach/2007/06/fostercare.cfm>. The bill is S. 1512.

<sup>20</sup> See Williams, Carol W. *The Independent Living Program: Today's Challenge, Preparing Youth for Long-Term Success*. Washington, DC: CWLA Press, 2001; Courtney, Mark E., et al., "Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 21," 2008, 3, available at [www.chapinhall.org/article/abstract.aspx?ar=1355&L2=61&L3=130](http://www.chapinhall.org/article/abstract.aspx?ar=1355&L2=61&L3=130).

<sup>21</sup> 42 U.S.C. § 11432

<sup>22</sup> 42 U.S.C. § 1437f; 24 C.F.R. § 982 et seq.

<sup>23</sup> NGA Center for Best Practices. Issue Brief: *State Policies to Help Youth Transition Out of Foster Care*, 2007, 3, available at [www.nga.org/files/pdf0701YOUTH.pdf](http://www.nga.org/files/pdf0701YOUTH.pdf)

<sup>24</sup> Chafee funds the Educational Training Voucher Program: 42 U.S.C. §674(e)(1), which provides \$5,000 per year for postsecondary education (including vocational training) to youth who were in foster care at age 16 (even if no longer in care), until they complete their educations, up until age 23. States also fund scholarships and tuition programs for youth aging out. Congressional Research Service, 2007, 8, 37.

<sup>25</sup> Congressional Research Service, 2007, 5; N.Y. Comp. Codes R. & Regs. tit. 18, § 430.9(f)(1)(i)(b).

<sup>26</sup> E.g., N.Y. Comp. Codes R. & Regs. tit. 18, § 430.12(f)(3)(i)(c); See also Allen, Molly. *Teens Aging Out of Foster Care in Oregon: A Guide to Transition Planning for Caseworkers, Judges and Advocates*, August 2005, 42, available at [www.jrplaw.org/Documents/Teens%20Aging%20Out%20of%20Foster%20Care%20in%20Oregon.pdf](http://www.jrplaw.org/Documents/Teens%20Aging%20Out%20of%20Foster%20Care%20in%20Oregon.pdf)

<sup>27</sup> E.g., an Article 78 action can be brought in New York Supreme Court (the state's civil trial court) against a state agency for violating a law. N.Y. C. P.L.R. § 7804(b); *Bowers v. Bowers*, 266 A.D.2d 741, 743 (N.Y. App. Div. 1999).

<sup>28</sup> Kim, Jane & Kevin Sobczyk. "Continuing Court Jurisdiction in Support of 18 to 21 Year-Old Foster Youth," paper edited by Howard Davidson. Washington DC: ABA Center on Children and the Law, July 2004, 2, available at [www.abanet.org/child/court-jurisdiction.doc](http://www.abanet.org/child/court-jurisdiction.doc)

<sup>29</sup> E.g., N.Y. Comp. Codes R. & Regs. tit. 18, §§ 430.12(f)(4)(a), 441.2(a)(ii)(c), 628.3(a)(1)(vii).

<sup>30</sup> E.g., N.Y. Fam. Ct. Act § 1089 (d)(2)(viii)(C); See also *Legal Rights of Teens*

## Upcoming Conferences

### **NACC 31<sup>st</sup> Annual National Juvenile and Family Law Conference** Savannah, GA, August 3-6, 2008

This conference is designed for attorneys who practice juvenile (dependency and delinquency) and family law. Conference sessions focus on abuse and neglect, adoption, foster care, juvenile justice, family law, ethics, policy advocacy, and children's legal office programs. Presenters are leading experts and practitioners in the field. To learn more, visit [www.naccchildlaw.org](http://www.naccchildlaw.org)

### **The 15<sup>th</sup> Midwest Adoption Conference** Deerfield, IL, Sunday, November 2, 2008

An educational conference for adoption professionals, foster and adoptive parents, and adopted children. This year's conference features Dr. John Raible, who has been educating audiences about transracial adoption for more than 30 years. For more information, visit [www.midwestadoption.org](http://www.midwestadoption.org)

### **Save the Date:**

### **National Conference on Health and Domestic Violence** New Orleans, LA, October 8 - 10, 2009

The National Conference provides professional education on the latest research and innovative health prevention and clinical responses to domestic violence. Co-chaired by 35 organizations, it is hailed as "the best violence related conference" in the country.

For more information, contact Anna Marjavi at [anna@endabuse.org](mailto:anna@endabuse.org), ph: 415/252-8900 or visit [www.endabuse.org/health/conference/](http://www.endabuse.org/health/conference/)

*in Out-of-Home Care*. San Francisco: Youth Law Center, September 2003, 26 (describing California practice), available at [www.nrcys.ou.edu/yd/resources/publications/pdfs/teens2003.pdf](http://www.nrcys.ou.edu/yd/resources/publications/pdfs/teens2003.pdf); Pokempner, Jennifer & Lourdes Rosado. *Dependent Youth Aging Out of Foster Care: A Guide for Judges*. Philadelphia: Juvenile Law Center, 2003, 3 (describing Pennsylvania practice), available at [www.jlc.org/files/publications/dependent-youth-aging-out.pdf](http://www.jlc.org/files/publications/dependent-youth-aging-out.pdf)

<sup>31</sup> E.g., in New York City, ACS' *Family Team Conferences: Adolescent Services Discharge Conference Protocol*, First Edition, June 2001, 1.

<sup>32</sup> See New Jersey Housing and Mortgage Finance Agency. *Special Needs Programs*, [www.nj.gov/dca/hmfa/biz/devel/secneed/programs.html](http://www.nj.gov/dca/hmfa/biz/devel/secneed/programs.html)

<sup>33</sup> E.g., N.Y. Comp. Codes R. & Regs. tit. 18, § 428.8; see also 42 U.S.C. § 675, requiring aging-out youth to receive a copy of health and education records.

<sup>34</sup> E.g., N.Y. Fam. Ct. Act §§ 1052(b)(i)(A)(6)(iv), 1089(c)(v), 1089(d)(2)(i)(E), N.Y. Soc. Serv. Law § 358-a(3)(a), N.Y. Comp. Codes R. & Regs. tit. 18, § 430.12(f); See also Allen, Molly, 205, 55.

<sup>35</sup> E.g., in New York, any young person who has been remanded to foster care is entitled to have the state conduct an emergency home study for placement with a relative or nonrelative who has "a significant prior relationship with the child's family." A nonrelative may include, but is not limited to, "a child's godparent, neighbor, family friend, or an adult with a positive relationship with the child. N.Y. Comp. Codes R. & Regs. tit. 18 § 443.1 & 443.7; See also "Emergency Home Studies for Youth Placed in Foster Care," ACS Memorandum, May 25, 2005; N.Y. Fam. Ct. Act. §§ 1017(2)(b), 1017(2)(b).

<sup>36</sup> Courtney, et al., 2008, 20.

<sup>37</sup> Children's Defense Fund. *States' Subsidized Guardianship Laws at a Glance*, October 2004, available at [www.childrensdefense.org/site/DocServer/guardianship\\_laws.pdf?docID=544](http://www.childrensdefense.org/site/DocServer/guardianship_laws.pdf?docID=544).

<sup>38</sup> In the Spirit of the Children, in New York City, provides many services to youth after foster care, with no age or time limit, and is wholly independent from the state.

<sup>39</sup> N.Y. Comp. Codes R. & Regs. tit. 18, § 430.12(f)(4)(a); N.Y. Comp. Codes R. & Regs. tit. 18, § 430.12(f)(4)(b).

## How an Education Expert Can Assist with Child Custody Solutions

by Edward F. Dragan

Consider the following hypothetical situations:

- *“My ex-wife wants to move out of the state and I’m concerned about the school my child is to attend. I don’t think it’s as good as the one he’s in now. How do I find out?”*
- *“My child is gifted and my ex-husband wants to send her to a private school. How do I know if that’s the right thing to do?”*
- *“My daughter has Down syndrome and my ex-wife wants to place her in an inclusive education program. How do I find out if that’s going to meet my daughter’s needs?”*

If you represent parents in child custody cases, the child’s education is likely to arise in custody decisions. Issues such as what school a child should attend and the quality of education offered in different school systems can profoundly impact a child’s future and the quality of life for the child and parents.

Education issues in the custody arena arise when the custodial parent seeks to change residence or change the school or program in which a child is enrolled. Because the “where and how” of a child’s education affects the child’s quality of life, it plays a critical role in a child custody “best interests” assessment.

An education expert is an invaluable resource to help parents make education-related decisions at a time when emotions can overtake a parent’s well-intentioned desire to provide a better quality family life. As an education expert, I have made many impartial recommendations concerning educational programs and placements for children. This has helped parents, other caregivers, and the court make informed decisions that benefit the child’s future.

### How an Education Expert Can Help

Legal battles often defuse and more easily resolve when a trained education expert offers an objective analysis of the situation. Quicker resolution

benefits the child and the parents.

An education expert is an important resource for a lawyer during the dispute resolution process in custody cases. By accessing professional resources and expertise, the expert can help lawyers narrow the gap between where their clients are and where they want and need to be. Through training and relevant experience these impartial individuals see and understand complex data and understand and evaluate situations that emotionally-involved parents cannot navigate objectively. Impartiality is crucial to a “best interests” analysis.

An education expert is not an advocate for one side or the other. The expert is an active and objective participant who has training and the ability to authoritatively and effectively push forth solutions to complex, emotional, and life-altering issues.

After conducting a complete and careful review of the education issues in the case, the expert writes a detailed report with findings and recommendations and provides testimony to assist the trier of fact.

### A Typical Case

Consider a case involving Kathleen, the custodial parent of a seven-year-old second-grader named Lisa. What does Kathleen do when she wishes to move out of state and James, her ex-husband, resists? Case law places the burden on the custodial parent to show

that any move would “significantly improve the quality of life” for the child.<sup>1</sup>

Courts throughout the country have not developed a uniform approach to addressing issues involved in relocation requests. Some courts recognize a presumption against removal as a point of departure; others use a presumption in favor of removal; still others presume nothing and rely on a best-interests analysis.<sup>2</sup>

Some courts incorporate a variation on a best interests analysis and require proof that the child will not suffer from the move.<sup>3</sup> The New Jersey Supreme Court holds that the burden is on the custodial parent who seeks to relocate to prove: (1) a good faith motive and (2) that the move will not be inimical to the interests of the child.<sup>4</sup> The noncustodial parent must show that resistance to the proposed move is based upon a concern for the child and his or her relationship to the child.

In Kathleen and James’s case, the noncustodial parent, James, must look at all relevant issues surrounding a proposed move. This includes his daughter’s education. This becomes the role of the education expert. Looking at and analyzing the overall strengths and weaknesses of school systems and schools can be useful in these cases. However, the education expert with experience reviewing student records, reviewing education programs, and making education placement decisions will conduct an in-depth and careful review of a child’s academic history and potential.

The expert seeks to understand individual children and their needs and desires, how the current school meets those needs and desires, and whether the proposed school is reasonably likely to do the same. This process entails gathering data and background information about the school system and

community and applying that data within an analytical structure that includes a thorough review and analysis of the child's needs and desires.

### **Identifying the child's educational needs**

The education expert's careful review of Lisa's record revealed specific data about her educational needs. The student data and school data was integrated into a "picture" of Lisa, including her educational needs and the school programs and services that currently respond to those needs. That data was confirmed through a telephone interview with her teacher and the school principal. Lisa was receiving all related services outlined in her Individualized Education Program (IEP), such as speech/language therapy, physical therapy, and occupational therapy. A review of her record found she was succeeding in the placement and the school system appropriately implemented the IEP.

An interview with Lisa's teacher revealed Lisa has a well-established circle of friends, both within her special education classroom and within the school. The principal shared that his school has established a very successful "Circle of Friends" program, integrates Lisa in many regular classrooms, and provides afterschool care where a teacher assistant reinforces many of Lisa's academic and social skills.

### **Evaluating proposed school's ability to meet child's education needs**

An interview with the principal at the proposed school was conducted to generate a descriptive picture of Lisa and answer questions about how the school system and the school would meet Lisa's individualized educational needs.

The interview process revealed that Lisa would be placed in the school's special education classroom with students who were similar to those in her current placement. Asked

## **Assessing Gifts and Talents**

A school-age student may have special gifts and talents that must be addressed during the evaluation process. Questions an expert will explore are:

- Does a school system or school offer specialized programs and services and are they easily obtained?
- Does the school offer a "pull-out" enrichment program?
- Are enrichment programs infused into the regular classroom?
- Will the proposed new school offer a similar program and what are the resources to provide such programs?

about the level of services available in the school for Lisa, the principal said the school, by law, would have to provide the services as outlined in the IEP.

Further probing revealed the school did not currently employ a speech/language therapist. According to the principal, the students in the special education class were all verbal and did not need such services.

Additional interviewing revealed that this was the only special education class in the school system and all the other students with disabilities attend either private or other state schools for the handicapped. The school does not employ an occupational therapist or physical therapist. Further, the school does not integrate any of the students from the special education class into the regular school program except for lunch and some assemblies.

### **Analyzing school data and background information**

In addition to data gleaned from interviews, the education expert thoroughly reviewed both school systems' statistics. This included data pertaining to student enrollment; teacher-student ratio; standardized test scores; numbers of students graduating; the amount of money spent on each student and other factors relating to education quality.

Information about schools is readily available from state, county, and local education authorities and several services collect data for comparison. While this standardized infor-

mation is useful, when the custody case involves a highly individualized program or placement, each child and each individual school should be separately reviewed and analyzed.

### **Making an assessment and recommendation**

When educational opportunities at a proposed school are not comparable to those a child currently receives, the educational component of the best interests test may fail and it may not be in the child's best interest to move. However, the analysis should not end there. The critical question then becomes what path to take that will not harm the child?

Important factors to consider are the quality and opportunities that different school systems and individual schools within those systems offer.

- Will Lisa, who has a disability, have the same opportunities to benefit from her education in the school system where her mother is proposing to live as she has in the district where she currently lives?
- Will the move and transfer to a new school system significantly improve Lisa's quality of life?
- Does the proposed new school system offer more opportunities for Lisa to benefit from her education?
- Is it likely that she will suffer educationally if she is moved from the current school system?

After analyzing Lisa's records and interviewing her current teachers and the principal at the proposed school placement, the expert determined that a transfer would leave her without speech and language services she needs and give her fewer appropriate special education program choices. The proposed district had only one special education class and all the other students had to get these services outside of the district. Therefore, the expert determined the proposed move would not significantly improve Lisa's quality of life and would very likely detract from it.

### Tips for Working with Education Experts

In child custody matters it is critical that lawyers recognize early on the value of the consultant-expert. Early engagement helps the expert undertake a comprehensive and detailed review and develop the requisite contacts and relationships that are critical to the overall conclusion and recommendation. An education expert can have the greatest impact when the issues are new before emotions run too high, significant time has passed, or large sums of money are spent.

In many cases, the expert's effectiveness will determine the outcome of the dispute. A lawyer should look for an education expert with a broad background that includes teaching, supervision, management, curriculum development, and program monitoring. An expert with a majority of career activities in one or two areas may not be as credible as one with a broader background.

### Conclusion

An education expert is vital in child custody cases in which one parent wants to change the child's residence, school or educational program, and especially if the child may be moved to another state. The expert's specialized training and objectivity help the trier of fact decide more quickly whether such a move is in the child's best interests, defusing what might otherwise be a

protracted emotional struggle between the parents over this key "quality of life" issue.

By looking at statistics on each school's educational quality, the resources available to the child in each program—particularly if the child has special needs—reviewing the child's academic performance and potential, and interviewing school staff, the expert makes an informed and credible recommendation about whether the new educational program will be better or worse for the child.

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### Endnotes

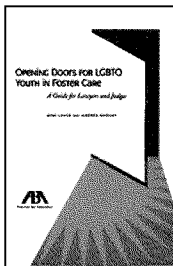
<sup>1</sup> See *Gruber v. Gruber*, 583 A.2d 434 (Pa. Super. Ct. 1990); *Lozinak v. Lozinak*, 569 A.2d 353 (Pa. Super. Ct. 1990).

<sup>2</sup> See, Driscoll, Ann M. "In Search of a Standard: Resolving the Relocation Problem in New York," *Hofstra Law Review* 26, 1997, 175, 176.

<sup>3</sup> See, *Holder v. Polanski*, 544, A.2d 852 (N.J. 1980); *Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606 (N.J. 1984).

<sup>4</sup> See, *Baures v. Baures*, 770 A.2d 214 (N.J. 2001).

### New in Print



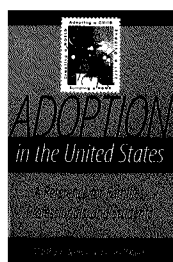
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## Is MEPA/IEP Working for African American Children?

A new report by the Evan B. Donaldson Adoption Institute challenges transracial adoption policies and practices relating to African American children. The report recommends fine-tuning these policies and practices to better meet the needs of waiting African American children.

The Multiethnic Placement Act of 1994 (MEPA) and the Removal of Barriers to Interethnic Adoption Provisions of 1996 (IEP) prohibit child welfare agencies from denying or delaying adoptive placements based on race, color, or national origin. They also require state agencies to make diligent efforts to recruit foster/adoptive parents representing racial and ethnic backgrounds of children in the child welfare system.

MEPA/IEP tried to address the disproportionate representation of African American children in the child welfare system by removing barriers to transracial adoption. The Donaldson Institute's report looks at how well MEPA/IEP is achieving its goals. While recognizing its positive role in reducing discriminatory practices in adoption recruitment and selection, the report argues its intended outcomes are not being realized.

### Findings:

- Equity is not being reached in achieving permanency for African American children waiting for adoption. Adoption rates of African American children remain lower than those of other racial/ethnic groups.
- The amount of time African American children wait in foster care for adoption is longer than White children (average 9 months longer).
- Enforcement of MEPA/IEP results in a "color blindness" that prevents agencies from evaluating if

families are ready to adopt a child of another race/ethnicity and helping them prepare.

- The requirement that agencies make diligent efforts to recruit adoptive families who represent the racial/ethnic backgrounds of foster children is not being well-implemented.

### Recommendations:

In response to these findings, the Donaldson Institute recommends several changes to ensure African American children are placed with families who can meet their needs.

- Reinforce in all adoption-related laws, policies, and practices that a child's best interests must be paramount in placement decisions.
- Amend IEP to allow consideration of race/ethnicity in permanency planning and in the preparation of families adopting transracially. The original MEPA standard—which provided that race is one factor, but not the sole factor, to be considered in selecting a foster or adoptive parent for a child in foster care—should be reinstated.
- Enforce the MEPA requirement to recruit families who represent the racial and ethnic backgrounds of children in foster care and provide sufficient resources, including funding, to support such recruitment.
- Address existing barriers to fully engaging minority families in fostering and adopting by developing alliances with faith communities, minority placement agencies, and other minority recruitment programs.
- Provide support for adoption by relatives and, when that is not the best option for a particular child,

provide federal funding for subsidized guardianship.

- Provide postadoption support services from time of placement through children's adolescence to help families address transracially adopted children's needs.

A number of national child advocacy organizations have endorsed this report's findings and recommendations, including the North American Council on Adoptable Children, the Child Welfare League of America, the National Association of Black Social Workers, among others. Other groups and individuals have raised concerns. For example, the National Council for Adoption released a statement ([www.adoptioncouncil.org](http://www.adoptioncouncil.org)) in which it expressed concerns over the report's:

- use of the phrase "color blind" to describe MEPA/IEP's requirements
- assertion that MEPA/IEP does not permit agencies to train or educate prospective adoptive parents on transracial parenting
- recommendation to reinstate MEPA's original standard that race is one factor but not the *sole* factoring in selecting foster/adoptive parents

Nearly 15 years have passed since MEPA was enacted. The time is ripe to start assessing what's working and what's not. This report takes the first step and more discussion is sure to follow as current federal law and policy governing the role of race in foster/adoptive placements continues to be examined.

**Download the full report, *Finding Families for African American Children: The Role of Race & Law in Adoption from Foster Care*, by visiting [www.adoptioninstitute.org/research/2008\\_05\\_mepa.php](http://www.adoptioninstitute.org/research/2008_05_mepa.php)**

## Florida Representation Project Speeds Permanency for Foster Children

**A** Florida child advocacy program is doing something right to speed permanency for Florida foster children, according to a recent study by the Chapin Hall Center for Children and the University of Chicago. The study looked at how quickly the Foster Children's Project at the Legal Aid Society of Palm Beach County achieves permanency for the children it represents. This program includes 10 lawyers who each carry an average caseload of 35 cases and represent the children's expressed interests.

Here's what the study found:

**Permanency rates:** Child clients represented by the program had significantly higher permanency rates, compared to a control group, than children who were not represented by them. Note that family reunification rates did not decrease and there were no increases of re-entry of children into foster care.

**Termination of parental rights:** Children represented by the program

were found to move from final case plan approval to termination of parental rights at almost four times the rate of the control group.

**Practices that speed permanency:** Practices that lawyers used to speed permanency were:

- filing legal motions for discovery, case status checks, and to compel action of other parties such as the child welfare agency;
- using advocacy skills at staffings and case plan meetings to better define individualized, prescriptive case plans for child clients and their families;
- filing TPR petitions; and
- identifying potential preadoptive homes or potential permanent guardianship homes.

**Success with older youth:** Participant interviews suggested this legal program was particularly effective with older children. However, data showed their success at permanency for foster children they represented, compared to the control group, was highest for ages four to seven, followed by children ages one to three.

**Legal representation costs:** What is the daily cost of quality legal representation for each child, from the time work starts on a case until permanency is finalized? Foster care costs alone are \$68 per day, but are lowered to \$32 per day when factoring in the lawyers' work to speed permanency. The per child legal representation costs are estimated to be \$13.31 per day.

To obtain this study, *Evaluation of the Legal Aid Society of Palm Beach County's Foster Children's Project: Final Report*, by A.E. Zinn & J. Slowriver, visit [www.chapinhall.org/article\\_abstract.aspx?ar=1467](http://www.chapinhall.org/article_abstract.aspx?ar=1467)

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